TITLE VII AND HOMOSEXUAL HARASSMENT AFTER *ONCALE*: WAS IT A VICTORY?

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In the paradigmatic Title VII case,[1] the harasser is male and his target is female, and that gender constellation is relevant in assessing the claim.[2] Increasingly in recent years, however, cases have arisen which do not fit the paradigm. Instead, these new cases involve individuals of the same sex.[3] Sometimes, the cases involve situations where all of the parties are heterosexual men, but the plaintiff is disturbed by the sexualized forms of harassment used against him. In some of the cases, the plaintiff is, or at least is perceived as, gay or insufficiently masculine and is apparently targeted because of those perceptions. In other cases, the defendant is, or is perceived as, gay and thus, the harassing behavior is seen as a form of unwanted sexual demand.[4] Previously, courts, faced with

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1. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1994) provides in relevant part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

2. As the language of Title VII, which forms the statutory basis for federal sexual harassment claims, indicates, the cause of action must show harassment because of sex. The early recognition of the cause of action reflected the work of feminist scholars such as Catharine MacKinnon. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). It remains true that "[t]he prevailing paradigm defines unwanted heterosexual sexual advances as the core conduct that constitutes sex-based harassment. The quintessential case of harassment involves a . . . male supervisor [and] . . . a female subordinate." Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998).

3. Corey Taylor, Comment, *Same-Sex Sexual Harassment in the Workplace Under Title VII: The Legal Dilemma and the Tenth Circuit Solution*, 46 KAN. L. REV. 305 (1998). Examples of such recent same-sex cases include *Oncale v. Sundowner Offshore Service, Inc.*, 118 S. Ct. 998 (1998), *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded by Oncale*, 118 S. Ct. 1183 (1998), and *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996). These cases were almost all decided in the last few years.

The case of a male plaintiff charging harassment by a female supervisor or co-worker is also distinguishable from the paradigm and problematic under some interpretations of Title VII. Most of those doctrinal puzzles, however, are comprised within an analysis of same-sex harassment claims, and any issues particular to the female-to-male harassment question are beyond the scope of this article.

4. Formally, the gender of the parties is irrelevant. A case involving two women is conceptually identical to a case involving two men, just as a case involving a male harasser and a female target is conceptually the same as one involving a female harasser and a male target. In reality, gender

these varieties of same sex sexual harassment claims, took a wide range of doctrinal positions on the viability of the cause of action.

In 1998, the Supreme Court provided a modicum of resolution for these issues. In *Oncale v. Sundowner Offshore Services, Inc.*,[5] a unanimous Supreme Court rejected the argument that Title VII did not apply, as a matter of law, when the harasser and the harassed employee were of the same sex. Rather, it held, the plaintiff must prove that "the conduct at issue . . . constituted 'discrimina[tion] . . . because of . . . sex,'" as well as satisfying the other doctrinal requirements of a sexual harassment claim.[6] If he could do so in a same-sex context, then he was entitled to relief.[7] *Oncale*, however, did not settle the question of what evidence would establish that same-sex harassment was "because of sex."[8]

This article focuses on one particular type of same-sex sexual harassment case after *Oncale*, namely those in which a male employee allegedly harasses a male subordinate or coworker because of his sexual desire for the plaintiff.[9] The easy assumption that these cases are simply gender-variants of the standard male harasser/female target situation significantly oversimplifies how such cases are likely to be litigated and decided. If the theory and practice of such cases is not carefully examined and developed, gay workers may well find that *Oncale* has made them more, rather than less, vulnerable in the workplace.

Part I canvasses the historical terrain by summarizing the case law prior to *Oncale*, examining what *Oncale* decided, and determining what issues it left unresolved. It also briefly describes the theoretical approaches to same-sex harassment in prior academic commentary. Part II examines the gay harasser case as it is likely to be analyzed under the existing doctrinal structure[10] and focuses on the questions: (1) whether the harassment is "because of . . . sex;"[11] (2)

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itself matters. In the remainder of this article, I use male pronouns when discussing same-sex harassment in general, both because the language will get excessively complicated and because the bulk of the same-sex cases involve male parties.

5. 118 S. Ct. 998, 1003 (1998).

6. *Id.* The elements of a claim are explicated in text accompanying note 80.

7. *See infra* text accompanying notes 36-54. In effect, *Oncale* told us what the law was not, but did very little to tell us what the law is. *See id.*

8. *Infra* text accompanying notes 115-21.

9. In contrast, most of the prior commentary on same-sex harassment has focused on the variant in which heterosexual men harass other men because of their perceived homosexuality or other forms of gender non-conformity. *See, e.g.*, Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) [hereinafter Abrams, *New Jurisprudence*]; Katharine Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Pamela J. Papish, *Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law*, 28 COLUM. HUM. RTS. L. REV. 201 (1996).

10. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982). There are two forms of actionable sexual harassment. In quid pro quo cases, a supervisor demands sexual favors, using the threat of negative workplace consequences or the promise of workplace reward to obtain compliance. In "hostile environment" cases, a supervisor and/or co-workers engage in conduct that is "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Henson, 682 F.2d at 904. This doctrinal structure was laid out by the EEOC in its Guidelines, 29 C.F.R. § 1604.11(a) (1981), and approved by the Supreme Court in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

11. *See supra* text accompanying notes 84-122.

whether the harassment is sufficiently "severe and pervasive," including the question of whose perspective the courts are to use in making that judgment;[12] and (3) whether the harassing conduct was sufficiently "unwelcome" to be actionable.[13] Part III considers what impact a cause of action for same-sex sexual harassment may have on employees who are, or are perceived to be, gay. Finally, in Part IV, I propose a short-term solution for minimizing the unjust risks associated with a same-sex cause of action under existing Title VII doctrine. In addition, I suggest that this problem provides still another demonstration of the need for a long-term, probably legislative, reconceptualization of the legal approach to sexual harassment in the workplace.

I. THE BACKGROUND

A. The Judicial History of Same Sex Harassment Law

As Justice Scalia noted in *Oncale*, "the state and federal courts [had] taken a bewildering variety of stances" on the applicability of Title VII to sexual harassment between persons of the same sex.[14] Nonetheless, almost all of the prior cases fit within one of three broad categories: cases holding that there could never be a cause of action for same-sex harassment; cases allowing the cause of action only when the harasser was shown to be homosexual; and cases permitting a cause of action in at least some situations regardless of the sexual orientation of the parties.

1. Same Sex Never Actionable

The leading case holding that same-sex harassment is never actionable was *Goluszek v. Smith*.[15] In that case, a male plaintiff sued under Title VII claiming that he had been subjected to a hostile work environment.[16] Although the alleged harassment would clearly have been sufficient to defeat a motion to dismiss in the normal cross-gender paradigm, the court dismissed the claim because Goluszek was a man. It held, in effect, that Title VII was intended to protect from the misuse of power "against a discrete and vulnerable group."[17] Since the court could not conceive of how actions by men directed against another man could reflect an anti-male animus, it found Goluzsek's claim outside the scope of

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12. *See supra* text accompanying notes 123-71. This issue is frequently characterized in the literature as whether severity should be judged from the perspective of a "reasonable person" or from a more subjective viewpoint, such as that of the "reasonable woman."

13. *See supra* text accompanying notes 172-203.

14. 118 S. Ct. 998, 1002 (1998).

15. 697 F. Supp. 1452 (N.D. Ill. 1988).

16. In *Goluszek*, the plaintiff was shy and sexually inexperienced. His coworkers repeatedly harassed him by asking if he had engaged in sexual activity, showing him pictures of nude women, poking his buttocks with a stick and telling him he should "get married and get some of that soft pink smelly stuff that's between the legs of a woman." *Id.* at 1453-54. The employer did little in response to Goluszek's complaints. *See id.* at 1454.

17. *Id.* at 1456. The *Goluszek* Court relied on a Harvard Law Review note in its construction of the statute; there was no other evidence of the asserted intention of Congress. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984).

