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## Note

### State Sexual Harassment Definitions and Disaggregation of Sex Discrimination Claims

*Eleanor Frisch\**

For many courts, classic cases of sex discrimination have lost their appeal. In states that have adopted definitions of sexual harassment, women who have faced denigrating or derogatory treatment because of their gender have found their claims are not “sexy” enough for courts. In a startling example, a female police officer’s coworker repeatedly asserted that women should not be police officers.<sup>1</sup> He regularly teased and harassed her for being a woman,<sup>2</sup> and even told her she should kill herself.<sup>3</sup> Her complaints about his conduct went unheeded.<sup>4</sup> One night, when the two were patrolling together, the officers shot and killed each other.<sup>5</sup> Believing the shooting was a result of the harassment, the deceased woman’s sister brought suit for sex discrimination.<sup>6</sup> On appeal, the Michigan Supreme Court held that, under the state’s civil rights act, the claim was not cognizable because her attorneys had framed it as “sexual harassment.”<sup>7</sup> The court found the conduct under question was not “sexual in nature” and therefore did not meet the definition for sexual harassment that the state’s legislature had adopted.<sup>8</sup>

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1. See Appellee’s Brief on Appeal at 1, *Haynie v. State*, 664 N.W.2d 129 (Mich. 2003) (No. 120426) [hereinafter *Haynie* Appellee’s Brief on Appeal].

2. *Id.* at 1–2.

3. *Id.*

4. *Id.* at 1.

5. *Id.* at 1–2.

6. *Id.*

7. *Haynie*, 664 N.W.2d at 131.

8. *Id.* at 135–36. Michigan’s civil rights act states that “[s]exual harass-

A sex-discriminatory hostile work environment occurs when conduct, directed at a person because of his or her sex, is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive.<sup>9</sup> Hostile work environment claims for sex discrimination have developed along two separate lines. Claims for “classic sex-based discrimination,” hereinafter referred to as “non-sexual harassment,” where an employee is denigrated, ridiculed, scorned or otherwise treated unequally simply for being a man or a woman, are directly derived from the language of civil rights acts prohibiting discrimination “because of . . . sex.”<sup>10</sup> On the other hand, “sexual harassment”—unwanted sexual advances and other conduct of a sexual nature—can also constitute a hostile work environment.<sup>11</sup> Although the language of Title VII<sup>12</sup> and many state civil rights acts do not use the words “sexual harassment,” the “because of . . . sex” language has been interpreted to embrace sexual conduct.<sup>13</sup> Accordingly, the EEOC and several state legislatures have promulgated or adopted specific definitions for what constitutes “sexual harassment.”<sup>14</sup> This has resulted in the development of sexual-specific<sup>15</sup> rules for determining when *sexual* conduct rises to the level of a hostile work environment, effectively driving a wedge into sex discrimination law. Sexual-specific rules and definitions have caused federal courts considering Title VII claims to separately consider sexual and non-sexual conduct in a two-tiered analysis, parsing out the sexual from the non-sexual incidents and ultimately deciding that neither alone is sufficiently severe or pervasive to constitute a hostile work environment, or that the “because of . . . sex” causation requirement is not met.<sup>16</sup> Several scholars

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ment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature” under certain conditions. MICH. COMP. LAWS § 37.2103 (2013).

9. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

10. *See generally* 42 U.S.C. § 2000e-2 (2006).

11. *See Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11 (2013).

12. *See* 42 U.S.C. § 2000e-2.

13. *See, e.g.*, 29 C.F.R. § 1604.11.

14. *Id.*; sources cited *infra* note 68.

15. “Sexual-specific” refers to rules that apply only to conduct of a sexual nature, such as sexual advances or conduct, requests for sexual favors, sexual touching, etc.

16. *See Vicki Schultz, Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689–90 (1998) (“When severed from a larger pattern of [discrimination], sexual advances or ridicule can appear insufficiently severe or perva-

have touched on this issue,<sup>17</sup> hereinafter referred to as the “disaggregation problem” because it disaggregates sex discrimination law by treating sexual and non-sexual harassment as two separate types of discrimination.

Yet no scholars have focused their analysis of the issue on interpretation of state law, where the disaggregation problem abounds<sup>18</sup> and, in some states, sexual harassment definitions are explicitly incorporated into civil rights statutes.<sup>19</sup> Courts in these states are developing a worrisome pattern of rejecting classic sex-based discrimination claims either because incidents of non-sexual, sex-based harassment (hereinafter, “non-sexual harassment”) cannot be considered in assessing these claims,<sup>20</sup> or because non-sexual harassment just is not bad enough to meet the “severe-or-pervasive” requirement.<sup>21</sup> These cases show

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sive . . . .”); *see also* Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047, 1055 (N.D. Ill. 1985) (holding a female employee failed to prove a hostile work environment after separately considering her coworkers’ lewd comments as sexual harassment and her claim that her discharge was gender-based discrimination), *aff’d*, 798 F.2d 210 (7th Cir. 1986), *abrogated by* Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); sources cited *infra* note 51.

17. See Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 198–200 (1995) (noting that courts have narrowed claims to those of a sexualized nature and that “sexual harassment doctrine contains some troubling, limiting principles that have begun to influence the rest of anti-discrimination law”); Schultz, *supra* note 16 (providing a thorough survey of the disaggregation problems in the federal courts).

18. See, e.g., Haberman v. Cengage Learning, Inc., 103 Cal. Rptr. 3d 19, 31 (Cal. Ct. App. 2009) (dismissing “[m]ost of the alleged incidents” because they were “not sexual in nature”); Hale v. Haw. Publ’ns, Inc., 468 F. Supp. 2d 1210, 1221 (D. Haw. 2006) (finding sex discrimination claim was time barred because the sexually-charged harassing conduct occurred prior to the cut-off date, and “none of the Plaintiff’s allegations regarding Defendants’ [other] behavior . . . such as intensified supervision, interference with her accounts, constructive discharge, or [a] threatening incident . . . are of a sexual nature”).

19. Sources cited *infra* note 68.

20. See, e.g., Gray v. Genlyte Grp., Inc., 289 F.3d 128, 135 (1st Cir. 2002) (finding plaintiff had “narrowed her claim” to conduct “of a sexual nature,” although “acts of intimidation could comprise part of a pattern of sexual harassment” when considered in context); Haynie v. State, 664 N.W.2d 129, 140 (Mich. 2003) (requiring conduct to be sexual in nature).

21. See Hoffelt v. Ill. Dep’t of Human Rights, 867 N.E.2d 14, 18 (Ill. App. Ct. 2006) (holding non-sexual harassment and inaccurate performance evaluation based on sex do not establish a severe or pervasive change in the daily conditions of employment); LaMont v. Indep. Sch. Dist. No. 728, 814 N.W.2d 14 (Minn. 2012) (reaching the Minnesota Supreme Court on the question of whether conduct is required to be sexual in nature, and holding that although

that, because of the effect and operation of sexual harassment definitions, the disaggregation phenomenon that other scholars have identified at the federal level is much more pronounced and explicit at the state level. Several state courts have determined that framing a sex discrimination claim as “sexual harassment” limits the scope of the action to exclude any conduct that is not sexual in nature,<sup>22</sup> and even in other states, courts may view harmful discriminatory behavior that is non-sexual as less severe or pervasive, or less likely to be gender-motivated, than sexual conduct.<sup>23</sup>

Essentially, states’ statutory definitions for sexual harassment have formally severed the law of sex discrimination, prejudicing plaintiffs whose claims include elements of classic discrimination—non-sexual harassment. This Note explores this problem. Part I introduces the disaggregation problem, moving from the federal to state level, and discusses the operation of sexual-specific statutory definitions in recent state court opinions. Part II analyzes the effect of statutory definitions for sexual harassment on sex discrimination cases based on non-sexual, rather than sexual, harassment, or a mix of both (“mixed cases” or “mixed harassment”). Part III considers the pros and cons of developing statutory definitions and calls for a reshaping of state-level statutory definitions and discrimination provisions. This Note ultimately proposes methods for dealing with the disaggregation problem in state courts, including adopting “aggregation rules” and “aggregation provisions,” and re-evaluating policies’ singular focus on sexual harassment.

## I. FROM FEDERAL TO STATE: THE LANDSCAPE OF THE DISAGGREGATION PROBLEM

Title VII of the federal Civil Rights Act (CRA) makes it illegal to discriminate or deny someone employment privileges “because of . . . sex.”<sup>24</sup> Today, courts and the general public take

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it is not, the conduct in this case did not meet the “severe-or-pervasive” requirement.

22. *E.g., Gray*, 289 F.3d at 135–36; *Haynie*, 664 N.W.2d at 140.

23. See, e.g., *LaMont*, 814 N.W.2d at 19, 22–24 (concluding that non-sexual conduct should be considered but that segregating women, imposing a rule of silence on women but not men, and making dozens of denigrating comments about women were not severe or pervasive enough to constitute a hostile work environment and implying harassment may not have been gender-motivated).

24. 42 U.S.C. § 2000e-2 (2006).

it for granted that “sexual harassment” is a form of workplace sex discrimination.<sup>25</sup> However, courts originally rejected the notion that employers who terminated or punished employees for rejecting sexual advances or who created a sexually-charged work environment were discriminating “because of . . . sex.”<sup>26</sup> Only later did sexual harassment come to be seen as the quintessential form of sex-based workplace harassment.<sup>27</sup> As sexual harassment legal doctrines developed, federal courts began applying a two-tiered analysis that separates out the sexual and non-sexual incidents of harassment, imposing serious obstacles for non-sexual harassment plaintiffs.<sup>28</sup> This issue has solidified and come to the forefront at the state level, and states’ adoption of sexual-specific, statutory definitions of sexual harassment and the resulting case law offer an ideal lens through which to examine its negative effects.

This Part maps the landscape of the disaggregation problem in four parts. Part A explains how sexual harassment came to be seen as the quintessential form of sex discrimination and how this resulted in claim disaggregation. Part B highlights the serious harms of non-sexual harassment in the workplace. Parts C and D show, respectively, the prevalence of state statutory sexual harassment definitions and how courts’ interpretations of those definitions have allowed the disaggregation problem to flourish at the state level.

#### A. HOW “SEXUAL” CAME TO THE FOREFRONT OF HARASSMENT CLAIMS

Feminists viewed the courts’ early refusal to recognize unwanted sexual advances and comments as sex discrimination as harmful to women, since they saw unwanted sexual advanc-

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25. See *infra* note 54.

