THE UNENVISAGED CASE, INTERPRETIVE PROGRESSION, AND THE JUSTICIABILITY OF TITLE VII SAME-SEX SEXUAL HARASSMENT CLAIMS

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I. INTRODUCTION

The year is 1964. The United States House of Representatives is considering H.R. 7152, the proposed Civil Rights Act of 1964 and, in particular, a provision that would make it unlawful to discriminate against individuals on the basis of race, color, religion, or national origin. Representative Howard Smith (D.-Va.), in an effort to stop the passage of the legislation, introduces a last-minute floor amendment proposing the addition of the word "sex" to the bill.[1] The House clerk announces Representative Smith's amendment ("After the word

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This article is dedicated to the loving memory of Geraldine Turner Berringer.

1. *See* Civil Rights Act, 42 U.S.C. §§ 1981-2000h-6 (1964); *see also* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 116 (1985) ("Smith counted on the amendment passing and making H.R. 7152 so controversial that eventually it would be voted down either in the House or Senate."); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives."); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997) ("The statute's prohibition on gender discrimination was a last minute addition . . . proposed by conservative opponents of the civil rights legislation who believed that it would lead to the defeat of the entire bill.") (citations omitted); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996) ("The statute's prohibition on gender discrimination was a last minute addition . . . proposed by conservative opponents of the civil rights legislation who believed that it would lead to the defeat of the entire bill"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 (1991) [hereinafter MacKinnon, *Reflections*] ("[S]ex discrimination in private employment was forbidden only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination.").

The effort to derail Title VII with the sex discrimination amendment is also discussed in Taylor Branch, Pillar of Fire: America in the King Years 1963-1965, at 231-33 (1998); Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 278 (1992); Hugh Davis Graham, The Civil Rights Era: Origins and Developments of National Policy 1960-1972, at 12, 136-38 (1990); Cynthia Harrison, On Account of Sex: The Politics of Women's Issues, 1945-1968, at 176-82 (1988); Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 3 n.2 (1992); John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. Chi. L. Rev. 1337, 1337-38 (1989); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966).

'religion,' insert 'sex' . . .'),[2] and the House "erupt[s] in shock as the full import of the amendment [sinks] in."[3]

After two hours of debate, Representative Smith's attempted sabotage fails as the House votes 168-133 in favor of the sex discrimination amendment.[4] The sex discrimination ban was thus added to the prohibitions against employment discrimination on the basis of race, color, religion, and national origin and was made part of Title VII of the Civil Rights Act ("Title VII")[5] signed into law by President Lyndon Johnson on July 2, 1964.[6] With the passage of this statute, "the modern law of sex discrimination got its statutory footing" and "the parallelism the act established between various types of forbidden discrimination assured that concepts developed in one area would be used in others." [7]

The year is 1994. Joseph Oncale, a roustabout on an eight-man crew working on an oil rig in the Gulf of Mexico, has filed a Title VII action against his employer, Sundowner Offshore Services, Inc. ("Sundowner").[8] Oncale alleges that he had been subjected to unlawful *quid pro quo* and hostile environment same-sex sexual harassment by his male coworkers and supervisor.[9]

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2. WHALEN & WHALEN, *supra* note 1, at 115.

3. *Id*.

4. *See id.* at 117 (stating that the House voted in favor of passing H.R. 7152 with a vote of 168-133); MacKinnon, *Reflections*, *supra* note 1, at 1283-84 ("Sex was added as a prohibited ground of discrimination when this attempted *reductio ad absurdum* failed and the law passed anyway.").

5. *See* 42 U.S.C. § 2000e – 2000e-17 (1964).

6. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964).

7. Paul Gewirtz, *The Triumph and Transformation of Antidiscrimination Law*, *in* RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 110, 112 (Austin Sarat ed., 1997).

8. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

9. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 (5th Cir. 1996). *Quid pro quo* (play-or-pay or put-out-or-get-out) harassment occurs when employees must either comply with sexual demands or suffer adverse, tangible job actions. *See* Jones v. Flagship Int'l, 793 F.2d 714, 721-22 (5th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 908-09 (11th Cir. 1982); *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 32 (1979) [hereinafter MACKINNON, WORKING WOMEN] (stating that in cases of *quid pro quo* harassment, "the woman must comply sexually or forfeit an employment benefit"); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 175 (1998) (stating that *quid pro quo* harassment "occurs when an employee must submit to unwelcome sexual contacts in order to retain her job or when her willingness to submit is considered in decisions affecting her employment"). A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). For a discussion of this form of sexual harassment, see Eugene Scalia, *The Strange Career of* Quid Pro Quo *Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307 (1998).

Hostile work environment harassment involves unwelcome conduct of a sexual nature that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting *Henson*, 682 F.2d at 904); *see also* MACKINNON, WORKING WOMEN, *supra*, at 40 (stating that hostile environment harassment "simply makes the work environment unbearable. Unwanted sexual advances, made simply because she has a woman's body, can be a daily part of a woman's work life"); Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151 (1994) (discussing hostile environment harassment). This category of sexual harassment is discussed *infra* at notes 83-93 and accompanying text.

The United States Court of Appeals for the Fifth Circuit, affirming the District Court's summary judgment in favor of the employer,[10] holds that Oncale's claim of same-sex sexual harassment is not cognizable under Title VII.[11] The Supreme Court agrees to review the decision.

In its brief to the Supreme Court, Sundowner, urging affirmance and arguing for a static purposivist approach to Title VII,[12] states that "Congress included the prohibition . . . 'to protect the employment rights of all women.'"[13] In addition, Sundowner argues that "the purpose of Title VII is to eradicate the subordinate treatment of women in the workplace, thereby fostering the princi-

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10. The district court held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." *Oncale*, 83 F.3d at 119 (quoting district court opinion). The district court relied on *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994). *Garcia*, noting a prior unpublished Fifth Circuit decision (see *Giddens v. Shell Oil Co.*, 12 F.3d 208 (1993) (per curiam)), stated that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." 28 F.3d at 451 (citation omitted).

11. *See Oncale*, 83 F.3d at 118.

12. In interpreting a statute under a purposivist approach, a court looks to and focuses on broad statutory purpose "derive[d] not only from the text simpliciter, but also from an understanding [of] what social problems the legislature was addressing and what general end it was seeking." Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1999); *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 88 (1975) (stating that statutory purpose "refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish"); HENRY M. HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge & Philip P. Frickey eds., 1994) (arguing for statutory purpose in the summation "note on the rudiments of statutory interpretation"). The employer's purposivist argument in *Oncale* is static in that counsel argued for an application of the statute based on an understanding of what the law was "seeking to accomplish at the time of its enactment" as opposed to "what function it serves in the law in the current day." Strauss, *supra*, at 228.

The purposivist approach to statutory interpretation differs from two other interpretive approaches. The first, textualism, posits that the "text is the law, and it is the text that must be observed." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997). One form of textualism looks to the plain meaning of statutory text, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994), and may refer to that meaning "as fixed from the date of enactment." *Id.* at 9; *see also* Strauss, *supra*, at 228 ("[A] textualist who sees statutes to be static will be concerned with what meaning the words of the statute had at the moment of its adoption"). Other textualists may employ a dynamic approach and will "be concerned with how a contemporary reader would understand the language employed, in relation also to the law of the current day". Strauss, *supra*, at 228. For a recent decision applying the plain meaning approach, see *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 213 (1998) (holding that the "plain text" of the Americans with Disabilities Act of 1990 "unambiguously extends to state prison inmates").

An additional interpretive analysis, intentionalism, attempts to discern the actual understanding of a law held by the members of the enacting legislature. *See* Strauss, *supra*, at 227. That understanding is reflected in and is revealed by the statutory text and legislative history. *See* DICKERSON, *supra*, at 88. This analysis has been criticized on the grounds that legislatures do not have specific intents with regard to most issues of statutory interpretation. *See* ESKRIDGE, *supra*, at 16; Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 754 (1966) (discussing on-going debate as to whether legislatures have specific intents with regard to issues of statutory interpretation); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1570 (1997).

13. Respondents' Brief at 8, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96-568) (quoting 110 Cong. Rec. 2577 (1964)).

ple of equal employment opportunity."[14] While the prohibition of "opposite-gender sexual harassment is a necessary extension of the principle of equal employment opportunity,"[15] Sundowner contends, "same-gender harassment is unrelated to the types of inequalities and discriminations Title VII aims to eradicate . . . ."[16] As "same-gender sexual harassment does not involve a difference between the sexes or otherwise implicate Title VII's remedial goal of providing equal employment opportunity for women and men, it is an entirely separate area of concern that cannot and should not be grafted onto Title VII."[17]

It is 1998, and the Supreme Court unanimously rejects the proposition that Title VII does not reach allegations of same-sex sexual harassment.[18] Employing a textualist analysis, Justice Scalia finds "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[19] Accordingly, the Court holds that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[20]

In the thirty-six years since Representative Smith attempted to sink the Civil Rights Act, discrimination on the basis of sex has evolved, adjusting to the shifting contours of social norms. This article argues that *Oncale's* application of Title VII in the "unenvisaged case"[21] of same-sex harassment is a defensible and logical extension of various interpretive stages preceding the Court's consideration of and ruling on Joseph Oncale's claim. This extension and its underlying "bottom up" approach to statutory interpretation are considered in Part II's discussion of various stages and significant legal and social developments in the

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14. *Id*. at 9.

15. *Id*. at 12.

16. *Id*. at 14.

17. *Id*. at 17.

18. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

19. *Id.* at 79.

20. *Id*.

21. The unenvisaged case arises when it is urged that a statute passed to deal with a specific problem also applies to a problem neither known to nor foreseen by the enacting legislature. As stated by one commentator:

> This inability [of the legislature] to anticipate brings with it a relative indeterminacy of aim. When we are bold enough to frame some general rule of conduct . . . the language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds. They are the paradigm, clear cases . . . and our aim in legislating is so far determinate because we have made a certain choice. . . . On the other hand, until we have put the general aim . . . into conjunction with those cases which we did not, or perhaps could not, initially envisage . . . our aim is, in this direction, indeterminate. *We have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs* . . . When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us.