Title VII.[18] Under the *Goluszek* approach, the sexual orientation of the parties is irrelevant; if both parties are of the same sex, the court will dismiss the claim.[19]

2. Same-Sex Actionable Only When the Harasser is Homosexual

Courts in the second category permit a cause of action if, but only if, the harasser's behavior can be attributed to his homosexual sexual orientation. A gay male-to-male quid pro quo case, for example, seems conceptually identical to the classically actionable situation of a quid pro quo demand by a heterosexual supervisor toward a different-sex subordinate.[20]

This approach has been adopted where the homosexual defendants allegedly engaged in hostile environment same-sex sexual harassment. The Fourth Circuit, for example, had held in *McWilliams v. Fairfax County Board of Supervisors*[21] that there was no cause of action "where both the alleged harassers and the victim are heterosexuals of the same sex,"[22] since it was a matter of "common understanding" that such behavior was not "'because of' the victim's sex."[23] In *Wrightson v. Pizza Hut of America, Inc.*,[24] a case involving harassment by a supervisor and coworkers who were openly gay, the Fourth Circuit distinguished *McWilliams* and held that the plaintiff could attempt to establish that the homosexual defendants harassed him because he was male.[25]

These cases assume that the gay male perpetrator situation parallels the male perpetrator/female target situation because the plaintiff would not have been subjected to harassment had he or she been of a different sex. These courts

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18. *See Goluszek*, 697 F. Supp. at 1456**.** The Fifth Circuit subsequently adopted the *Goluszek* approach in *Garcia v. Elf Atochem North America*, 83 F.3d 118 (5th Cir. 1994) and followed it in *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev'd* 118 S. Ct. 998 (1998). *See also* Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995) (following the *Goluszek* approach); Mayo v. Kiwest Corp., 898 F. Supp. 334 (E.D. Va. 1995) (same); Polly v. Houston Lighting & Power Co., 803 F. Supp. 1 (S.D. Tex. 1992) (same).

19. While cases following the *Goluszek* rule seem generally to have involved heterosexual harassers, the rule was also followed in *Torres v. National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996), a case involving a supervisor who engaged in unwanted sexual touching, sexually explicit and degrading remarks, and demands for sexual favors that held that "same-gender sexual harassment does not and cannot occur, as a matter of law, 'because of' the victim's 'sex.'" *See also* Schoiber v. Emro Marketing Co., 941 F. Supp. 730 (N.D. Ill. 1996) (determining that victim does not have to be of the opposite sex of the harasser for there to be sexual harassment).

20. *See* Yeary v. Goodwill Industries-Knoxville, Inc., 107 F.3d 443, 447-48 (6th Cir. 1997) (willing to recognize a cause of action in a quid pro quo case, in which a supervisor makes sexual demands on a same-sex subordinate); s*ee also* Fredette v. BVP Management Assocs., 112 F.3d 1503, 1506 (11th Cir. 1997).

21. 72 F.3d 1191, 1195 (4th Cir. 1996).

22. *Id.*

23. *Id*. at 1196. The court never explained why the sexual orientation of the plaintiff mattered under this analysis.

24. 99 F.3d 138, 141 (4th Cir. 1996). The alleged harassment "took the form of sexual advances, in which [a defendant] graphically described homosexual sex to Wrightson in an effort to pressure Wrightson into engaging in homosexual sex." *Id.* at 139. Apparently because there were no threats or promises attached to these advances, however, the claim was couched as one for hostile environment rather than quid pro quo harassment.

25. *Id*. at 143-44. While not all harassment of a male by homosexual males would be actionable, it was sufficient that the plaintiff's sex was part of the motivation for the behavior. *See id*. at 144 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

reject the *Goluzsek* approach and extend Title VII to homosexual same-sex harassment in part from a concern that homosexual harassers will otherwise be given a "free pass," thus "effectively 'exempt[ing] homosexuals from the very laws that govern the workplace conduct of heterosexuals.'"[26] Their arguments for limiting same-sex harassment to homosexual defendants are based either on a failure to comprehend the bases for actionable sexual harassment other than lust[27] or a concern that the broader alternative would open the floodgates and turn Title VII into a general civility code.[28]

3. Same Sex Can Be Actionable Regardless of the Parties' Sexual Orientation

Courts adopting the third approach permit same-sex harassment cases to proceed regardless of the sexual orientation of the parties. Cases in this category focus upon the sexual nature of the behavior, or the gendered way in which it is experienced, rather than upon whether gender or sexuality are crucial to the harasser's motivation.[29] In *Quick v. Donaldson*,[30] an Eighth Circuit case involving numerous incidents of "bagging,"[31] the court reversed a summary judgment for the defendants. It rejected the trial court's adoption of the *Goluzsek* analysis, stating that Title VII did not require any showing that the behavior was motivated by an anti-male animus[32] and held that it was sufficient to show that hostile behavior of a sexual nature was targeted primarily at members of one gender.[33]

This approach provides several benefits. It allows a cause of action when a harasser targets a person because of his or her sex for reasons of animus, a form of sexual harassment unrelated to the actor's sexual orientation. It also avoids the difficulties created by the second approach of litigating and judicially determining people's sexual orientation,[34] an issue that a court should not be required to decide.[35]

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26. Caldwell v. KFC Corp., 958 F. Supp. 962, 969 (D.N.J. 1997) (quoting Pritchett v. Sizeler Real Estate Management Co., Inc., No. CIV.A. 93-2351, 1995 WL 241855, at *2 (E.D. La. Apr. 25, 1995)).

27. *See* Schultz, *supra* note 2 at 1774-82.

28. *See* McWilliams, 72 F.3d at 1196; *cf.* Oncale v. Sundowner Offshore Servs. Inc., 118 S. Ct. 998, 1002 (1998) (rejecting this argument).

29. *See, e.g.*, Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded by* Oncale v. Sundowner Offshore Servs. Inc., 118 S. Ct. 1183 (1998).

30. 90 F.3d 1372 (8th Cir. 1996).

31. Bagging is the actual or threatened grabbing and squeezing of a male's testicles.

32. *See* Quick, 90 F.3d at 1378, *rev'g* Quick v. Donaldson, 895 F. Supp. 1288 (S.D. Iowa 1996).

33. *See id.* This approach, in which harassment is actionable regardless of the sex of the parties so long as it involves differential treatment based on sex, is also the one taken by the EEOC in its proposed guidelines on sexual harassment. *See* EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987) ("The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.").

34. *See, e.g.*, Miller v. Vesta Inc., 946 F. Supp. 697, 705 (E.D. Wis. 1996) (stating that a cause of action lies where a person discriminates based on dislike of the plaintiff's gender without any element of sexual desire).

35. *See* Doe v. City of Belleville, 119 F.3d 563, 589 (7th Cir. 1997) (noting the "appalling discov-

4. *Oncale* Resolves the Conflict

In *Oncale*, a male plaintiff in an all-male workplace was, in the carefully discreet language of the Supreme Court, "forcibly subjected to sex-related humiliating actions . . . physically assaulted . . . in a sexual manner, and . . . threatened . . . with rape."[36] The lower courts, consistent with Fifth Circuit precedent,[37] granted the defendants' motion to dismiss. The Supreme Court reversed and held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."[38]

Oncale thus firmly rejected the *Goluszek* approach. It also rejected the second, *McWilliams*, approach. While it indicated that one means of showing that the harassment was because of sex would be by providing evidence that *Oncale's* tormentors were gay, it then noted that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[39] *Oncale* in essence adopts the third approach, recognizing that a cause of action can exist for same-sex sexual harassment by heterosexual as well as homosexual harassers.

The Court specifically rejected the defendant's argument that the cause of action should be narrowed to avoid turning Title VII into 'a general civility code' forbidding all sexualized workplace speech or action.[40] In same-sex, as in different sex contexts, the dangers of such overreaching were protected against by two aspects of existing doctrine.

