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NOTE

THE CAUSAL ROLE OF SEX IN SEXUAL HARASSMENT

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INTRODUCTION

Sexual harassment was once so simple. In the 1970s, Diane Williams, a Department of Justice employee, faced repeated sexual advances from her supervisor—advances that she refused.[1] Her refusal ultimately led to her termination, and her termination led her to sue. This type of situation is what most people think of when envisioning sexual harassment. But sexual harassment suits have moved well beyond Diane Williams.

For example, in a more recent case, a man sues because his gay coworker makes sexual advances toward him at work.[2] Other men sue

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1 *See* Williams v. Saxbe, 413 F. Supp. 654, 655–56 (D.D.C. 1976), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

2 Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 139–41 (4th Cir. 1996).

because their male coworkers tease, grab, and otherwise intimidate them because they are gay.[3] Still other men sue because they were teased and harassed for being effeminate.[4] Finally, some men, neither gay nor effeminate, sue because their male employer, engaging in behavior termed "horseplay," grabbed their buttocks and testicles at work.[5] Courts have understandably found these same-sex harassment cases more difficult to adjudicate.

Yet other cases, while intuitively regarded as clear instances of sexual harassment, have met with surprising fates. A female employee in a predominantly male workplace endured her male supervisor and coworkers simulating sex acts on a mannequin and engaging in graphic discussions about oral sex.[6] Though a jury returned a verdict in her favor, an appellate court set the verdict aside,[7] holding that the plaintiff's coworkers were *so generally lewd* that they were not specifically harassing the plaintiff because of her sex.[8] Another court dismissed the case of a husband and wife who were both sexually propositioned by their employer and who faced retaliation for refusing his advances.[9] The reason? Because the employer conditioned the employment of *both* a male and a female employee on providing sexual favors, the wife could not plausibly claim that the harassment occurred because of her sex, nor could the husband.[10] This peculiar result has become known as the "'equal opportunity harasser'" defense.[11]

If an employer sexually harasses members of one sex only, he faces liability under Title VII for sex discrimination,[12] which prohibits

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3 *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1065 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1573 (2003); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 259–60 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002); Quick v. Donaldson Co., 90 F.3d 1372, 1374–75 (8th Cir. 1996).

4 *See, e.g.*, Nichols v. Azteca Rest. Enters., 256 F.3d 864, 870 (9th Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 567 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998).

5 Equal Employment Opportunity Comm'n v. Harbert-Yeargin, Inc., 266 F.3d 498, 501–03 (6th Cir. 2001). *See generally* Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES MAG., Oct. 13, 2002, at 52, 54 (noting that "[s]ince 1992 the percentage of sexual[ ]harassment charges filed by men with the E.E.O.C. and state agencies has been increasing steadily, to 13.7 percent in 2001, from 9.1 percent in 1992[,]" "[m]en's claims of harassment often center on what is considered 'horseplay,' or what [one employment lawyer] describes as 'bullying, hazing, adolescent kinds of behavior.'").

6 *See* Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 354 (4th Cir. 2002), *reh'g en banc granted, vacated* Dec. 16, 2002.

7 *Id.* at 366.

8 *See id.* at 358.

9 Holman v. Indiana, 24 F. Supp. 2d 909, 911, 916 (N.D. Ind. 1998), *aff'd*, 211 F.3d 399 (7th Cir. 2000), *cert. denied*, 531 U.S. 880 (2000).

10 *Id.* at 915.

11 *See id.* at 912.

12 Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or

discrimination (of which sexual harassment is one form) "because of" sex.[13] If he selects victims from both sexes, however, he escapes liability by showing that the harassing conduct was not directed at anyone because of his or her sex.[14] The culprit for this mess is the interpretation of the "because of" sex requirement in Title VII.

What makes sexual harassment "because of" sex? Thus far, courts have interpreted this requirement as a "but-for" test:[15] but for the plaintiff's sex, would the conduct complained of still have occurred?[16] If the answer to this question is yes, the plaintiff's claim fails under Title VII. The unfortunate result of the but-for test has been that plaintiffs in work environments where the most sexual harassment occurs, are often left without a federal remedy.[17] In those work environments in which the lewd and harassing behavior goes on irrespective of the presence of women, or in which the offensive behavior is directed at members of both sexes, no employee can bring suit under Title VII.[18]

The fact that an interpretive test precludes a remedy for those suffering the greatest harm, compels a search for a replacement test. Devising such a replacement is the central purpose of this Note. Part I explains the development of Title VII as a remedy for sex discrimination and the manner in which sexual harassment came to be recognized as one form of that discrimination. Part II discusses the recent Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.*, which held that same-sex sexual harassment is actionable sex discrimination under Title VII.[19] Part III explains the post-*Oncale* attempts of lower federal courts to wrestle with the "because of" sex requirement as applied to both male and female plaintiffs. Part IV provides a brief survey of the major academic conceptualizations of sexual harassment, some of which attempt to create purely normative theories of

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privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000).

13 *See id.*; *Holman*, 211 F.3d at 402. *But see* Equal Employment Opportunity Comm. v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 (6th Cir. 2001) (Guy, Jr., J., concurring in part and dissenting in part) (holding that "gross, vulgar, male horseplay" between male employer and male employees did not constitute discrimination because of sex); *infra* Part III.A.

14 *See* Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 356 (4th Cir. 2002), *reh'g en banc granted, vacated* Dec. 16, 2002; *Holman*, 211 F.3d at 403 (noting that Title VII does not cover the "bisexual harasser").

15 This interpretation originates with *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

16 *See* Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 80 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

17 *See Ocheltree*, 308 F.3d at 356–59; McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193–94, 1195–96 (4th Cir. 1996), *abrogated by Oncale*, 523 U.S. at 79.

18 *See* cases cited *supra* note 16.

19 523 U.S. at 82.

the wrongness of sexual harassment as guides for the courts, and others of which attempt to link the wrong of sexual harassment to that of sex discrimination. Part V articulates a new test for the "because of" sex requirement in Title VII. This new test is then applied to both actual and hypothetical cases as a way of comparing it to the but-for test. This Note concludes that the new test remedies the defects of the but-for test and should be adopted as a replacement.

I
TITLE VII AND THE EMERGENCE OF SEXUAL HARASSMENT AS SEX DISCRIMINATION

Sexual harassment plaintiffs often file their claims in federal court under Title VII, an antidiscrimination law enacted as part of the 1964 Civil Rights Act.[20] Title VII does not specifically prohibit sexual harassment. Rather, it makes it unlawful "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[21] The prohibition on sex discrimination was added to Title VII "at the last minute on the floor of the House of Representatives,"[22] leaving courts with "little legislative history to guide [them] in interpreting the Act's prohibition against discrimination based on 'sex.'"[23]

Courts did not immediately recognize sexual harassment as actionable sex discrimination under Title VII.[24] In *Corne v. Bausch & Lomb, Inc.*, a male supervisor made sexual advances toward two female subordinate employees. The district court that heard the claim regarded the advances as the expression of "nothing more than a personal proclivity" and an attempt to satisfy "a personal urge."[25] Because "no employer policy [was] involved," the court feared that allowing

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20 Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2000)).

21 42 U.S.C. § 2000e-2(a)(1) (2000). Title VII was amended by the Civil Rights Act of 1991, which provided compensatory and punitive damages to victims of discrimination. The Supreme Court has explained that Title VII "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale*, 523 U.S. at 78 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

22 *Meritor Sav. Bank*, 477 U.S. at 63; 110 CONG. REC. 2577–84 (1964) (statements of Representative Howard Smith, proposing inclusion of sex discrimination provision in hopes of defeating entire legislation); HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972, at 75 (1992).

23 *Meritor Sav. Bank*, 477 U.S. at 64.

24 *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated by* 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 1974 WL 10628 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

25 *Corne*, 390 F. Supp. at 163, *vacated by* 562 F.2d 55 (9th Cir. 1977).

such causes of action would result in "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another."[26] Similarly, in *Tomkins v. Public Service Electric & Gas Co.*, the district court dismissed a claim for sex discrimination where a supervisor invited an office worker, Adrienne Tomkins, to lunch, purportedly to discuss a promotion. Once at lunch, he made sexual advances toward her and threatened both personal and professional recrimination if she refused.[27] The court dismissed largely based on its fear of inviting a flood of frivolous litigation: "If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time."[28]

However, while Adrienne Tomkins' case was pending on appeal,[29] the D.C. District Court allowed a cause of action under Title VII by Diana Williams, a former Department of Justice employee, who was fired for refusing the sexual advances of her supervisor.[30] For the first time, a federal court recognized that the "requirement of willingness to provide sexual consideration" creates "an artificial barrier to employment" that was applied to members of one sex but not to the other, thereby constituting sex discrimination under federal law.[31] Subsequently, citing the *Williams* case, the Third Circuit reversed the dismissal of Tomkins' claim.[32]

The following year, the D.C. Circuit set forth in *Barnes v. Costle* what became the standard test for actionable sexual harassment under Title VII.[33] The plaintiff, Paulette Barnes, was fired for refusing to have sex with her supervisor.[34] The court found that the plaintiff's termination occurred "because of" sex within the meaning of Title VII, explaining that her "job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male."[35] Stated as a traditional but-for question, the inquiry that emerged was, "but for the plaintiff's sex, would the harass-

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26 *Id.*

27 Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 555, 557 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

28 *Id.* at 557.

29 *Tomkins*, 568 F.2d at 1048.

30 Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). On remand, the district court again found a violation of Title VII. *See* Williams v. Civiletti, 487 F. Supp. 1387, 1389 (D.D.C. 1980).

31 *Saxbe*, 413 F. Supp. at 659.

32 *See Tomkins*, 568 F.2d at 1048–49.

33 561 F.2d 983, 989 (D.C. Cir. 1977).

34 *Id.* at 985.

35 *Id.* at 989 (footnote omitted).

ing conduct have occurred?"[36] If the question was answered in the negative, the conduct was actionable under Title VII.[37]

The above cases are all instances of "quid pro quo" sexual harassment, in which the terms of employment are conditioned upon the receipt of sexual favors from the employee.[38] Thus, the standard case of quid pro quo harassment would be an employer or supervisor telling an employee, "sleep with me or you're fired." As is clear from the foregoing discussion, the typical motive of sexual desire in quid pro cases initially caused courts to place them beyond the purview of Title VII, regarding them instead as private matters. When quid pro quo situations finally did emerge as cases that could be litigated, they did so only because the sexual expectations were imposed exclusively on women.

In the 1980s, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing Title VII, identified a second type of conduct that can form the basis of a sexual harassment claim.[39] Conduct that has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" gives rise to a hostile environment type sexual harassment claim.[40] The Supreme Court recognized this type of harassment as sex discrimination in *Meritor Savings Bank v. Vinson*.[41] Mechelle Vinson brought suit claiming that the vice president of the bank at which she was employed, sexually harassed her for several years.[42] The vice president, Sidney Taylor, pressured Vinson into having sex with him, "exposed himself to her," "fondled her in front of other employees," and "forcibly raped

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36 The E.E.O.C.'s position on sexual harassment adopts the but-for inquiry as well:

> [I]n sexual harassment cases as in all other sex discrimination cases, the relevant question is whether the plaintiff was treated differently because of his or her sex. . . . When a plaintiff can demonstrate that he or she would not have been sexually harassed but for his or her sex, that plaintiff states a claim for sex discrimination under Title VII.

Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 704 (1997) (quoting Brief for E.E.O.C. as Amicus Curiae in Opposition to Defendant's Motion for Summary Judgment at 5–6, Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393 (D. Minn. 1996) (No. 3-95-538) (alteration in original)).

37 *See Barnes*, 561 F.2d at 989 n.49. What is more puzzling about the *Barnes* opinion is that the court regarded as "immaterial" the fact that Barnes's employment was conditioned on sexual activity rather than on something else; all that mattered was that the condition on employment applied only to women. *Id.*

38 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

39 *See* 29 C.F.R. § 1604.11(a) (2002).

40 *Id.*

41 477 U.S. 57 (1986). *Meritor Savings Bank* is also the first Supreme Court opinion to recognize any form of sexual harassment as sex discrimination under Title VII. *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 555 (2001).