H.L.A. HART, THE CONCEPT OF LAW 128-29 (2d ed. 1994) (emphasis added); *see also* H.L.A. Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 265, 270 (1983) ("[A]ll legal rules and concepts are 'open'; and when an unenvisaged case arises we must make a fresh choice, and in doing so elaborate our legal concepts, adapting them to socially desirable ends.").

field of sexual harassment law and policy leading up to the Court's decision in *Oncale*.[22] That decision is examined in Part III. Part III's discussion, going beyond *Oncale* and the now-decided question of the justiciability of same-sex harassment claims, sets forth some provisional thoughts on the next generation of same-sex harassment litigation.

II. INTERPRETIVE PROGRESSION AND THE SEXUAL HARASSMENT CAUSE OF ACTION

This part surveys the interpretive progression of Title VII's sexual harassment proscription and, looking from the "bottom up," examines administrative, judicial, social, and scholarly developments leading up to, and providing the analytical foundations for, the Supreme Court's recognition of a Title VII cause of action for the centuries-old problem of workplace sexual harassment.[23]

A. Stage One—Actionable Racial And Other Harassment

Beginning in the early 1970s, the Equal Employment Opportunity Commission ("EEOC") addressed workplace harassment in the context of race and concluded that such harassment violated Title VII.[24] During that same time period, the United States Court of Appeals for the Fifth Circuit recognized a Title VII cause of action for ethnic and racial harassment in *Rogers v. EEOC*.[25] Calling for a liberal interpretation of Title VII,[26] the court stated "that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, and privileges of employment' . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[27] Polluted work environments can destroy minority employees' emotional and psychological stability, the court continued, and "Title VII was aimed at eradication of such noxious practices."[28]

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22. On the "bottom up" approach, see ESKRIDGE, *supra* note 12, at 69-80. Rather than view statutory interpretation from the top down and from the "Olympian perspective of the Supreme Court," *id.* at 70, the "bottom up" technique "consider[s] statutes from the 'bottom up,' from the perspective of private parties, agencies, and lower courts, whose work most shapes statutes and influences what the Court hears and how it will resolve cases." *Id.* at 69 (quoting 16 U.S.C. § 1536 (1976)). Professor Eskridge argues that this approach recognizes that the "interpreters whose horizons matter so much in statutory interpretation are not just judges but also include citizens, interest groups, and administrators." *Id.* I add to this roster those academics, commentators, and activists who have made and continue to make crucial contributions to the development of sexual harassment law and policy.

23. *See generally*, KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993 (1994) (discussing the long and pervasive history of sexual harassment of women in the workplace).

24. *See, e.g.*, EEOC Dec. No. 72-0679, 4 Fair Empl. Prac. Cas. (BNA) 441 (1971); EEOC Dec. No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) 21 (1971).

25. 454 F.2d 234 (5th Cir. 1971).

26. Title VII "should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." *Id.* at 238.

27. *Id.*

28. *Id.*

Notably, the court also pointed to the congressional usage of general statutory language to be applied by courts in specific and unenvisaged cases.

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. . . .[29]

Subsequent decisions in the mid- and late 1970s held that harassment on the basis of national origin,[30] race,[31] and religion[32] fell within the coverage of, and was prohibited by, Title VII. Sexual harassment, however, had not yet been found to be within the purview of the statute.

B. Stage Two—Non-Actionable Sexual Harassment

Initial Title VII sexual harassment decisions held that such harassment was not actionable under, and therefore did not violate, the statute. In *Corne v. Bausch & Lomb, Inc.*,[33] for example, the court viewed a supervisor's allegedly harassing conduct as "nothing more than a personal proclivity, peculiarity, or mannerism" done to satisfy his "personal urge" and not for the benefit of the company.[34] That court was concerned that an outgrowth of holding that sexual harassment was actionable "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another."[35]

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29. *Id.* In dissent, Chief Judge Roney found nothing in the statute or its legislative history indicating that Congress "was concerned about whether an employer's business presents conditions for employment that are environmentally attractive to all . . . or whether a particular individual might be uncomfortable or have feelings of unhappiness in his employment." *Id.* at 246 (Roney, C.J., dissenting). Whether the statute should apply to such matters "is not up for decision. Congress has simply not given this scope to its legislation." *Id.*

30. *See, e.g.*, Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (per curiam) (holding that while ethnic slurs used against the plaintiff did not amount to harassment on the basis of national origin, such slurs could rise to such a level sufficient to constitute a violation of Title VII).

31. *See, e.g.*, Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977); Gray v. Greyhound Lines E., 545 F.2d 169 (D.C. Cir. 1976); Calcote v. Texas Educ. Found., Inc., 458 F. Supp. 231 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978); Steadman v. Hundley, 421 F. Supp. 53 (N.D. Ill. 1976).

For more recent examples, *see* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996); Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991); Davis v. Monsanto Chem. Co., 858 F.2d 345 (6th Cir. 1988); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985).

32. *See, e.g.*, Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976).

33. 390 F. Supp. 161 (D. Ariz. 1975).

34. *Id.* at 163.

35. *Id.* at 163-64 (also stating that, "[t]he only sure way an employer could avoid such charges would be to have employees who were asexual"). In another district court opinion, the court stated:

> The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group.

Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

In another decision, *Tomkins v. Public Service Electric & Gas Co.*,[36] the court held that sexual harassment did not constitute sex discrimination under Title VII. The court stated that the statute's "aim is to make careers open to talents irrespective of race or sex" and is "not intended to provide a federal tort remedy" for sexually-motivated attacks at the office.[37] The court concluded that supervisory abuse of employees for personal purpose "is not . . . sex discrimination within the meaning of Title VII even when the purpose is sexual."[38] On that view, sexual harassment is personal and private and is not subject to public-law regulation and proscription.

The argument that Congress did not specifically intend to prohibit workplace sexual harassment when it enacted Title VII in 1964 is correct, but, as discussed below, is not dispositive. It is certainly true that the members of the enacting Congress

> would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term "sexual harassment" did not come into currency until the late 1970s. They were fashioning a *civil rights* law—that is, one addressing impediments to individuals as a result of discriminatory acts—not a law proscribing just any kind of oppressive act that one person might commit against another.[39]

If the interpretive project were limited to and did not go beyond the inquiry into what the enacting Congress specifically intended and envisioned when it passed

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36. 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977). In reversing this decision, the Third Circuit ruled that an employee's claim that her continued employment was conditioned on her submission to a male supervisor's sexual advances stated a cause of action for sexual harassment and would be unlawful if the plaintiff could prove that she would not have been treated in the same manner if she were a man.

37. *Tomkins*, 422 F. Supp. at 556.

38. *Id*. The court was also concerned that the recognition of a Title VII sexual harassment cause of action could open the floodgates of 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. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

Id. at 557. For views sympathetic to those expressed in the just-quoted passage, see WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 64-82 (1997). *But see* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1049 (3d Cir. 1977) (stating that the "congressional mandate that the federal courts provide relief is strong; it must not be thwarted by concern for judicial economy").

39. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990); *see also* John Cloud, *Sex and the Law*, TIME (Mar. 23, 1998), at 49 (noting instance in which a university forced a graduate student to remove from his desk a picture of his wife clad in a bikini, and quoting Professor Eugene Volokh: "In 1964, if you told a member of Congress, 'If you vote to bar discrimination based on sex, you will prohibit employees from putting pictures of their wives in bikinis on their desks,' most legislators would have said, 'Wait a minute, where does it say that?'").

the statute, this Stage Two view would be correct, and sexual harassment would neither be covered by nor would violate Title VII.[40]

C. Stage Three—Statutory Protection For All

The Supreme Court, however, rejected this narrow interpretive model for Title VII by reading the statute broadly in *McDonald v. Santa Fe Trail Transportation Co.*[41] In that race discrimination case, the Court reviewed lower courts' dismissals of white employees' Title VII actions on the grounds that whites were not protected by the statute. Rejecting the lower courts' view that Title VII was limited to protecting African Americans and other racial and ethnic minorities, the Court concluded, by interpreting and applying the statute as written, that any individual of any race who was subjected to race-based discrimination could pursue a Title VII action against an employer. This reading of Title VII is a prominent illustration of the Court's unwillingness to limit the reach of the statute or to create and carve out statutory exceptions not expressly found in the text.

Seven years later, the Court rejected a narrow reading of Title VII in the area of sex discrimination using comparable analysis in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.[42] That case considered the question of whether an employer's health plan limiting pregnancy coverage for the spouses of male employees, but not for the spouses of female employees, discriminated against male workers because of their sex. The plan was unlawful, the Court held, "because the protection it affords married male employees is less comprehensive than the protection it affords to married female employees."[43] Although the Court found that Congress had "focused on the needs of female employees of the work force rather than the spouses of male employees" when passing Title VII, it nevertheless concluded that such Congressional purpose did "not create a negative inference limiting the scope of this Act to the specific problem that motivated its enactment."[44]

D. Stage Four—Actionable Sexual Harassment

In the mid-seventies, activists, scholars, and courts challenged the Stage II view that sexual harassment was not actionable sex discrimination under Title VII. In May 1975, Working Women United ("WWU") held the very first "Speak-Out On Sexual Harassment."[45] The WWU "clearly conceptualized harassment in terms of sexual advances."[46] One of the organization's founders, Dierdre Silverman, argued that harassment existed "when job retention, raises or promo-

40. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 23 (1998) ("[T]he Congress that enacted Title VII was arguably not even concerned about male-on-female sexual harassment, much less male-on-male harassment.").

41. 427 U.S. 273 (1976).

42. 462 U.S. 669 (1983).

43. *Id.* at 676.

44. *Id.* at 679 (internal quotation marks omitted).

45. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 n.2, 1698-99 (1998).