First, the harassment must be because of sex. It is not sufficient for a sexual harassment claimant merely to show that "the words used have sexual content or connotations."[41] The inference of discrimination is "easy to draw" when a male harasser targets a female, the Court says, because the conduct "typically involves explicit or implicit proposals of sexual activity;" and the same inference is available where there is "credible evidence that the harasser was homosex-

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ery issues" if the requisite sexual orientation of the harasser were a legal precondition to suit); *see also*, Ryczek v. Guest Services, Inc., 877 F. Supp. 754, 762 (D.D.C. 1995). This unseemly task could, of course, also be avoided by the *Goluszek* approach. *Cf.* Torres v. National Precision Blanking, 943 F. Supp. 952, 960 (N.D. Ill. 1996) ("[S]ame-gender sexual harassment, as opposed to typical gender discrimination, cannot be wholly separated from sexual orientation, preference, identification, and affectation [sic]. In order to allow same-gender sexual harassment actionability, federal courts would be required to delve into the gyttja [sic] of subjective psychological analysis in litigation.") The *Torres* court concluded that this provided additional support for excluding all same-sex harassment from the scope of Title VII. *See id.* at 961.

36. Oncale v. Sundowner Offshore Servs. Inc., 118 S. Ct. 998, 1001 (1998).

37. *See* Garcia v. Elf Atochem North America, 83 F.3d 118 (5th Cir. 1996).

38. Oncale, 118 S. Ct. at 1001-2. Unsurprisingly, the opinion written by Justice Scalia focused on the language of Title VII, which does not include any limitation based on the gender patterns of harasser and target. Scalia noted that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 1002. On Justice Scalia's textualist jurisprudence, *see generally* Antonin Scalia, A MATTER OF INTERPRETATION (1997).

39. Oncale, 118 S. Ct. at 1002.

40. *See id.*

41. *See id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993)) ("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.").

ual."[42] When the parties are the same sex, and no such evidence exists, other forms of evidence are necessary to show that the harassment was because of sex. These might include evidence that members of the other sex are in fact treated better by this defendant or direct evidence that the harassment reflects general hostility to the workplace presence of members of the plaintiff's sex.[43]

Second, the conduct must be sufficiently severe or pervasive to create an objectively hostile work environment. Thus, "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation" is not actionable.[44] The Court emphasized the objective aspect of this test and insisted that

> 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.[45]

The Court thus adopted a test that is inherently complex and multifactored. It gave some examples of ways in which one could prove discrimination, but made clear that these are only examples.[46] It reiterated that the abuse must be objectively severe, as judged "from the perspective of a reasonable person in plaintiff's position, considering 'all the circumstances.'"[47] This test, however, is no more determinative than it was when previously announced in *Harris v. Forklift Systems, Inc.*[48]

There is only a single hint of what the Supreme Court understands its decision in *Oncale* to entail. Shortly after that decision was announced, the Court vacated and remanded *Doe v. City of Belleville* for reconsideration in light of *Oncale*.[49] This suggests that the Supreme Court thinks that the Seventh Circuit's approach in *Doe* is not entirely consistent with its own. The *Doe* court, on facts similar to those of *Oncale*,[50] had provided two distinct rationales for finding that

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42. *Id.*

43. *See id.*

44. *Id.* at 1003.

45. *Id.* The Court noted the difference between a coach's smack on the buttocks of a professional football player and the same smack upon the buttocks of the coach's (male or female) secretary as an example of the way in which the question of severity and pervasiveness were inflected by social context.

46. *See id.* at 1002.

47. *Id.* at 1003 (quoting *Harris*, 510 U.S. at 23).

48. 510 U.S. 17 (1993). As Justice Scalia pointed out in his concurrence in *Harris*, "[t]oday's opinion does list a number of factors that contribute to abusiveness . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, 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.

49. *See* City of Belleville v. Doe, 118 S. Ct. 1183 (1998).

50. In both *Doe* and *Oncale*, the harassers are heterosexual, although the facts alleged in *Doe* clearly suggest that at least one of the plaintiffs was targeted because of his gender nonconformity. The *Doe* plaintiffs were two teenage brothers working during the summer in an all-male crew assigned to do lawn and garden work in the municipal cemetery. One of the brothers wore an earring and the harassment included explicit questioning of his gender and his sexual orientation. *See* Doe, 119 F.3d at 566-67. In the posture in which *Oncale* arose, there had been no fact-finding regarding the reasons for targeting the plaintiff.

Doe could show, as required by Title VII, that he was harassed "because of . . . sex." First, the court suggested that the requirement would be met simply by showing that "the harassment has explicit sexual overtones."[51] Alternatively, the court suggested that the harassment would constitute sex discrimination if the plaintiff were singled out because he did not fit his coworkers' criteria for appropriate masculinity.[52]

Based on the Supreme Court's decision to remand, it is plausible to infer that the Supreme Court disagrees with at least one of these rationales. The first seems most vulnerable, for it is hard to distinguish between the "explicit sexual overtones" found sufficient in *Doe* and the "offensive sexual connotations" found insufficient in *Oncale*.[53] This inconsistency is surely sufficient to explain the remand of *Doe*. It is, therefore, entirely unclear what the Supreme Court thought—or, to be more pragmatic, will likely think—about the second *Doe* rationale, holding that attacks on gender nonconformity form an appropriate basis to meet the "because of sex" requirement for actionable sexual harassment.[54]

B. The Scholarship of Same-Sex Harassment

After the courts recognized a cause of action for sexual harassment under Title VII, relevant scholarship first focused on the scope of the claim and the questions of evidence, proof and doctrinal rules.[55] More recently, there has been a re-examination of the underlying theoretical justifications. This newer literature seems partly inspired by, and an attempt to grapple with, the increasing prevalence of same sex sexual harassment claims.[56] To decide if such claims fall within Title VII requires understanding the relationship between the harm caused by such behaviors and those harms forbidden by the statute. That analysis, in turn, requires a comprehensive understanding of the statute's purposes.

Commentators have suggested three different approaches to the question "why is sexual harassment actionable under Title VII?"[57] First, sexual harassment is illegal under Title VII because it is a form of differential treatment of in-

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51. *See* Doe, 119 F.3d at 576. Note that under this approach, the motivation of the harasser is irrelevant.

52. *See id.* at 580.

53. *Cf.* Oncale v. Sundowner Offshore Servs. Inc., 118 S. Ct. 998, 1002; Doe, 119 F.3d at 576.

54. This article focuses on cases unlike either *Doe* or *Oncale*, in which the harasser is (or is perceived to be) gay. Other academic literature has focused on the appropriate response to cases factually similar to these two. That is, whether when heterosexual men harass a man they perceive as effeminate it is to be viewed as discrimination on the basis of gender presentation and therefore "sex discrimination" or discrimination on the basis of sexual orientation and therefore outside the protection of Title VII. *See, e.g.*, Franke, *supra* note 9; Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992). Professors Franke and Marcosson both recognize that these two ways of viewing the same factual situation are difficult to separate because of the conflation in Euro-American law among sex, gender and sexual orientation. Franke, *supra*, note 9 at 762-71; Marcosson, *supra*, at 6, 11-28. *See generally* 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).

55. *See* Abrams, *New Jurisprudence*, *supra* note 9, at 1170-71.

56. *See, e.g., id.*; Franke, *supra* note 9; Schultz, *supra* note 2.