42 477 U.S. at 60.

her on several occasions."[43] The bank claimed, among other things, that Title VII only protected against "economic" or "tangible" discrimination.[44] The Court rejected this view, and clarified that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[45] Such disparate treatment extended to creating a hostile work environment for women by sexually harassing them. As the Court explained:

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."[46]

However, in recognizing the creation of a hostile environment by sexual harassment, the Court added that the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'"[47] The level of severity the conduct must reach, and the effect it must have on the victim, was established in *Harris v. Forklift Systems, Inc.*[48] The plaintiff, Theresa Harris, was one of only two female managers working for the defendant forklift company, the other being the daughter of Charles Hardy, the company president.[49] Hardy made clear to Harris his disdain for female managers: he paid her less than the men, denied her benefits given to the men, made her bring coffee to meetings, and made a variety of sexual and sexist comments to her.[50]

The Court granted relief to Theresa Harris, and, in doing so, laid out important standards for future hostile environment cases.[51] First, the Court reiterated that plaintiffs bringing hostile environment claims must meet a "severity" requirement (absent in quid pro quo cases) by showing that the conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment."[52] Second, the severity requirement was given both an objective component and

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43 *Id.*

44 *Id.* at 64.

45 *Id.* (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) and quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

46 *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

47 *Id.* (internal quotations and citations omitted) (alteration in original).

48 510 U.S. 17 (1993).

49 *See id.* at 19; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–12 (1998).

50 *See* 510 U.S. at 19.

51 *See id.* at 21–24.

52 *Id.* at 21.

a subjective component: the conduct must be objectively severe as determined from the perspective of a reasonable person, and the plaintiff herself must perceive the environment to be hostile or abusive.[53] Third, in meeting the subjective requirement, the plaintiff need not show psychological injury.[54] Rather, psychological harm is simply one factor among many in determining whether harassment has occurred: "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."[55] The hostility of the environment is instead determined by looking at the totality of circumstances, including, but not limited to, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[56] Thus, the pattern may be short in duration if it is sufficiently intense to affect the working environment, or it may be persistent, but less intense.[57]

Hostile environment claims comprise the vast majority of sexual harassment suits. Between 1986 and 1995, nearly 70% of the suits brought included only a hostile environment claim, and another 22.5% of suits included a hostile environment claim in addition to a quid pro quo claim.[58] However, plaintiffs bringing hostile environment claims are more likely to prevail when the complained of conduct is of a sexual, as opposed to merely a sexist, nature.[59]

A third category of sexual harassment suits based on gender stereotyping appeared following the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*.[60] Ann Hopkins worked in an accounting firm and was denied partnership because she failed to exhibit stereotypically feminine qualities.[61] One partner advised her to "'walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.'"[62] Another partner suggested that she take "'a course at charm school.'"[63] The Court

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53 *See id.* at 21–22.

54 *See id.* at 22.

55 *Id.* (citation omitted).

56 *Id.* at 23.

57 *See* Ross v. Double Diamond, Inc., 672 F. Supp. 261, 270 (N.D. Tex. 1987) (discussing frequency as a factor in sexual harassment claims).

58 Juliano & Schwab, *supra* note 41, at 565.

59 *Id.* at 555.

60 490 U.S. 228 (1989) (plurality opinion), *superseded by statute as stated in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305 (N.D. Cal. 1992). Because Title VII does not explicitly forbid gender stereotyping, plaintiffs claiming this type of injury stand in a precarious position. Circuits have split over both the scope of *Hopkins* and whether it applies to men as well as to women. *See infra* Parts III & V.

61 *Hopkins*, 490 U.S. at 234–35.

62 *Id.* (citing Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985).

63 *Id.* (citation omitted).

found that the plaintiff was denied partnership not because she failed to exhibit the qualities of a manager, but rather because she failed to exhibit the qualities of a *female* manager.[64] At the same time, had Hopkins not displayed certain aggressive qualities, she would not likely have ascended to a position in which she would be in consideration for partnership in the first place.[65] In short, Hopkins was judged by a different standard than other candidates for partnership because she was a woman. Given that the qualities she possessed would have been acceptable in a male manager and therefore would not have cost her an opportunity to achieve partnership, the Court held that the accounting firm engaged in sex stereotyping that was actionable sex discrimination under Title VII.[66]

It is important to note that none of the aforementioned cases featured male sexual harassment claimants. Initially, courts contemplated that Title VII provided protection exclusively to women harmed by sexual harassment. Not until 1998 did the Supreme Court address whether, and to what extent, Title VII protects men.

II
THE *ONCALE* DECISION

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court first addressed same sex sexual harassment under Title VII.[67] Joseph Oncale worked on an oil platform in the Gulf of Mexico as part of an eight person crew.[68] A fellow employee and two supervisors subjected Oncale to humiliating actions with sexual overtones, sexually assaulted him, and threatened him with rape.[69] Fearing additional and more severe abuse, Oncale quit his job and filed suit.[70] Both the district court and the Fifth Circuit Court of Appeals held that Oncale, as a male, had no cause of action under Title VII.[71]

The Supreme Court reversed, holding that the prohibition of discrimination "because of . . . sex" found in Title VII protects both men

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64 *See id.* at 250.

65 *Id.* at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.").

66 *Id.* at 258.

67 *See* 523 U.S. 75 (1998).

68 *Id.*

69 *Id.* The Supreme Court declined to mention the details of Oncale's harassment, *id.* at 76–77, but the Fifth Circuit indicated that the victim had a bar of soap pushed into his anus and was restrained by one coworker while another put his penis on Oncale's neck. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118–19 (5th Cir. 1996), *rev'd*, 523 U.S. at 82.

70 *Oncale*, 82 F.3d at 119.

71 *Id.* at 118.

and women.[72] It further stated that same sex sexual harassment is actionable regardless of whether one of the parties to the harassment is homosexual.[73] In other words, the conduct need not be motivated by sexual desire in order to constitute harassment; it simply must be directed at the victim "because of" his or her sex.[74] While acknowledging that Title VII did not initially intend to target same sex harassment against men, the Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[75]

In determining whether conduct is directed at a victim "because of" his or her sex, the Court instructed an inquiry into whether the victim suffers certain treatment that members of the other sex do not experience.[76] Once a court finds disparate and offensive treatment, it determines whether such treatment rises to the level of harassment "from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[77] Thus, as the Court explained, the actions of a football coach might be abusive when directed toward his secretary in the office, but not when aimed at his players on the football field.[78]

The *Oncale* opinion suggests three ways for plaintiffs to establish a same sex harassment claim under Title VII. First, a plaintiff could establish explicit or implicit proposals of sexual activity "if there were credible evidence that the harasser was homosexual."[79] Second, a female victim might show that she was harassed by another woman in a way that makes clear that "the harasser is motivated by general hostility to the presence of women in the workplace."[80] Third, a same sex harassment plaintiff might "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed sex workplace."[81]

Because the Supreme Court decided only that same sex harassment was *actionable* under Title VII, the Court remanded *Oncale* for further proceedings.[82] The plaintiff in that case was unlikely to prevail based on the any of the three evidentiary routes the Court listed.

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72 *Oncale*, 523 U.S. at 78, 82.
73 *See id.* at 79–80.
74 *Id.* at 80.
75 *Id.* at 79.
76 *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).
77 *Oncale*, 523 U.S. at 81 (quoting *Harris*, 510 U.S. at 23).
78 *Id.*
79 *Id.* at 80.
80 *Id.*
81 *Id.* at 80–81.
82 *Id.* at 82.

After all, the opinion does not suggest that either sexual desire[83] or a general hostility to men in the workplace motivated Oncale's harassers. Also, the plaintiff probably could not produce comparative evidence on how members of both sexes were treated because the workplace was predominantly, if not entirely, male.[84] Even assuming that the workplace in *Oncale* was mixed sex, the plaintiff would need to prove further that he was singled out and treated differently because of his sex, not because of his insufficiently masculine behavior (the reason given by the harassers for their behavior).[85]

The Court's opinion leaves unclear whether the stated list of ways a same sex plaintiff may prevail under Title VII is exhaustive.[86] Even if other ways of prevailing are possible, it is likely that plaintiffs will face greater difficulty in showing why the conduct at issue, while perhaps harassing, is actually *discriminatory*. Thus, even after *Oncale*, same sex harassment plaintiffs, particularly men, have a precarious claim under Title VII.

Finally, an odd but likely result of *Oncale* is that it appears to expose homosexuals to liability for harassing members of the same sex, but fails to protect homosexuals from harassment at the hands of other men, unless the harassers themselves are homosexual. Thus, post-*Oncale*, men could face liability as harassers under Title VII because of their sexual orientation, but enjoy no protection as harassment *victims* because of their sexual orientation under Title VII.

III
THE POST-*ONCALE* LANDSCAPE

A. Male Plaintiffs After *Oncale*

The *Oncale* decision has lead to confusion among the circuit courts. This confusion stems from the difficulty in reconciling *Oncale*'s extension of Title VII to protect men with *Oncale*'s possibly exclusive list of ways same sex harassment plaintiffs can show harassment "because of sex."[87] One can read *Oncale* broadly by combining it with

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83 Proceeding by way of this evidentiary route leads to bizarre cases, wherein courts examine individual instances and comments to determine whether they constitute "earnest sexual solicitation." *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 260–61 (4th Cir. 2001); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009–10 (7th Cir. 1999); English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 845–47 (E.D. Va. 2002).

84 *Oncale*, 523 U.S. at 77 (describing Oncale's coworkers as an "eight[ ]man crew").

85 *See id.* at 79.

86 At least two cases have suggested that the three enumerated evidentiary routes in *Oncale* are not exhaustive. *See Shepherd*, 168 F.3d at 1009; *English*, 190 F. Supp. 2d at 843.

87 Several lower federal courts have decided that the list in *Oncale* is not exhaustive. *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067–68 (9th Cir. 2002), *cert. denied*, 2003 WL 144593; Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th

Price Waterhouse to support a cause of action for men who are harassed for being effeminate. Or, one can read *Oncale* narrowly to support a cause of action for men only in the hypothetical situations listed by the Court.

The Ninth Circuit has read *Oncale* broadly, as is clear by its decision in *Nichols v. Azteca Restaurant Enterprises.*[88] Antonio Sanchez sued his employer for gender stereotyping after his male coworkers and a male supervisor verbally harassed him for being effeminate.[89] On a daily basis, Sanchez's restaurant coworkers teased him for carrying his tray "'like a woman,'" and called him "'faggot'" and "'fucking female whore.'"[90] Sanchez claimed that "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine[;]" the Ninth Circuit Court of Appeals agreed.[91] The court therefore concluded that Sanchez had met his burden of showing that the harassment was "because of" sex.[92]

In a more recent Ninth Circuit case, simply showing that "physical conduct of a sexual nature" occurred as part of the harassment was enough to state an actionable claim for same sex harassment.[93] Medina Rene, an openly gay man, alleged that his male coworkers and his supervisor "grabbed him in the crotch and poked their fingers in his anus through his clothing."[94] The Ninth Circuit explained that "grabbing, poking, rubbing or mouthing areas of the body linked to sexuality . . . is inescapably 'because of . . . sex.'"[95] The court's reasoning depends on the simple premise that all forms of sexual assault are discriminatory acts based on sex. The court treated as irrelevant whether the plaintiff was targeted because of his sexual orientation and instead focused simply on the notion that acts directed at body parts "clearly linked to . . . sexuality[,]" satisfy the "because of sex" requirement in Title VII.[96]

Although the Ninth Circuit claimed to draw support from *Oncale*, the *Oncale* opinion never stated that acts directed at sexual body parts are *per se* discrimination "because of" sex. Nevertheless, the Ninth Cir-

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Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000); Jones v. Pac. Rail Servs., 2001 WL 1223533, at *2 (N.D. Ill. Oct. 12, 2001).

88 256 F.3d 864 (9th Cir. 2001).

89 *Id.* at 869.

90 *Id.* at 870.

91 *Id.* at 874.

92 *Id.* at 875.

93 Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1065 (9th Cir. 2002) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)), *cert. denied*, 123 S. Ct. 1573 (2003).

94 *Id.* at 1064.

95 *Id.* at 1066 (citing Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997)).