46. *Id.* at 1699.

tions depend on tolerating, or submitting to, unwanted sexual advances" including "clearly suggestive looks and/or remarks, to mild physical encounters (pinching, kissing, etc.) to outright sexual assault."[47]

During this same time period, scholars analyzed and commented on the subject of workplace sexual harassment. Carroll Brodsky, in her work *The Harassed Worker*, defined sexual harassment as behavior involving "repeated and persistent attempts . . . to torment, wear down, frustrate, or get a reaction from another. It is treatment that persistently provokes, pressures, frightens, intimidates, or otherwise discomforts another person."[48] Interestingly, Brodsky's conception of sexual harassment included men teasing other men about sexual matters.[49] In 1979, Professor Catherine MacKinnon published her influential book on sexual harassment,[50] which developed and advanced the argument that *quid pro quo* and hostile environment harassment constitute sex discrimination in employment.[51] MacKinnon defined sexual harassment as:

> [T]he unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities. When one is sexual, the other material, the cumulative sanction is particularly potent. . . .[52]

The scholarly recognition of the problem of workplace sexual harassment was accompanied by federal court decisions holding that sexual harassment indeed violated Title VII. *Williams v. Saxbe*[53] involved allegations of a male supervisor's retaliation against a female employee who refused his sexual advances.[54] In the court's view, the supervisor's conduct "created an artificial barrier to employment which was placed before one gender and not the other, despite the

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47. *Id*. (quoting Dierdre Silverman, *Sexual Harassment: Working Women's Dilemma*, QUEST: FEMINIST Q. 15, 15 (Winter 1976-77)).

48. CARROLL BRODSKY, THE HARASSED WORKER 2 (1976).

49. *See id*. at 28; *see also* Schultz, *supra* note 45, at 1700.

50. *See* MACKINNON, WORKING WOMEN, *supra* note 9. On the influence of MacKinnon's work on the law of sexual harassment, see, for example, *Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (D.C. Cir. 1982), in which the court notes MacKinnon's work on sexual harassment. *See also* LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 229 (1998) (noting the law reforms proposed by MacKinnon and others to resist the "most public practices of dominance heterosexuality, that is, pornography and workplace sexual harassment"); RICHARD A. POSNER, SEX AND REASON 32 (1992) (stating that MacKinnon's "writings on sexual harassment in the workplace and on pornography as an instrument of male dominance have been particularly influential" (footnote omitted)); JEFFREY TOOBIN, A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT 173 (1999) (stating that MacKinnon's book on sexual harassment "surely ranks as one of the most influential law books of the late twentieth century").

51. *See supra* note 9 and accompanying text.

52. MACKINNON, WORKING WOMEN, *supra* note 9, at 1; *see also* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 14-15 (1978) (defining sexual harassment as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker").

53. 413 F. Supp. 654 (D.D.C. 1976).

54. *See id.*

fact that both genders were similarly situated."[55] Congress intended a broad interpretation of Title VII, the court stated, and the "plain meaning of the term 'sex discrimination' as used in the statute encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason."[56]

Barnes v. Costle[57] is another example of early judicial recognition of the justiciability of Title VII sexual harassment claims. In that case, a female employee alleged that her supervisor repeatedly sought sexual favors from her and suggested that her employment status would be enhanced if she had a sexual affair with him.[58] When the employee resisted, the supervisor allegedly belittled her, stripped her of her job duties, and ultimately abolished her job.[59] Construing Title VII liberally, the court concluded that the retention of the plaintiff's job, premised on her submission to sexual relations with the supervisor, was "an exaction which the supervisor would not have sought from any male." The court continued by saying, "It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job."[60]

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55. *Id*. at 657-58.

56. *Id*. at 658 (also noting, "[i]t is important in this regard to note that Title VII is applicable to men as well as women" (footnote omitted)). In addition, the court rejected the argument that a finding of illegal sex discrimination depended upon the harassing supervisor's sexual preference stating: "the reason for the discrimination under Title VII is not necessary to a finding of discrimination." *Id.* at 659 n.6 (citation omitted). For a discussion of sex discrimination based on sex stereotypes, see *infra* notes 174-181 and accompanying text.

57. 561 F.2d 983 (D.C. Cir. 1977).

58. *See id.* at 985.

59. *See id.*

60. *Id*. at 989-90 (footnote omitted). A footnote in the *Barnes* opinion considered several scenarios of sexual harassment, including the possibility of same-sex sexual harassment by homosexual or bisexual supervisors:

> It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at bar, are to be distinguished from a bisexual supervisor who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.

Id. at 990 n.55; *see also* Jones v. Flagship Int'l, 793 F.2d 714, 720 n.5 (5th Cir. 1986) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based on sex."); Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (citing *Barnes*, 561 F.2d at 990 n.55) (Bork, J., dissenting from denial of rehearing en banc) ("Title VII does *not* prohibit sexual harassment by a 'bisexual supervisor [because] the insistence upon sexual favors would . . . apply to male and female employees alike'"; thus, "only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible."); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (finding that in "cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers," the harassment "would not be based on sex because men and women are accorded like treatment"); Williams v. Saxbe, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976) (stating that a "finding of discrimination could not be made if the supervisor were bisexual"). *But see* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (in

Thereafter, in September 1980, the EEOC issued final guidelines recognizing both *quid pro quo* and hostile environment sexual harassment:[61]

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, and (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[62]

In the year following the issuance of the EEOC's guidelines, the United States Court of Appeals for the District of Columbia Circuit in *Bundy v. Jackson*[63] held that an employer could engage in unlawful sexual harassment even where an employee was not deprived of tangible job benefits.[64] Relying on the Fifth Circuit's decision in *Rogers v. EEOC*[65] and noting its prior decision in *Barnes v. Costle*,[66] the *Bundy* court reasoned that:

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case involving supervisor's harassment of men and women, the court did "not rule out the possibility that *both* men and women working at Showboat have viable claims . . . for sexual harassment").

Professor Vicki Schultz has articulated a different analysis of the bisexual supervisor issue. In her view:

> Rather than criticizing the court for permitting sexual overtures by a bisexual supervisor to go unpunished, my analysis suggests that the focus on harassment as sexual overtures is the source of the problem. Once such a focus is abandoned and harassment is understood more broadly to include any kind of conduct directed at someone because of gender, it becomes clear that the sexual orientation of the harasser is irrelevant.

Schultz, *supra* note 45, at 1703-04 n.93; *see also* Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals under Title VII*, 27 RUTGERS L. REV. 383, 408, 412 (1996) ("The archetypal bisexual harasser chooses his victims regardless of their gender—he is happy with either" and his equal sex-based mistreatment of both sexes should be actionable); Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1044 (1996) (arguing for a dominance analysis of equal opportunity harassment and calling for the recognition "that when an equal opportunity harasser sexually harasses both men and women, he or she reinforces the idea that being a sex object, a gender stereotype usually associated with women but also transferrable [sic] to men, is a subordinate status in society").

61. *See* 29 C.F.R. §§ 1604.11(a)-(f) (1980).

62. *Id.* at § 1604.11(a).

63. 641 F.2d 934 (D.C. Cir. 1981).

64. *See id.*

65. 454 F.2d 234 (5th Cir. 1971), discussed *supra* note 25 and accompanying text. The *Bundy* court explained the significance of *Rogers*:

> Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?

641 F.2d at 945.

On the relationship between racial and sexual harassment, see L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997).

66. 561 F.2d 983 (D.C. Cir. 1977); *see also supra* note 57 and accompanying text.

> [U]nless we extend the *Barnes* holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance, thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance seriously.[67]

Another notable case, *Henson v. City of Dundee*,[68] involved the appeal of a district court's rejection of a plaintiff's allegations of hostile environment sexual harassment.[69] Reversing the district court, the Eleventh Circuit determined that an offensive or hostile work environment violative of Title VII could be created under certain circumstances, even though a plaintiff did not suffer tangible job detriment.[70] In an important passage, the court wrote:

> Sexual harassment which creates a hostile or offensive work 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. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.[71]

In sum, Stage Four's developments included activist and scholarly analyses of the problem of sexual harassment and judicial and EEOC recognition of a Title VII case of action available to those subject to such misconduct. Would the Supreme Court similarly conclude that sexual harassment was conduct actionable under and regulable by Title VII?

E. Stage Five—The Supreme Court Speaks

The interpretive progression of Title VII and sexual harassment proceeded from Stage One's recognition of actionable racial harassment, to Stage Two's non-recognition of sexual harassment claims, to Stage Three's broad reading of

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67. 641 F.2d at 945 (quotation marks omitted).

68. 682 F.2d 897 (11th Cir. 1982).

69. The district court was not convinced that sexual harassment was actionable under Title VII. Addressing counsel for the parties, the judge distinguished sex discrimination from sexual harassment:

> Do you understand the problem? . . . In other words a discrimination case is one thing, do you understand? It is based on being a female and treated differently from the males. That is a clear proposition, no question about it, but when you mix up the other with it then you are in an area that is uncertain. So, we will have to hear it, but the Court doesn't think too much of it. If [the plaintiff] quit that job because of sexual harassment that is a State case. . . . She can sue someone in the County of the State of Florida, but not in the Federal court. I think that is the law on that subject. We will hear your case, but that is what you are up against.

Id. at 900 n.2 (quoting the district court judge's statement during opening argument taken from the transcript of the trial).

70. *Id.* at 901.

71. *Id.* at 902 (footnote omitted).