57. *See* Franke, *supra* note 9, at 691.

dividuals, male or female, because of their gender.[58] This approach embodies the formal equality theory of feminism and is apparent in the earliest cases accepting the cause of action.[59] In effect, it asks the counter-factual question, "[w]ould the complaining employee have suffered the harassment had he or she been of a different gender?"[60] If not, the harassment was "because of . . . sex." Under this approach, the unwanted, sexualized, harassing behavior forced upon one man by another because of the perpetrator's sexual desire for the other is readily seen as actionable.[61] Conversely, such behavior directed at a male plaintiff by heterosexual men would be far harder to characterize as sex-discrimination.[62] Some commentators see these implications of the equality approach as a reason for rejecting the theory, at least as the sole rationale for liability under Title VII.[63] Others seek to expand the notion of individual differential treatment to reach at least some forms of heterosexual same-sex harassment.[64] Applying the same rationale used to extend marriage rights to same-sex couples in *Baehr v. Lewin*,[65] they argue that harassment of gay plaintiffs is sex discrimination. In effect, the argument is that Title VII, by banning sex discrimination in employment, logically bans sexual orientation discrimination as well, whatever Congress may have thought it was doing.[66] The argument retains the structure of the formal equality approach, while expanding its content to bring more actions under the rubric of "because of . . . sex."

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58. *See* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) (discussing this approach as a variant of the equality or sameness branch of feminist legal theory) [hereinafter Abrams, *Complex Female Subject*]; *see also* MACKINNON, *supra* note 2 (criticizing this theory in the early stages of the development of sexual harassment law).

59. *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977).

60. Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (stating that this question is one of but-for causation).

61. *See, e.g.*, EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995); Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981); Charles R. Calleros, *The Meaning of 'Sex': Homosexual and Bisexual Harassment under Title VII*, 20 VT. L. REV. 55, 64-65 (1995) (noting how readily harassment by gay men is included under such an interpretation). Calleros then argues that harassment by a heterosexual man is analytically indistinguishable "[s]o long as the supervisor selectively abuses members of his own gender because of their gender." *Id.* at 64-65.

62. Some courts suggest that it is the target's shyness or other individual vulnerability or the actor's vulgarity or perversity, rather than the target's gender, which explains the behavior, and thus that it is not discrimination "because of . . . sex" as required for Title VII liability. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996).

63. *See, e.g.*, Franke, *supra* note 9; Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J. L. & FEMINISM 375 (1995).

64. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Marcosson, *supra* note 54.

65. 852 P.2d 44 (Haw. 1993). As an example of this rationale consider the following. An employer discriminates against John, or permits other employees to harass John because he sleeps with men. They would not behave in the same way toward Sally because she sleeps with men. Thus, John is treated differently from the counter-factual Sally *because* he is a man.

66. If Marcosson or Koppelman are persuasive, it is because of their theoretical arguments for why discrimination against gay men and lesbians reflects and reinforces gender role restrictions and not because of linguistic sleight-of-hand. S*ee generally* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (providing linkages between sexual orientation discrimination and gender discrimination); Valdes, *supra* note 54.

A second theoretical approach argues that the gravamen of sexual harassment is the inappropriate importation of sexuality into the workplace.[67] According to these commentators, sexualized behaviors in the workplace are experienced in gendered ways.[68] Thus, they inherently meet the statutory requirement of discrimination "because of . . . sex." This approach does not depend on the gender or sexual orientation of the parties and would make all such behaviors potentially actionable, including those by gay men towards heterosexual men and by heterosexual men towards gay men.[69]

The last theoretical approach revives and refines the anti-subordination view of sexual harassment championed by Catharine MacKinnon.[70] This approach focuses on how sexual harassment affects women (and, in some formulations, men) as a group. Sexual harassment is, under this approach, a form of sex discrimination because it contributes to the devaluative sexualization of women,[71] and/or the enforcement of norms of masculinity and femininity.[72] Same-sex sexual harassment is viewed and assessed through the same lens, which readily permits the recognition of harassment of gay men as sex-discriminatory.[73]

Oncale adopts the formal equality/differential treatment approach and seems clearly to reject the sexuality per se approach.[74] Inferentially, then, it also rejects an approach that would permit sexual harassment claims only under a structural, anti-subordination approach and not under a formal equality approach.

The *Oncale* decision still permits, however, a theoretical structure that accommodates both the formal equality and some form of anti-subordination approaches.[75] Combining these approaches seems truer to the underlying purposes

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67. *See generally*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991).

68. *See* Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383 (1996); Regina L. Stone-Harris, Comment, *Same-Sex Harassment — The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269 (1996).

69. Both Locke and Stone-Harris, *id.*, use the sex as sexuality approach to argue for extending protection to cases involving heterosexual male harassment of other men.

70. MACKINNON, *supra* note 2.

71. *See, e.g.*, Abrams, *Complex Female Subject*, *supra* note 58, at 2516 (stating that cause of action should exist when the plaintiff is male and the challenged activity or workplace environment reflects an anti-woman bias); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 124-30 (1992).

72. Franke, *supra* note 9; Sandra Levitsky, Note, *Footnote 55: Closing the 'Bisexual Defense' Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013 (1996); *see also* Marcosson, *supra* note 54, at 18-21 (suggesting that sexually offensive conduct in the workplace is inherently directed at the female sex and thus perpetuates barriers to women's equality).

73. *See, e.g.*, Abrams, *Complex Female Subject*, *supra* note 58, at 2518-26; Kathryn Abrams, *Gender Discrimination And The Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1209-14 (1989) [hereinafter Abrams, *Transformation of Workplace Norms*]; Franke, *supra* note 9, at 762-71.

74. *See Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998). Note that this approach may still be viable under state employment discrimination statutes. Unlike Title VII, where the sexual harassment cause of action exists only as an extension of sex discrimination, some of these statutes specifically recognize sexual harassment itself as illegal. *See, e.g.*, Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997); Fiol v. Doellstedt, 50 Cal. App. 4th 1318 (1996).

75. In other contexts, the Supreme Court has recognized that Title VII forbids actions that re-

of Title VII. If courts were to adopt this two-theory model,[76] both gay harasser and heterosexual harasser same-sex situations would be covered by Title VII. The former situation, as *Oncale* suggests, would be viable under the formal equality approach—the target would not have been harassed if he had been a woman and thus not sexually desirable to the harasser. The latter situation would be covered when the harassment reflected and perpetuated gender stereotypes. Such harassment would perpetuate the view that workplaces are designed for masculine men—a view that harms both non-conforming men, the direct targets, and, indirectly, women and is thus a form of sex discrimination. While this latter type of same-sex harassment, by heterosexual men, is the more theoretically interesting, I want to focus the remainder of this article primarily on the former type, in which the harasser is, or perceived to be, gay.[77] The troubling results, detailed below, of applying existing doctrine to these cases may help us further refine our theoretical understanding of all sexual harassment law.

II. APPLYING THE ELEMENTS OF SEXUAL HARASSMENT DOCTRINE TO THE "HOMOSEXUAL HARASSER" CASE

In any hostile environment case, the plaintiff must allege and prove five elements: that he belongs to a protected group; that he was subject to unwelcome sexual harassment; that the harassment was based upon sex; that the harassment affected a "term, condition, or privilege" of employment; and that the employer is responsible.[78] Since men and women may both bring sexual harassment claims, the first element is rather pointless. It "requires a simple stipulation that the employee is a man or a woman."[79] The last element is subject to

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flect and reinforce sex stereotypes as a form of sex discrimination . *See* 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)). (Title VII intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); *see also* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (finding that Title VII reached a rule that excluded mothers, but not fathers, of pre-school children from the workplace).

76. *See* Abrams, *Transformation of Workplace Norms*, *supra* note 73, at 1191-92 (arguing that feminist theory, as applied to workplace issues, ought to embody both equality and anti-subordination approaches and rejecting the assumption that there must be a single comprehensive principle of anti-discrimination law).

77. The heterosexual same-sex cases, by definition, will all be of the hostile-environment variety. The gay same-sex cases may be either brought as quid pro quo or hostile environment. For purposes of this analysis, I generally focus upon the hostile environment cause of action, because such cases seem more common and because there is no indication in the case law that the sexual orientation of the parties affects a court's willingness to find a threat or promise, as required for the quid pro quo claim.

78. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982). If a plaintiff can show that the harasser was a workplace superior and that there was a threat or promise associated with the sexual advance, the case follows a quid pro quo structure. *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1983) (focusing on the changes in one's working conditions). In such cases, there is no need to meet the criteria that the harassing behavior be 'severe or pervasive' and employer liability is easier to establish.

79. Henson, 682 F.2d at 903. While it appears that there is no Title VII cause of action for discrimination against transsexuals, even transsexuals can state a claim insofar as they are perceived as and harassed as men or as women. *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th

real contention, although the most recent Supreme Court cases[80] have set out a framework that many hope will clarify the law in this area and reduce the need for litigation.[81] Nonetheless, nothing about the employer's legal liability is affected by the gender or sexual orientation of the parties. The elements for which these factors may significantly affect the analysis are the requirements that the challenged conduct be 'because of sex,' that it is 'severe or pervasive' as viewed by the plaintiff and by a reasonable person and that it is 'unwelcome.' Each of these criteria, as developed below, is likely to be inappropriately construed in the context of an alleged gay male harasser in ways that make the plaintiff's case easier than in the paradigm male-to-female situation.[82]

A. Was the Harassment "Because of Sex"?

Sexual harassment is forbidden by Title VII when it comprises practices that "discriminate against any individual . . . because of such individual's . . . sex."[83] A paradigmatic example of such forbidden sexual harassment under Title VII would be a male supervisor grabbing the breasts and buttocks of a female employee and telling her that he wants her to engage in sexual activities with him.[84] The harasser has targeted the plaintiff because she is a woman and because he is inspired by his (heterosexual) lust for her.[85] This situation is viewed as paradigmatic in part because the earliest cases to be brought to the courts' attention were precisely of this type.[86] Indeed, part of the historic achievement of sexual harassment as a cognizable form of sex discrimination was the reconceptualization of such behavior as based on sex and not merely on the nonactionable personal proclivities of the perpetrator or the particular sexual attraction of the target.[87] The shift properly recognized that Title VII should provide a

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Cir. 1977); Miles v. New York Univ., 979 F. Supp. 248, 250 (S.D.N.Y. 1997).

80. *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

81. *See* Dominic Bencivenga, *Wise Employers Adopt Full Remedial Programs*, 220 N.Y.L.J. 5, (1998); Margo L. Ely, *New Liability Standards Set for Sex Harassment Claims*, CHI. DAILY L. BULL., July 13, 1998 at 6 (discussing means by which employers can reduce potential liability in accordance with guidelines set out in these cases).

82. This will also apply, to a lesser extent, to a lesbian harasser.

83. 42 U.S.C. § 2000e-2(a)(1) (1994).

84. Assuming that the other necessary conditions such as unwelcomeness and employer liability are met.

85. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). In *Meritor*, the first sexual harassment case to reach the United States Supreme Court, the plaintiff described a pattern of repeated demands for sexual favors, sexual touchings and comments and even rape, which ceased only when the harasser was informed that she had a boyfriend. *See id.* at 59-61; *see also* Louise F. Fitzgerald, Who Says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment, 6 (1998) (unpub. paper, on file with author) (describing the same phenomenon as the "courtship trope").

86. *See, e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); *see generally* MACKINNON, *supra* note 2 (collecting and describing early cases).

87. *See, e.g.*, Corne v. Bausch & Lomb Inc., 390 F. Supp. 161, 163 (D. Ariz. 1973), *vacated and remanded* 562 F.2d 55 (9th Cir. 1977) ("Mr. Price's conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge"). Thus, the behavior was found to be beyond the scope of Title VII. *See id.*; *see also*

remedy where "sex is for no legitimate reason a substantial factor in the discrimination" even if the perpetrator might not make such unwelcome advances to every woman who comes within range.[88]

I do not argue that courts require a showing of lust to permit a male-female or other sexual harassment case to proceed.[89] Rather, I suggest, as have other commentators,[90] that the use of heterosexual lust driven harassment as the paradigmatic case has distorted the focus of Title VII law, making some situations harder to see as actionable than they should be and others, such as homosexual male-to-male behavior, as easier than they should be.

In seeing such cases as paradigmatic, courts made two assumptions. First, the courts assumed that the men who engaged in harassing behavior towards women were heterosexual.[91] Second, they assumed that heterosexual men, in engaging in such behavior towards women, were driven by lust.[92] Consequently, the lust paradigm has had highly deleterious effects on the larger body of male-on-female sexual harassment cases.[93] A full understanding of the lust

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Tomkins, 422 F. Supp. at 556 (Title VII does not cover "what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley"); Ellen Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 349-50 (1990) (arguing that although a practice is not discriminatory unless it is directed towards all members of the group, but in lust-driven sexual harassment the perpetrator directs his behavior toward a particular person who happens to be female).

88. *Bundy*, 641 F.2d at 942. *See generally* MACKINNON, *supra* note 2 (explaining why such behavior is sex discrimination). This view has become standard in male-female cases. *See, e.g.*, King v. Board of Regents, 898 F.2d 533, 539 (7th Cir. 1990) (finding a sex discrimination and thus a Title VII, cause of action where "[h]is actions were based on her gender and motivated by his libido").

89. *See, e.g.*, Doe v. City of Belleville, 119 F.3d. 563, 575 (7th Cir. 1997) (finding cause of action for behaviors intended to demean the plaintiffs in ways linked to their sex); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993) (same).

90. *See* Schultz, *supra* note 2, at 1686-87 (stating that "much of the gender-based hostility and abuse that women (or men) endure is neither driven by the desire for sexual relations nor even sexual in content."); Fitzgerald, *supra* note 85, at 12 (arguing that "sexual harassment has nothing to do with attraction").

91. *See, e.g.*, Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178 (N.D. Ind. 1995). The court discusses the significance of sexual orientation in assessing a same sex claim, but notes that "[w]hen a man touches a woman in a sexual manner, or asks her to have sexual relations with him it can be presumed that he is doing so because she is a woman. Her gender is probably not incidental." *Id.* at 1181. The court simply assumes the heterosexuality of that perpetrator.

The heterosexual presumption is "reasonable and efficient" in the male-on-female sexual harassment case. *See* Franke, *supra* note 9, at 693. However, insofar as the assumption reflects an unconscious view of the world, it obscures the deliberate policy judgment that Professor Franke makes, and that might allow the presumption to be rebutted in appropriate cases.

92. Sexual harassment in the workplace has been viewed, in essence, as a form of sexually predatory behavior that happens to occur in the workplace, rather than a form of sex discrimination that happens to involve the use of sexually aggressive words and actions. *See generally* Estrich, *supra* note 67 (constructing sexual harassment as an analogue to rape).

93. Schultz, *supra* note 2. These deleterious effects include an obscuring of the extent to which plaintiffs are subjected to non-sexualized gender harassment, the ways in which gender harassment and sexual harassment reinforce each other, and the ways in which sexualized harassment may reflect aggression and animus towards women as well as sexual desire for them. S*ee, e.g.*, EEOC v. Farmer Bros. Co., 31 F.3d 891, 897-98 (9th Cir. 1994) (distinguishing cases of unwanted sexual attention from those in which the employer is "using sexual harassment primarily to subordinate women", but recognizing that "in many cases the sexual harasser will have a mixed motive for engaging in this type of conduct"); *see also* Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988)

paradigm's harms to sexual harassment law are especially apparent when focusing on same-sex cases. It is perhaps not surprising, then, that it was a court faced with a same-sex case that most clearly recognized the error of the paradigm as "betray[ing] a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok."[94]

The harms of the lust paradigm can be seen in the analysis of the pre-*Oncale* cases that denied a cause of action for heterosexual same-sex harassment, since this was perceived as definitionally not rooted in sexual desire.[95] Male-to-female sexualized offensive speech and touching of genitalia is sexual harassment *because* it is a form of sexual advance. Yet, the same behavior among heterosexual men is not meant as a sexual advance, but "mere horseplay."[96] If "because of . . . sex" becomes equated with "because of . . . the actor's sexual desires," such horseplay is outside Title VII. Under the lust paradigm, the targets of heterosexual same-sex harassment—a group that is likely to frequently include men who are, or are perceived to be, gay—have no federal remedy. The heterosexual lust paradigm also, however, harms gay men as potential defendants because it both dichotomizes and essentializes sexual orientation.[97] Gay men are assumed to comprise a definable, discrete category. When people within the category engage in sexualized behavior towards other men, it is assumed to reflect their lust-driven sexual desire for the target.[98] All other men are presumed heterosex-

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(involving the use of both sexualized and non-sexualized techniques of harassment against women in non-traditional work); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (same); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) *cert. denied* 115 S. Ct. 733 (1995) (same); Bell v. Crackin Good Bakers Inc., 777 F.2d 1497 (11th Cir. 1985) (same).