26. See, e.g., *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (“[S]exual harassment and sexually motivated assault do not constitute sex discrimination under Title VII.”), *rev’d*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Train*, 13 Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. Aug. 9, 1974) (“The substance of plaintiff’s complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff’s supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff’s sex.”), *rev’d sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

27. See *Schultz*, *supra* note 16, at 1796 (“[C]ourts began to view sexual advances as the quintessential form of gender-based harassment . . . ”).

28. See generally *id.*

es in the workplace as a manifestation of suppressive discriminatory regimes and even an extension of the act of rape.<sup>29</sup> The feminist legal community struggled to carve out of Title VII a sex discrimination claim based on unwanted sexual advances or sexually explicit conduct.<sup>30</sup> Eventually, federal courts did begin to recognize sexual-based harassment as discrimination “because of . . . sex,” on the theory that the causation requirement was met because heterosexuals would only target one sex with their sexual advances.<sup>31</sup> Eventually, courts would find causation even in same-sex cases, as long as the plaintiff could prove that the harasser had made sexual advances and was attracted to the same-sex.<sup>32</sup>

In the 1980s and ‘90s, the idea that sexual harassment was a form of sex discrimination gained momentum in the courts, the media, and the government.<sup>33</sup> Borrowing from race discrimination cases,<sup>34</sup> a branch of law grew out of the notion that a workplace charged with unwanted sexuality could create a hostile work environment, since the harassment itself affected the terms or conditions of employment.<sup>35</sup> Thus, the courts developed two alternative routes for establishing a valid sexual harassment claim: “quid pro quo” sexual harassment, where the terms and privileges of employment are actually conditioned on acceptance of sexual advances, and “hostile work environment” sexual harassment, where the presence of “severe or pervasive” sexual advances or conduct creates an environment that is so

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29. *See id.* at 1698–99 (“[S]exual desire and domination were inextricably linked in the institution of heterosexuality. . . . [A]ll sexist behavior [wa]s an extension of the paradigmatic act of rape.” (quoting Ellen Willis, *Radical Feminism and Feminist Radicalism*, in NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS 117, 144 (1992))).

30. *See id.* at 1702–03.

31. *Barnes*, 561 F.2d at 990 (“[B]arnes became the target of her superior’s sexual desires because she was a woman. . . . [N]o male employee was susceptible to such an approach by appellant’s supervisor. . . . Thus [Barnes] . . . advances a prima facie case of sex discrimination within the purview of Title VII.”).

32. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

33. Schultz, *supra* note 16, at 1692–1732.

34. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (outlining the hostile work environment doctrine in the racial context).

35. *See Schultz, supra* note 16, at 1707–08 (discussing the emergence of hostile work environment cases based on unwanted sexuality).

intolerably sexually charged as to affect workplace conditions for an employee.<sup>36</sup>

Perhaps understanding that “sex sells,” the media quickly began paying more attention to the sexually charged cases than the classic sex discrimination cases.<sup>37</sup> As if on cue, in 1980 the Equal Employment Opportunity Commission (EEOC) adopted the following guidelines:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.<sup>38</sup>

To this day, these sexual-specific guidelines remain in effect without any explanation of how they interact with the elements of a non-sexual harassment claim,<sup>39</sup> despite the fact that the EEOC’s own data shows that the majority of Title VII claims are non-sexual.<sup>40</sup> Employers have embraced the guidelines, creating numerous policies that either focus on “sexual harassment” or completely discount non-sexual harassment of employees.<sup>41</sup> Meanwhile, new studies suggest non-sexual harassment can be more psychologically harmful to employees, and

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36. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67–68 (1986) (criticizing the lower court for relying on the quid pro quo harassment doctrine when hostile environment was also a potential route).

37. See Schultz, *supra* note 16, at 1692 (noting that the “most publicized harassment cases” such as the Anita Hill-Clarence Thomas scandal “have accentuated” the sexual paradigm).

38. Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11).

39. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2013).

40. *Model EEO Programs Must Have an Effective Anti-Harassment Program*, EEOC, [http://www.eeoc.gov/federal/model\\_eeo\\_programs.cfm#policies](http://www.eeoc.gov/federal/model_eeo_programs.cfm#policies) (last visited Apr. 3, 2014) (finding that “non-sexual harassment is the issue most frequently raised in EEO complaints”).

41. See, e.g., Livingston Bd. of Educ., *Policy 5751: Sexual Harassment*, LIVINGSTON.ORG (Dec. 13, 2010), <http://www.livingston.org/cms/lib4/NJ01000562/Centricity/Domain/14/Policies/Section%205000/Policy%205751%20-%20Sexual%20Harassment.pdf> (“Nonsexual touching or other nonsexual conduct does not constitute sexual harassment.”); *School Policies: Policy on Sexual Harassment*, SUCCESS SCHOOLS LLC, <http://successschoolsllc.com/school-policies-1.html> (last visited Apr. 3, 2014) (focusing on sexual harassment).

can interfere more with work, than unwanted sexual advances or comments.<sup>42</sup>

To aid in understanding the problem, hostile work environment claims based on sex discrimination can be viewed as falling into three categories: classic or “non-sexual harassment,” “sexual harassment,” and “mixed harassment.” Non-sexual harassment may come in the form of derogatory or denigrating statements, differential treatment, or adverse employment conditions based on one’s status as a man or a woman. One common example is competence-undermining; employers may not take female workers seriously and may humiliate them, refer to them as “dumb,” and remind them they cannot perform a “man’s job.”<sup>43</sup> “Sexual harassment” typically involves sexually explicit comments, sexual touching, or sexual advances. In what this Note describes as a “mixed harassment” claim,<sup>44</sup> an employee experiences both non-sexual and sexual harassment in combination. For example, an employer or coworkers may make derogatory remarks about women’s competence, deny women training opportunities, and also employ sexual touching, winking, and sexual advances.<sup>45</sup>

All of these claims are forms of sex discrimination, yet courts tend to view sexual and non-sexual harassment claims as mutually exclusive, making it very difficult for victims of mixed and non-sexual harassment to obtain relief. Vicki Schultz performed a comprehensive analysis of federal sex discrimination law and the disaggregation of sexual and non-sexual harassment.<sup>46</sup> Schultz first established that many federal court opinions have altogether discounted valid sex-based discrimination claims because they were non-sexual in na-

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42. See Rick Nauert, *Non-Sexual Worksite Harassment Is More Harmful*, PSYCHCENTRAL (March 10, 2008), <http://psychcentral.com/news/2008/03/10/non-sexual-worksit...> (2020).html (noting that, among other things, non-sexual harassment led to higher anxiety, more job stress, and a higher rate of leaving jobs).

43. See, e.g., *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1543, 1545–46 (10th Cir. 1995) (noting allegations by plaintiff that she had been referred to as “dumb” and humiliated at work); *supra* notes 1–3 and accompanying text (noting allegations of humiliation at work and being told the work was a man’s job).

44. Not to be confused with a “mixed-motive” case. A “mixed-motive case” is one “where both legitimate and illegitimate reasons motivated [an employment decision].” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003).

45. Cf., e.g., *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 211–12 (7th Cir. 1986) (alleging sexual advances as well as a gender-based discharge).

46. Schultz, *supra* note 16.

ture.<sup>47</sup> “[W]hen presented with evidence of nonsexual misconduct, judges have tended to miss any harmful gender dynamics involved.”<sup>48</sup> She then showed how federal courts that *do* consider the non-sexual components of a discrimination claim tend to parse them out from the sexually-charged incidents of harassment, in effect turning mixed harassment claims into two separate claims—one for non-sexual harassment and one for sexual harassment.<sup>49</sup> The result is that it is difficult for women with primarily non-sexual harassment or mixed claims to sufficiently establish the severe-or-pervasive or “because of . . . sex” requirements for one or the other, even if the harassment may be sufficiently severe or pervasive, or clearly because of sex, when both sexual and non-sexual components are viewed in combination.<sup>50</sup> A proper application of the law would view incidents of mixed harassment in the aggregate, since they are all “discriminat[ion] . . . because of . . . sex.” Despite this, courts seem largely unaware of the effect of a two-tiered approach or the gender dynamics involved in non-sexual or mixed harassment claims, and at the federal level the disaggregation problem persists.<sup>51</sup>

#### B. THE HARMS OF NON-SEXUAL HARASSMENT

Scientific studies of the effects of harassment have also developed along separate lines, isolating “sexual” from “non-sexual” workplace aggression.<sup>52</sup> However, several recent studies

47. *Id.* at 1733.

48. *Id.* at 1739.

49. See *id.* at 1739–44 (discussing how courts generally address sexual and non-sexual allegations as two separate causes of action).

50. See *id.* at 1720–21 (explaining the effect of disaggregation on the severe-or-pervasive requirement and noting that “when separated from sexual advances and other sexual conduct, the nonsexual actions may appear to be gender-neutral forms of hazing with which the law should not interfere”).

51. See, e.g., Gupta v. Fl. Bd. of Regents, 212 F.3d 571, 583–86 (11th Cir. 2000) (conflating “gender-related” conduct with conduct of a “sexual nature,” and then analyzing the sexual conduct on its own); St. Louis v. N.Y.C. Health & Hosp. Corp., 682 F. Supp. 2d 216, 233 (E.D.N.Y. 2010) (finding, for purposes of determining when the statute of limitations ran, that harassment “permeated with gender-based animus of a non-sexual nature” is “unrelated” to the “alleged acts of sexual harassment” and therefore defendant’s conduct cannot be said to form ‘one unlawful employment practice’); Sessom v. Home Depot U.S.A., Inc., No. 2:05CV84-P-B, 2006 WL 3210484, at \*9 (N.D. Miss. Nov. 6, 2006) (“It would seem better to avoid confusion by distinguishing hostile work environment sexual harassment based on sexual misconduct from hostile work environment based on gender discrimination.”).

52. See Laurent M. Lapierre et al., *Sexual Versus Nonsexual Workplace*

have performed meta-analyses to determine whether non-sexual and sexual harassment have different effects on victims and whether one is more harmful than the other.<sup>53</sup> Based on the amount of attention sexual forms of harassment receive, one might suspect that sexual harassment is more harmful than non-sexual sex discrimination.<sup>54</sup> However, the empirical evidence shows that, in all probability, the *opposite* is true: non-sexual harassment likely has a greater impact on victims' health, attitudes, and overall job satisfaction.<sup>55</sup>

Ironically, one of the factors that cause non-sexual harassment to be more harmful is society's focus on eradicating *sexually* harassing conduct.<sup>56</sup> Because victims see employers and the media giving great attention to sexual harassment, they may be more likely to believe that they have the tools to stop the harassment and hold their harassers accountable.<sup>57</sup>

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*Aggression and Victims' Overall Job Satisfaction: A Meta-Analysis*, 10 J. OCCUPATIONAL HEALTH PSYCHOL. 155, 155 (2005) ("[W]ith few exceptions, the empirical literatures on sexual and nonsexual aggression have grown along separate lines." (citations omitted)).