Title VII's antidiscrimination provisions, to Stage Four's judicial, scholarly, and administrative recognition of the sexual harassment cause of action. These developments, viewed from the bottom up perspective of lower courts, commentators, and the EEOC,[72] formed the backdrop for the Supreme Court's 1986 consideration of the sexual harassment issue in *Meritor Savings Bank, FSB v. Vinson*[73] and its unanimous holding that a claim of hostile environment sexual harassment is a form of sex discrimination actionable under the statute. As stated in Justice Rehnquist's opinion for the Court, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex."[74]

The Court rejected, on two grounds, the employer's argument that Congress was concerned, not with the psychological aspects of the work environment, but with tangible economic barriers caused by discrimination. "First, the language of Title VII is not limited to economic or tangible discrimination. The 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.'"[75] Second, the EEOC's guidelines on sex discrimination[76] "fully support the view that harassment leading to noneconomic injury can violate Title VII,"[77] and describe kinds of misconduct qualifying as sexual harassment "whether or not it is directly linked to the grant or denial of an economic *quid pro quo* . . . ."[78] The Court noted that the EEOC drew upon case law and EEOC determinations holding that Title VII prohibits work environments containing "discriminatory intimidation, ridicule, and insult."[79] Citing *Rogers v. EEOC*[80] and other lower court decisions prohibiting workplace harassment on the basis of race, religion, and national origin, the Court concluded that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law."[81] In addition, the Court quoted from the Eleventh Circuit's decision in *Henson v. City of Dundee*[82] in support of its observation that, subsequent to the issuance of the EEOC guidelines, "courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[83]

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72. *See supra* note 22 and accompanying text.

73. 477 U.S. 57 (1986).

74. *Id*. at 64 (internal quotation marks omitted).

75. *Id*. (internal quotation marks omitted) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

76. *See supra* note 61 and accompanying text.

77. *Meritor*, 477 U.S. at 65.

78. *Id*.; *see also* 29 C.F.R. § 1604.11(a) (1985).

79. *Meritor*, 477 U.S. at 65.

80. 454 F.2d 234 (5th Cir. 1971), discussed *supra* note 25 and accompanying text.

81. *Meritor*, 477 U.S. at 66.

82. 682 F.2d 897, 902 (11th Cir. 1982); *see supra* note 68 and accompanying text.

83. *Meritor*, 477 U.S. at 66.

Having recognized the hostile environment harassment cause of action, the Court cautioned that not all conduct constitutes harassment affecting an employee's terms, conditions, or privileges of employment within the meaning of Title VII. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[84] Such severe or pervasive conduct, if unwelcome,[85] will violate Title VII. The allegations made in *Meritor Savings Bank*—"which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for hostile environment sexual harassment."[86]

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84. *Id*. at 67 (quoting *Henson*, 682 F.2d at 904).

85. Whether a plaintiff voluntarily engaged in an intimate or sexual relationship is not the relevant question:

> [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged advances were "unwelcome."

Id. at 68 (quoting 29 C.F.R. § 1604.11(a) (1985)). Thus, the correct judicial inquiry was whether Mechelle Vinson "by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id*.

Although voluntariness was not relevant to the harassment claim, the Court disagreed with the view (taken by the United States Court of Appeals for the District of Columbia Circuit in the case below, see 753 F.2d 141, 146 n.36 (1985)) that a plaintiff's "sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant." *Meritor*, 477 U.S. at 69. Concluding that any claim that the relevance of such evidence was outweighed by potential unfair prejudice could be made to and resolved by the trial court, the Court stated that "there is no *per se* rule against its admissibility." *Id*.

86. *Meritor*, 477 U.S. at 67. In another section of its opinion, the Court dealt with the issue of employer liability for supervisory hostile environment harassment. Declining to issue a definitive rule, the Court concluded that Congress wanted the courts to look to agency principles for guidance, cautioning that common-law principles may not be transferable in all particulars to claims under Title VII. *Id*. at 72. The Court held that employers were not automatically liable for their supervisors' sexual harassment; that the absence of notice of such harassment to the employer did not necessarily insulate it from liability; and that the employer's anti-discrimination policy and grievance procedure did not insulate it from liability because the policy did not specifically address sexual harassment and the procedure required Vinson to complain first to her supervisor Taylor, the alleged harasser. *Id*. at 73; *see also* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 CORNELL L. REV. 66 (1995); Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 DET. MERCY L. REV. 817 (1994); Ronald Turner, *Employer Liability under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of* Meritor Savings Bank, 33 HOW. L.J. 1 (1990) (same).

Revisiting the employer liability question in 1998, the Court held that an employer is vicariously liable for hostile environment harassment caused by a supervisor, subject to an affirmative defense of reasonable employer and unreasonable plaintiff conduct. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1 (1999); Ronald Turner, *Employer Liability for Supervisory Hostile Environment Sexual Harassment: Comparing Title VII's and Section 1983's Regulatory Regimes*, 31 URB. LAW. 503 (1999); Marianne Lavelle, *The New Rules of Sexual Harassment*, U.S. NEWS & WORLD REP. (Jul. 6, 1998), at 30.

F. Stage Six—The Supreme Court Speaks Again

In 1993 a unanimous Supreme Court in *Harris v. Forklift Systems, Inc.*[87] reaffirmed *Meritor Savings Bank*. The Supreme Court rejected and reversed the lower courts' holdings that, to be actionable, an abusive work environment had to seriously affect an employee's psychological well-being or result in injury to the plaintiff.[88] Justice O'Connor's opinion for the Court noted that the *Meritor Savings Bank* standard took a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[89] Setting forth objective and subjective analytical prongs, the Court stated:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if 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.[90]

Noting that Title VII "comes into play before the harassing conduct leads to a nervous breakdown,"[91] the Court said that an abusive work environment can detract from an employee's job performance, can discourage an employee from staying on the job, and can stop an employee's career advancement.[92] "Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment

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87. 510 U.S. 17 (1993).

88. The Court reasoned that analysis of the question whether the alleged conduct seriously affects a plaintiff's psychological well-being or causes injury:

> [M]ay needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. 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.

Id. at 22 (citation omitted).

89. *Id*. at 21.

90. *Id*. at 21-22; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (reaffirming the "severe or pervasive" test); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998) (same).

The *Harris* Court also conceded that there is no "mathematically precise" test to be applied in hostile environment cases. A determination of whether an environment is hostile or abusive requires an examination of all of the circumstances, including the following:

> [T]he 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. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

510 U.S. at 23.

91. 510 U.S. at 22.

92. *Id*.

abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."[93]

Harris provided further guidance with respect to a regulatory regime outlawing severe or pervasive conduct of a sexual nature where such conduct alters the conditions of an individual's employment and creates an abusive working environment. The question remained, however, of whether this antiharassment regime, applied in the context of opposite-sex harassment, would provide a statutory remedy for same-sex sexual harassment.

G. Stage Seven—Recognizing Intragroup Discrimination

Can a member of a protected group discriminate against another member of that same group?[94] Several court decisions decided before the Supreme Court's decision in *Oncale* answered that question in the affirmative, thereby providing theoretical and analytical backing for the Court's 1998 ruling. In *Castaneda v. Partida*,[95] for example, the Court stated, "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[96] Justice Marshall, in a concurring opinion, commented on intragroup discrimination. "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority."[97]

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93. *Id*. Concurring, Justice Scalia complained that the Court's opinion added little certitude to the meaning of the words "abusive" and "hostile": "today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." *Id.* at 24 (Scalia, J., concurring). But, seeing no alternative to the Court's approach and no basis in the language of Title VII for limiting the inquiry to the question whether the conduct unreasonably interfered with an employee's work performance, Justice Scalia accepted *Meritor Savings Bank*'s interpretation of Title VII "as the law . . . the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts." *Id*. at 25.

In a separate concurrence, Justice Ginsburg argued that the critical issue "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." *Id.* (Ginsburg, J., concurring) (citation omitted). Relying on a Sixth Circuit race discrimination case, *Davis v. Monsanto Chemical Co*., 858 F.2d 345 (1988), Ginsburg stated that the:

> [A]djudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. . . . It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.

510 U.S. at 25 (Ginsburg, J., concurring) (quotation marks omitted).

94. *See generally* Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness?: An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997); Ronald Turner, *The Color Complex: Intraracial Discrimination in the Workplace*, 46 LAB. L.J. 678 (1995).

95. 430 U.S. 482 (1977).

96. *Id*. at 499.

97. *Id*. at 503 (Marshall, J., concurring).

Intragroup discrimination was at issue in *Walker v. Secretary of the Treasury*,[98] a Title VII action filed by a light-skinned African-American plaintiff against her dark-skinned African-American supervisor. Noting both that Title VII's prohibitions include discrimination on the bases of race and color[99] and that the plaintiff's claim alleged color-based discrimination, the court concluded that the plaintiff's intragroup discrimination action could proceed as it was "not controlling that . . . a black person is suing a black person."[100] Similarly, *Hansborough v. City of Elkhart Parks and Recreation Department*[101] held that intraracial discrimination was actionable under Title VII, for "as a purely conceptual matter it is possible for one black person to discriminate against another black person on the basis of race . . . ."[102] Thus, "discrimination claims should not be barred merely because the plaintiff(s) and defendant(s) belong to the same race."[103]

An intragroup discrimination claim was also lurking in the background in the Supreme Court's decision in *Johnson v. Transportation Agency, Santa Clara*.[104] The male plaintiff alleged that the employer violated Title VII when, pursuant to an affirmative action plan, it promoted a woman to a position he sought. In holding that the employer acted lawfully, the Court did not deem it significant that the individual who made the challenged employment decision was, like the plaintiff, a man.[105]

III. *ONCALE* AND BEYOND

Joseph Oncale's same-sex harassment action presented the Supreme Court with the question of whether a claim of same-sex sexual harassment was actionable under Title VII.[106] In facing this question the Court had to decide whether to

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98. 713 F. Supp. 403 (N.D. Ga. 1989), *modified on other grounds*, 742 F. Supp. 670 (N.D. Ga. 1990).

99. *See* Felix v. Marquez, 24 EPD (CCH) Para. 31, 279 (D.D.C. 1980); Vigil v. City & County of Denver, 15 EPD (CCH) Para. 8000 (D. Colo. 1977).

100. *Walker*, 713 F. Supp. at 408.

101. 802 F. Supp. 199 (N.D. Ind. 1992).

102. *Id.* at 206.