94. Doe v. City of Belleville, 119 F.3d 563, 586 (7th Cir. 1997), *vacated and remanded by* Oncale v. Sundowner Offshore Servs. Inc., 118 S. Ct. 1183 (1998).

95. *See, e.g.,* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988); Dillon v. Frank, No.90-2290, 1992 WL 5436, at *1 (6th Cir. 1992) (stating that comments such as "Dillon sucks dicks, or gives head" were not sex-based harassment when directed against plaintiff perceived as gay by heterosexual male coworkers). Courts rejecting or severely circumscribing the cause of action for heterosexual same sex harassment also seem driven by a fear of a slippery slope into a federal civility code. *See infra* text accompanying note 40.

96. *See* Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (finding no cause of action for same-sex heterosexual hostile environment since "the presumption of sexual gratification and thus, sex discrimination ceases to exist").

97. There is, of course, one exception to this dichotomization: the mythical bisexual harasser. Regardless of the fact that there are no reported cases involving an actual bisexual harasser, the theoretical possibility of a bisexual harasser has regularly been a subject of case law and commentary. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); Dixon v. State Farm Fire & Cas. Ins. Co., Civ. A. No. 4:94CV165, 1995 WL 810016 (E.D. Va. Aug. 23, 1995); Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 (D.D.C. 1995) (referring to such a bisexual harasser as a "particularly unspeakable cad"); Calleros, *supra* note 61. In any event, even under a lust paradigm, the real issue is not orientation in general, but particular behavior. Only if the defendant at the workplace sexually harassed both men and women could one say that the harassment was not because of sex. *Cf.* Dixon v. State Farm Fire & Cas. Ins. Co., 926 F. Supp. 548, 551 (E.D. Va. 1996) (suggesting, in a same-sex sexual harassment case that the proper issue is characterization of behavior and that sexual orientation *vel non* should not be an element of plaintiff's case).

98. *See* Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997) ("The reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser—i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers."). *See also* Christopher W. Deering, Comment, *Same-Gender Sexual Har-*

ual, and their behavior towards other men is therefore presumed never to be driven by sexual desire.[99] Thus, courts that see heterosexual same-sex harassment as nothing but non-actionable horseplay[100] may be all too ready to find sex discrimination in any homosexual same-sex harassment.[101] As an example of the courts' willingness, consider the following quote from *Yeary v. Goodwill Industries-Knoxville, Inc.*:[102]

> [T]his case is as traditional as they come, albeit with a twist. It is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive . . . we find no substantive difference between [male-to-female or female-to-male situations] and that present here.[103]

In contrast to the male-to-female case, however, the sexual attraction of the perpetrator for a same-sex target cannot be assumed. Rather, it is an issue to be proved.[104] Because of the assumption that sexual orientation is fixed and dichotomous, however, the issue becomes not the motivation of the perpetrator for the particular behavior complained of, but his sexual orientation as such. Men who sexually harass women are assumed to be heterosexual and acting out of lust; men who sexually harass men are assumed either (a) to be heterosexuals engaging in non-sexual horseplay[105] or (b) homosexuals indulging their sexual

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assment: A Need to Reexamine the Legal Underpinnings of Title VII's Ban on Discrimination "Because Of" Sex, 27 CUMB. L. REV. 231 (1996-1997) (critiquing courts for shifting focus from the events in the workplace to the attempt to discover the plaintiff's 'true' sexual orientation).

99. *See McWilliams*, 72 F.3d 1191. This approach ignores the substantial evidence that people who identify themselves as heterosexual do engage in same-sex sexual behavior. *See, e.g., Developments in the Law —Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1511 n.1 (1989); EDWARD O. LAUMANN, THE SOCIETAL ORGANIZATION OF SEXUALITY 283, 287-301 (1994) (stating that the concept of sexual orientation is a complex one, comprising elements of sexual history, sexual desire, and self-understanding, which are related in subtle ways); John P. DeCecco, *Definition and Meaning of Sexual Orientation*, *in* PHILOSOPHY AND HOMOSEXUALITY 51, 64 (Noretta Koertge, ed. 1985).

100. *See, e.g.*, Blueford v. K.W. Prunty, 108 F.3d 251, 254 (9th Cir. 1997) (rejecting a claimed "right under federal law to be free of puerile and vulgar same-sex trash talk" in heterosexual same-sex case).

101. *See, e.g.*, McCoy v. Macon Water Auth., 966 F. Supp. 1209, 1217 (M.D. Ga. 1997) (citing Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1049 (N.D. Ala. 1996)) (explicitly stating that a Title VII cause of action is available for homosexual, but not for heterosexual, same sex sexual harassment). As with male-female cases, the quid pro quo (and thus inherently homosexual, attraction-based) cases were the most readily recognized as actionable. *See, e.g.*, Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983).

102. 107 F.3d 443 (6th Cir. 1997).

103. *Id.* at 447-48; *see also* Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997); *Wright*, 511 F. Supp. at 310; Dixon v. State Farm Fire Cas. Ins. Co., Civ. A. No. 4.94CV165, 1995 WL 810016, at *6 (E.D. Va. Aug. 23, 1995); Boyd v. Vonnahmen, No. 93-CV-4358-JPG, 1995 WL 420040 (S.D. Ill. Mar. 29, 1995).

104. *See* Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 517 (1996) (noting the hetero-normativity of this approach); *cf.* Blozis v. Mike Raisor Ford Inc., 896 F. Supp. 805, 807 (N.D. Ind. 1995) (stating that in the male-female context, courts can assume sexualized behavior is 'because of sex;' whereas in the male-male context, the plaintiff must prove that the harassment is because of sex either by showing that the perpetrator is homosexual [the lust paradigm] *or* that he is acting out of an anti-male animus).

105. *See, e.g.*, Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988); Ashworth v. Roundup Co.,

desires for the plaintiff.[106] The key issue is deciding in which category the particular defendant fits.[107]

Some courts have recognized that making the defendant's sexual orientation an issue will lead to "appalling" discovery processes.[108] All the stereotypes that people use to guess at a person's homosexual orientation may become subject to discovery and to testimony and argument at trial.[109] Yet, it is difficult to see how disputes over sexual orientation can be avoided unless and until the courts move away from either the lust paradigm or the assumption that particular workplace behavior is merely an instance of an external and immutable sexual orientation.

Defendants in these cases are subject not only to a privacy-shattering investigation of their sexual orientation, but also a stereotype-based misreading of their behavior. Courts often assume that sexual orientation is always manifested and thus is equivalent to an explanation for particular behavior.[110] Thus, ambiguous behavior, which might be seen as mere puerility or vulgarity if engaged in by a heterosexual perpetrator,[111] is instead seen as "because of sex" once the perpetrator is defined as gay.[112] The court in *Griswold v. Fresenius USA, Inc.*[113] for example, recognized the ambiguity of such actions by the perpetrator as putting

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897 F. Supp. 489 (W.D. Wash. 1995).