53. See generally M. Sandy Hershcovis & Julian Barling, *Comparing Victim Attributions and Outcomes for Workplace Aggression and Sexual Harassment*, 95 J. APPLIED PSYCHOL. 874 (2010) (comparing the attitudinal, behavioral, and health outcomes of workplace aggression and sexual harassment); Lapierre, *supra* note 52; *Bullying More Harmful than Sexual Harassment on the Job, Say Researchers*, AM. PSYCHOL. ASS'N (Mar. 8, 2008), <http://www.apa.org/news/press/releases/2008/03/bullying.aspx>; Nauert, *supra* note 42.

54. See Hershcovis & Barling, *supra* note 53, at 875 ("Legal attention to sexual harassment has created significant awareness of and policy aimed at preventing workplace sexual harassment; workplace aggression has not received the same level of attention.").

55. See *id.* at 874 ("Negative outcomes of workplace aggression were stronger in magnitude than those of sexual harassment for 6 of the 8 outcome variables."); Lapierre, *supra* note 52, at 165 ("[R]esults indicate that the negative relationship between nonsexual aggression and victims' overall job satisfaction . . . is significantly stronger than the one between sexual aggression and victims' overall job satisfaction . . ."). It should be noted that both of these studies include "gender harassment" as one of three forms of "sexual harassment." Hershcovis & Barling, *supra* note 53 at 875; Lapierre, *supra* note 52, at 156. However, due to the more subtle and inconspicuous nature of the non-sexual aggression that stems from sex discrimination, many incidents of sex discrimination were likely categorized as "non-sexual aggression" and their effects captured in those results, and, even if this were not the case, in theory, had the studies separated out non-sexual "gender" harassment, it likely still would have been found to be more harmful for the same reasons.

56. See Lapierre, *supra* note 52, at 157–58 (discussing some of the potential effects the attention on sexual harassment may have on individuals experiencing other forms of harassment).

57. *Id.*

While the awareness-raising efforts surrounding sexual harassment have empowered women to fight back, because non-sexual harassment has received little attention, women may not understand the illegal nature of their harassers' conduct and therefore may feel powerless to stop it.<sup>58</sup> For example, employers rarely display posters prohibiting or defining *non-sexual* harassment as discrimination in the workplace. Thus, employees might feel they do not have the legal or linguistic tools to fight this form of sex discrimination,<sup>59</sup> or that non-sexual harassment is more likely to reoccur in the workplace.<sup>60</sup> Moreover, victims of sexual harassment may be less likely to internalize their harassers' viewpoints.<sup>61</sup> The end result is that non-sexual workplace harassment likely has a more harmful effect on women's psyche, and their careers.

### C. ENCAPSULATING THE DISAGGREGATION PROBLEM IN STATE DEFINITIONS

Almost all state legislatures—forty-seven plus the District of Columbia—have adopted general civil rights statutes prohibiting discrimination in the workplace.<sup>62</sup> Most of the statutes' language mirrors that of the federal Civil Rights Act<sup>63</sup> or something similar, including the “because of . . . sex.”<sup>64</sup> It should be

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58. See *id.* (describing the potential for “fear and hopelessness” among such victims).

59. See *id.*

60. See *id.* (“[V]ictims of nonsexual aggression may experience stronger negative outcomes . . . because nonsexual aggression could be viewed as more likely to reoccur in their organization than would sexual aggression.”).

61. See Hershcovis & Barling, *supra* note 53, at 875 (“Female victims of sexual harassment may be more likely than victims of [non-sexual] workplace aggression to depersonalize their experience of mistreatment and attribute it to the perpetrator’s prejudice toward their gender group.”).

62. See *State Laws on Employment-Related Discrimination*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 2014), <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx>; see, e.g., ALASKA STAT. § 18.80.220 (2013); COLO. REV. STAT. § 24-34-402 (2013); D.C. CODE § 2-1402.11 (2013); IDAHO CODE § 67-5909 (2013); LA. REV. STAT. § 23:332 (2013); N.Y. EXEC. LAW § 296 (2013); OR. REV. STAT. § 659A.030 (2013); S.C. CODE § 1-13-80 (2013); TEX. LAB. CODE § 21.051 (2011); W. VA. CODE § 5-11-2 (2013). The three states that have not adopted private employment civil rights statutes with private rights of action are Alabama, Mississippi, and North Carolina. See *Royster v. Costco Wholesale Corp.*, 378 F. Supp. 2d 595, 608 (M.D.N.C. 2005) (“North Carolina courts have not recognized a private cause of action under the [North Carolina Equal Employment Practices Act.]”); *State Laws on Employment-Related Discrimination*, *supra* note 62.

63. 42 U.S.C. § 2000e-2 (2006).

64. See, e.g., ARIZ. REV. STAT. § 41-1463 (2014) (“because of . . . sex”); FLA.

no surprise, then, that disaggregation problems abound at the state level just as they do at the federal level.<sup>65</sup> In addition, unusual formations of the anti-discrimination statute, such as the variation found in California,<sup>66</sup> can further contribute to disaggregation problems by compelling courts to parse out “harassment” from “discrimination,” creating two distinct causes of action and making a further mess of the law.<sup>67</sup>

However, some states’ civil rights statutes have created a novel problem. While the federal legislature never adopted language specific to “sexual” harassment, a handful of state legislatures—nine, to be precise—have done so.<sup>68</sup> Other states may include sexual-specific language or statutory definitions of “sexual harassment” in other sections of their codes, such as the rules of judicial conduct.<sup>69</sup> Many state statutes include subdivisions requiring employers to develop sexual harassment policies.<sup>70</sup> These provisions often go so far as to require employers to inform employees of the definition of “sexual harassment,” provide employees with specific examples of sexual harassment on the job, and hang signs about sexual harassment in the workplace.<sup>71</sup> State legislatures usually base the language of their statutory sexual harassment definitions on the EEOC’s guidelines.<sup>72</sup> Most of the state statutes that connect the defini-

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STAT. § 760.10 (2013) (“because of . . . sex”); IDAHO CODE § 67-5909 (“because of, or on a basis of . . . sex”).

65. See, e.g., sources cited *supra* note 18.

66. The California Fair Employment and Housing Act contains two independent clauses, one prohibiting discrimination “because of . . . sex,” CAL. GOV’T CODE § 12940(a) (2012), and one prohibiting harassment “because of . . . sex,” *id.* § 12940(j)(1).

67. See *Miller v. Dep’t of Corr.*, 115 P.3d 77, 86 n.5 (Cal. 2005) (“[C]laims for sexual discrimination and sexual harassment are distinct causes of action, each arising from different provisions of the FEHA.”).

68. See Conn. GEN. STAT. § 46a-60(a)(8) (2013); 775 ILL. COMP. STAT. 5/2-101 (2011); MASS. GEN. LAWS ch. 151B, § 1 (2013); MICH. COMP. LAWS § 37.2103(i) (2013); MINN. STAT. § 363A.03 (2013); NEB. REV. STAT. § 48-1102 (2013); N.D. CENT. CODE § 14-02.4-02 (2014); VT. STAT. ANN. tit. 21, § 495d (2013); WIS. STAT. § 111.32 (2014).

69. See, e.g., COL. CODE OF JUDICIAL CONDUCT R. 2.3, cmt. 4 (2010) (“Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”).

70. See, e.g., TENN. CODE ANN. § 4-3-124 (2011).

71. See, e.g., CAL. GOV’T CODE § 12950(a) (“Each employer shall post the amended poster [on discrimination and sexual harassment] in a prominent and accessible location in the workplace.”); sources cited *infra* note 208.

72. See, e.g., CONN. GEN. STAT. § 46a-60(a)(8) (defining “sexual harassment” as “any unwelcome sexual advances or requests for sexual favors or any

tion to the general civil rights provision do so by stating that discrimination because of sex “includes” sexual harassment or that sexual harassment is “a form of” sex discrimination.<sup>73</sup>

One might suspect that the inclusion of these sexual-specific statutory definitions exacerbates the disaggregation problems in these courts and state courts’ tendency to overlook non-sexual conduct. However, recent developments show that the problem is much worse than that. The statutory sexual harassment definitions have effectively driven a wedge in states’ sex discrimination doctrine, resulting in explicit disaggregation rules.<sup>74</sup>

#### D. THE OPERATION OF STATUTORY SEXUAL HARASSMENT DEFINITIONS

In particular, at least three court decisions—*LaMont v. Independent School District No. 728*,<sup>75</sup> *Haynie v. State*,<sup>76</sup> and *Gray v. Genlyte Group, Inc.*<sup>77</sup>—explicitly analyze the effect of state

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conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment”; MASS. GEN. LAWS ch. 151B, § 1 (defining “sexual harassment” as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment”). *But see* WIS. STAT. § 111.32 (dropping the requirement that the harassment affect a term, condition, or decision of employment, interfere with the individual’s work, or create a hostile environment, and including specific examples of “unwelcome verbal or physical conduct of a sexual nature”).

73. See, e.g., MASS. GEN. LAWS ch. 151B § 1; MICH. COMP. LAWS § 37.2103(i); MINN. STAT. § 363A.03; N.D. CENT. CODE § 14-02.4-02; VT. STAT. ANN. tit. 21, § 495d. *But see* CONN. GEN. STAT. § 46a-60(a)(8) (defining sexual harassment without clearly prohibiting it, although a proposed bill would resolve this seemingly technical error, *see* S.B. 385, 2014 Gen. Assemb., Feb. Sess. (Conn. 2014)); 775 ILL. COMP. STAT. 5/2-102 (outlawing “unlawful discrimination” and “sexual harassment,” in separate subdivisions); NEB. REV. STAT. § 48-1102 (specifically prohibiting employees from “harass[ing]” or “otherwise discriminat[ing]” because of sex, and defining “harass because of sex”).

74. See *infra* Part I.D.3 (exploring mixed harassment claims).

75. *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14 (Minn. 2012).

76. *Haynie v. State*, 664 N.W.2d 129 (Mich. 2003).

77. *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128 (1st Cir. 2002).

statutory sexual harassment definitions on sex discrimination claims.<sup>78</sup> While in all three cases appellate courts purported to hold that non-sexual harassment was unlawful under the respective civil rights statutes, all three officially bifurcated sex discrimination law, creating two separate causes of action—one sexual, and the other non-sexual. Furthermore, two out of the three courts found that mentioning “sexual harassment” in the complaint could render a non-sexual harassment claim invalid.<sup>79</sup> The ultimate result is the dismissal of meritorious claims.