96 *Id.*

cuit found "two lessons" in *Oncale* to support its holding.[97] First, it read *Oncale* as interpreting Title VII to prohibit "severe or pervasive same[ ]sex offensive sexual touching."[98] Second, the Ninth Circuit determined that "offensive sexual touching is actionable discrimination even in a same[ ]sex workforce."[99] In short, the Ninth Circuit's flexible reading of *Oncale* led it to conclude that

> discrimination can take place between members of the same sex, not merely between members of the opposite sex. Thus, Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men.*[100]

Because Rene was mistreated *as compared with other men,* the Ninth Circuit reversed a grant of summary judgment in favor of the defendant.[101]

In dissent, Judge Hug accused the majority of ignoring the plain language of the *Oncale* opinion.[102] He stressed that the Supreme Court has never held "that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[103] As Justice Ginsburg stated in her concurring opinion in *Harris v. Forklift Systems, Inc.*: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the *other* sex are not exposed."[104]

Writing for three judges in concurrence, Judge Pregerson located *Rene,* as the court did previously in *Nichols v. Azteca Restaurant Enterprises,*[105] at the crossroads of *Price Waterhouse* and *Oncale.*[106] Because in *Price Waterhouse* at least one sort of gender stereotyping[107] was found actionable, and because in *Oncale* at least some kinds of same sex harassment against men were found actionable, Judge Pregerson reasoned that, together, the two cases supported a cause of action for

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97 *Id.* at 1067.

98 *Id.*

99 *Id.*

100 *Id.*

101 *See id.* at 1068.

102 *See id.* at 1072–76 (Hug, J., dissenting).

103 *Id.* at 1073 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

104 Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (emphasis added).

105 *See* 256 F.3d 864, 874 (9th Cir. 2001).

106 *Rene,* 305 F.3d at 1068 (Pregerson, J., concurring).

107 The terms "gender stereotyping" and "gender discrimination" will henceforth be used interchangeably.

men subjected to gender stereotyping.[108] Although the plaintiff did not explicitly claim to be a victim of gender stereotyping, the court held him to have stated such an action.[109] Therefore, Judge Pregerson argued that, like the *Nichols* plaintiff, Rene should have a remedy for gender discrimination due to the combination of the *Oncale* and *Price Waterhouse* decisions.[110]

A superficially less surprising post-*Oncale* outcome occurred in *Bibby v. Philadelphia Coca Cola Bottling Co.*, in which the Third Circuit reaffirmed the district court's judgment that Title VII does not prohibit same sex harassment based on sexual orientation.[111] As noted earlier, this result is warranted and predictable given the language of Title VII, which does not list sexual orientation as a protected characteristic.[112] Title VII only prohibits discrimination based on race, color, religion, sex and national origin.[113] However, the result stands in stark contrast to the Ninth Circuit's willingness to allow Title VII harassment claims based on gender stereotyping. One would predict, then, that the Third Circuit would dismiss same sex harassment claims if based either on sexual orientation or on gender stereotyping. But, this prediction turns out to be wrong. Indeed, in *Bibby*, the Third Circuit indicated a willingness to allow the plaintiff's claim to go forward had he also claimed that he "was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave."[114]

Therefore, had the plaintiff, who was in fact gay, argued that he was harassed because of his failure to comply with masculine stereotypes, his cause of action likely would have survived, but because he argued that he was harassed because he was gay, his cause of action was dismissed.[115] Arguably, however, harassment because of sexual orientation is, at least in most cases, harassment because of failure to comply with masculine stereotypes.[116] If being heterosexual is part of the masculine stereotype, it makes little sense to distinguish among varieties of animus in this way. However, were the court to allow a

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108 *Rene*, 305 F.3d at 1068 (Pregerson, J., concurring).

109 *Id.* at 1068–69.

110 *Id.*

111 260 F.3d 257, 261 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002).

112 *See* 42 U.S.C. § 2000e-2(a)(1) (2000).

113 *See id.*

114 *Bibby*, 260 F.3d at 264.

115 *See id.*

116 *See Recent Cases: Employment Law—Title VII—Sex Discrimination—Ninth Circuit Holds that Male Coworkers' and Supervisor's Harassment of Male Employee for Failing to Meet Sex Stereotype Constitutes Sex Discrimination*—Nichols v. Azteca Rest. Enters., 115 HARV. L. REV. 2074, 2080–81 (2002) (noting that "allegations of homosexuality often go hand in hand with allegations of gender deviance. . . . [W]orkplace discrimination against gays and lesbians is itself a form of sex stereotyping[,]" and that "[s]uch discrimination is premised on the notion that gays and lesbians fail to act like 'real men and women' should act: 'real men' only have sex with women and 'real women' only have sex with men" (footnote omitted)).

cause of action explicitly based on sexual orientation to go forward, it would contravene the plain language of Title VII. This quandary simply forces plaintiffs to resort to clever pleading in stating the reasons for their harassment.[117] A more consistent approach would be to allow both types of claims as variants of gender stereotyping cases, or to disallow both as beyond the purview of Title VII.[118]

The Sixth Circuit recently encountered an entirely new same sex harassment suit, involving male employees, neither gay nor effeminate,[119] complaining about vulgar, gross "horseplay" in a mostly male workplace.[120] The plaintiffs alleged that they "were subjected to unwanted touching, poking, and prodding in their genital areas, and to a hostile work environment that allowed such behavior to flourish."[121] After the jury returned a verdict for plaintiffs Woods and Carlton, the defendant, Harbert-Yeargin, Inc., moved for judgment as a matter of law, which the district court granted with respect to Woods's claim but denied with respect to Carlton's claim.[122]

The Sixth Circuit affirmed the district court's judgment against Woods and reversed the district court's judgment in favor of Carlton.[123] In short, both Woods and Carlton ultimately lost. Woods's claim failed because Harbert-Yeargin neither knew nor should have known of the harassment against Woods.[124] Dissenting with respect to Carlton's claim, Judge Gilman argued that the trial testimony amply supported a jury verdict for Carlton by establishing that males in the mixed sex workplace were subjected to harassment of a sexual nature that females were not.[125] The supervisor himself testified that he

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117 The plaintiff in *Simonton v. Runyon* claimed discrimination based on sexual orientation or, in the alternative, on sexual stereotypes. *See* 232 F.3d 33, 35–37 (2d Cir. 2000). The Second Circuit affirmed the lower court's dismissal of both claims. *See id.* at 38. Though the court agreed that the treatment that the plaintiff suffered was "morally reprehensible," it reiterated that such discrimination is not cognizable under Title VII. *Id.* at 35. The court found the discrimination claim based on sexual stereotypes to be legally "more substantial," but factually insufficient, adding that it "express[ed] no opinion as to how this issue would be decided in a future case in which it is squarely presented and sufficiently pled." *Id.* at 37. The First Circuit reached a similar result in *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259–60 (1st Cir. 1999).

118 This choice will be discussed more fully *infra* Part V.B.3.

119 More properly, the employees did not complain of any gender stereotyping, teasing based on being effeminate, or failing to conform to gender stereotypes.

120 *See* Equal Employment Opportunity Comm'n v. Harbert-Yeargin, Inc., 266 F.3d 498, 502 (6th Cir. 2001).

121 *Id.* at 501.

122 *See id.* at 500.

123 *Id.* at 523 n.7. The opinion of Judge Gilman is the majority opinion with respect to Woods's claim, but a dissenting opinion with respect to Carlton's claim. Judge Guy's opinion is the opinion of the court with respect to Carlton's claim. *Id.* at 519 & n.1.

124 *Id.* at 518.

125 *Id.* at 506. Notably, however, only three out of two hundred and ninety-two employees were women, and they worked in the office and not in the field where most of the male

> had never touched a female employee in the breast, buttocks, or pubic area, nor would he have done so, even though he admitted to touching male employees in the nipples, buttocks, and pubic areas. [Another supervisor] stated that he would never thump the genitals of a woman, although he acknowledged having done so to a male employee.[126]

Judge Gilman's reasoning seems to accord with *Oncale*. Males in the workplace were subjected to disparate treatment and in this case, the disparate treatment was of a severe and sexual nature.

In an unintended illustration of the difficult plight of male plaintiffs under Title VII, Judge Guy, in an opinion joined by Judge Morris, expressed sarcasm for the very nature of the case before him:

> Georgie Porgie pudding and pie
> Goosed the men and made them cry
> Upon the women he laid no hand
> So it cost his employer 300 grand.[127]

Judge Guy's opinion suggested at various points that the male employees simply should be able to tolerate such conduct.[128] At one point, he asked rhetorically, if the court did not rule against the plaintiffs, "what's next—towel snapping in the locker room?"[129] This comment was surprising given the severity of the conduct. Plaintiff Carlton, a welder, was subjected to sexual grabbing while he was welding.[130] Clearly, such conduct is distracting, and possibly dangerous. But, ac-

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employees worked. *Id.* at 503; *id.* at 520 (Guy, J., concurring in part and dissenting in part). These facts cut somewhat against Judge Gilman's conclusion.

126 *Id.* at 505.

127 *Id.* at 520 (Guy, J., concurring in part and dissenting in part).

128 Possibly working against his claim was Carlton's physical stature. He was described as "'maybe 6-foot-5 and 250 pounds'" and nicknamed "'the Marlboro Man'" by the secretaries in the office. *See* Talbot, *supra* note 5, at 52, 54. Judge Guy's opinion suggests that the "Marlboro Man" should be able to handle such "horseplay."

129 *Harbert-Yeargin, Inc.*, 266 F.3d at 522 (Guy, J., concurring in part and dissenting in part). Recall that the same dire predictions were made in dismissing the earliest opposite sex harassment cases. *See supra* Part I. The Seventh Circuit has also drawn a comparison between initial resistance to opposite sex harassment cases and current resistance to same sex harassment cases:

> Here we are, twenty years later, and the sky has not fallen. We are not, it turns out, incapable of distinguishing between the occasional off-color joke, stray remark, or rebuffed proposition, and a work environment that is rendered hostile by severe or pervasive harassment. . . . When a man complains that he has been sexually harassed by another man, then, we know how to distinguish between harassment and "horseplay"; we have been making that very distinction for years in the cases that female plaintiffs have brought.

Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 591 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998).

130 266 F.3d at 501 ("Carlton had bent over a table while welding, when he felt a hand that 'kind of comes in from the backside to my testicles and kind of comes all the way around to the bottom of my back. I just threw the hood down. I almost lost it. I really did.'").

cording to Judge Guy, "[t]he error is in concluding that all harassment of a sexual nature amounts, *ipso facto*, to gender discrimination."[131] Instead, the two judge majority found the crucial question to be whether the plaintiffs could show that the supervisor's actions were motivated by a general hostility to men in the workplace.[132] Judge Guy surmised that, far from having hostility toward men in the workplace, "[the harasser] liked nothing better than to have men in the workplace. If not, who else would he roughhouse with?"[133]

Most striking about Judge Guy's opinion is his understanding of "hostility" to a group in the workplace. If a harasser's desire to keep men in the workplace for the purpose of roughhousing negates a claim of hostility to men in the workplace, would not a desire to keep women in the workplace for sexual titillation negate a claim of hostility to women in the workplace? Indeed, Judge Guy's reasoning would jettison nearly *all opposite sex* harassment cases as well. A male harasser could always be said to "like nothing better" than to have women in the workplace, for otherwise there would be no one to harass or sexually proposition. The error here is in thinking that "hostility" is assessed from the perspective of the defendant rather than from the perspective of a reasonable person in the *plaintiff's* position.[134] If the conduct is unwelcome or if it offends and injures the plaintiff, the defendant's actual internal attitude toward the victim is irrelevant.[135]

What emerges from this post-*Oncale* landscape for male victims of same sex harassment? Most likely, those harassed by homosexuals fare best given that they alone fit clearly within the language of *Oncale*. Male victims of gender stereotyping also fare reasonably well in some circuits. Those who are gay might be able to prevail on a claim of gender stereotyping if they are also teased for being effeminate, or if they can convince the court that heterosexuality is part of a gender stereotype. Those who conform to gender stereotypes, however, thus far appear to have no remedy, no matter how severely they are harassed.

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131 *Id.* at 521 (Guy, J., concurring in part and dissenting in part).

132 *Id.* at 521–22 (Guy, J., concurring in part and dissenting in part).

133 *Id.* at 522 (Guy, J., concurring in part and dissenting in part).

134 *Cf.* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) ("The correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.").

135 *See Harris*, 510 U.S. at 21–22; *Meritor Sav. Bank*, 477 U.S. at 68.

B. Female Plaintiffs After *Oncale*

Though one would expect the plight of female plaintiffs to be less affected by the *Oncale* decision, female victims of opposite sex harassment may face greater difficulties due to *Oncale*'s stringent interpretation of the "because of" sex requirement. The following two cases illustrate these difficulties.