106. *See* Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1501-02 (E.D. Va. 1996) (concluding that a plaintiff in a same sex case must "must plead and prove that the alleged harasser was sexually attracted to his victim or homosexual" since otherwise the allegedly harassing conduct could as easily be construed as "mere locker room antics, joking, or horseplay."); *see also* Franke, *supra* note 9, at 737.

107. *See* Hopkins v. Baltimore Gas & Elec. Co. 77 F.3d 745, 752 (4th Cir. 1996) *cert. denied* 117 S. Ct. 70 (1996) ("The principal way in which this burden [of showing that same-sex harassment is because of sex] may be met is with proof that the harasser acted out of sexual attraction to the employee"). *Hopkins* then indicates that external evidence is necessary; it is insufficient that the challenged behavior itself could be construed as a manifestation of same-sex sexual attraction.

108. *See* Doe v. City of Belleville, 119 F.3d 563, 589 (7th Cir. 1997); Ryczek v Guest Servs., 877 F. Supp. 754, 762 (D.D.C. 1995); *see also* Deering, *supra* note 99, at 287.

Some courts pointed to this issue in justifying the denial of relief in any same-sex situation. *See, e.g.*, Torres v. National Precision Blanking, 943 F. Supp. 952, 960 (N.D. Ill. 1996) ("In order to allow same-gender sexual harassment actionability, federal courts would be required to delve into the gyttja [sic] of subjective psychological analysis in litigation"). That resolution, of course, is barred by *Oncale*.

109. If a man is married, he is presumably heterosexual and thus not engaged in lust-based sexual harassment of other men. Conversely, if he is single, especially if he has a male roommate, one might infer that he was gay. Limp wrists, swishy walks, being seen at known homosexual hangouts all provide evidence that the man is gay. *See* Griswold v. Fresenius USA, Inc. 978 F. Supp. 718, 723 (N.D. Ohio 1997).

110. *See, e.g.*, McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997).

111. *See* Papish, *supra* note 9, at 203-04; Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1069 (1996).

112. *See, e.g.*, Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 403-06 (D. Minn. 1996) (rejecting the defendant's motion for summary judgment and finding sufficient evidence to allow the inference that the perpetrator was making sexual advances and thus that the behavior was 'because of sex"). For example, in *Waag*, the plaintiff did not perceive his male supervisor's frequent touching of his abdomen accompanied by comments that he "kept in shape" as sexual until the supervisor told him a homosexual sexually explicit joke. *See id.* at 396.

113. 978 F. Supp. 718, 728 (N.D. Ohio 1997).

his arms around the plaintiffs' shoulders, rubbing their backs and patting their buttocks, allegedly in a sexually suggestive manner. It permitted the plaintiff to proceed with his case, however, because other evidence of the perpetrator's stereotypically homosexual behaviors could lead a fact-finder to conclude that he was acting out of sexual desire and thus "because of . . . sex."[114]

Oncale acknowledges that the lust paradigm is not the *only* way in which harassment can be based on sex.[115] Although it begins its list of the ways in which same-sex harassment can be shown to be because of sex with the "easy" inference from the homosexual orientation of the harasser, it goes on to note other possible modes, including a showing that the plaintiff is "harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility" to persons of the plaintiff's [and the harasser's] sex.[116] This approach does not protect gay alleged harassers from the harms detailed above.[117] It does, however, facilitate recognition of the alternative mode of same-sex harassment, which is rooted in gender animus. Heterosexual male-to-male sexual harassment, like male-to-female sexual harassment, is often rooted in a particular vision of gender and work. The workplace is reserved for real men; this ideology is enforced by harassment of women and certain men because of their performance, or lack of it, as men.[118] As others have noted, the male plaintiffs who might have a cause of action for sex-discriminatory sexual harassment under an animus theory are especially likely to be men who are, or

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114. *Id.* at 731. *But see* Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1174-75 (D. Nev. 1995) (resisting the temptation to equate the homosexuality of the perpetrator with a finding that his harassment of the same-sex plaintiff was "because of sex"). In *Fox*, the male plaintiffs charged that they were the victims of hostile environment sexual harassment by being subjected to sexually explicit writings, drawings and discussions of "homosexual acts . . . and other topics in a depraved manner." *Id.* at 1172. The plaintiffs claimed protection for their heterosexual sensibilities, not for their masculinity, within the alleged hostile work environment. The *Fox* court focused on the heart of the claim, namely the plaintiff's reaction, rather than on the perpetrator's (irrelevant) sexual orientation, and dismissed the action. *Id.* at 1174. Logically, the plaintiff's sexual orientation should not matter, since it need affect neither the perpetrator's choice to target him as sexually appealing nor the plaintiff's decision not to respond favorably to such advances. *See, e.g.,* Johnson v. Community Nursing Servs., 932 F. Supp. 269, 273-74 (D. Utah 1996) (noting that sex of harasser does not matter). Yet in the same sex context, some courts have suggested that the target's sexual orientation is relevant. *See, e.g.,* Hopkins v. Baltimore Gas & Elec. Co. 77 F.3d 745 (4th Cir. 1996), *cert. denied* 117 S. Ct. 70 (1996); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996). *But see* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).

115. *See* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

116. *Id.*

117. *See id.* As *Doe* puts it, showing that the perpetrator is homosexual becomes sufficient, though not necessary, to demonstrate that the same sex harassment was because of sex. *See Doe*, 119 F.3d at 575.

118. *See* Franke, *supra* note 9; Koppelman, *supra* note 64; Schultz, *supra* note 2. In the same sex context, mixed motives, including the target's gender, seem sometimes to be deemed insufficient for Title VII liability. *Cf.* Caldwell v. KFC Corp., 958 F. Supp. 962, 969 (D.N.J. 1997) (stating that Title VII's purpose is to protect discrete and vulnerable groups).

Other courts however recognize that in at least some same-sex situations "an employee may suffer harassment based on sex that is motivated by pure misanthropy or misogyny. Title VII prohibits discrimination in *all* its forms, and . . . is not limited to discrimination in the form of unwanted sexual advances committed by an individual who is actually serious." Griswold v. Fresenius USA, Inc., 978 F. Supp. 718, 728 (N.D. Ohio 1997).

are perceived as, gay.[119] A plaintiff such as Oncale might prevail if he can show that the harassers "were motivated by general hostility to the presence of" persons of the plaintiff's sex.[120] *Oncale* leaves the door slightly open to make this argument. But it opens the door wide for extending the lust-based paradigm to protect heterosexual plaintiffs where there is "credible evidence that the harasser was homosexual."[121] Overall, based on *Oncale's* approach to the "because of sex" issue, it is not clear if gays in the workplace are better or worse off than if the Supreme Court had limited Title VII to opposite-sex harassment.

B. Was the Harassment Severe or Pervasive?

Not all discriminatory speech or conduct in the workplace violates Title VII. As indicated in the EEOC guidelines, such behavior is forbidden when it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[122] Under the standard formulations of the doctrine, the plaintiff must show that the harassment was objectively severe and pervasive.[123] It is necessary, but not sufficient, to show that the plaintiff found the behavior hostile or offensive because "Title VII does not serve 'as a vehicle for vindicating the petty slights suffered by the hypersensitive.'"[124] Furthermore, "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."[125]

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119. *See* Franke, *supra* note 9, at 696-97; Grose, *supra* note 63. In at least one case, however, homosexual same sex harassment is misconstrued as lust driven. The perpetrators were a group of gay men who harassed the plaintiff and other heterosexual men. The Fourth Circuit allowed the case to proceed because the perpetrators were gay, a distinction that can be determinative only through a lust-based paradigm. Consider the behavior there however. The perpetrators "graphically describe[d their] homosexual lifestyle"; "subject[ed the plaintiff] to vulgar homosexual sexual remarks"; and pulled down his pants, making sexually explicit remarks while touching him. Wrightson v. Pizza Hut of Am. Inc., 99 F.3d 138, 139-40 (4th Cir. 1996). This behavior does not seem to reflect sexual desire for the plaintiff and his fellow targets or an attempt to induce the plaintiff to engage in homosexual behaviors with them. Rather, it suggests a misuse of power, in a workplace with a strong representation of gay men, to embarrass and humiliate the plaintiff, a straight man who, they rightly perceived, was vulnerable to such sexualized teasing and trash-talk. The case is, in effect, a mirror image of *Goluszek*, rather than a heterosexual lust-based sexual harassment case because the plaintiff was targeted because he was male and because he was straight. Katharine Franke describes the behavior in *Wrightson* as "group harassment" of straight men. *See* Franke, *supra* note 9, at 743. *See also* McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 231 (S.D. Ga. 1995) (construing a case as homosexual sexual harassment when a black female perpetrator rubbed her breasts against a white female plaintiff's chest and forced her tongue into plaintiff's mouth even though plaintiff's own evidence indicates perpetrator had explained her behavior in terms of racial animus: "we have always been able to make a white bitch like you quit, you're one stubborn stupid bitch").