### 1. *Haynie v. State*: Barring Purely Non-Sexual Harassment Claims

In *Haynie*, the appellate court dismissed a claim in its entirety for being non-sexual in nature.<sup>80</sup> Virginia Rich, the female police officer described in this Note’s introduction, was assigned to the Michigan State Capitol Security unit along with a male co-worker, Canute Findsen.<sup>81</sup> After making numerous inappropriate comments about women and harassing Rich and other women on the force, Findsen’s behavior allegedly escalated to the point where Rich began “secretly carry[ing] a hidden tape recorder during her work hours.”<sup>82</sup> Rich’s father had committed suicide a few years prior to Rich’s death by shooting himself in the head, and several times Findsen allegedly presented Rich with a bullet to use on herself and once even wrote a note suggesting to Rich that she should kill herself “using the bullet in her daddy’s gun.”<sup>83</sup> Although Rich complained to her supervisors, her complaints were ignored.<sup>84</sup>

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78. See *id.* at 134–36 (analyzing whether an error occurred if “the district court effectively told the jury that it could not consider non-sexual conduct but only conduct that was either explicitly sexual or had ‘sexual overtones’”); *Haynie*, 664 N.W.2d at 130–31 (considering “whether gender-based harassment that is not at all sexual in nature is sufficient to establish a claim of sexual harassment under the Civil Rights Act”); *LaMont*, 814 N.W.2d at 18 (“We turn to the first question: whether a hostile work environment claim brought under the MHRA may be based on harassing conduct that is based on sex, even if the offending conduct is not sexual.”).

79. See generally *Gray*, 289 F.3d at 135–36; *Haynie*, 664 N.W.2d at 140.

80. *Haynie*, 664 N.W.2d at 140 (reversing the judgment of the Court of Appeals and reinstating the order granting summary judgment in favor of the defendants).

81. *Haynie* Appellee’s Brief on Appeal, *supra* note 1, at 1.

82. *Id.* at 2.

83. *Id.* at 1–2.

84. See *id.* at 1 (describing Rich’s requests not to work with Findsen anymore).

One night, Rich and Findsen were making rounds in a patrol car.<sup>85</sup> The complete facts are forever lost, but at some point, the two police officers exited the vehicle and shot and killed each other.<sup>86</sup> Rich's sister, Carol Haynie, sued under Michigan's Elliot Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101.<sup>87</sup> While Haynie sued under the entire Act, her attorneys often framed the claim as one for hostile work environment due to "sexual harassment."<sup>88</sup>

The Michigan civil rights statute prohibits employers from discriminating "because of . . . sex"<sup>89</sup> and states that "[d]iscrimination because of sex includes sexual harassment."<sup>90</sup> The statute goes on to define sexual harassment as requiring conduct of a "sexual nature," and uses language substantially similar to the EEOC's guidelines.<sup>91</sup> In a previous case, the court had found that non-sexual harassment based on sex could constitute "sexual harassment."<sup>92</sup> In *Haynie*, however, the Michigan Supreme Court overruled its previous decision and held that "only conduct or communication that is sexual in nature can constitute sexual harassment."<sup>93</sup> While non-sexual conduct could serve as the basis for a sex discrimination claim, the court said "sexual harassment is *another* type of discrimination,"<sup>94</sup> and "a claim of sexual harassment *must prove something considerably different . . .*"<sup>95</sup> Although the harassment Rich experienced could support a viable sex discrimination cause of action, Haynie had alleged that Rich was "sexually harassed,"<sup>96</sup> so her claim failed.<sup>97</sup>

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85. *Id.* at 2.

86. *Id.*

87. *Id.* (citing MICH. COMP. LAWS § 37.2101 (2013)).

88. See, e.g., *Haynie* Appellee's Brief on Appeal, *supra* note 1, at 9 ("The elements for a hostile work environment/sexual harassment claim were set forth in . . . [a prior Michigan case].").

89. MICH. COMP. LAWS § 37.2202.

90. *Id.* § 37.2103.

91. See generally *id.* (defining sexual harassment).

92. See *Koester v. City of Novi*, 580 N.W.2d 835, 839 (Mich. 1998) ("[H]arassment on the basis of a woman's pregnancy is sexual harassment."), overruled by *Haynie v. State*, 664 N.W.2d 129 (Mich. 2003).

93. *Haynie*, 664 N.W.2d at 135.

94. *Id.* at 134 (emphasis added).

95. *Id.* (emphasis added).

96. *Id.* at 135.

97. *Id.* at 135–36 ("In this case, plaintiff concedes that there were no 'unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct or communication of a sexual nature . . . .' Accordingly, plaintiff

2. *LaMont v. Independent School District No. 728:*  
Insufficiency of Non-Sexual Harassment Claims

*LaMont* is another case involving primarily non-sexual harassment.<sup>98</sup> When a new employee took over supervision of Carol LaMont's night shift as a high school custodian, her once peaceful working hours were replaced with humiliation, psychological torment, and degrading comments about women.<sup>99</sup> LaMont alleged her new supervisor openly told her he did not want women on his crew.<sup>100</sup> He would not allow female employees to speak and told male workers not to talk to them.<sup>101</sup> He required the women to take on additional work and segregated them from the men.<sup>102</sup> "Women have their place," he said.<sup>103</sup> "You've got to keep them in their place."<sup>104</sup> At one point, he forced LaMont to clean the top rows of bleachers, despite the fact that she was previously exempted from this task due to a severe fear of heights, and then he proceeded to ridicule her for her phobia.<sup>105</sup> Although LaMont reported these problems to her supervisor, the school district made no real efforts to resolve the situation.<sup>106</sup>

LaMont submitted a complaint under the Minnesota Human Rights Act (MHRA),<sup>107</sup> which prohibits an employer from discriminating against an employee "because of . . . sex."<sup>108</sup> The Minnesota legislature has provided that sex discrimination "includes" sexual harassment, and has adopted a specific statutory definition for sexual harassment requiring conduct of a "sexual nature," mirroring the EEOC's guidelines.<sup>109</sup> The state court of

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clearly has not established a claim of sexual harassment . . . ." (alteration in original).

98. *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 17 (Minn. 2012) (describing differential treatment of employees based on sex).

99. See generally Petitioner's Brief and Appendix, *LaMont*, 814 N.W.2d 14 (No. A10-543) [hereinafter *LaMont* Petitioner's Brief and Appendix].

100. *Id.* at 4.

101. *Id.* at 3, 9.

102. *Id.* at 3.

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 8.

106. See *id.* at 11 (explaining that the school district's investigator never even spoke to the supervisor about his harassing conduct).

107. See *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 16 (Minn. 2012).

108. MINN. STAT. § 363A.08, subd. 2 (2013) (describing unfair employment practices).

109. See *id.* § 363A.03, subd. 13 (defining discriminate); *id.* subd. 43 (defin-

appeals affirmed the dismissal of LaMont's hostile work environment case on summary judgment,<sup>110</sup> holding that a workplace sex discrimination claim based on harassment that was not sexual in nature was not actionable under the MHRA.<sup>111</sup>

LaMont appealed, arguing that, like the federal CRA containing nearly identical language,<sup>112</sup> the MHRA broadly prohibits sex discrimination, not merely discrimination that is sexual in nature.<sup>113</sup> The Minnesota Supreme Court overturned the holding on the non-sexual harassment issue, finding that "the MHRA permits a hostile work environment claim based on sex, *separate and apart from* its prohibition of sexual harassment . . .".<sup>114</sup> However, the Minnesota Supreme Court ultimately held that the harassment LaMont experienced was not "severe or pervasive" enough to "alter the conditions of the plaintiff's employment and create an abusive working environment."<sup>115</sup> The court found that the denigrating comments about women were "not severe or intimidating" or "physically threatening."<sup>116</sup> It noted that since LaMont's supervisor also yelled at male employees there was no reason to think the yelling and other harsh treatment was "because of . . . sex."<sup>117</sup> The court found that the segregation and order of silence imposed on the female employees was not enough to "impair[] [their] job performance."<sup>118</sup> The court did not consider any of the sexual comments LaMont had mentioned in her brief.<sup>119</sup>

### 3. *Gray v. Genlyte Group, Inc.*: Mixed Claim Splitting

In *Gray v. Genlyte Group, Inc.*,<sup>120</sup> one of the first opinions to explicitly consider the effect of a state's sexual harassment definition, a jury was instructed to discard non-sexual conduct in a

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ing sexual harassment).

110. *LaMont v. Indep. Sch. Dist. No. 728*, No. A10-543, 2011 WL 292131, at \*1 (Minn. Ct. App. Feb. 1, 2011), *aff'd*, 814 N.W.2d 14 (Minn. 2012).

111. *LaMont*, 814 N.W.2d at 16.

112. See 42 U.S.C. § 2000e-2 (2006).

113. See *LaMont* Petitioner's Brief and Appendix, *supra* note 99, at 16–37.

114. *LaMont*, 814 N.W.2d at 19 (emphasis added).

115. *Id.* at 21–22.

116. *Id.* at 22.

117. See *id.* at 23 ("Th[e] evidence . . . suggests that [LaMont's supervisor's] harsh conduct was directed at the entire workforce and not at LaMont personally or the female employees exclusively.").

118. *Id.* at 22.

119. Compare *id.*, with *LaMont* Petitioner's Brief and Appendix, *supra* note 99.

120. *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128 (1st Cir. 2002).

mixed harassment claim. During her seventeen years employed at a Genlyte factory, one of Linda Gray's co-workers allegedly repeatedly harassed her, including making tongue gestures mimicking oral sex, grabbing his crotch, touching her hair, grabbing her and shaking her, howling at her, staring at her, following her in the parking lot, and once even following her and her children home in the car.<sup>121</sup> When the harassment escalated, Gray had a severe panic attack and left work for months.<sup>122</sup> After she reported the conduct and her employers took "no significant action," Gray brought suit in federal court under Massachusetts' anti-discrimination statute.<sup>123</sup> The Massachusetts statute, similar to the federal statute, provides that it is unlawful for an employer to discriminate against an individual "because of . . . sex."<sup>124</sup> However, the Massachusetts statute defines sexual harassment as involving "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . ."<sup>125</sup> The statute states that "[d]iscrimination on the basis of sex shall include, but not be limited to, sexual harassment."<sup>126</sup>

Gray's complaint cited to the entire anti-discrimination provision but often phrased the claim as "sexual harassment."<sup>127</sup> The judge instructed the jury to ask the following questions:

- (1) Was the plaintiff, Linda Gray, subjected to sexual harassment, i.e. verbal or physical conduct of a sexual nature?
- (2) Was that conduct offensive and/or unwelcome to plaintiff?
- (3) Was that conduct sufficiently severe and/or pervasive so as to alter the conditions of plaintiff's employment by creating a work environment that a reasonable person would find intimidating, hostile, humiliating or sexually offensive?<sup>128</sup>

Overall, the jury deliberated for more than seven hours before deciding that the harassment was not "severe and/or pervasive" enough to constitute a hostile work environment.<sup>129</sup>

Gray appealed, arguing that the instructions could have led the jury to discount non-sexual conduct, and that this had

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121. *Id.* at 131–32.