Karen Holman alleged that her supervisor at the Indiana Department of Transportation ("IDOT") touched her inappropriately, made sexist remarks to her, solicited sex from her, and retaliated against her when she rejected his advances.[136] This would appear to be a straightforward case of sexual harassment and sex discrimination under Title VII. However, the district court granted IDOT's motion to dismiss Holman's claim,[137] and the Seventh Circuit affirmed the dismissal.[138] Unfortunately for Holman, her husband—and co-worker—was also a victim of the supervisor's sexual advances.[139] Therefore, as a matter of law, neither Karen Holman nor her husband could show the harassment occurred "because of" sex.[140]

Quoting the disparate treatment language of *Oncale*, the Seventh Circuit emphasized that Title VII requires a showing that the harasser subjected the plaintiff to terms of employment to which members of the opposite sex were not exposed.[141] Discrimination after *Oncale* therefore requires a gender-comparative analysis that leaves the "equal opportunity harasser" with an affirmative defense to liability.[142] This result is troubling for the obvious reason that the most active

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136 Holman v. Indiana, 211 F.3d 399, 401 (7th Cir. 2000).

137 Holman v. Indiana, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998).

138 211 F.3d at 401.

139 *Id.* at 400–01.

140 *Id.* at 401.

141 *Id.* at 403. The Seventh Circuit did not subscribe to "equal opportunity harassing" prior to *Oncale*. *See* Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 578–80 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998). Similarly, the Ninth Circuit, at least until *Oncale*, rejected the equal opportunity harasser defense. *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) ("[E]ven if [the harasser] used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women. . . . [W]e do not rule out the possibility that *both* men and women working at Showboat have viable claims . . . for sexual harassment.").

142 *See Holman*, 211 F.3d at 403. The court explains the rationale behind the "equal opportunity harasser" bar to liability:

> [B]ecause Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).

Id. Other Seventh Circuit cases have also emphasized the importance of unequal treatment of the sexes in evaluating sexual harassment claims. *See, e.g.*, Shepherd v. Slater Steels Corp., 168 F.3d 998, 1008–09 (7th Cir. 1999); Pasqua v. Metro. Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996).

harassers will escape liability. What happened to Karen Holman is no less injurious simply because a similar wrong was also inflicted on her husband. The force of the *harm* to her is not mitigated because the wrong was also inflicted on another. It is thus counterintuitive that the force of the *legal wrong* is not only *lessened*, but *eliminated*, because the harm was also inflicted on another.

Moreover, it is far from clear that *Oncale* compels this result. The "'critical issue,'" the Court stated in *Oncale*, "'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[143] This does not necessarily mean that *no* member of the opposite sex can be exposed to the same disadvantageous condition. Further, the language in *Oncale* should not mean that members of the sex opposite from the plaintiff's must be treated perfectly well. It seems plausible, even after *Oncale*, for plaintiffs to urge sex specific injuries in work environments where members of the opposite sex are exposed to some kind of abusive treatment.[144]

The recognition that members of both sexes could be discriminatorily harassed existed in at least some circuits pre-*Oncale*. In *Steiner v. Showboat Operating Co.*, the Ninth Circuit acknowledged that while a casino supervisor "was abusive to men and women alike[, . . .] his abusive treatment and remarks to women were of a sexual or gender specific nature."[145] In its defense, Showboat argued that the supervisor's harassment of men and women, as well as his use of racial epithets, immunized the casino from liability for sex discrimination. This argument was unequivocally rejected.[146]

The Seventh Circuit also rejected the "equal opportunity harasser" defense in a case prior to *Steiner*. In *McDonnell v. Cisneros*, an earlier sexual harassment case, the Seventh Circuit explained that "[i]t would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female."[147] Unusually, then, a case many thought

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143 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

144 This point will be discussed more fully *infra* Part V.B.

145 25 F.3d 1459, 1462 (9th Cir. 1994).

146 *Id.* at 1464. The court reasoned that

> even if [the supervisor] used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby "cure" his conduct toward women. . . . The fact that [the supervisor] may have uttered racially discriminatory slurs only suggests that he was just as insensitive in matters of race as in those of gender. It in no way excuses his conduct toward Steiner.

Id. (footnote omitted).

147 84 F.3d 256, 260 (7th Cir. 1996) (citing *Steiner*, 25 F.3d at 1464).

expanded liability under Title VII, led the Seventh Circuit in *Holman* to grant the immunity from liability it previously found "exceedingly perverse."[148]

Female plaintiffs in hostile environment cases might also face greater difficulty post-*Oncale*. Consider the plight of Linda Ocheltree, the only female employee in the production shop where she worked and the plaintiff in *Ocheltree v. Scollon Productions, Inc.*[149] Ocheltree complained that her male coworkers used sexually explicit profanity, pretended to perform oral sex and other sexual acts on a workplace mannequin, told sexually oriented jokes and graphically described their sexual exploits.[150] One coworker sang a song for Ocheltree with lewd lyrics,[151] and several coworkers discussed how their wives and girlfriends performed oral sex.[152] Specifically, Ocheltree testified that her coworkers made comments about their female sexual partners

> 'as to that she swallowed, she gave good head, that I fucked her all night long,' etc. One employee related that his girlfriend 'gave good head and that she likes to swallow, that she liked it from behind, that she would do it anywhere with him.' He further said that she 'could suck a golf [ball] through a garden hose.'[153]

A former employee corroborated Ocheltree's account of the workplace environment and said that various vulgar acts or discussions took place on a daily basis.[154]

Although a jury returned a verdict in favor of Ocheltree, the Fourth Circuit Court of Appeals set aside the verdict.[155] Interpreting the "because of" sex requirement as a strict but-for test, the court considered whether Ocheltree would still have been harassed had she been male.[156] The court undertook an uncomfortable but exhaustive analysis of individual comments and incidents to determine whether they were gender motivated.[157] For example, the majority determined

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148 *See* Holman v. Indiana, 211 F.3d 399, 400–01 (7th Cir. 2000).

149 308 F.3d 351 (4th Cir. 2002), *reh'g en banc granted, vacated*, Dec. 16, 2002. A new opinion is expected to issue in the summer of 2003.

150 *Id.* at 353–54.

151 *Id.* at 354 ("[A] co-worker sang [Ocheltree] a song in which the lyrics were 'come to me, oh baby, come to me, your breath smells like cum to me.'")

152 *Id.* at 369 (Michael, J., dissenting in part and concurring in the judgment in part).

153 *Id.* (Michael, J., dissenting in part and concurring in the judgment in part) (citations omitted) (alteration in original).

154 *Id.* at 354.

155 Though the Fourth Circuit has since vacated its opinion and reheard the case en banc, the facts of the case and the court's original analysis provide a useful backdrop for the discussion in Part V of the shortcomings of the "but-for" test and of the replacement test urged in this Note.

156 *Id.* at 356–59.

157 *See id.*

that words like "d—khead," "p-ssy," and "blow job," were not "unambiguous [gender] epithet[s]."[158]

The lurid conversations about oral sex also failed to persuade the majority.[159] The dissent found these to be gender motivated because they portrayed women as sexually subordinate to men and valuable only as objects "to gratify male desires for oral sex."[160] The majority disagreed, however, commenting instead that "the conversations simply depict—in graphic and crude terms—heterosexual sex, including oral sex. Indeed, the conversations *depict the sexual prowess of females* at least to the same extent as they do males."[161] Moreover, working against Ocheltree was the finding that her coworker's conduct was "equally offensive to both men and women," as evidenced by the fact that two of Ocheltree's male coworkers had previously complained to management about the coworkers' harassing conduct.[162]

Only two incidents of harassment were found to satisfy the but-for test: lewd lyrics sung to Ocheltree, and simulating oral sex on the mannequin in front of her.[163] The rest of the conduct by her coworkers was ultimately brushed aside: "The discussions certainly were sexually explicit . . . and while they were generally degrading, humiliating, and even insulting, they were not aimed solely at females in any way."[164]

Once the court determined that only two incidents of harassment had occurred "because[ ]of" the plaintiff's sex, it considered only those incidents in assessing the hostility of the workplace, making it virtually impossible for Ocheltree to satisfy the severity requirement.[165] Moreover, it borrowed from the Seventh Circuit a peculiarly strict definition of "hostile" environment, stating that "[t]he workplace that is actionable is the one that is hellish."[166] Consequently,

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158 *Id.* at 358 (citing Springs v. Diamond Auto Glass, Inc., 242 F.3d 179, 185 (4th Cir. 2001) (alteration in original).

159 *Id.*

160 *Id.* at 374 (Michael, J., dissenting in part and concurring in the judgment in part).

161 *Id.* at 358 (emphasis added).

162 *Id.*

163 *See id.* at 357.

164 *Id.* at 357–58. The Fourth Circuit reached a similar result in a same-sex hostile environment case brought by a male plaintiff, finding that although the conduct was sexual and offensive, it was not directed at males in any particular way. Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 261–62 (4th Cir. 2001).

165 *Id.* at 359–60.

166 *Id.* at 359 (quoting Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997). Notice that this standard is significantly stricter than that articulated by the Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), discussed *supra* Part I ("So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.") (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

the majority found Ocheltree's hostile environment claim "not cognizable as a matter of law."[167]

In his dissenting opinion, Judge Michael urged a more flexible "because of" sex requirement, which would be satisfied when the effect of the conduct is "disproportionately more offensive or demeaning to one sex."[168] This test appears to accord with *Oncale*, where the Court provided that "[a] same[ ]sex harassment plaintiff may . . . offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed[ ]sex workplace."[169] If plaintiffs in same sex harassment cases are permitted to offer such evidence, then plaintiffs in opposite sex cases should have this option as well. Offering "comparative evidence" does not imply that members of one sex must bear the full brunt of harassment while members of the other sex remain relatively unaffected; rather, it implies that the victim simply is treated *worse than* members of the opposite sex.[170] Consequently, plaintiffs subjected to a comparative evidence test will fare better than those subjected to a but-for test.

However, categorically labeling sexual discussions *per se* as "more offensive to women" is precarious insofar as it might invite old fashioned stereotypes of female prudery. Indeed, the majority accused the dissent of just such stereotyping.[171] Given that Ocheltree was the only female in the workplace,[172] such discussions *under those circumstances* could be expected to make the environment more hostile *for her* than it would be for the men.[173] Further, the majority's putatively

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167 *Id.* at 360.

168 *Id.* at 372 (Michael, J., dissenting in part and concurring in the judgment in part) (citations omitted).

169 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

170 The Eighth Circuit took this approach in the same-sex harassment case of *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996) ("[A] fact-finder could reasonably conclude that the treatment of men at Donaldson was worse than the treatment of women. Thus, Quick has raised a genuine issue of material fact as to whether the alleged harassment was gender based.") (citing Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269–70 (8th Cir. 1993)).

171 Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 363–64 (4th Cir. 2002).

172 *Id.* at 367 (Michael, J., dissenting in part and concurring in the judgment in part).

173 *Id.* at 374–75 (Michael, J., dissenting in part and concurring in the judgment in part) (internal citations omitted). The dissent further noted:

> [T]he tone of the discussions in the production shop was hardly one of mutuality and respect. . . . Comments like these portray women as sexually subordinate to men; indeed, it is not too strong to say that the overall tenor of the workplace banter conveyed the message that women exist primarily to gratify male desires for oral sex. . . . When a workplace is suffused with representations of women as sexual objects, a woman in that workplace would doubtless wonder whether the primary questions about her in the minds of her coworkers involved such matters as whether she "swallows" or whether she could "suck a golf ball through a garden hose."

Id.

"progressive" claim that such discussions actually depict female sexual prowess simply strains reality.

If the two cases discussed above prove to be representative, female plaintiffs will have greater difficulty establishing sexual harassment claims after *Oncale,* at least in circuits that read *Oncale* as endorsing a strict but-for test. Paradoxically, though *Oncale* initially appeared to expand the rights of sexual harassment plaintiffs, it quite possibly has instead contracted those rights. Further, the post-*Oncale* case law illustrates that a gap has formed between the concepts of sexual harassment and sex discrimination. In the next section, this Note will survey the attempts of several commentators to bridge that gap and to provide the courts with greater guidance in adjudicating the new variety of sexual harassment cases.