103. *Id.*; *see also* United States v. Crosby, 59 F.3d 1133, 1135 n.4 (11th Cir. 1995) (finding that Title VII may be violated when the supervisor is the same race as the plaintiff); Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 688 n.3 (D.N.J. 1996) (stating that whether decisionmaker is in protected group is not the question of discrimination); Franceschi v. Hyatt Corp., 782 F. Supp. 712 (D.P.R. 1992) (holding that a claim of discrimination brought by a Puerto Rican against another Puerto Rican was actionable); Veatch v. Northwestern Mem'l Hosp., 730 F. Supp. 809, 817 (N.D. Ill. 1990) ("The fact that a woman fired a woman or a black fired another black does not demonstrate that the supervisor's decision was free of the racial and gender stereotyping that federal law attempts to remove from employers' decisionmaking."); LaFlore v. Emblem Tape & Label Co., 448 F. Supp. 824 (D. Colo. 1978) (holding that an intraracial claim brought by white plaintiff is actionable under Section 1981).

104. 480 U.S. 616 (1987).

105. *See id.* at 624-25; *accord* Fredette v. BVP Management Assoc., 112 F.3d 1503, 1509 n.16 (11th Cir. 1997).

106. For pre-*Oncale* commentary on the question of the justiciability of Title VII same-sex harassment claims, see Jo Bennett, *Same-Sex Sexual Harassment*, 6 LAW & SEX. 1 (1996); Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375 (1995); Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims under Title VII*, 12 LAB. LAW. 291 (1996); Melissa Manaugh Feldmeier, *Filling the Gaps: A Comprehensive Review of the Debate over Same-Sex Sexual Harassment*, 65 U. CIN. L. REV. 861 (1997); E. Gary Spitko, *He Said, He*

extend the interpretive progression, developments and precedents to cases involving allegations of male-on-male and female-on-female harassment, or to employ static purpovistic analysis by finding the claim non-justiciable because Congress did not have same-sex harassment in mind when it enacted Title VII. Although the Court allowed Oncale to proceed with his action and thus decided in favor of the interpretive progression, it did so in a minimalist opinion that left significant issues undecided.[107]

A. Justiciable Same-Sex Harassment

In *Oncale*, the only question before the Court was whether the Fifth Circuit correctly held that an action for same-sex sexual harassment did not state a justiciable claim under Title VII.[108] The Fifth Circuit's position differed from views expressed by other federal courts of appeals. The Fourth Circuit had held that same-sex harassment claims "are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire),"[109] while the Seventh Circuit, taking a different position, had held that same-sex harassment "is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."[110]

Faced with this circuit split, Justice Scalia, writing for a unanimous Court, first noted that the Court had previously held that Title VII's antidiscrimination provision "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment"[111] and prohibits sex discrimination against men and women.[112] Further noting that Title VII applies to intragroup discrimination, Justice Scalia wrote that the Court has "rejected any conclusive presumption that an employer will not discriminate against members of his own race"[113] or gender.[114]

Grounding his analysis in the Court's prior interpretation and application of Title VII, Justice Scalia then turned to the same-sex harassment issue. "If our

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Said: Same-Sex Sexual Harassment under Title VII and the "Reasonable Heterosexist" Standard, 18 BERKELEY J. EMPL. & LAB. L. 56 (1997); Ronald Turner, *Same-Sex Sexual Harassment: A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL. & L. 151 (1997) [hereinafter Turner, *Same-Sex*].

107. On the Supreme Court's minimalism and minimalist decisions, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

108. *See supra* notes 106 and accompanying text.

109. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996). For a discussion of this position, see Turner, *Same-Sex*, *supra* note 106, at 181-89.

110. *Oncale*, 523 U.S. at 79 (citation omitted); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

111. *Oncale*, 523 U.S. at 78 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

112. *Id.* (internal quotation marks omitted and citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)). *See also supra* notes 42 and accompanying text (discussing *Newport News*).

113. 523 U.S. at 78; *see also supra* notes 94 and accompanying text (discussing intragroup discrimination and Title VII).

114. *See id.* (commenting on *Johnson v. Transp. Agency*, 480 U.S. 616, 624-625 (1987), wherein the Court "did not consider it significant that the supervisor who made that decision was also a man" where a male employee challenged the affirmative action promotion of a female worker).

precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[115] He saw "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[116] He addressed head-on the employer's argument that same-sex harassment was not contemplated or prohibited by the Congress that enacted Title VII in 1964.[117]

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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.[118]

Justice Scalia then addressed the employer's and *amicis'* argument that recognition of the same-sex harassment cause of action would "transform Title VII into a general civility code for the American workplace."[119] Not persuaded, he opined that "that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex'."[120] Workplace harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations."[121] "The critical issue," he wrote, "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."[122] Nor does the statute "reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of

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115. *Id*. at 79.

116. *Id*.

117. *See supra* notes 18-20 and accompanying text.

118. 523 U.S. at 79. *See also* Scalia, *supra* note 12, at 17 ("It is the *law* that governs, not the intent of the lawgiver.").

119. 523 U.S. at 80. In his recent book, Professor Stephen Carter suggests that "one might look at the problem of sexual harassment as a reflection precisely of the willful refusal to follow civility's rules." STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 183-84 (1998). In his view:

> Some critics are uncomfortable with the theoretical basis for sexual harassment law, but that may be because we tend to describe it as resting on principles of nondiscrimination rather than principles of civility. When a supervisor repeatedly asks an employee for a date, or when workers express attitudes that result in the "hostile environment" that can sometimes constitute harassment, what they are really being is uncivilized. . . . [V]iewing an individual in a purely sexual dimension refuses to recognize that person's humanity. . . .

Id. at 184 (citations omitted); *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (arguing that hostile environment sexual harassment is form of incivility and disrespect and discussing the virtues of a legal approach to sexual harassment based on the standard of respectful person).

120. 523 U.S. at 80.

121. *Id*.

122. *Id*.

the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."[123]

How can one distinguish between "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—[and] discriminatory 'conditions of employment'"?[124] In Justice Scalia's view, the requirement that sexual harassment must be objectively hostile or abusive in order to violate Title VII,[125] and is subjectively perceived by the plaintiff as abusive, is sufficient to enable courts and juries to make the distinction between lawful horseplay and unlawful harassment.[126] The judicial inquiry must focus on the "social context in which particular behavior occurs and is experienced by its target."[127] "For example, a professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."[128]

In distinguishing between horseplay and harassment, Justice Scalia wrote, courts and juries should focus on the social context and employ common sense:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[129]

Another notable aspect of the Court's decision is its recognition that sexual harassment can occur in situations involving, not sexual desire, but sex-based hostility; thus, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[130] For example, dis-

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123. *Id*. at 81. For post-*Oncale* decisions dealing with the issue of offensive workplace conduct in the context of same-sex harassment, see Martin v. Schwan's Sales Enters., Inc., 198 F.3d 246 (6th Cir. 1999); Robinson v. Roney Oatman, Inc., No. 97C8964, 1999 WL 1102694 (N.D. Ill. Nov. 23, 1999).

124. *Oncale*, 523 U.S. at 81. For an interesting discussion of the distinction between horseplay and actionable sexual harassment, see Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After* Oncale, 11 YALE J.L. & FEMINISM 155 (1999).

125. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview." *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

126. *See Oncale*, 523 U.S. at 81.

127. *Id*.

128. *Id*.

129. *Id*. at 81-82.

130. *Id*. at 80; *accord* Williams v. General Motors Corp., No. 97-3351, 1999 U.S. App. LEXIS 18232, at *22-26 (6th Cir. Aug. 5, 1999); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (stating that "[t]o constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones"); Lipsett v. University of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988) ("This attack, although not explicitly sexual, was nonetheless charged with anti-female animus, and therefore could be found to have contributed significantly to the hostile environment."); Hall v. Gus Constru. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d

crimination could be found "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[131] The point that harassment need not be desire-based in order to be actionable and, if proven, unlawful[132] is a significant acknowledgment of the fact that hostility-based harassment, often grounded in the harasser's effort to dominate and exercise control of and power over the harassed,[133] can occur when someone is called a "dumb ass woman"[134] or a "bitch" or "floor whore,"[135] or is threatened with physical violence and is verbally abused.[136]

Oncale's holding and the Court's brief and unanimous textualist opinion[137] provide a clear and definite answer to the general question of whether same-sex sexual harassment claims are cognizable under Title VII's sex-discrimination ban.[138] "Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."[139] The Court

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1406, 1415 (10th Cir. 1987); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (stating that "the District Court appears to have assumed that an incident of physical force . . . cannot constitute sexual discrimination or harassment unless it is for the purpose of obtaining sexual favors or is otherwise blatantly sexually oriented. This assumption, however, is legally flawed"); *cf.* Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273 (7th Cir. 1991) (holding that a physical threat "not specifically racial in nature . . . may be considered as a predicate act in establishing racial harassment in a hostile work environment, because it would not have occurred but for the fact that Daniels was black").

131. *Oncale*, 523 U.S. at 80.

132. *See* 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.01[3] (2d ed. 1996) (stating that a sexual harassment claim is not negated by the absence of sexual overtones); *EEOC Policy Guidance on Current Issues of Sexual Harassment* N-915.050 (Mar. 19, 1990), *reprinted in* Daily Lab. Rep. (BNA) Mar. 28, 1990, at E-1 (stating that hostility, intimidation, and aggressive acts can cause discriminatory terms and conditions of employment and constitute disparate treatment on the basis of sex).

133. *See* Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) ("[H]arassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser, issues not necessarily related to sexual preference.").

134. Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993); *see also* Epstein, *supra* note 1, at 399 (describing a wide variety of speech that has been held to constitute harassment).

135. Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996). On the offensiveness of the word "bitch" in sexual harassment cases, see Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on* Galloway v. General Motors Service Parts Operations *and* Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741, 761 (1997).

136. *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); *see also* Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996) (stating that harassment "need not be explicitly sexual in nature . . . nor have explicit sexual overtones. . . . Since sexual harassment can occur in many forms, it may be evidenced by acts of physical aggression or violence or incidents of verbal abuse").

137. *See* Dorf, *supra* note 40, at 22-24 (discussing *Oncale* and the Court's textualism).