122. *Id.* at 132.

123. *Id.* at 128, 132.

124. MASS. GEN. LAWS ch. 151B, § 4(1) (2013).

125. *See id.* § 1(18).

126. *Id.*

127. *Gray*, 289 F.3d at 135.

128. *Id.* at 133 (emphasis added).

129. *Id.*

influenced its decision on the severe-or-pervasive element by excluding some of the most severe harassing behaviors (such as the stalking).<sup>130</sup> The First Circuit held that, since Gray's complaint repeatedly phrased the claim in terms of "sexual harassment," Gray had "narrowed her claim to 'sexual harassment' as defined by Massachusetts law."<sup>131</sup> Thus, it was not plain error to instruct the jury to consider only "conduct of a sexual nature."<sup>132</sup> The court thought that "in the context of the trial," the jury probably realized that the acts of intimidation could be considered as part of the pattern of sexual harassment, and therefore "it [was] doubtful that the jury was misled."<sup>133</sup> Yet, after dismissing Gray's other arguments on procedural technicalities and upholding the jury verdict, the court opined:

If Gray's version of events were taken at face value, it would be hard to understand the jury's finding that severe sexual harassment had not been proved . . . [W]e . . . think the outcome on question (3) surprising, even allowing for what seems to have been a skillful defense [attacking Gray's credibility].<sup>134</sup>

Thus, *Gray*, like *LaMont* and *Haynie*, directly addressed the disaggregation problem, yet, despite the court's surprise at the outcome, it failed to recognize the harmful consequences of disaggregation.<sup>135</sup> All three cases have essentially utilized statutory sexual harassment definitions to ossify disaggregation into black-letter law.<sup>136</sup>

## II. BREAKING DOWN DISAGGREGATION AT THE STATE LEVEL

The statutory definitions for sexual harassment have created an unnecessary hurdle for victims of sex discrimination seeking justice against their employers. While perhaps adopted with the best intentions, states' statutory definitions for sexual harassment have driven a wedge into sex discrimination law. At the state level, the problem goes far beyond the methodological disaggregation Schultz identified;<sup>137</sup> disaggregation has

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130. See *id.* at 134 (summarizing plaintiff's argument that the instructions "altered the outcome of the case by excluding merely threatening conduct").

131. *Id.* at 135 (emphasis added).

132. *Id.* (internal quotation marks omitted).

133. *Id.*

134. *Id.* at 141.

135. See generally *id.*; *Haynie v. State*, 664 N.W.2d 129 (Mich. 2003); *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14 (Minn. 2012).

136. See generally sources cited *supra* note 135.

137. See generally Schultz, *supra* note 16.

been officially crystallized in state civil rights acts. An analysis of the three cases that explore the operation of sexual harassment definitions highlights the harmful effects of the definitions on sex-based hostile work environment claims.<sup>138</sup> First, attorneys are forced to decide whether to plead and argue non-sexual “sex discrimination” or “sexual harassment,” but pleading and arguing a combination of the two becomes tricky.<sup>139</sup> In addition, the presence of the definition forces judges to create a bifurcated methodology, examining conduct that might rise to the level of “sexual harassment” in its own independent tier.<sup>140</sup> Ultimately, the presence of the definitions legitimizes society and lawmakers’ focus on what is “sexual,” and undermines the states’ public policies of bringing an end to discrimination.

Part II proceeds in four parts. Part A demonstrates how *LaMont*, *Haynie*, and *Gray* crystallize disaggregation via statutory sexual harassment definitions.<sup>141</sup> Part B shows how the resulting bifurcation creates intractable problems for pleading and briefing non-sexual or mixed harassment claims. Part C explains why courts’ methodologies are misguided, and Part D explores the advantages and disadvantages of adopting statutory sexual harassment definitions.

#### A. LESSONS FROM *LAMONT*, *HAYNIE*, AND *GRAY*

The three cases that directly consider the effect of statutory sexual harassment definitions on non-sexual or mixed harassment claims encapsulate the bifurcation of the law that can occur when courts grapple with the presence of those definitions in their sex discrimination statutes.<sup>142</sup> *Haynie* and *Gray* show how merely mentioning “sexual harassment” in pleadings can be fatal to a mixed or non-sexual harassment case.<sup>143</sup> *LaMont* offers an example of the operation of the vague and rigorous standard that discrimination victims must meet when proving that incidents of non-sexual harassment are severe or

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138. See *infra* Part II.A (exploring the lessons learned from *Gray*, *LaMont*, and *Haynie*).

139. See *infra* Part II.B (analyzing disaggregation problems at the pleading and briefing stages).

140. See *infra* Part II.C (illustrating courts’ disaggregation methodologies).

141. See generally *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128 (1st Cir. 2002); *Haynie v. State*, 664 N.W.2d 129 (Mich. 2003); *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14 (Minn. 2012).

142. See, e.g., *Gray*, 289 F.3d 128; *Haynie*, 664 N.W.2d 129; *LaMont*, 814 N.W.2d 14.

143. See *supra* notes 96–97, 131 and accompanying text.

pervasive enough to constitute a hostile work environment.<sup>144</sup> All three opinions expressly create two separate causes of action for a sex-discriminatory hostile work environment and formally disaggregate sexual and non-sexual claims.<sup>145</sup>

*Haynie* is perhaps the most problematic of these cases.<sup>146</sup> Because *Haynie*'s attorneys made the mistake of pleading a "sexual harassment" claim, the Michigan Supreme Court decided there was no need "to reach out and address whether [Michigan's civil rights act] recognize[d] a claim for hostile work environment based on anything other than sexual harassment."<sup>147</sup> The court believed the Michigan legislature had created "two separate causes of action"—one for sexual harassment and one for sex discrimination—and therefore did not go on to consider the precise relationship between sexual harassment and non-sexual workplace conduct in contributing to a hostile work environment.<sup>148</sup> By splitting hostile work environment cases into two separate causes of action, the court ensures that, in the future, judges will parse out the sexual from the non-sexual incidents when evaluating mixed sex discrimination claims. This will negatively impact the results of sex discrimination victims' legitimate mixed and non-sexual harassment claims. Seemingly holding that *Haynie* had waived her non-sexual harassment claim, the court failed to recognize that, in male-dominated fields such as law enforcement, sexual and non-sexual harassment serve the same "gender-guarding, competence-undermining function . . . polic[ing] the boundaries of the work and protect[ing] its idealized masculine image . . .".<sup>149</sup>

The *Haynie* rule ensures that sexual and non-sexual conduct will not be considered in combination when courts determine whether harassment is "because of sex" or is "severe or pervasive" enough to constitute a hostile work environment. This will make it difficult for plaintiffs to decide how to plead mixed harassment claims. Furthermore, it imposes unwarranted obstacles on plaintiffs who mistakenly frame their non-sexual harassment claim as "sexual harassment," even though members of the legal community—and courts—often refer to

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144. See *supra* notes 115–16, 118 and accompanying text.

145. See *supra* notes 95, 114, 131 and accompanying text.

146. See generally *Haynie*, 664 N.W.2d 129.

147. *Id.* at 138.

148. See *id.* at 140 ("[T]he Michigan Legislature has specifically created a cause of action for both sex discrimination and sexual harassment.").

149. See Schultz, *supra* note 16, at 1691.

any sex-based hostile work environment claim as “sexual harassment.”<sup>150</sup>

While the Minnesota Supreme Court’s *LaMont* decision seems to represent the best outcome thus far for courts explicitly considering the effect of sexual harassment definitions, the opinion is problematic in several ways. While the court decided that pleading a sexual harassment claim did not bar a concurrent non-sexual harassment claim, the court declared that sexual harassment is a claim “separate and apart from” non-sexual harassment.<sup>151</sup> The court failed to clarify the elements of the severe and pervasive requirement and never addressed whether both sexual and non-sexual incidents should be considered in combination when evaluating this prong. Thus, although *LaMont*’s particular claim was primarily non-sexual, the ultimate impact of the opinion on mixed harassment claims is uncertain, but worrisome. As in *Haynie*, the court’s “separate and apart from” language<sup>152</sup> seems to foreshadow a future parsing out and two-tiered analysis of mixed sex discrimination claims, making it difficult for mixed harassment plaintiffs to prove discriminatory conduct is severe or pervasive. Furthermore, the court’s causation analysis is troublesome. The court failed to recognize the gender dynamics behind the non-sexual harassment. For example, the court dismissed *LaMont*’s claim without even considering her supervisor’s numerous attempts to undermine her competence by attacking her work product.<sup>153</sup> Nor did the court discuss the “hazing” incident where the supervisor evoked *LaMont*’s fear of heights.<sup>154</sup> Yet scholars consider such hazing and competence-undermining to be some of the most harmful and insidious symptoms of sex discrimination in the workplace.<sup>155</sup> Furthermore, the court wrongly dismissed several incidents of harassment because they were occasionally directed against men as well as women.<sup>156</sup> By discounting these incidents due to lack of causation, the court ignored the discriminatory context, and the fact that such forms of harassment become severe or pervasive when coupled with blatant

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150. See, e.g., *supra* notes 130–34 and accompanying text.

151. *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 19 (Minn. 2012).

152. *Id.* See generally *Haynie*, 664 N.W.2d 129.

153. *LaMont* Petitioner’s Brief and Appendix, *supra* note 99, at 5–8.

154. *Id.* at 8.

155. *Schultz*, *supra* note 16, at 1762–69; see sources cited *supra* note 55.