IV

THEORIZING SEXUAL HARASSMENT AS SEX DISCRIMINATION

Sexual harassment theory began as the province of feminist scholars such as Catherine MacKinnon, who defined the "wrong" in sexual harassment as institutionalizing the sexual subordination of women in the workplace.[174] The paradigmatic example of harassment under early sexual harassment theory was that of heterosexual male perpetrator and female victim, with the conduct motivated either by particularized sexual desire or by a more generalized desire to sexually exploit women.[175] Vicki Schultz dubbed this approach to sexual harassment the "sexual desire-dominance" paradigm.[176] Men harassed women either because they desired them sexually or wanted to dominate them. Either way, the harassment was clearly "because of" sex and constituted sex discrimination.[177]

Schultz criticized this paradigm as preventing courts from recognizing many hostile environment cases of sexual harassment, and as wrongly directing courts to focus on sexual conduct as the primary wrong in sexual harassment cases.[178] For example, in early sexual harassment cases like *Harris v. Forklift Systems,* the lower courts considered only sexual conduct directed at the plaintiff, ignoring overtly discriminatory, but nonsexual conduct by employers, such as denying female employees benefits routinely given to male employees.[179] Empirical

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174 *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 9–10 (1979).

175 *Id.* at 179 ("[A] sex stereotype is present in the male attitude, expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will, beings who exist for men's sexual stimulation or gratification.").

176 Schultz, *supra* note 49, at 1692–96.

177 MACKINNON, *supra* note 174, *passim.*

178 Schultz, *supra* note 49, at 1710.

179 *See id.* at 1712.

research on sexual harassment cases also suggests that plaintiffs alleging harassment including sexual conduct have "significantly higher win rates" than those who allege nonsexual, sexist conduct.[180] According to Schultz, this approach is misguided because "many of the most prevalent forms of harassment are actions that are designed to maintain the workplaces—particularly in the more highly rewarded lines of work—as bastions of masculine competence and authority."[181]

Schultz therefore urges that the "sexual desire-dominance" paradigm of sexual harassment should be replaced by a "competence-centered" paradigm.[182] According to this paradigm, sexual harassment includes any conduct "that has the purpose or effect of undermining the perceived or actual competence of women (and some men) who threaten the idealized masculinity of those who do the work."[183] Such an approach could extend protection both to women and to those men who fail to conform to the idealized masculine stereotype of heterosexuality and machismo. If men want to ensure that their workplaces remain masculine in an attempt to preserve their individual masculine identities, they will punish those who threaten their image of the workplace—typically women, homosexuals, and effeminate men.[184] The competence of these categories of workers is then undermined, and their socioeconomic position in society is ultimately diminished.[185] The "competence-centered" paradigm, therefore, makes sexual conduct neither a necessary nor a sufficient condition for sexual harassment.

Anita Bernstein has formulated a competing theory of sexual harassment derived from Kantian ethics that attempts to give "content to the ideal of equality behind Title VII as well as the ideal of individual autonomy behind dignitary-tort law."[186] Treating others as rational, autonomous agents should both elicit and prohibit certain behavior. People ought to refrain from interfering with the autonomy of others in certain ways, and ought to help them fully realize their autonomy if it is hindered by external conditions. Bernstein explains the prohib-

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180 Juliano & Schwab, *supra* note 41, at 580.

181 Schultz, *supra* note 49, at 1687.

182 *Id.* at 1755–74.

183 *Id.* at 1762 (footnote omitted).

184 *See id.* at 1762–69.

185 *Id.* at 1761. Schultz further notes:

> [B]y portraying women as less than equal at work, men can secure superior jobs, resources and influence—all of which afford men leverage over women at home and everyplace else. Work and workplace relations are active shapers of gender difference and identity, and harassment is a central mechanism through which men preserve their work and skill as domains of masculine mastery.

Id. (footnote omitted).

186 Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446, 450 (1997).

ited behavior in terms of three "duties to refrain[:]" (1) from treating another as a mere means of achieving one's own ends, (2) from humiliating another, and (3) from denying the autonomy and "self-conception" of another.[187] Sexual harassment involves the violation of at least one of these duties.[188] Bernstein sees the advantage of this approach as moving courts' scrutiny away from victims and toward the harassers, who lack the fundamental respect for persons *qua* rational, autonomous agents.[189] Thus, according to Bernstein, sexual harassment should not be viewed simply through the lens of gender, but as a fundamental moral wrong.

Not surprisingly, what Bernstein identifies as the main advantage of her approach others cite as a disadvantage. Kathryn Abrams has criticized Bernstein for neglecting to consider "that the humiliation of sexual harassment is perpetrated by more powerful members of a gendered hierarchy against the less powerful members."[190] Why should we view sexual harassment as a uniquely "gendered" wrong rather than as one instance of a more generalized moral wrong? Abrams offers two reasons in reply. First, she claims that locating the wrong of sexual harassment within "a context of systematic gender inequality" makes it a societal, rather than individual wrong, which increases the "imperative for responding to it."[191] Second, she claims that focusing on the individual rather than the gendered wrong of harassment makes it more difficult to take preventive and remedial measures.[192]

Abrams's account essentially combines the views of both MacKinnon and Schultz. She sees sexual harassment as an attempt to entrench masculine norms and preserve male control in the workplace.[193] Like Schultz, Abrams sees this entrenchment as impacting both men and women by masculinizing men and feminizing women.[194] Also, like both MacKinnon and Schultz, Abrams sees the consequence of sexual harassment as the socioeconomic subordination of women, because harassment victims often perform below capacity at their jobs or seek inferior employment as a way of avoiding harassment.[195] Based on her conception of the "wrong" of sexual har-

187 *Id.* at 487.

188 *See id.* at 487–92.

189 *Id.* at 492–97.

190 Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1185 (1998).

191 *Id.* at 1187.

192 *Id.*

193 *See id.* at 1205–20.

194 *See id.* at 1218–19.

195 *See id.* at 1217–20.

assment, Abrams interprets the "because of sex" requirement as "'connected with the enforcement of a sex and gender hierarchy.'"[196]

Abrams identifies several ways that harassment, or the entrenching of male norms, can occur. The most flagrant way is through physical aggression or persistent verbal harassment, which sends unequivocal signals that women are not welcome in the workplace.[197] Another way is to sexualize or overly feminize[198] women in the workplace, thereby demeaning their work related qualities and sending the message that women are only valued as objects of male desire in the workplace.[199] Abrams believes both of these types of harassment have a negative impact on women because they elevate masculine norms at the expense of feminine norms. Other, more subtle forms of harassment include devaluing women who perform traditionally feminine tasks and creating workplace environments in which sexually predatory behavior or roughhousing flourishes.[200] All of these actions interfere with the agency of women, according to Abrams, and so constitute sexual harassment.[201]

Katherine Franke has developed a theory of sexual harassment similar to that of Abrams.[202] Like Abrams, Franke sees sexual harassment as a means of perpetuating gender hierarchies and therefore defines sexual harassment in broad terms.[203] In fact, Franke describes one of the goals of Title VII as providing "all people more options with respect to how they do their gender."[204] Consequently, she views sexual harassment as sex discrimination "because of the gender norms it reflects and perpetuates."[205] In particular, the norm perpetuated is that of "hetero-patriarchy," meaning that sexual harassment is used as a tool to elevate heterosexual, masculine values and to devalue those individuals who deviate from the norm.[206] Thus, Franke calls sexual harassment a "technology of sexism," but simply means that it is a tool for perpetuating hetero-normative ideals and regulating gender behavior.[207] It is this "by means of" relationship between sexual harassment and sexism that makes sexual harassment "because of" sex.[208]

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196 *Id.* at 1223.

197 *Id.* at 1206.

198 An example of such treatment would be the use of "pet names" by male workers for the female employees.

199 *See id.* at 1207–08.

200 *Id.* at 1209–10.

201 *See id.* at 1219–20.

202 Franke, *supra* note 36, at 693–94.

203 *See id.* at 696.

204 *Id.* at 758.

205 *Id.* at 693.

206 *See id.* at 763.

207 *See id.* at 762–71.

208 *See id.*

One difference between Franke and Abrams—which Franke identifies as a strength—is that, according to Franke, the wrong in harassing gay or effeminate men does not derive from the subordination of women.[209] In other words, subordination theories like Abrams's must maintain that gay or effeminate men are harassed because they are regarded in the same manner as women and thus must be subordinated as women are subordinated.[210] In contrast, Franke places all these forms of harassment on the same level. Each form of harassment is merely one instance of a more general wrong: furthering the gender hierarchy.[211]

The above theorists share a repudiation of the assumption that sexual conduct in the workplace is *per se* sexual harassment, thereby distancing themselves from Catherine MacKinnon.[212] This repudiation might be partly a response to the apparent overemphasis of sexual conduct by the courts, which has worked to the detriment of female plaintiffs bringing hostile environment claims based on nonsexual conduct.[213] An additional worry about identifying sexual conduct in the workplace as inherently wrong or harassing is that it stereotypes women as passive or prudish victims.[214] Thus, while Franke, Schultz, and Abrams focus on how sexual conduct can be used to further certain wrongs, they reject the notion that sexual conduct in the workplace is itself inherently wrong.[215]

Rosa Ehrenreich has taken a different approach to sexual harassment that does not attempt to fit all sexual harassment under the rubric of sex discrimination.[216] On the contrary, Ehrenreich criticizes the scholarly literature on sexual harassment for conceptualizing sex-

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209 *See id.* at 762–63.

210 *See id.* at 761 & n.373 (quoting Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2516 (1994)).

211 *Id.* at 762–63. Franke criticizes the subordination theory, stating that

> [u]nderlying [the subordination theory of] gendered inferiority is an ideology that is designed to reduce women to victimized, highly sexual, less competent sub-humans who do not enjoy full agency. . . . But the net effect of this kind of conduct extends beyond any particular case in that it solidifies what 'real men' and 'real women' should be.

Id. at 762–63.

212 *See* Schultz, *supra* note 49, at 1689, 1755; Abrams, *supra* note 190, at 1213–14; Franke, *supra* note 36, at 746.

213 *See* Schultz, *supra* note 49, at 1689.

214 *See* Franke, *supra* note 36, at 746–47.

215 In contrast, David Schwartz has urged a return to the "sex per se" rule, which holds that sexual conduct *per se* establishes the causation requirement in Title VII. Schwartz's proposal, however, addresses the need for a bright-line rule in sexual harassment cases rather than the fundamental wrong of sexual harassment. *See* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1782-87 (2002).

216 *See* Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999).

ual harassment as a gendered harm, which she says conflates "the *nature of the harm of harassment*, which is a dignitary harm, and the *context in which the harassment occurs*, which is a context of discrimination."[217] Ehrenreich's conception of a dignitary harm is similar to the lack of respect for personal autonomy discussed by Bernstein and as such, dignitary harm is not a uniquely gendered wrong.[218] Rather, it is a harm one suffers *qua* human being, not *qua* woman.[219] But the context of the workplace—where the harm is inflicted—is one imbued with a history of discrimination against women.[220] As such, the victim of sexual harassment suffers in the workplace *qua* woman, but suffers the actual injury *qua* human being.[221]

Distinguishing the harm from the context of its occurrence leads Ehrenreich to argue that while all workplace harassment should be actionable as a tort, it should not all be actionable under Title VII.[222] Ehrenreich reminds the reader that Title VII essentially protects women from sex discrimination and is ill equipped to handle male victims of sexual harassment.[223] However, she adds that many of the claims that cannot be brought under Title VII can be brought as common law tort claims such as assault, battery, invasion of privacy, false imprisonment, and intentional infliction of emotional distress.[224] For plaintiffs bringing such claims, Ehrenreich argues that courts should treat the fact that the conduct occurs in the workplace as an aggravating factor.[225]

Comparing the approaches of Bernstein and Ehrenreich with those of Abrams, Schultz and Franke, we face a basic choice of whether to view gender as an *essential* or as an *accidental* part of the wrong in sexual harassment cases. Abrams, Schultz and Franke all

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217 *Id.* at 3.

218 *See id.* at 22; Bernstein, *supra* note 186, at 450. Ehrenreich further notes:

> While the common-law notion of harm to one's dignity or personality interests may not bear intense philosophical scrutiny, its core assumptions are clear enough: all individuals share in "personhood," are autonomous and unique, and are entitled to be treated with respect. Actions that would humiliate, torment, threaten, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person are actions that can be said to injure an individual's dignitary interests and, if sufficiently severe, can give rise to causes of action in tort.