138. For scholarly discussions of the Court's decision, see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Charles R. Calleros, *Same-Sex Harassment, Textualism, Free Speech, and* Oncale*: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability*, 7 GEO. MASON L. REV. 1 (1998); Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517 (1999); Catherine J. Lanctot, *The Plain Meaning of* Oncale, 7 WM. & MARY BILL RTS. J. 913 (1999); Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14 LAB. LAW. 261 (1998); Steven L. Wellborn, *Taking Discrimination Seriously:* Oncale *and the Fare of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677 (1999); Rebecca Hanner White, *There's Nothing Special about Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725 (1999).

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

also treated Oncale's now-settled hostile environment claims[140] as a disparate treatment case[141] requiring a showing of discrimination because of sex.[142] Furthermore, the Court applied the text of the statute to same-sex harassment even though the 1964 Congress did not consider, address, or intend to prohibit workplace sexual harassment of any type.[143] Thus, when viewed solely from the perspective of the intent of the enacting Congress, the Court applied the statute to the unenvisaged case of same-sex harassment (as it had done in the context of opposite-sex harassment). This application of Title VII was the logical extension of the judicial, administrative, social, and scholarly developments found in the earlier stages of the statute's interpretive progression leading up to *Oncale.*

B. The Next Stage?

The Court's holding that same-sex sexual harassment claims are justiciable resolved an important issue concerning the interpretation and application of Title VII. Remaining in the aftermath of the Court's decision, however, were a number of crucial issues,[144] including the question of what kind of evidence a same-sex harassment plaintiff must present and establish in order to prove that

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140. On October 21, 1998, Oncale settled his sexual harassment claim against Sundowner. *See Parties Settle Same-Sex Harassment Suit Just Short of Trial Before Federal Jury*, Daily Lab. Rep. (BNA), Oct. 29, 1998, at A-4.

141. In a disparate treatment case, a plaintiff must allege and prove that an employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

For discussions of disparate treatment analysis and Title VII, see Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991); Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1 (1998).

142. *See* White, *supra* note 138, at 729; Holman v. State of Indiana, 24 F. Supp. 2d 909, 913 (N.D. Ind. 1998) (following the *Oncale* standard regarding sexual harassment and discrimination based on sex).

For cases in which the plaintiff failed to meet the "because of sex" showing, see Klein v. McGowan, 198 F.3d 705 (8th Cir. 1999); Raum v. Laidlaw Ltd., 173 F.3d 845 (2d Cir. 1999); Pirolli v. World Flavors, Inc., No. CIV.A. 98-3596, 1999 WL 1065214 (E.D. Pa. Nov. 23, 1999); EEOC v. Trugreen L.P., No. 98-C-164-C, 1999 U.S. Dist. LEXIS 9368 (W.D. Wis. Mar. 23, 1999).

143. *See* Cass R. Sunstein, *Is Tobacco a Drug?: Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1044 (1998) (noting *Oncale's* holding "that the ban on sex discrimination applies to same-sex harassment, even though that problem was far from the specific intention of the passing Congress").

144. *Oncale* has been criticized "for failing to provide sufficient guidance about when sexual harassment constitutes sex discrimination." Dorf, *supra* note 40, at 78; *see also id.* at 23 (stating that the Court's "determined textualism prevented it from even identifying relevant considerations"); Lanctot, *supra* note 138 (noting criticism that the Court left open a number of questions). The Court's brief opinion is understandable given the state of the record (the case was dismissed on summary judgment) and given Oncale's allegations and evidence. Important issues awaiting treatment and exploration by the lower courts include those discussed in this section (see *infra*) and other issues identified by Professor Martha Chamallas: the power dynamics of same-sex harassment and a "theory of sexuality or sexual aggression to supplant traditional notions of sexuality such as sexual desire and attraction." Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 371 (1998).

the alleged harassment constitutes unlawful discrimination because of sex. Stated differently, how can a plaintiff meet the statutory causation requirement?[145]

1. Inferential Evidence And Homosexual Harassers

Justice Scalia's opinion for the Court noted that inferences of discrimination have been easy to draw in male-female harassment cases involving explicit or implicit sexual propositions; in those instances, "it is reasonable to assume those proposals would not have been made to someone of the same sex. The same claim of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual."[146] Under that analysis, an alleged harasser's sexual orientation and imputed sexual desires would be relevant, indeed critical, in establishing the foundation from which inferences of discrimination could be drawn and in reaching the conclusion that the alleged misconduct would not have been directed at a person of the opposite sex.[147] Using this analysis, a district court recently dismissed a same-sex harassment claim where this foundational evidence was not presented by the plaintiff.[148]

The Seventh Circuit has addressed the issue of the sexual orientation of the alleged harasser in light of *Oncale*.[149] The court noted evidence in the record suggesting that the alleged harassment by an employee named Jemison was

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145. *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting employment discrimination "because of" an individual's race, color, religion, sex, or national origin).

146. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). Obtaining evidence of the harasser's sexual orientation could present vexing issues in the discovery phase of a same-sex harassment lawsuit, particularly one in which the alleged harasser does not admit or disputes the assertion that he or she is gay or lesbian. Suppose that the plaintiff's attorney asks, in an interrogatory or deposition, whether the alleged harasser is homosexual, and that the deponent answers in the negative. If the inquiring counsel is not satisfied with and is not willing to accept that answer, further investigation into the deponent's background may be pursued, with personal and invasive questions posed to the deponent's family, friends, acquaintances, and others who may have relevant information concerning the deponent's lifestyle and sexual practices and proclivities. *See id.*

147. In *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996), for example, the court noted that:

> [A] male employer who discriminates only against his male employees and not against his female employees, and a female employer who discriminates against her female employees and not against her male employees, may be discriminating against his or her employees "because of" the employee's sex, no less so than may be the employer (male or female) who discriminates only against his or her employees of the opposite sex. In all four instances, it is possible that the employees would not have been the victims of the employer's discrimination were it not for their sex.

Id. at 142; *see also* Wright v. Methodist Youth Serv. Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (finding that an allegation that a male employee made sexual demands of another male employee stated a cause of action where such a demand would not be directed at female employees); *accord* Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd without op.*, 749 F.2d 732 (11th Cir. 1984) (finding that the unwelcome homosexual advances of the plaintiff's manager established a prima facie case of sexual discrimination).

148. *See* Pavao v. Ocean Ships, Inc., No. C-97-4059-VRW, 1998 U.S. Dist. LEXIS 20431, at *6-7 (N.D. Cal. 1998) ("[P]laintiff has submitted no declaration or other evidence contradicting [the alleged harasser's] assertion that he is not homosexual and has never engaged in homosexual contact.").

149. *See* Shepherd v. Slater Steels Corp., 168 F.3d 998 (7th Cir. 1999).

borne of sexual attraction.[150] Although none of those incidents proved that Jemison was gay, "the connotations of sexual interest in Shepherd [the plaintiff] certainly suggests that Jemison might be sexually oriented toward members of the same sex. That possibility, in turn, leaves ample room for the inference that Jemison harassed Shepherd because Shepherd is a man."[151] The court noted, however, that a jury could easily reach a different conclusion:

> A jury might decide . . . that Jemison was not at all interested in Shepherd sexually, but made these types of remarks and engaged in this type of behavior simply because he was exceedingly crude and/or because he knew that this type of sexually charged conduct would make Shepherd uncomfortable. What to make of Jemison's behavior (assuming that it occurred as Shepherd described it) is a task that requires one to weigh the tone and nuances of his words and deeds and a host of other intangibles that the page of a deposition or an affidavit simply do not reveal. This is a task for the factfinder after trial, not for the court on summary judgment.[152]

From a plaintiff's viewpoint, drawing inferences of discrimination in sexual-desire harassment cases involving alleged homosexual harassers arguably presents the least difficult and easiest to prove type of same-sex harassment claim.[153] Courts and juries may be more willing to infer and find actionable discrimination in cases alleging harassment by a gay or lesbian individual as opposed to cases involving heterosexual harassers who contend that they were engaging in horseplay and had no sexual desires for or interest in the plaintiff.[154] Indeed, some commentators have warned that providing a remedy for individuals alleging same-sex harassment by a homosexual perpetrator will increase tolerance for heterosexism and homophobia in the workplace.[155] On that view, the application of Title VII to such harassment will "rely on and perpetuate society's commitment to regulate, if not to prohibit, any 'abnormal' expressions of sexuality,"[156] and courts could impose "relatively greater liability for the employer of a gay sexual harasser."[157] If these observations are correct, and given the fact that many cases of same-sex harassment are brought by heterosexuals

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150. *See id*. at 1009.

151. *Id*. at 1010.

152. *Id*.; *see also* Merritt v. Delaware River Port Auth., No. 98-3313, 1999 U.S. Dist. LEXIS 5896 (E.D. Pa. April 20, 1999) (finding that a genuine issue of material fact existed as to whether the alleged harasser is homosexual).

153. I have argued elsewhere that a same-sex harassment plaintiff should not be required to prove that a harasser was homosexual. The harassers' conduct, and not his or her sexual orientation, should inform and govern the analysis. *See* Turner, *Same-Sex*, *supra* note 106; *accord* Spearman v. Ford Motor Co., No. 98 C 0452, 1999 U.S. Dist. LEXIS 14852 at *15 n.3 (N.D. Ill. Sept. 1, 1999) (stating that the perpetrator's sexual orientation is irrelevant "since the relevant question is whether the actions of the perpetrator created a hostile work environment because the victim was singled out because of her sex").

154. *See* Mary Coombs, *Title VII and Homosexual Harassment after* Oncale*: Was it Victory?*, 6 DUKE J. GEN. L. & POL'Y 113, 144-45 (1999).

155. *See* Richard F. Storrow, *Same-Sex Sexual Harassment after* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 719 (1998) (noting the increased tolerance argument).