156. See *LaMont*, 814 N.W.2d at 23.

segregation and denigrating comments about women.<sup>157</sup>

Finally, *Gray* shows us that not only are judges using states' statutory sexual harassment definitions to officially disaggregate non-sexual and sexual harassment claims, but they may not be aware of the negative consequences of adopting such a methodology, even when those negative consequences are staring them in the face. The First Circuit interpreted the Massachusetts statute in much the same way as the *Haynie* and *LaMont* courts, encouraging future courts to consider sexual harassment and non-sexual harassment as separate causes of action when determining whether there is a hostile work environment.<sup>158</sup> The court failed to recognize the important role disaggregation and bifurcation of harassment claims can play in a jury's determination of whether the severe-or-pervasive element has been met. The jury was clearly instructed to consider only whether the sexually charged conduct added up to a hostile work environment, which likely meant the jury discounted the staring, stalking, and other forms of less explicitly sexual harassment.<sup>159</sup> Yet despite the court's surprise at the strange jury verdict and its sympathy for Gray's plight, it still held that any procedural missteps were harmless error.<sup>160</sup> While *Gray*, a mixed harassment case, offered the perfect opportunity for the court to recognize the harmful effects of the disaggregation problem and avoid driving a wedge into sex discrimination jurisprudence, the court ultimately chose to limit the plaintiff's claim and failed to seriously entertain the possibility that "the jury was misled" by the sexual-focused instructions, much less understand the subtle harms of disaggregation.<sup>161</sup>

The above court decisions establish precedents or models that will serve as obstacles to legitimate sex discrimination actions by diluting the strength of mixed harassment claims and trivializing non-sexual harassment. For example, the *Haynie* decision has already spawned a series of dismissals by limiting

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157. See Schultz, *supra* note 16, at 1800 ("In the context of a workplace with longstanding inequality . . . an apparently gender-neutral act of hazing may assume heightened causal significance." (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring))).

158. *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128, 135–36 (1st Cir. 2002).

159. *Id.* at 133.

160. See *id.* at 137–38, 141 ("Certainly, the full complement of conduct alleged in this case obviously 'would alter a reasonable woman's work environment' . . .").

161. *Id.* at 136.

plaintiffs' mixed harassment claims to their sexual components, even though the *Haynie* decision did not necessarily bar non-sexual harassment claims.<sup>162</sup> In light of these three opinions, it seems likely that other state courts will allow the presence of statutory sexual harassment definitions to imperil sex discrimination plaintiffs' meritorious claims for non-sexual or mixed harassment. Since six states have yet to explicitly consider the effect of the sexual harassment definitions,<sup>163</sup> and more states may develop such definitions in the future, the problem is likely to escalate over time.

#### B. DISAGGREGATION PROBLEMS AT THE PLEADING AND BRIEFING LEVEL

The first roadblock that statutory definitions of sexual harassment impose is at the level of pleading and briefing. Attorneys are faced with the unenviable task of deciding whether to plead and argue their plaintiffs' claims as a single cause of action for "sex discrimination" that attempts to fold the sexual harassment into a larger sex discrimination claim, to plead and argue them in the alternative, or to choose one or the other and hope for the best. All of these approaches have their drawbacks, which are best illustrated in mixed cases. In a mixed harassment case, if plaintiff's counsel pleads claims under an "umbrella" cause of action—arguing "sex discrimination" that *includes* incidents of "sexual harassment"—there is the risk that the pleading will use the phrase "sexual harassment" too frequently. Courts could respond in the way of *Haynie* and *Gray*,

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162. See, e.g., *Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 473 (6th Cir. 2012) (dismissing claim because the "majority of the comments . . . cited in [the] complaint cannot be construed as sexual in nature"); *Corley v. Detroit Bd. of Educ.*, 681 N.W.2d 342, 343, 346 (Mich. 2004) (framing plaintiff's claim as "sexual harassment" and dismissing it for being non-sexual in nature, even though plaintiff brought the claim under the entire sex discrimination provision); *Schmitt v. City of E. Lansing*, No. 307571, 2012 WL 6913785, at \*3–5 (Mich. Ct. App. Nov. 20, 2012) (dismissing a claim because "[t]here is no indication that [the harasser] continuously exhibited sexual conduct toward plaintiff that created a hostile work environment").

163. To my knowledge, courts in Connecticut, Illinois, Nebraska, North Dakota, Vermont, and Wisconsin have not yet considered whether their states' sexual harassment definitions disaggregate sex discrimination claims. See CONN. GEN. STAT. § 46a-60(a)(8) (2013); 775 ILL. COMP. STAT. 5/2-101 (2011); NEB. REV. STAT. § 48-1102(14) (2013); N.D. CENT. CODE § 14-02.4-02 (2014); VT. STAT. ANN. tit. 21, § 495d(13) (2013); WIS. STAT. ANN. § 111.32(13) (2014). In addition, in Massachusetts, the issue was considered by a federal, not a state, court. See *Gray*, 289 F.3d at 141.

discounting any conduct that was non-sexual.<sup>164</sup> Under the *Haynie* and *Gray* decisions, it is unclear exactly how many times the phrase “sexual harassment” must appear in a complaint or brief before a claim is relegated to the narrower category of “sexual harassment” rather than the broader umbrella of “sex discrimination.” On the other hand, if plaintiffs’ lawyers plead and argue two separate causes of action in the alternative—one for “sexual harassment” and one for “sex discrimination”—courts will likely become confused, consider the claims as mutually exclusive, and parse out the sexual from the non-sexual conduct. This will effectively bifurcate the claims into two—one for sexual harassment and one for non-sexual harassment—making it difficult for plaintiffs to meet the severe-or-pervasive requirement or to prove that the non-sexual conduct, when viewed in light of the concurrent sexual harassment, had underlying gender-based motivations. Finally, plaintiffs could choose to argue only one cause of action. But if plaintiffs choose to plead and argue *only* “sexual harassment,” they might have waived their opportunity to include incidents of non-sexual discrimination that would ultimately strengthen their hostile work environment claim. And if plaintiffs plead “sex discrimination,” the court may discount sexual conduct because the “sexual harassment” claim was waived.

The problem is likely to be even more severe in states where the effect of the statutory definitions has not yet been litigated, since plaintiffs will not have access to precedent to warn them of the potential pigeonholing effect of using “sexual harassment” in their complaints or briefs. In these states, attorneys trying to do their clients justice must have the foresight to predict the disaggregation problem or risk the demise of the plaintiffs’ claims due to a technicality in the pleadings or motions. However, the potential for a disaggregation problem is far from intuitive. Plaintiffs’ attorneys are likely to be caught by surprise when opposing counsel raises the “non-sexual” argument as a defense.<sup>165</sup> After all, most workplace sex discrimination claims are brought under Title VII, where there is no explicit, statutory distinction between sexual and non-sexual

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164. *Gray*, 289 F.3d at 135–36; *Haynie v. State*, 664 N.W.2d 129, 135 (Mich. 2003).

165. See Interview with David Schlesinger, Attorney for LaMont, in Minneapolis, Minn. (Sept. 21, 2012) (“I was totally surprised. I did not see it [coming]. I did not think it was likely that our case would be dismissed on those grounds.”).

harassment.<sup>166</sup> Furthermore, the patchwork of law on sex discrimination is nebulous.<sup>167</sup> Since so many hostile work environment cases are in fact sexual in nature, and these cases have received a copious amount of attention from the law and the media<sup>168</sup> and form essential precedent, it is difficult to talk about sex discrimination law, much less plead a claim, without using the magic words “sexual harassment.”

In sum, attorneys pleading sex discrimination claims in states with statutory definitions for sexual harassment face a catch-22. No matter which course they choose, courts will likely either bifurcate their mixed claims or, if plaintiffs mention “sexual harassment” in their briefs, completely exclude allegations of non-sexual harassment.

### C. THE COURTS’ DISAGGREGATING METHODOLOGY

Courts’ handling of sexual harassment definitions is severing sexual harassment from broader discrimination claims under their states’ statutes. Their opinions do not offer an effective means for analyzing sex discrimination claims. After all, the true cause of action for both sexual and non-sexual harassment arises from a single statutory provision generally prohibiting workplace discrimination “because of . . . sex.”<sup>169</sup> Since many plaintiffs will bring mixed claims of sex discrimination based on both sexual and non-sexual incidents,<sup>170</sup> it makes no sense to require plaintiffs to avoid the words “sexual harassment” when pleading and arguing their cases. The harmful consequences of requiring mixed harassment plaintiffs to avoid using the term “sexual harassment” underscores the problematic disaggregation of workplace sex discrimination law. Since the relationship between sexual harassment and sex discrimination is difficult to grasp, courts should not punish plaintiffs for their attorneys’ understandable use of the “sexual harassment” vocabulary in pleading and briefing. Attorneys may not foresee a state statute’s potential to deviate from well-established federal case law. While it is true that harassers

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166. See 42 U.S.C. § 2000e-2(a) (2006).

167. See Schultz, *supra* note 16, at 1747 (“[T]he focus on sexual conduct has opened up as many questions as it has answered, embroiling judges in tension-filled rulings that create a patchwork of justice.”).

168. See *id.* at 1695–96.

169. See 42 U.S.C. § 2000e-2.

170. See, e.g., Kannenberg v. Labor & Indus. Review Comm’n, 571 N.W.2d 165, 174–75 (Wis. Ct. App. 1997).

may not be relying on prior case law when they discriminate on the job, that does not mean plaintiffs' attorneys are not relying on prior case law when they write their complaints and briefs. Judicial decisions can influence how attorneys plead and brief their cases in the future, and this should be considered when determining the impact of precedent on the viability of non-sexual or mixed harassment claims pled as "sexual harassment."<sup>171</sup> At the very least, when courts consider the issue as a matter of first impression, they should allow plaintiffs to amend their pleadings.

Courts do have a duty to fulfill the intent of the state legislature when interpreting statutes.<sup>172</sup> Readers may wonder what the purpose of a sexual harassment definition is, if not to create a separate cause of action.<sup>173</sup> The fact that state legislatures have diverged from Congress's model by incorporating a statutory definition seems potentially significant.<sup>174</sup> However, state legislatures might merely be trying to replicate federal law by incorporating the EEOC guidelines into the definitions section of their civil rights acts. Taking a broad perspective on the issue, it seems likely that *Haynie* and *Gray* fail to fulfill legislative intent. The fact that the definitions tend to mimic EEOC guidelines most likely evinces an intent to mirror, not diverge from, federal law.<sup>175</sup> While it is true that disaggregation is occurring at the federal level as well, it is primarily because of the federal courts' failure to properly apply the law.<sup>176</sup> By hold-

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171. In *Haynie*, the court addressed a potential stare decisis issue, since it had previously held that non-sexual conduct could constitute sexual harassment. The court explained that since plaintiff's decedent could not have relied on the earlier court's decision to her detriment, there was no stare decisis issue. *See Haynie v. State*, 664 N.W.2d 129, 136–38 (Mich. 2003).

172. See, e.g., *Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003) ("Our purpose in construing a statutory provision is to give effect to legislative intent."); *Keck v. Okla. Tax Comm'n*, 108 P.2d 162, 164 (Okla. 1940) ("It is a cardinal rule that in the construction of statutes the legislative intent must govern . . .").