Ehrenreich, *supra* note 216, at 22 (footnote omitted).

219 *See* Ehrenreich, *supra* note 216, at 22.

220 *See id.* at 16.

221 *See id.*

222 *See id.* at 27–39.

223 *See id.* at 35–36.

224 *See id.* at 36–44.

225 *Id.* at 44–52. Thus, for a plaintiff suing to recover for intentional infliction of emotional distress, a tort that requires the defendant's conduct be "outrageous," courts should consider occurrence in the workplace as enhancing the outrageousness of the conduct. *See id.* at 46–47.

view sexual harassment as some sort of attempt to police or enforce a gender hierarchy. Therefore, gender is an essential property of the normative wrong of sexual harassment. In contrast, Bernstein and Ehrenreich view sexual harassment as one manifestation of a more fundamental wrong—the invasion of another's autonomy. Thus, they view gender as an accidental property of the normative wrong of sexual harassment.

This choice is important because it potentially affects the scope of cases one deems as within the purview of Title VII. If sexual harassment is wrong essentially because it elevates hetero-patriarchy, homosexual and effeminate men might be included as among the victims who can sue under Title VII. If, on the other hand, sexual harassment is an invasion of another's autonomy that just happens to be directed at some victims because of their sex, the class of Title VII plaintiffs might be limited to women and to male victims of homosexual harassers.

The foregoing discussion is also important as a framework for assessing the adequacy of any "because of" sex test. An adequate test should not only be workable for courts, but it also should comport with our basic intuitions about the normative wrong in sexual harassment. Although the author is more sympathetic to the views of Abrams, Schultz and Franke than those of Bernstein and Ehrenreich, the aim of this Note is not to defend any particular normative theory. Rather, the aim in the next section is to propose and defend a workable test that also accommodates the "gendered wrong" intuition by selecting for those instances of offensive conduct that promote hetero-patriarchy.

V

SEXUAL HARASSMENT: THEORY AND PRACTICE

A. The Failure of the But-For Test

The but-for test, standing alone, is insufficient as a test for harassment or discrimination.[226] The reasons, as is evident from the case discussions in Part III, are that a but-for test is ambiguous, overly simplistic, too weak, and too strong.

The test is too weak because, when applied, it finds causal connections where intuitively there are none.[227] For example, in many sexual harassment cases, the harassment would not have occurred *but*

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226 Price Waterhouse v. Hopkins, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) ("Common-law approaches to causation often require proof of but-for cause as a starting point toward proof of legal cause."), *superseded by statute as stated in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305 (N.D. Cal. 1992).

227 For example, one's birth is a but-for cause of every event that occurs in one's lifetime. Had one not been born, one could not have done any of the things one has in fact

for the victim's age—or some other quality—and yet it would be incorrect to say the harassment occurred *because of* age. Consider again an example of an effeminate man who is harassed because he is effeminate. Intuitively, this is a case of gender harassment: targeting a man for abuse because he does not conform to the stereotypically masculine norm the harasser values. In short, he was harassed because of his gendered identity (effeminate male), not because of his sex.

However, a court might also find that the victim was harassed because of his sex. After all, had the victim been female, he would not be faulted for failing to conform to a stereotypically masculine norm. Further, had the male victim been a child, he also would not be subject to harassment because males are typically held to stricter gender roles during and after adolescence. But intuitively, the harassment does not occur because of age, and no court would (or should) find this to be a case of age discrimination. Thus, the but-for test alone sweeps too broad a range of conduct under the rubric of sexual harassment.

The but-for test is also too strong (i.e., underinclusive) given the case discussions in Part III. Classic tort cases illustrate this underinclusiveness in situations of causal overdetermination—that is, where two or more events jointly produce a certain effect.[228] In the sexual harassment context, where harassment occurs because of both a generalized desire to be crass as well as gender animus, the generalized crassness diverts the court's attention from the gender animus, as occurred in *Ocheltree.*

A third problem with the but-for test is its ambiguity. In asking whether conduct would have occurred but for the victim's sex, one might mean at least two different things.[229] First, one might mean that a particular act would not have had the same effect on the victim, but for his or her sex. This is the roughly the interpretation urged by Judge Michael in his dissenting opinion in *Ocheltree,* where he suggested that certain acts can be "disproportionately more offensive or

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done in one's lifetime. However, intuitively, one's birth is not the *cause* of one's going to law school.

228 *See, e.g.*, Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948) (holding that, when two hunters negligently fired guns in the direction of a third hunter injured nearby, both could be treated as liable); Kingston v. Chi. & N.W. Ry. Co., 211 N.W. 913, 915 (Wis. 1927) (explaining that each wrongdoer is responsible for the entire damage where separate acts of negligence concur in producing injury, and either would have produced such damage alone).

229 This ambiguity might simply mirror the ambiguity inherent in the concept of "discrimination." When we say that someone was discriminated against as a woman, we might mean that she was harmed in a sex-specific way, or that someone sought to punish her by virtue of her femaleness. The replacement test I propose *infra* Part V.B attempts to accommodate both the intent-oriented and effect-oriented intuitions that exist regarding the concept of discrimination.

demeaning to one sex."[230] Also, the Seventh Circuit, in *Doe ex rel. Doe v. City of Belleville*, appeared to adopt this version of the test, at least when the complained of conduct involves sexual touching:

> [W]hen a woman's breasts are grabbed or when her buttocks are pinched, the harassment necessarily is linked to her gender. . . . It would not seem to matter that the harasser might simultaneously be harassing a male co[ ]worker with comparable epithets and comparable physical molestation. When a male employee's testicles are grabbed, his torment might be comparable, but the point is that he experiences that harassment as a man, not just as a worker, and she as a woman. In each case, the victim's gender not only supplies the lexicon of the harassment, it affects how he or she will experience that harassment.[231]

In *Doe*, the Seventh Circuit took the additional step of using the effect of the harassment as an indicator of the harasser's discriminatory intent, saying, "[f]rankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender."[232]

The second meaning that we might give to the but-for test is that the *desire to harass* would not have arisen *but for* the sex of the victim. This is the approach the majority of the Fourth Circuit apparently adopted in its now vacated opinion in *Ocheltree*.[233] The court focused on the totality of the offensive conduct occurring in the workplace to determine whether the desire to torment Ocheltree would have existed had she been male.[234] Finding that so much of the offensive conduct was of a generalized nature, the court concluded that the desire to engage in the complained of conduct would have existed even if Ocheltree had been male.[235]

The Sixth Circuit also favored the intent oriented interpretation in *Harbert-Yeargin, Inc.*, but its application illustrates the clumsiness of the but-for test.[236] Clearly, the complained of conduct in that case—testicle grabbing[237]—could only be directed at men. Therefore, the court's finding that the but-for test was not satisfied indicates that it looked to employer intent. Specifically, the court considered whether

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230 Ocheltree Prods., Inc. v. Scollon, 308 F.3d 351, 372 (2002) (Michael, J. dissenting in part and concurring in the judgment in part) (citations omitted), *reh'g en banc granted, opinion vacated*, Dec. 16, 2002.

231 119 F.3d 563, 578 (7th Cir. 1997) (internal citations omitted), *vacated by* 523 U.S. 1001 (1998).

232 *Id.* at 580.

233 *See Ocheltree*, 308 F.3d at 356–59.

234 *See id.*

235 *See id.* at 359.

236 *See* Equal Employment Opportunity Comm'n v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001); *supra* notes 119–35 and accompanying text.

237 *See id.* at 501–03.

the conduct was motivated either by sexual desire or by hostility to men in the workplace.[238] Concluding that the supervisor's conduct was motivated by neither, the court appeared to regard as irrelevant whether the intent was gender specific for some other reason.

Notice how the ambiguities of the but-for test emerge in the possible approaches to the conduct at issue in *Harbert-Yeargin, Inc.* On the one hand, one might say that a man cannot have his testicles grabbed *but for* his sex, thereby finding the conduct satisfies the result oriented interpretation of the but-for test. On the other hand, one might find that the conduct was motivated by either desire for or animus toward men, thereby satisfying the intent oriented interpretation of the but-for test. But there are at least two additional, and plausible, interpretations of the conduct at issue.

One might argue that the overall context of the workplace suggested that the supervisor was bullying and teasing everyone equally, and simply found testicle-grabbing a *convenient way* of bothering the men. In other words, perhaps the victim's sex motivated the *form*, but not the *occurrence*, of the harassment. The desire to harass *by some means* might have existed regardless of the victim's sex. It is unclear whether a court would find the but-for test satisfied under these circumstances. Alternatively, even if the supervisor's intent to harass was directed only at men, perhaps the intent arose neither from desire nor animus, but rather out of an innocuous, but mistaken, belief that the conduct really was "horseplay" and that men would understand this. The majority appears to endorse this last reading, thereby applying an intent oriented interpretation of the but-for test, but with the added requirement that the intent include gender based desire or animus.[239]

Even assuming the Sixth Circuit reached the right result using the but-for test in *Harbert-Yeargin*, it should be increasingly clear that the test can be read in a variety of ways, leading to unpredictable results and providing little guidance. A superior test would avoid conflating the intent and effect of harassing conduct, and would clarify the role of gender based animus in harassment.

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238 *See id.* at 521 (Guy, J., concurring in part and dissenting in part) (discussing the error in the jury instructions at the trial level). As explained *supra* notes 230–31 and accompanying text, the Seventh Circuit, at least pre-*Oncale*, interpreted the "but-for" test differently. *See* Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998). In *Doe*, the Seventh Circuit indicated that when one's sexual organs are grabbed, they are grabbed because of that person's sex, and the victim suffers a sex specific harm. *See id.* at 587–88. However, *Doe* was a gender stereotyping case, so it is unclear how the Seventh Circuit would rule on a case such as *Harbert-Yeargin, Inc.*, which did not involve any element of gender stereotyping.

239 *See Harbert-Yeargin, Inc.*, 266 F.3d at 521 (Guy, J., concurring in part and dissenting in part).

Finally, the language of *Price Waterhouse*, which has been largely ignored, makes clear that reading the "because of" sex requirement as a but-for test is overly simplistic. In interpreting the relevant provision of Title VII, Justice Brennan, writing for a four Justice plurality, explained that "[w]e take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them."[240] The plurality held that if an employee shows but-for cause, she prevails, but the Court rejected the contention that the employee *must* show but-for cause.[241] It further explained that "the words 'because of' do not mean '*solely* because of.'"[242] In other words, the *Price Waterhouse* plurality regarded the but-for test as a sufficient, but not a necessary, condition for satisfying the "because of" sex requirement. It also indicated concern that the simplistic but-for test would mislead courts into assuming that sex must be the *sole* motivating factor in the harassment.[243]

In short, the main problems with the but-for test—that it violates the language of *Price Waterhouse*, and that it is simultaneously ambiguous, too strong, and too weak—warrant consideration of a replacement. The following section proposes an interpretation of the "because of" sex requirement that replaces the but-for test, and analyzes the fates of a variety of cases under the new approach.

B. When Sexual Harassment Is "Because of" Sex

1. *The New Test*

In place of the but-for interpretation of the "because-of" sex requirement, this Note proposes a conjunctive, two pronged test that is both intent oriented and result oriented in relating sex to sexual har-

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240 Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (plurality opinion) (footnote omitted), *superseded by statute as stated in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305 (N.D. Cal. 1992).

241 *Id.* at 240 n.6; *see also id.* at 241 n.7 ("Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'") (citing 110 CONG. REC. 2728, 13837 (1964)).

242 *Id.* at 241. The Court further noted:

> When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

Id. Justice O'Connor, concurring in the judgment, worried that the plurality's approach allowed a cause of action where considerations of gender merely "tainted" the decision, and instead would require gender to be a "substantial factor" or a "motivating factor" in the challenged employment decision. *Id.* at 275–78 (O'Connor, J., concurring).

243 *See, e.g.*, Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 362 (4th Cir. 2002) ("[T]he inquiry is always whether 'but for' the plaintiff's gender, the harassment would not have occurred . . ."), *reh'g en banc granted, opinion vacated*, Dec. 16, 2002.

assment. In determining whether the complained of conduct was "because[ ]of" sex, courts should ask:

(1) whether it was foreseeable, under the circumstances, that the victim would suffer harm[244] by the conduct, given the sex of the individual;[245] and

(2) whether the victim's sex was a motivating factor in the harassing conduct.[246]

To satisfy the "because of" sex requirement, a plaintiff must establish both prongs of the Motivating Factor and Foreseeability (MFF) test. However, in some circumstances, a plaintiff will be able to show the first prong quite easily, but will be unable to show the second by any direct evidence. Therefore, this Note proposes the following additional inquiry.