156. Grose, *supra* note 106, at 379.

157. Spitko, *supra* note 106, at 80.

against homosexuals,[158] the same-sex harassment prohibition could fall disproportionately on gays and lesbians.[159]

2. Comparator Same-Sex Harassment Cases

Another approach to the causation issue suggested by Justice Scalia's *Oncale* opinion involves a same-sex harassment plaintiff's offer of "comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[160] Under this approach, a same-sex harassment plaintiff would state a cause of action and would prevail where it is alleged and proven that conduct constituting harassment as a matter of law was directed at one gender but not the other.[161]

Post-*Oncale* decisions shed light on what a same-sex harassment plaintiff must establish in order to survive summary judgment and proceed to a trial of his or her claim. In one such case, the court found that summary judgment for the employer was not warranted where the male plaintiffs presented evidence that their male supervisor "limited his insults, unwanted sexual touching, and threats to males. Indeed, by [the supervisor's] own admission, his conduct was directed only at males."[162]

In another case, the court denied summary judgment and ordered a trial of the plaintiff's allegations of unlawful same-sex harassment involving the practice of "violating."[163] The employer argued that the plaintiff could not maintain

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158. *See* Grose, *supra* note 106, at 377 n.8.

159. *See* Storrow, *supra* note 155, at 718-21 (discussing the disproportionality argument). Professor Catherine MacKinnon, disagreeing with the argument that recognizing the same-sex harassment claim will disadvantage homosexuals, believes that recognition of the claim will advance the rights of gays and lesbians and will promote their interest in ending male supremacy. *See* Spitko, *supra* note 106, at 72 n.79 (discussing Professor MacKinnon's views as set forth in her letter to Professor Spitko).

160. 523 U.S. at 81. Comparative evidence "consists of evidence that employees who are similarly situated to the plaintiff but who do not share the pertinent and protected characteristic (race, color, sex, etc.) received better and more favorable treatment from the employer than did the plaintiff." Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 433 (1995). Thus, for example, a male plaintiff may contend that, because of his sex, he was subjected to adverse treatment in employment, that women were not subjected to such mistreatment, and that, viewed under a comparative analysis, the employer violated Title VII because it treated him differently from women.

161. *See* Quick v. Donaldson, 90 F.3d 1372, 1379 (8th Cir. 1996) (holding that the plaintiff's case could be tried to a jury because the evidence obtained in discovery revealed incidents of the bagging of male, but not female, employees and therefore reasoning that a factfinder could reasonably conclude that only men were subjected to disadvantageous terms or conditions of employment, and that there was a genuine issue of material fact regarding the question of whether the asserted male-on-male harassment was based on the plaintiff's sex); *see also* Spearman v. Ford Motor Co., No. 98 C 0452, 1999 U.S. Dist. LEXIS 14852 (N.D. Ill. Sept. 1, 1999) (finding a same-sex claim actionable where the plaintiff was harassment because of his sex).

162. Carney v. City of Shawnee, No. 98-2019-KHV, 1999 U.S. Dist. LEXIS 3142, at *9 (D. Kan. Feb. 19, 1999).

163. This "violating" consists of a variety of sexually explicit and violent acts including but certainly not limited to: groups of men jumping the Plaintiff, holding him down (sometimes in a bin of raw meat or a trough of blood), and simulating oral and anal sex acts; grabbing or hitting Plaintiff's testicles; forcing and rubbing a "steel" (the rod used to sharpen knives) between the Plaintiff's legs; and verbal harassment regarding the Plaintiff's sexual practices (calling him "Fargo Fag," asking him if he preferred "it up the ass or

his same-sex harassment claim because he failed to assert that he was assaulted because of his sex; in his deposition, the plaintiff testified that he did not know why his coworkers and supervisors acted as they did and that he did not know whether they treated him that way because he was a man.[164] Even though the plaintiff did not know what his coworkers were thinking during the assaults, the court determined that a reasonable factfinder could conclude from the assaults themselves, and the frequent references to homosexual acts, that the plaintiff's gender was a motivating factor of the behavior.[165] In addition, the finder of fact could conclude that men and women were treated in a qualitatively different way and that men perceived as vulnerable were disadvantaged because of their gender.[166] While male supervisors and coworkers made suggestive comments and draped their arms around female workers, those acts directed towards female employees "did not . . . involve simulation of anal sex, simulation of oral sex, physical restraint by whole groups of men, or painful physical assault on their genitalia."[167]

Where both sexes are the targets of the alleged harassment and the comparative approach will not reveal differential treatment based on sex, same-sex harassment may not be found as a matter of law. Consider, on this point, *Holman v. State of Indiana*.[168] A husband and wife sued their employer alleging that they were both sexually harassed by the same supervisor. The court noted that, in light of *Oncale*, it is now settled that both Holmans are protected from sexual harassment regardless of their gender or the harasser's sexual orientation if the discrimination occurred because of sex. "Under the Supreme Court's analysis, presumably, if members of one sex are exposed to identical disadvantageous terms or conditions of employment as the other sex, there is no Title VII discrimination."[169] Although both plaintiffs suffered harassment which involved the supervisor's requests for sexual favors, the court concluded that neither was subjected to disadvantageous terms or conditions of employment to which members of the other sex (in this case, their spouse) were not exposed.[170] Accordingly, their sexual harassment claims were dismissed.

> down the throat," etc.) . . . this obscene physical and verbal abuse was a daily phenomenon-he was often jumped multiple times in one day and the verbal harassment was continuous-and was perpetrated by coworkers as well as at least one supervisor . . .

Breitenfeldt v. Long Prairie Packing Co., Inc., No. 97-1615 (DWF / AJB), 1999 U.S. Dist. LEXIS 6826, at *2 (D. Minn. Apr. 28, 1999).

164. *Id.*

165. *Id.* at *14.

166. *Id.*

167. *Id.* at *15; *see also* Bacon v. Art Inst. of Chicago, 6 F. Supp. 2d 762 (N.D. Ill. 1998) (denying summary judgment to an employer where the following evidence created a genuine issue of fact: a male building manager (1) took a picture of a male employee's buttocks and put the picture on the manager's desk; (2) repeatedly touched or grabbed an employee's buttocks and body, ran his fingers through the employee's hair; and (3) rubbed his penis against an employee's buttocks and simulated a sex act).

168. 24 F. Supp. 2d 909 (N.D. Ind. 1998) *aff'd*, 211 F.3d 399 (7th Cir. 2000).

169. *Id.* at 913; *see also* Pasqua v. Metropolitan Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996) ("Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.").

170. *See Holman*, 24 F. Supp. 2d at 915.

Comparator cases are also not available where the employer's work force is all-male or all-female. As recently noted by one court, proof that men and women were treated differently "may be difficult, if not impossible, to obtain when the plaintiff and the harasser work in the kind of single-sex work environment that the Supreme Court confronted in *Oncale*; and it is in that kind of environment where same-sex harassment frequently occurs."[171] Joseph Oncale would have faced this problem[172] if his case had not been settled just before trial.[173]

3. A Gender-Based Approach

Another approach to the same-sex harassment causation issue, and one not advanced by the Court in *Oncale*, would distinguish between, and would not conflate,[174] biological sex (male and female) and cultural-attitudinal gender (feminine and masculine).[175] Under this approach, a harasser's determination that a man was not sufficiently masculine,[176] or that a woman was not sufficiently feminine,[177] could constitute actionable discrimination where the harassment is triggered by the target's nonconformity to the harasser's gender expec-

171. Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999).

172. Sundowner's counsel argued that Oncale could not prove that his crewmates would not have abused women: "What women? There are no women on the rigs. It would just be a speculative thing." John Cloud, *Harassed or Hazed?*, TIME, Mar. 16, 1998, at 55 (quoting employer's counsel).

173. *See Parties Settle Same-Sex Harassment Suit Just Short of Trial Before Federal Jury*, Daily Lab. Rep. (BNA), Oct. 29, 1998, at A-4.

174. *See generally* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161 (1996) (examining the distinction between biological sex and cultural gender); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (deconstructing the conflation between biological sex, cultural gender, and sexual orientation).

175. Justice Scalia, the author of the Court's opinion in *Oncale*, has previously noted that the "word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male." J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). *See also* POSNER, *supra* note 50, at 24-25 (positing that gender is "borrowed from grammar to designate the sexes viewed as social rather than biological classes"); Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 133 (1994) ("Sex is the expression of biological difference; gender is the social accommodation of biological difference, expressed through stereotypes and imagery."); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 117 n.121 (1989) ("Gender roles are the social construction of masculine and feminine, the definition of self related to one's sex."); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 9 (1995) ("Sex—male and female—is physical, biological, and immutable; while gender—masculinity and femininity—is cultural, attitudinal, and mutable."); Deborah Zalesne, *When Men Harass Men: Is it Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 403 (1998) (stating that gender refers to, and encompasses roles associated with, masculinity and femininity).

176. Under traditional gender stereotyping, masculine traits "include strength, courage, independence, competitiveness, ambition, and aggression." DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 22 (1997).

177. "Feminine qualities . . . include emotional sensitivity, patience, caution, nurturance, passivity, and dependence." *Id.*

tations.[178] In those instances, the harassed and nonconforming individual's presence in the workplace "challenge[s] accepted notions of what it means to be a man, or a male victim of discrimination."[179] For example, cases in which a male target is harassed by other males who ridicule him because of the way he talks, or because he does not date women or is not married,[180] or because he is or is perceived to be gay or bisexual could constitute actionable gender-based harassment. Presumably, the harassee would not have been harassed if he or she "had not deviated from the harasser's gender norms and expectations . . ."[181]

Recognition of gender-based sexual harassment as a form of actionable and, if proven, unlawful conduct could be grounded in the Court's Title VII precedent. In *Price Waterhouse v. Hopkins*,[182] the Court considered a Title VII action brought by a senior manager after her candidacy for a partnership with an accounting firm was placed on hold and was not reconsidered.[183] Some of the partners involved in the evaluation of the plaintiff's partnership bid had gender-based negative reactions to her personality.[184] They described the plaintiff as "macho," suggested that she take a "course at charm school," commented that she had "matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate," and advised the plaintiff to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[185]

Justice Brennan, writing for himself and Justices Marshall, Blackmun, and Stevens, concluded that the employer had engaged in sex stereotyping.[186] Concluding that such stereotyping was legally relevant, Justice Brennan stated that:

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178. The traditional characteristics of masculinity and femininity (*see supra* notes 175-177) have been challenged. Professor Deborah Rhode has noted that anthropological studies

> cast[ ] doubt both on the universality of sex-linked traits and on our inheritance of rigid gender role divisions from early hunter-gatherer societies. Contrary to many sociobiologists' assertions, it does not appear that men in these societies were the only major providers while women were constantly preoccupied with childrearing. Rather, birthrates were relatively low and the sexes shared breadwinning responsibilities.