173. See *Haynie*, 664 N.W.2d at 139–40 (noting the significance of the fact that the Michigan Civil Rights Act differs from the federal act by defining sexual harassment).

174. See *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128, 135 (1st Cir. 2002) (emphasizing the differences between the Massachusetts and federal statutes); *Haynie*, 664 N.W.2d at 139–40.

175. See *Haynie*, 664 N.W.2d at 145 (Cavanagh, J., dissenting) ("By codifying the federal guidelines, our Legislature merely clarified that the sexual-harassment protections in the federal statutes were analogous in scope to those in Michigan's Civil Rights Act.").

176. See generally *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985), abro-

ing that pleading “sexual harassment” limits a plaintiff’s claim to only conduct of a sexual nature,<sup>177</sup> the *Haynie* and *Gray* decisions diverge from federal law, officially legitimize disaggregation, and encourage the proliferation of a disaggregating methodology. Furthermore, the fact that state legislatures generally provide definitions stating that sex discrimination “includes” sexual harassment<sup>178</sup> should be an argument *against* drawing an unnecessary distinction between sexual harassment and other sex discrimination claims, since the use of “includes” suggests sexual harassment is simply one manifestation of the broader “sex discrimination.”<sup>179</sup> In light of the legislatures’ clear purposes of ending discrimination,<sup>180</sup> it is difficult to believe that legislatures would have chosen to bifurcate and limit plaintiffs’ sex discrimination claims. If both sexual and non-sexual harassment are “because of . . . sex,” it is best to view them cumulatively as different permutations of the same underlying sex discrimination. There is no reason to limit claims with non-sexual components.

Of course, not all state judges have read the work of modern scholars highlighting the disaggregation problem, and thus courts may not truly understand the difficulties they produce when they bifurcate claims.<sup>181</sup> Judges may not even realize that they are parsing out the sexual from the non-sexual conduct and performing a two-tiered severe-or-pervasive analysis. In *Gray*, for example, the court failed to recognize how disaggregation influenced the jury’s decision on the severe-or-pervasive prong.<sup>182</sup> If other appellate judges do not foresee how the two-tiered approach weakens mixed harassment claims, *LaMont*

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gated by Stevens v. Dep’t of Treasury, 500 U.S. 1 (1991); Schultz, *supra* note 16, at 1732–38 (explaining that the McKinney court applied good law, but that subsequent courts have failed to follow it properly).

177. *Gray*, 289 F.3d at 135; *Haynie*, 664 N.W.2d at 136.

178. MASS. GEN. LAWS ch. 151B § 1 (2013); MICH. COMP. LAWS § 37.2103(i) (2013).

179. See, e.g., United States v. Umbacia, No. 8:05-CR-99-T-24EAJ, 2005 WL 1424821, at \*1 n.1 (M.D. Fla. June 17, 2005) (noting that the use of the word “includes” suggests that the following list is not exhaustive).

180. See, e.g., Noecker v. Dep’t of Corr., 512 N.W.2d 44, 45 (Mich. Ct. App. 1993) (“The purpose of the [Michigan Civil Rights] Act is to prevent discrimination directed against a person because of that person’s membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.”).

181. See *Gray*, 289 F.3d at 136 (claiming it was “doubtful that the jury was misled”).

182. See *id.*

suggests that they may uphold lower courts' severe-or-pervasive findings and affirm the dismissal of plaintiffs' claims, even if the lower court was analyzing the severity or pervasiveness of the sexual and non-sexual harassment separately.

Finally, even in cases where courts rightly decide the explicit "sexual" vs. "non-sexual" issue, as in *LaMont*, they may fail to see the true harm and severity of non-sexual conduct.<sup>183</sup> Courts may point out that some forms of harassment are directed toward both men and women but may not consider how the plaintiff—and the mythical reasonable woman—would perceive such harassment in light of other discriminatory remarks and the historical suppression of women.<sup>184</sup> The severe-or-pervasive prong of a hostile work environment claim focuses on the effects of the harassment, not the intent of the harasser.<sup>185</sup> For a plaintiff who has been told she is unworthy and stupid because she is a woman, being screamed at acquires more sinister overtones—regardless of whether men are also berated on occasion. It is difficult to see how, as in *LaMont*, being screamed at, segregated from men, hazed, and having one's competence repeatedly undermined by unwarranted attacks on work product, could *not* interfere with the "conditions of employment" and impair one's ability to perform the work.<sup>186</sup> Yet courts will likely dismiss the majority of incidents of non-sexual harassment as failing the "because of . . . sex" component, because the courts fail to see the wider pattern of discrimination. Considering that verbal assaults, social segregation, and competence-undermining are some of the forms of harassment that are traditionally used to drive women out of the workplace,<sup>187</sup> failing to recognize them as gender-motivated, or severe or pervasive enough for a hostile work environment claim, hinders progress toward a more equitable society.

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183. See *supra* notes 55–61 and accompanying text.

184. See *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 23 (Minn. 2012) (discarding certain instances of harassment because the supervisor similarly harassed male employees).

185. See *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (noting that part of the severe-or-pervasive test is whether "the conduct unreasonably interferes with the employee's job performance").

186. See *LaMont*, 814 N.W.2d at 16–19.

187. See, e.g., *Schultz, supra* note 16, at 1762–69 (highlighting the competence-undermining function of a hostile work environment).

#### D. TO DEFINE OR NOT TO DEFINE? THE PROS AND CONS OF STATUTORY DEFINITIONS

By now it should be clear that defining “sexual harassment” within a state’s civil rights statute has numerous negative effects. As shown above, the three cases that explicitly consider the operation of the definitions nicely illustrate how such definitions not only exacerbate, but actually formally crystalize, the disaggregation problem. However, there are some interesting advantages to legislatures’ decisions to include the definitions which are also worthy of consideration.

For many years, federal courts refused to recognize sexually harassing behaviors as a form of sex discrimination.<sup>188</sup> The courts were not convinced that such harassment met the causation requirement and was discrimination “because of . . . sex.”<sup>189</sup> It was only after the tireless efforts of early feminists that the law began to recognize it as sex discrimination.<sup>190</sup> By adopting statutory definitions of “sexual harassment,” legislatures thus ensure that the long struggle of early feminists for recognition of sexual harassment as sex discrimination would not have to be relived in the state courts. In other words, the sexual harassment definitions statutorily overcame the problematic causation hurdle. The sexual aspects of the harassment serve as convenient proxies that help give an inference of causation,<sup>191</sup> and thus the inclusion of the definitions arguably gives sexual harassment plaintiffs a clearer path to success.

Furthermore, as parties litigate over the presence and operation of the definition, it brings the disaggregation problem to the forefront. At the very least, the *LaMont*, *Haynie*, and *Gray* cases concretely illustrate and evaluate the disaggregation problem, vindicating Vicki Schultz and other scholar’s observations despite certain feminists’ refusal to acknowledge the problem exists.<sup>192</sup> As the three cases explicitly considering the effect

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188. See, e.g., sources cited *supra* note 26.

189. *Id.*

190. Schultz, *supra* note 16, at 1704–05.

191. See *id.* at 1744 (“In the absence of clear criteria for determining whether harassment is directed at workers because of their identities as men or women, judges may look to sexual conduct as a proxy.”).

192. Vicki Schultz is a relative newcomer to the field relative to Catharine MacKinnon. After Schultz criticized some of Catharine MacKinnon’s assumptions, Schultz, *supra* note 16, at 1704–05, MacKinnon in return suggested that the disaggregation problem is worthy of nothing more than a footnote, see Catharine A. MacKinnon, *Afterword*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 696–97 n.22 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); see

of the definitions show, litigation over the “sexual” issue can force courts to consider the relationship between sexual and non-sexual harassment within the broader category of sex discrimination. Thus, the presence of sexual harassment definitions in state statutes could actually give courts the chance to address the disaggregation problem head-on.

Unfortunately, thus far the case law shows that courts are not taking advantage of this opportunity, and are instead using the definitions to impose additional barriers to recovery for sex discrimination plaintiffs. It seems the problem with sexual harassment definitions is not that they exist, but rather that they are being misinterpreted and likely require tweaking. The case law suggests that, so far, statutory definitions of sexual harassment have likely done more harm than good. However, if approached correctly, the presence of the definitions could force consideration of the issue and lead other courts and judges to develop a more nuanced understanding of the disaggregation problems in sex discrimination law.

### III. OVERCOMING THE DISAGGREGATION BARRIER

In the spirit of collaboration, lawyers, judges, and lawmakers should utilize strategies to contain and mitigate the disaggregation problem rooted in states’ statutory sexual harassment definitions. In fact, judges and lawmakers could use the sexual harassment definitions to combat the disaggregation problem once and for all, at least at the state level. Part A of this section suggests that courts wield their states’ sexual harassment definitions to develop explicit “aggregation rules,” clearing the path for non-sexual and mixed harassment claims. Part B explains how legislatures should adopt sexual harassment definitions and contextualize them using clear statutory language and an “aggregation provision.” Finally, Part C proposes that state lawmakers, employers, and human resources managers rethink laws and policies that focus only on sexual harassment and draw attention away from other forms of discrimination.

#### A. AGGREGATION RULES

To avoid the injustices that might result from disaggrega-

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*also Kathryn Abrams, Subordination and Agency in Sexual Harassment Law, in DIRECTIONS IN SEXUAL HARASSMENT LAW, supra note 192, at 111–12 (arguing for collaboration in addressing these issues and criticizing the antagonism).*

tion, courts should develop *LaMont*-like holdings that do not force attorneys to avoid the phrase “sexual harassment” when pleading non-sexual harassment claims. However, courts should avoid the dicta in *LaMont* stating that the statutory definition creates a sexual harassment claim “separate and apart from” non-sexual harassment,<sup>193</sup> since this kind of dicta will eventually lead to the bifurcation of mixed harassment claims. Instead, judges should adopt an “aggregation rule” and explicitly hold that the existence of the sexual harassment definition in the state statute does *not* create two separate causes of action. Courts should state specifically that discriminatory conduct of a non-sexual nature should be considered *in combination with* sexually charged conduct in assessing any sex discrimination claim based on a hostile work environment. Using the existing statutes,<sup>194</sup> judges can ground these holdings (1) in the fact that the state statutes create a single cause of action for discrimination “because of . . . sex,”<sup>195</sup> and (2) in the language of sexual harassment definitions, which generally state that sex discrimination “includes” sexual harassment.<sup>196</sup> To ensure that they are implementing the aggregation rule, courts should pay close attention to their own severe-or-pervasive and causation analyses to better identify when they are weakening the plaintiffs’ claims by parsing out the sexual from the non-sexual incidents.