Once a plaintiff establishes the first prong, the court should then consider *whether a reasonable member of the victim's sex would think the complained of conduct conveyed a discriminatory message.* If so, the court *may infer* that the second prong is satisfied as well. This helps plaintiffs in hostile work environments that promote hetero-patriarchy, but the prevalence of generalized, lewd behavior makes it difficult to establish discriminatory *intent* in a straightforward way.

To see how this works, consider an all male workplace in which the men discuss their female sexual partners in graphic detail, portraying them as eager sex objects. Suppose they discuss hard core pornographic movies and comment that all women should perform sexually as porn stars do. Further, imagine they hang pornographic images in the workplace, listen to sexually explicit and sexist programs on the radio, and frequently make derogatory remarks about women in conversations with one another. Suppose this conduct continues after a female employee joins the workplace, although the men do not specifically address the female employee in their conversations. She complains that the conversations disturb her, and that she detests going to work and listening to them. The men protest that "it's nothing personal," and remind her that they have always engaged in such conduct.

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244 The "harm" is here construed as it commonly is understood in the sexual harassment case law, that is, the harm need not be economic, but rather, it may be emotional or psychological.

245 It is important to remember that this test only replaces the *causal* requirement in Title VII cases. Thus, a defendant will not face liability unless additional elements, such as those discussed *supra* Part I, are also present. Henceforth, this test will be referred to as the "MFF test"—Motivating Factor and Foreseeability.

246 Recall that the "motivating factor" interpretation of the "because of" sex requirement was endorsed by Justice O'Connor in *Price Waterhouse*, 490 U.S. at 275–78 (O'Connor, J., concurring).

Our hypothetical female employee could not prevail in a sexual harassment suit under the but for test, nor could she satisfy the "motivating factor" prong of the MFF test with direct proof of discrimination based on sex. She could, however, establish that the conduct foreseeably harmed her, given her sex, particularly after she made her discomfort known. Once she does so, she can subsequently argue that a reasonable woman would find that the overall conduct conveyed a message of discrimination. In this case, the overall work environment strongly suggests that either women are not welcome or that they are valued primarily as sexual subordinates. If the court agrees, it may then infer that the second prong was established as a result.

Consequently, the fact that the offensive conduct occurred before the female employee arrived does not affect the MFF test as it would the but-for test. This is as it should be. To illustrate, imagine an all white workplace comprised of members of the Ku Klux Klan who engaged in racist discussions, listened to racist radio programs, and so forth. Suppose that an African American employee then joined the workplace, and that the offensive conduct continued. It seems reasonable to suppose that the new employee would suffer foreseeable harm given his race. It is also reasonable to infer that the overall workplace environment conveyed a message of discrimination—in this case, a message of white supremacy. Therefore, a court should be able to infer that the offended employee suffered harassment "because of" his race. In short, the employee would satisfy the MFF test.

However, he would fail to satisfy the but-for test. In asking whether, but for the employee's race, the complained of conduct would have occurred, the court would look to the state of the workplace when all the employees were white. Given that the same behavior occurred in the all white workplace, the employee's claim would fail. This is an absurd result. Where the environment projects a hostile racial hierarchy, and it is clearly foreseeable that an African American employee will suffer psychological injury given his race, the employee should have a cause of action for race based harassment.

The same principle applies in sexual harassment cases where a female employee joins the all male workplace. The fact that lewd, hetero-patriarchal behavior occurred previously should not immunize the workplace from liability. The men in the workplace might find it amusing or entertaining that the new female employee finds their conduct offensive, even if they would have engaged in such discussions had she not joined the workforce. Simply put, the female plaintiff's sex might "add to the fun" of such conduct, given that the male employees know that their actions bother her, but persist regardless. In short, the female employee deserves a cause of action in this situa-

tion because the male employees know, or should know, that they are harming her in a sex specific way.

To reiterate, if a plaintiff can show foreseeable, sex specific harm and that a reasonable member of her sex would find that the offensive conduct conveyed a discriminatory message, the court may infer that sex was a motivating factor in the harassment. This allows the plaintiff to satisfy the MFF test in cases where more direct proof of discriminatory intent is difficult due to the generalized coarseness of the workplace. Therefore, while a plaintiff must satisfy both the "intent" and "effect" prongs of the MFF test, she has available an evidentiary shortcut to satisfying the intent prong.

Note, too, that the harm under the foreseeability prong should be judged from the perspective of a reasonable member of the victim's sex under the circumstances. But "under the circumstances" is an important qualification. For instance, if the victim is singled out as a woman and subjected to harassing conduct, it is more likely to suffer foreseeable harm *as a woman* by additional, generalized crass behavior. Similarly, if the victim is the only woman in the workplace, it is more likely that the harasser(s) could foresee that they would harm her with lurid discussions of sex than if the workplace were half female and the women themselves engaged in such discussions. Further, if the victim complains about the conduct, she will more likely suffer foreseeable harm. In most cases, therefore, the relevant circumstances to consider are whether the victim was greatly outnumbered by members of the opposite sex, whether other conduct intentionally targeted the victim *as a woman* or *as a man*, and whether the victim complained about the conduct.

As discussed earlier, a plaintiff in a hostile environment case must meet two evidentiary burdens: she must show that she encountered harassment because of her sex, and that the sex specific conduct was severe and pervasive enough to constitute a hostile and offensive working environment. Thus, a plaintiff can base her claim only upon that conduct which meets the severity requirement. In *Ocheltree*, only two instances of conduct were determined to satisfy the "because of" requirement, and those two, standing alone, were insufficient to show severity and pervasiveness.[247] Because the MFF test allows plaintiffs to use a broader range of conduct in meeting the causal requirement, they obviously can avail themselves of a broader range of conduct in meeting the severity requirement as well.

Applying the MFF test would therefore have produced a different result in the *Ocheltree* case. Some of the actions by Ocheltree's coworkers and supervisor, such as simulating sex acts with a mannequin in

247 *See Ocheltree*, 308 F.3d at 359.

Ocheltree's presence and singing a lewd song about her, were directed at her as a woman, and the many more instances of generalized harassing conduct foreseeably harmed her as a woman.[248] The generalized conduct undoubtedly contributed to the hostility of the work environment in *Ocheltree*. Nevertheless, the court discounted this conduct in deciding Ocheltree's claim, both because it found that much of it would have occurred had Ocheltree been male, and because it resisted the assumption that some conduct and conversations are inherently more offensive to women than to men.[249] In contrast, under the MFF test, Ocheltree could proceed by showing (1) that the generalized conduct foreseeably harmed her as a woman, and (2) that a reasonable woman would find that the overall conduct conveyed a message of discrimination. After all, as the dissent pointed out, the comments by Ocheltree's coworkers

> portray[ed] women as sexually subordinate to men . . . [and] conveyed the message that women exist primarily to gratify male desires for oral sex. . . . When a workplace is suffused with representations of women as sexual objects, a woman in that workplace would doubtless wonder whether the primary questions about her in the minds of her coworkers involved such matters as whether she "swallows" or whether she could "suck a golf ball through a garden hose."[250]

Again, once Ocheltree showed foreseeable, sex specific harm and a discriminatory message within the generalized conduct, the court could infer that the first prong of the MFF test was satisfied. Consequently, Ocheltree could satisfy the severity requirement by marshalling as evidence the generalized conduct that satisfied the MFF test but was excluded under the but-for test.

Clearly, the MFF test is both more plaintiff friendly and produces more just results than the but-for test now used in typical hostile environment cases. The unfortunate result in *Ocheltree* was that, once again, the supervisor and coworkers could escape liability by subjecting all employees, both male and female, to lurid sexual discussions. The workplace environment described in *Ocheltree* is probably typical of the workplace environments in many sexual harassment cases. It is unlikely, after all, that those who harass women in the workplace treat their male coworkers with complete civility.[251]

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248 *See supra* notes 150–73 and accompanying text.

249 *See supra* notes 161–64 and accompanying text.

250 *Ocheltree*, 308 F.3d at 374–75 (Michael, J., dissenting in part and concurring in the judgment in part).

251 Studies by psychologist John Pryor suggest that men who sexually harass are also more likely to rape, are less empathetic, more authoritarian, and more accepting of interpersonal violence than their non-harassing peers. *See* Franke, *supra* note 36, at 742–43 & nn.265–69 (discussing the work of Pryor as well as several other psychologists who have

It is evident that plaintiffs laboring under the but-for regime who can use *only* the evidence of harassment *specifically directed at them* to meet the severity requirement are doubly disadvantaged. Not only are they barred from using evidence of coarse and offensive conduct directed at everyone *in support* of their hostile environment claim, but such evidence will be employed by defendants *against* plaintiffs to undermine a showing of the causal requirement.

The MFF test eliminates this evidentiary disadvantage by allowing the plaintiff to use evidence of generalized harassment in establishing the severity of the conduct when it foreseeably harms the plaintiff, given her sex. At the same time, this test does not threaten to turn Title VII into a "civility code" for the workplace.[252] Plaintiffs cannot use merely crass conduct to meet the severity requirement. Where sex is not clearly a motivating factor in the conduct, plaintiffs must still show foreseeable, sex specific harm and a discriminatory message in the conduct.

2. *Application of the Test to "Horseplay" and "Equal Opportunity Harasser" Cases*

Consider next the application of the MFF test to those cases involving men "goosing" and "bagging" other men in the workplace, as in *Harbert-Yeargin, Inc.*[253] Where only men in the workplace are harassed, plaintiffs could likely satisfy the second prong of the MFF test. A more difficult task for plaintiffs, however, would be satisfying the first prong. On the one hand, one might argue that the plaintiff suffered foreseeable harm as a man because only men have testicles, so only men can suffer harm by "bagging." The oddity of this result, however, forces a clarification of how harm should be understood.

Because this is a Title VII action, the harm suffered should be related to some sort of gender specific message: one is merely a sex object in the workplace, or one is unwelcome in the workplace. In short, one suffers harm because he reasonably reads a *discriminatory message* into the conduct. Notice that if one does reasonably read such a message into the conduct, or does suffer foreseeable harm, the existence of *actual animus* on the part of the harasser is irrelevant.

To illustrate, suppose that female employees in the same workplace were also "goosed" and had their breasts grabbed by the supervisor. Essentially, they encountered the same degree of abusive conduct

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studied the "factors, dynamics, and proclivities that make a man likely to sexually harass women with whom he works or studies.").

252 The Supreme Court addressed this persistent worry in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). The Court found that such a fear would be adequately avoided by carefully following the statutory requirements.

253 *See* Equal Employment Opportunity Comm'n v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001); *see supra* notes 119–35 and accompanying text.

as the men, but each of the employees was harassed in a sex specific way. Should any of these employees be able to sue for sexual harassment, and if so, which ones? Four options present themselves: (1) no one, (2) only the women, (3) only the men, and (4) both the men and the women. The worst option is, of course, the first. Unfortunately, the but-for test would dictate precisely this result, effectively allowing no Title VII remedy for employees that face sexual assault at work. Again, under the but-for test, had the supervisor harassed only the women, surely the women would recover. However, because the supervisor "bags" the male workers in addition to the female workers, he effectively immunizes himself from liability.

The third option makes little sense, given that both men and women were harassed. Also, one might think that the women are more likely to feel offended by such conduct, given that they might construe it as a discriminatory attempt to reduce them to sex objects. But even if one does not accept this additional proposition, there is no reason to *bar* a cause of action by the women while *allowing* one for the men.

The fourth option is a possibility, though perhaps an unlikely one, given that both men and women have to allege sex discrimination when they were subjected to similar forms of harassment. This is not to suggest that it would never be possible for both men and women in the same workplace to sue under Title VII for sexual harassment. One can imagine a workplace in which a male supervisor conditioned the employment of his *male* employees on their responding to his sexual advances, and spoke to the *female* employees using sexually derogatory terms. In effect, the supervisor subjects the men to quid pro quo harassment, and the women to hostile environment harassment. In such a case both the female and the male employees might reasonably bring suit, given that each group faces sex discrimination in different ways. Therefore, although the claims of both the men and the women might not ultimately succeed, the fourth option is a possibility, and one allowed by the MFF test.