Id. at 25 (footnote omitted). Another scholar has challenged the conventional view:

> [I]n some sexually egalitarian or relatively nonsexist cultures—among Native American tribes, for instance—women assume gender roles elsewhere considered masculine (roles like soldiering and hunting, which would be exclusively male in cultures with more rigidly dichotomous divisions of labor) and are permitted to take female sexual and marital partners . . .

ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES 146 (1996).

179. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2515 (1994).

180. In *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988), for example, a male employee's coworkers questioned him as to why he had no wife or girlfriend and told him that he needed to get married and have sex with a woman or go out with another female employee because she would have sex with him.

181. Turner, *Same-Sex*, *supra* note 106, at 169 (footnote omitted).

182. 490 U.S. 228 (1989).

183. *See id.*

184. *See id.* at 235.

185. *Id.* (citations omitted).

186. *See id.* at 251 (affirming the District Court's conclusion that the partner's comments showed "sex-stereotyping at work").

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' 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.[187]

In another section of his opinion, Justice Brennan stated:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor . . . does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[188]

Justice O'Connor, concurring in the judgment, wrote that "Ann Hopkins proved that Price Waterhouse 'permitt[ed] stereotypical attitudes toward women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.'"[189] In her view, Hopkins "proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision."[190] Commenting on the role race and gender play in employment decisions, Justice O'Connor stated:

> Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscrimina-

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In dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, thought "it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm." *Id.* at 294 (Kennedy, J., dissenting).

The Court held that, where a plaintiff establishes that gender played a motivating part in an employment decision, the employer would not be liable if it could prove, by a preponderance of the evidence, that it would have made the same decision without taking account of gender. *See id.* at 258. This holding was addressed by Congress in the Civil Rights Act of 1991 ("CRA"). *See* Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991). As amended by the CRA, Title VII now provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (1994). Under this provision, a plaintiff has a claim even if the employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor; however, the plaintiff will only be entitled to declaratory and injunctive relief and attorney's fees and costs, and may not receive damages or an award requiring the employer to reinstate, hire, promote, or pay the plaintiff. *See id.* § 2000e-5(g)(2)(B)(i-ii).

187. *Price Waterhouse*, 490 U.S. at 251 (citation omitted).

188. *Id.* at 256 (footnote omitted).

189. *Id.* at 272 (O'Connor, J., concurring in judgment) (citation omitted).

190. *Id.* (O'Connor, J., concurring in judgment).

> tory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.[191]

The recognition in *Hopkins* that gender-based sexual stereotyping could violate Title VII informed the United States Court of Appeals for the Seventh Circuit's analysis in *Doe v. City of Belleville*.[192] Twin brothers working summer jobs quit after two months of employment and filed suit alleging that they were sexually harassed by their male coworkers in violation of Title VII.[193] One brother, who wore an earring, was allegedly called "fag" and "queer," was urged to "go back to San Francisco with the rest of the queers," was asked if he was "a boy or a girl," was called "bitch," and was told by one coworker that he was going to take the brother "out into the woods" and "get [him] up the ass."[194] The court concluded that "the fact that [the plaintiff] was singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworkers' view of appropriate masculine behavior" supplied proof of same-sex harassment qualifying as sex discrimination.[195] Just as the sex stereotyping in *Hopkins* constituted sufficient proof that the plaintiff had been denied a partnership because of her sex, "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.'"[196] The plaintiff was harassed "in whole or in part because he wore an earring, a fact that evidently suggested to his coworkers that he was a 'girl,' or, in their more vulgar view, a 'bitch.'"[197]

Although *Doe* was vacated by the Supreme Court for reconsideration in light of *Oncale*, the court's gender-based approach warrants consideration.[198] Under this approach, discrimination on the basis of cultural-attitudinal gender is equivalent to discrimination because of biological sex for purposes of statutory analysis and application. The gender-based approach prohibits unlawful sex stereotyping and harassment directed towards those who do not conform to the gender norms of harassers. Men and women cannot and should not be castigated and subjected to sexually harassing conduct because they are not accepta-

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191. *Id*. at 277 (O'Connor, J., concurring in judgment).

In dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, thought "it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm." *Id.* at 294 (Kennedy, J., dissenting).

192. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

193. *See id.* at 566.

194. *Id.* at 566-67.

195. *Id*. at 580.

196. *Id*. at 581.

197. *Id*. (citations omitted).

198. *See* Doe v. City of Belleville, 523 U.S. 1001 (1998).

bly or adequately feminine or masculine.[199] Thus, the woman who acts too manly or in some way not like a woman (whatever that is) and the man who acts like a woman or in some way not like a man (whatever that is) in the eyes of sexual harassers would be protected by Title VII. To be targeted and harassed verbally and physically because one does not dress like a woman or wears an earring or is defined by others as soft, weak, not a real man's man, etc., is to be subjected to gender-based discrimination and the enforcement of a harasser's conception of gender norms. Title VII should be understood and applied in a way that encompasses and proscribes such affronts to equal opportunity in the workplace.

One plausible objection to the recognition of gender-based harassment is that the gender approach can extend Title VII coverage to a group not protected by the statute—gays and lesbians. In a number of decisions, courts have held that discrimination on the basis of sexual orientation is not discrimination based on sex and therefore does not state a claim under the statute.[200] The concern that a gender-based harassment claim is essentially an argument for protection from sexual orientation discrimination was addressed in *Klein v. McGowan*,[201] wherein the plaintiff claimed that the alleged harassment was based on the "sexual aspect" of his personality.[202] "The implication of this claim is that Plaintiff was harassed because he was perceived as being a homosexual."[203] Declining to equate the sexual aspect of the plaintiff's personality with his sex, the court concluded that "Title VII clearly does not prohibit harassment based on the victim's sexuality."[204]

Notwithstanding this objection, the better course is to recognize gender-based harassment claims where the harasser's real objection is to a target's nonconformity to a gender norm. Stating that a man or woman should or should not act a certain way is gender-based in the sense that the attempt to enforce a

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199. *See* Franke, *supra* note 175, at 96 ("If a woman cannot be punished or harassed for failing to demonstrate her femininity in accordance with some acceptable norm, then the same can and must be said about men and masculinity."); *see also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . 'a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity'." (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989)).

200. *See, e.g.*, Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992) (holding that harassment based on sexual orientation is not harassment based on sex and therefore receives no Title VII protection); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989) (flatly stating "Title VII does not prohibit discrimination against homosexuals"); DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986) (holding that discrimination based on sexual attraction is not discrimination based on sex for the purpose of Title VII protection); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084-87 (7th Cir. 1984) (same); Simonton v. Runyon, No. CV 96-4334, 1999 U.S. Dist. LEXIS 8212 (E.D.N.Y. May 25, 1999) (same).

201. 36 F. Supp. 2d 885 (D. Minn. 1999).

202. *Id*. at 889 (quotation marks and citation omitted).

203. *Id*.

204. *Id*. at 890; *see also* Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 76 (D. Me. 1998) (declining to equate gender with sexual orientation and stating, "Title VII does not provide a remedy to persons who have experienced harassment motivated solely by animus toward the plaintiff's sexual orientation" (footnote omitted)).

norm or stereotype is prompted by and is inextricably linked with that person's gender and biological sex. The plaintiff in the Seventh Circuit's *Doe* case[205] was singled out because he did not fall within the alleged harassers' view of what is and is not appropriate for a man. His maleness and (from the harassers' view) nonconformity were the source of the harassers' discontent. That the harassers used terms like "fag" and "queer" in carrying out their harassment does not alter the fundamental character of their objection (to the plaintiff's lack of gender conformity) and goal (to enforce their line between masculinity and femininity and ostracize those who have blurred or crossed over the line). Rather than view this form of harassment as based on sexual orientation, it is submitted that the better and more nuanced view holds that Title VII should recognize the cultural-attitudinal aspects of gender, and should prohibit workplace harassment directed at those who have a right to be free from gender- and sex-based intimidation and ridicule as they perform their jobs in the nation's workplaces.[206]

IV. CONCLUSION

Oncale is an important illustration of bottom up statutory interpretation and the way in which prior interpretive stages and legal and social developments can provide foundations for Supreme Court resolution of contested interpretations and applications of Congressional enactments. Moreover, the Court, in answering the justiciability question in the same-sex sexual harassment area, was not limited by the views of the 1964 Congress that enacted Title VII. Focusing instead on the express statutory prohibition against sex discrimination and applying that term to the same-sex harassment question, the Court held that same-sex claims are justiciable, a result that would not have been reached if the Court had asked the question whether the enacting Congress specifically considered and intended to prohibit harassment in creating its antidiscrimination law.

Having reached this stage of the interpretive progression, the courts now face the next generation of same-sex harassment issues. At this juncture only provisional thoughts and educated guesses can be given regarding judicial treatment of issues not addressed in or resolved by *Oncale*. This article's initial efforts to identify forthcoming issues and problems is only a starting point. Additional research and analysis are crucial as same-sex harassment cases continue to come before the courts. In particular, answers to the questions of whether and how the courts will treat gender-based claims of same-sex harassment will determine the breadth of the sex-discrimination proscription as well as the types of workplace conduct subject to employment discrimination regulation. Thus, the interpretive progression, applicable to future unenvisaged cases, continues.

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205. *See supra* note 192 and accompanying text.

206. On this point, see *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999), which held that the district court erred in dismissing a harassment claim on grounds that the claim was premised on sexual orientation rather than sex.