Finally, courts should pay attention to studies suggesting that non-sexual harassment may actually be more harmful to victim’s careers and psyches and the struggle for equal representation at all levels in the workforce.<sup>197</sup> Furthermore, scholars have noted that non-sexual conduct such as competence-undermining and hazing are classic examples of some of the most harmful kinds of sex discrimination in the workforce.<sup>198</sup> When analyzing whether or not discriminatory conduct is sex-motivated, or severe or pervasive enough to constitute a hostile work environment, courts should consider the larger pattern and actual impact of the conduct and set aside any preconceived notions of what the quintessential sex discrimination claim looks like.

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193. *LaMont v. Indep. Sch. Dist.* No. 728, 814 N.W.2d 14, 19 (Minn. 2012).

194. See sources cited *supra* note 62.

195. *But see* 775 ILL. COMP. STAT. 5/2-102 (2011) (outlawing “unlawful discrimination” and “sexual harassment” in separate subdivisions).

196. See *supra* note 73 and accompanying text.

197. See *supra* notes 55–61 and accompanying text.

198. Schultz, *supra* note 16, at 1687, 1762–69; see sources cited *supra* note 55.

Attorneys can help set courts on the right path. Until courts adopt aggregation rules, attorneys arguing sex discrimination claims under state statutes that contain sexual harassment definitions must plead and brief their cases carefully to avoid dismissal on a technicality.<sup>199</sup> While the lawyers in *Haynie* and *Gray* brought suit under the civil rights acts in general, they made the fatal error of using the term “sexual harassment” too often.<sup>200</sup> In contrast, the lawyers in *LaMont* brought a single claim with one cause of action, but repeatedly framed it as one of “sex discrimination” as well as “sexual harassment.”<sup>201</sup> Thus, a cursory review of the cases might suggest that pleading a single cause of action for both types of harassment might increase the chances of success in other states that have not yet litigated the issue. However, pleading a single cause of action has its disadvantages. By pleading “sexual harassment” as part of the “sex discrimination” claim, attorneys encourage courts to analyze the “sexual harassment” claim separately and perform an independent sexual-focused analysis utilizing the sexual harassment definition. This may encourage courts to parse out the sexual from non-sexual incidents during a severe-or-pervasive or causation analysis, or simply dismiss both claims if neither has sufficient foundation independent of the other. And, in some states, if attorneys with mixed claims only plead under the broader umbrella of sex discrimination and avoid the phrase “sexual harassment” altogether, the court could prohibit them from utilizing the relatively clearer elements of the sexual harassment definition in their arguments or consider the “sexual harassment” claim waived and therefore refuse to consider any sexual incidents at all as part of the broader sex discrimination claim.

Ultimately, when choosing whether to frame their claims as a single cause of action or two separate causes of action, at-

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199. See *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128, 135 (1st Cir. 2002) (“Gray’s complaint did cite section 151B’s discrimination provision at the outset but the rest of the complaint phrased the claim, and did so repeatedly, in terms of ‘sexual harassment.’ In other words, Gray narrowed her claim to ‘sexual harassment’ as defined by Massachusetts law.”); *Haynie v. State*, 664 N.W.2d 129, 138 (Mich. 2003) (“[P]laintiff’s only allegation here is that the employee was sexually harassed and that this sexual harassment created a hostile work environment. Therefore, the only issue before us is whether plaintiff has established a prima facie case of sexual harassment.” (footnote omitted)).

200. *Gray*, 289 F.3d at 135; *Haynie*, 664 N.W.2d at 138.

201. Complaint at 5–6, *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14 (Minn. 2012) (No. A10-543).

Attorneys should consider the pros and cons of pleading one or both causes of action based on the specific facts of their case. Attorneys who have cases that are either “sexual” or “non-sexual” in nature, but not both, can skirt the disaggregation problem and avoid dismissal of their claims by pleading either “sexual harassment” or “sex discrimination,” but not both. Attorneys with mixed harassment cases face a more difficult predicament. The best solution may be to plead separate counts for “sexual harassment” and “sex discrimination” and submit briefs that carefully contextualize the “sexual” conduct within a broader sex discrimination framework. In their complaints, attorneys could be sure to state that their broader sex discrimination claim “includes” the sexual harassment components, and incorporate their sexual harassment arguments by reference.

Such an approach would allow plaintiffs to argue the elements of sexual harassment definitions while encouraging judges to view the incidents of sexual harassment within the broader context of sex discrimination. By framing sexual harassment as a narrower claim within the sex-based discrimination claim in their initial complaints and briefs, plaintiff’s attorneys can draw attention to the potential disaggregation problem before it occurs. Ultimately, this may help encourage judges to develop aggregation rules. Of course, adopting an aggregation rule does not determine the outcome of any particular claim, but merely ensures that courts use a methodology that takes account of the discriminatory pattern as a whole, including both sexual and non-sexual components.

#### B. AGGREGATION PROVISIONS

As explained above, sexual harassment definitions as they currently stand most likely do more harm than good by contributing to the disaggregation problem. Although the definitions do ensure that the “sexual” nature of conduct will serve as a proxy for causation, legislatures may not worry about paving the way for sexual harassment claims because state courts will model their interpretation of their statutes, which parallel Title VII, after federal courts’ interpretations.<sup>202</sup> Thus, at first blush, it may seem that avoiding adoption of a sexual harassment definition altogether is the best solution. However, to the contrary, a properly adopted sexual harassment definition can prevent the disaggregation methodology seen at the federal level from

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202. See *LaMont*, 814 N.W.2d at 21.

infecting state sex discrimination law. Ultimately, the best way for legislatures to avoid disaggregation is most likely by combatting the problem head-on.

The case law shows that mere adoption of sexual harassment definitions that mirror the EEOC's will result in official bifurcation of sexual and non-sexual claims.<sup>203</sup> Therefore, legislatures should adopt sexual harassment definitions *only* if they also provide additional context.<sup>204</sup> For example, lawmakers could include an explicit statement that the civil rights act "creates a single cause of action for both sexual and non-sexual sex discrimination." Lawmakers should include specific instructions to courts that "sexual and non-sexual conduct shall be considered together or in combination" in assessing the viability of a hostile work environment claim for sex discrimination. In addition, legislators should direct courts to consider the cumulative psychological impact of both types of harassment, in combination, by providing definitions of "severe or pervasive" that encourage courts to combine both non-sexual and sexually charged conduct in their analyses. This should provide clear enough guidance to rid courts of disaggregating methodologies altogether. Since the disaggregation problem still persists in federal cases,<sup>205</sup> the end result would be state anti-discrimination acts that offer better protection against sex discrimination than the federal CRA.

### C. WORKPLACE POLICIES TO COMBAT ALL FORMS OF DISCRIMINATION

Because hostile work environment law has largely developed within the realm of sexual harassment,<sup>206</sup> less sexual forms of discriminatory harassment simply do not fit with the law's quintessential "image" of workplace sex discrimination. Lawmakers, employers, and human resource personnel should

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203. See, e.g., *Haynie*, 664 N.W.2d at 144–45 (Cavanagh, J., dissenting) (noting the strong similarities between the relevant provision of Michigan's Civil Rights Act and EEOC guidelines while criticizing the majority for narrowing sex discrimination claims to those of a sexual nature).

204. Of course, the EEOC could also help combat the disaggregation problem by changing its guidelines. However, this Note focuses on solutions at the state-law level.

205. See *supra* note 16 and accompanying text.

206. See generally Schultz, *supra* note 16 (discussing the prevalence of thinking about sex-based harassment in terms of sexuality and arguing for the reconceptualization of sexual harassment).

rethink policies that draw attention to sexual harassment and ignore other, arguably more harmful forms of discrimination.

Studies suggest the actual harms of non-sexual harassment are just as severe, if not worse than, the harms of sexual harassment.<sup>207</sup> Therefore, state legislatures, regulatory agencies, and employer policymakers should amend the portions of their statutes, rules, or policies that require employers to provide employees with information on sexual harassment to also require employers to provide information on non-sexual, discriminatory harassment, including hazing and competence-undermining because of sex. Legislatures have played into a sexual-centered approach by requiring employers to hang posters decrying sexual harassment in the workplace.<sup>208</sup> To discourage the trivialization of non-sexual harassment, legislatures should demand that employers develop clear policies against, and provide training to prevent, *all* forms of illegal, discriminatory conduct. Studies show that sexual harassment training and the distribution of information about sexual harassment laws have helped give women the tools they need to fight sexual harassment.<sup>209</sup> In fact, sexual harassment, even when it does occur, causes less harm because women now feel empowered to be better able to cope with sexual harassment in the workplace.<sup>210</sup> There is no good reason to limit training and awareness-raising efforts to sexual harassment.

## CONCLUSION

In states that have adopted sexual harassment definitions, the disaggregation problem, which has been visible between the lines in sex discrimination opinions for years at the federal level, has finally fully surfaced, but unfortunately the result is that disaggregation has been crystallized into state law. Thus far, the effect of statutory definitions for sexual harassment is essentially codification of the disaggregation problem. The definitions, as they stand, have allowed courts to explicitly and formally bifurcate state sex discrimination law. The result is

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207. See *supra* notes 55–61 and accompanying text.

208. See, e.g., TENN. CODE ANN. § 4-3-124 (2011) (“Each entity of state government shall post in the workplace the state policy for the prevention of sexual harassment established pursuant to Acts 1993, chapter 307.”); OR. REV. STAT. § 342.700 (2013) (“A school district’s sexual harassment policy shall be posted on a sign that is at least 8.5 by 11 inches in size.”).

209. See *supra* notes 57–58 and accompanying text.

210. See *id.*

that plaintiffs bringing meritorious claims for non-sexual or mixed harassment have faced, and will continue to face, insurmountable barriers to relief. The problem is only exacerbated by society and employers' vision of sexual harassment as the quintessential form of sex discrimination.

However, in the right context, sexual harassment definitions could actually offer a solution. Judges can use the definitions to encourage the aggregation of sex discrimination claims and ensure that non-sexual and sexual elements are not parsed out. Even better, sexual harassment definitions present legislatures with a unique opportunity to adopt aggregation provisions that will ensure the disaggregation problem does not materialize in their states' courts. Ultimately, this could make state-level sex discrimination claims a *better* option for plaintiffs than Title VII claims, which still may encounter informal disaggregation methodologies in federal courts. Tweaking laws and policies to shift away from a singular focus on sexual harassment will also aid in combatting the disaggregation problem. Just as employees should not have to use sex appeal to get ahead in the workplace, sex discrimination claims should not have to be "sexy" to garner the attention of lawmakers, courts, and policymakers.