Another possibility, and perhaps the best option, is the second, which allows only the women to bring suit. While either group may be able to show that their sex was a motivating factor in the harassment, the women are especially likely to be able to show foreseeable harm given their sex. Again, the women quite reasonably might construe the grabbing of their breasts not as mere horseplay, but as a proposition or as an attempt to reduce them to sex objects. Ultimately, this will be an issue for the jury, but under the MFF test, female employees at least have a cause of action, whereas under the but-for test such claims would likely fail as a matter of law.

The second and fourth options not only find support from the MFF test, but they also comport with the disparate treatment language

in *Oncale*. As explained earlier, the *Oncale* decision did not compel acceptance of the equal opportunity harasser defense, but rather allowed comparative evidence of how both sexes are treated in a mixed sex workplace.[254] Even after *Oncale*, as long as victims can produce evidence of sex specific harm, their claims should not fail as a matter of law simply because both males and females are harmed.

Thus far this Note has demonstrated the superiority of the MFF test over the but-for test in hostile environment cases, but the test must also be compared in the context of quid pro quo cases. In the typical opposite sex quid pro quo case, plaintiffs will prevail under either the but-for or the MFF test. However, the but-for test utterly fails for plaintiffs in *Holman*-style cases.[255] Indeed, any test would likely falter in such cases. The MFF test, however, might provide a glimmer of hope to some plaintiffs if they can show that members of their sex were the preferred targets. While the existence of a single victim of the opposite sex is likely to negate causation for the plaintiff under the but-for test, the same cannot be said under the MFF test. Therefore, although the MFF test will not allow members of both sexes to sue in *Holman*-style cases, the MFF test can at least allow a cause of action for members of the preferred sex if members of one sex appear to be the preferred targets.

3. *Application of the MFF Test to Gender Stereotyping Cases*

Finally, consider gender stereotyping harassment cases. Admittedly, there is reasonable hesitation surrounding the viability of gender stereotyping claims under Title VII. One might think that problems of proof will abound in such causes of action. What, after all, should be included in the concept of gender?[256] Is it part of the

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254 *See supra* text accompanying note 76.

255 Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000); *see supra* notes 136–42 and accompanying text.

256 Susan Estrich has written about "the comfort factor"—a combination of traits that make people comfortable with one's appearance, personality, and leadership ability—that predicts which men and women will rise to high positions in their professions. *See* SUSAN ESTRICH, SEX AND POWER 119–39 (2000). The comfort factor usually combines prototypical qualities of managers or leaders with certain stereotypically gendered qualities. As Estrich explains,

> 'The ideal woman,' one senior man tells me, 'is married, but has no children; attractive, without being too sexy; strong, but not too tough; ambitious, but not too aggressive. More buttoned up than Ally McBeal, less sweet than Mary Richards, fewer edges than Murphy Brown; a good athlete, and a good sport; active in professional groups, not women's groups; not a feminist,[']. . . The comfort factor also excludes men who are not macho enough, or too religious, to her children is a man who wants paternity leave and doesn't like sports.

Id. at 123. A difficult issue arises when an employee who scores low on the comfort factor brings a Title VII suit following an adverse employment decision, leaving courts to sift whether the qualities that influenced the decision were related to gender stereotypes or

masculine stereotype, and therefore important in the workplace, to love sports, or to be aggressive and muscular? Assuming gender discrimination for men and women is actionable under Title VII, should men be able to sue for teasing or adverse employment decisions based on such qualities as disinterest in sports or action movies, being too family oriented, too skinny, or too fat? If these men should not, but effeminate men should, does this make any sense? What about the noneffeminate, but short and overweight family man who hates sports and loves cooking?

The point is simply that gender stereotypes are many and varied, and one might argue that opening the door to all Title VII gender discrimination claims invites an inquiry into the reasons why someone is teased or denied promotion, followed by classification of qualities as gender based or gender neutral. Therefore, one might argue that such a classification is a substantive sociological inquiry for which the courts are ill suited. [257]

However, much can be said in favor of allowing men to bring gender stereotyping claims. The harassment of men for being gay or effeminate can be a brutal and humiliating form of workplace abuse.[258] Title VII should protect against this abuse, assuming adequate justification for such protection exists. As the Ninth Circuit has urged, the combined precedent of *Price Waterhouse* and *Oncale* provides a justification for allowing a variety of gender harassment claims. Although *Oncale* itself did not address gender stereotyping claims brought by males, support for their actionability can be surmised from

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merely to general "likeability." *Id.* (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)). In short, it is necessary to devise a system which protects against discrimination based on gender stereotyping without forcing courts to police likeability.

257 Of course, those making these arguments must distinguish the result in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute as stated in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305 (N.D. Cal. 1992), where the Court found for the plaintiff on her claim of discrimination based on sex stereotyping. However, this would not be particularly difficult. One might simply say that Ann Hopkins had a plausible claim for "ordinary" sex discrimination because her dress and behavior was subjected to a level of scrutiny that a man would not face. Hopkins could have argued that men rarely face adverse employment decisions for being too masculine, while she faced an adverse decision for that very reason. Therefore, as a woman, she was subjected to a different standard.

258 *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118–19 (5th Cir. 1996) (involving a male plaintiff who endured a bar of soap being shoved in his anus and threatened with rape), *rev'd*, 523 U.S. 75 (1998); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1194 (4th Cir. 1996), *abrogated by Oncale*, 523 U.S. at 79 (involving a plaintiff who took medical leave following emotional trauma from sexual assault); Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 567 (7th Cir. 1997) (involving plaintiffs who endured testicle grabbing and other assault, taunting, and threats of rape), *vacated by* 523 U.S. 1001 (1998); Quick v. Donaldson Co., 90 F.3d 1372, 1375 (8th Cir. 1996) (involving a plaintiff who was restrained and had his testicles grabbed, producing swelling and bruising); Simonton v. Runyon, 232 F.3d 33, 34 (2d Cir. 2000) (involving a male plaintiff who "endured [abuse] so severe that he ultimately suffered a heart attack.").

the opinion: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . ."[259] Men who are subjected to harassment for failing to conform to a gender stereotype are foreseeably harmed *as men* in the same way that Ann Hopkins was harmed *as a woman* in *Price Waterhouse*. Further, although there is admitted cloudiness about which characteristics are stereotypically male, heterosexuality should be recognized as part of that stereotype. Therefore, the precedents of *Price Waterhouse* and *Oncale* may support a cause of action for all men discriminated against for being effeminate or gay.

As an example, imagine a male employee in an accounting firm who was denied partnership in the course of being told to "act more masculine, dress and walk in a more masculine manner, and stop acting 'gay.'" Clearly, post-*Oncale*, this employee should have a cause of action as meritorious as that of Ann Hopkins, and fortunately, he can satisfy the MFF test. His sex was a motivating factor in the conduct and as a result, he was foreseeably harmed. Further, one can reasonably view the conduct as conveying a discriminatory message: namely, that effeminate or gay men are not "real" men. Therefore, the same sex harassment of men for not adequately conforming to their stereotypical gender roles is indeed a "comparable evil" that should be covered by the post-*Oncale* reading of Title VII. Arguably, this is the preferable approach to gender harassment. If we prohibit male claims based on gender stereotyping, we are left with the inconsistent result that nearly everyone is protected from harassment by homosexuals, but homosexuals and effeminate men are left unprotected as victims (that is, unless harassed by other homosexuals). This is an unfortunate and discriminatory result for an antidiscrimination statute.

Notwithstanding the arguments presented above, there are additional objections that could be made to this Note's proposed extension of Title VII to include harassment of men based on gender or sexual orientation. One potential issue is that, as mentioned above, "sexual orientation" is not listed as a protected category in Title VII. Would this test require a revision of the statute that would result in judicial legislating? Not necessarily. What this test advocates is a correction of the judicially created inconsistency of protection.

Given that the Supreme Court has already extended the statute both to include men and to protect against gender stereotyping of women, we risk two absurdities by failing to include sexual orientation as part of a gender stereotyping. First, as just noted, the case law gives all employees protection from homosexuals (who, so the argument goes, can harass women based on hostility to their sex and can harass

259 *Oncale*, 523 U.S. at 78.

men based on desire for their sex). At the same time, the case law does not protect homosexuals from the hostility based harassment they are most likely to face—that from other men in the workplace. Second, if we allow that men can sue when harassed for being effeminate but not for being gay, we encourage a bizarre form at pleading. Plaintiffs claim they were hated and harassed for being effeminate, and defendants *escape liability* by claiming the plaintiffs were *actually* hated and harassed for being gay.

The second possible objection to including claims of gender stereotyping is that, properly speaking, sex may not be the motivating factor in these cases. Rather, the motivating factor is arguably sex plus some additional property. The victim is harassed not for being male, but for being male *and* effeminate or for being male *and* gay. It is thus the combination of properties that motivates the harassment.

This objection misses the mark. The MFF test does not require that sex be the *only* motivating factor in the harassment; it need only be *a* motivating factor. Indeed, the Supreme Court has said that "because of" sex does not mean "solely" because of sex.[260] Further, the "sex[ ]plus" objection sweeps too broadly, as it applies to most sexual harassment cases, not just to gender stereotyping cases. In a quid pro quo case, a woman might be harassed because she is both female and sexually attractive. In a hostile environment case, a woman might be harassed because she is both female and prudish. In *Harbert-Yeargin, Inc.*, the supervisor testified that he targeted victims for "goosing" and "bagging" based on whether "they were 'goosey,'" that is, prone to a startled reaction.[261] In short, victims were targeted for being male *and* goosey. Given the likelihood that victims are often chosen both for being of a particular sex and for displaying some additional quality that makes them fun to harass, the sex plus objection does not cut exclusively against the inclusion of gender stereotyping cases.

In short, several circuits have already recognized the actionability of gender stereotyping claims brought by men.[262] The MFF test allows for the inclusion of these claims, including those based on sexual orientation, and should be read to do so. This modest extension follows naturally from the Supreme Court opinions in both *Oncale* and *Price Waterhouse* and corrects the current inconsistency of protection that thwarts the antidiscrimination purpose of Title VII.[263]

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260 *See Price Waterhouse*, 490 U.S. at 241 (plurality opinion).

261 *See* Talbot, *supra* note 5, at 52, 54.

262 *See supra* notes 87–100 and accompanying text.

263 To reiterate, the circuits are currently divided on this issue. In at least the First, Second, and Third Circuits, homosexuals can seek remedial action under Title VII if they plead discrimination based on gender stereotyping, though not if they plead discrimination based on sexual orientation. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261, 263 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002); Simonton v. Runyon, 232 F.3d

The MFF test should thus be adopted in place of the but-for test for several reasons. It does not suffer from being simultaneously too strong and too weak, as does the but-for test. Nor does it suffer from ambiguity as to whether it tests the intent or the effect of the harassing conduct. On the contrary, the MFF test explicitly separates the intent from the foreseeable effect of harassment into two distinct prongs. While being plaintiff friendly, the MFF test, as a conjunctive test, will not turn Title VII into a civility code for the workplace. It simply holds accountable those harassers who are motivated to harass and can foresee harm to victims based on their sex.

CONCLUSION

This Note began with an array of sexual harassment cases, some with bizarre and unpredictable results. The locus of unpredictability was the but-for interpretation of Title VII's "because of" sex requirement, especially after the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*[264] Circuit courts as well as academics have struggled to classify an ever increasing variety of sexual harassment cases as sex discrimination under Title VII, achieving only limited success. This Note therefore proposes that, in deciding whether conduct occurred "because of" sex, courts should look to whether the victim's sex was a motivating factor and created a foreseeable harm in the harassment. The proposed test avoids the intuitive absurdities produced by the but-for test, accords with classic tort law notions of causation, and resolves the inconsistencies in same sex harassment cases that have plagued the circuits since *Oncale*.

33, 35–36 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258–59 (1st Cir. 1999). The Ninth Circuit extends protection to plaintiffs pleading either type of discrimination. *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063–64 (9th Cir. 2002), *cert. denied*, 2003 WL 1446593; Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874–75 (9th Cir. 2001). The Fourth Circuit appears to extend protection only to those harassed by homosexuals. *See* Wrightson v. Pizza Hut of Am. Inc., 99 F.3d 138, 143–44 (4tb Cir. 1996).

264 523 U.S. 75 (1998).