120. *Oncale*, 118 S. Ct. at 1002.

121. *Id.*

122. 29 C.F.R. § 1604.11(a)(3) (1998).

123. *See* EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681 (Mar. 19, 1990) [hereinafter EEOC Guidance].

124. *See id.* at 3231 (quoting Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984)).

125. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (emphasis added).

The assessment is necessarily quite fact-specific. The Supreme Court in *Harris*[126] acknowledged that determining if a particular environment would reasonably be perceived as hostile or abusive requires "looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."[127] The ultimate determination requires an assessment of "the record as a whole and . . . the totality of the circumstances;" it must be made "on a case by case basis."[128] This approach embodies all the problems inherent in any use of a standard rather than a rule.[129] Even if a set of fact-finders could agree on what had happened in each case, and on the relative severity, so that the cases could be unanimously rank-ordered, there is neither a determinate legal formulation nor a societal consensus as to where the line should be drawn between those situations that are sufficiently severe and pervasive and those that are legally permissible.

If the concept of "severe and pervasive" cannot be defined in a sufficiently precise way to resolve cases, an alternative means of guiding fact-finders might be through providing a consistent perspective from which the varied situations can be assessed. Drawing on the analogous problem of determining "negligence" in tort cases, one might require that the fact-finder apply the perspective of the "reasonable person."[130] Both *Harris* and *Oncale* adopt, in passing, such a reasonable person standard.[131]

But who is this reasonable person? And, since he is neither a god nor a starfish, the reasonable person cannot be sexless. Is he really the classic "reasonable man" in gender-neutral clothing?[132]

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126. *Id.*

127. *Id.* at 23; *see also* Ross v. Double Diamond, Inc., 672 F. Supp. 261, 270-71 (N.D. Tex. 1987) (detailing some of the relevant factors).

128. 29 C.F.R. § 1604.11(b) (1998).

129. *See Harris*, 510 U.S. at 24, 25 (Scalia J. concurring) (noting plaintively that the formulation "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," but concluding that no more determinate formulation is consistent with the "inherently vague statutory language").

130. *Cf.* RESTATEMENT (SECOND) OF TORTS § 291 (1965) (adopting "reasonable person" standard to determine if an act is negligent).

131. *See Harris*, 510 U.S. at 21; Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998) (stating that common sense and sensitivity to social context will permit fact-finders 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" (emphasis added)).

132. *See* Laurie A. Taylor, Comment, *Provoked Reasons in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1691-92 (1986) (discussing the assertion that the "reasonable man" despite the linguistic shift to "reasonable person" remains a gendered being, distinct from the "reasonable woman"); *see also* A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 20 (1930) (commenting on the traditional absence of a "reasonable woman" concept in the common law and stating that "the view that there exists a class of beings, illogical, impulsive, careless, irresponsible, extravagant, prejudiced, and vain, free for the most part from those worthy and repellent excellences which distinguish the Reasonable Man, and devoted to the irrational arts of pleasure and attraction, is one which should be as welcome . . . in our Courts as it is in our drawing-rooms. I find therefore that at Common Law a reasonable woman does not exist.")

Perhaps the most famous, or infamous, case to analyze the meaning and significance of the reasonable person standard in sexual harassment law is *Rabidue v. Osceola Refining Co.*[133] Vivienne Rabidue was the sole woman manager in a company where male employees regularly displayed pictures of nude or scantily clad women.[134] Another manager, Douglas Henry, with whom she had to interact frequently, "was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."[135] The Sixth Circuit concluded that a reasonable person would not have found this behavior so severe or pervasive as to violate Title VII's proscriptions.[136] They focused on the need to be sensitive to context.[137] The "context" in which these events occurred, they noted, was a workplace that had always been one of rough-hewn language.[138] Furthermore, such language, along with "sexual jokes, sexual conversations and girlie magazines" are part of the lexicon of many American workplaces and pictures similar to those displayed there are available on many newsstand racks.[139] Viewing the behaviors contextually, the majority concluded that "although annoying, [they] were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."[140]

Other judges, some perhaps influenced by the widespread criticism of *Rabidue*,[141] rejected such a purely objective reasonable person standard. Some expressed concern that the reasonable person standard, especially as applied therein, seems to embody the expectations and behaviors of the ordinary man[142] as a standard of reasonableness to which women are expected to adjust.[143] Some courts responded directly to the perceived implicit maleness of the reasonable person standard by calling instead for a "reasonable woman" standard, in order to respond appropriately to the different perspectives of men and women.[144]

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133. 805 F.2d 611 (6th Cir. 1986).

134. *See id*. at 615.

135. *See id.* The dissent was more graphic: noting that Mr. Henry routinely referred to women as "cunt," "whores," "pussy," and "tits," and described Ms. Rabidue as a "bitch" who needed "a good lay"). *See id*. at 624 (Keith, J., dissenting).

136. *See id*. at 622.

137. *See id*. at 620.

138. *See id.*

139. *Id*. at 620 (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

140. *Id*. at 622.

141. *See, e.g.*, Chamallas, *supra* note 71; Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Susan M. Matthews, *Title VII And Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299 (1991).

142. More precisely, the judges' assumptions about ordinary working class men. *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1202 (1990).

143. *See Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) (noting that the majority's reasonable person standard "fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men"). *See also* Ehrenreich, *supra* note 142, at 1209 (discussing the class bias built into the *Rabidue* majority opinion).

144. *See* Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991). *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (using an objective standard which "asks

These courts adopt the language of "reasonable woman," in the context of a male-on-female harassment claim, so we cannot be certain, for example, what standard would be used in the context of other gender combinations.[145] Other courts have used a variety of linguistic formulations which do not make clear the rationale for the formula chosen and thus what the proper formula should be where the harasser is female or the victim male.[146]

Academic commentators have also been critical of the unmodified reasonable persons standard[147] and have put forth a range of alternatives.[148] *Rabidue* demonstrates the faults of a test that simply adopts the perspective of the average person. The same-sex cases, as developed below,[149] indicate that a gender-specified but analogous test is no better, for it would judge such a claim from the perspective of the average man. What is needed is a test of "normative reasonableness."[150] I suggest that the most recent approach to this problem by Profes-

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whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created"). The factual situation in *Robinson* was quite similar to that in *Rabidue*: a token woman in a dominantly male workplace confronted with pervasive pornography and obscenity-laced comments.

145. *See Ellison*, 924 F.2d at 879. In addition to its "reasonable woman" language, *Ellison* at one point describes its standard as the response of "a reasonable victim of the same sex as the plaintiff."

146. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 163 (1994) (footnotes omitted) (noting the range of formulae adopted by courts: "the reasonable person, the reasonable woman, the reasonable person of the same sex as the plaintiff, the reasonable victim, and the blended perspective of both the reasonable man and the reasonable woman"). *See also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (stating that the test is whether the behavior would "detrimentally affect a reasonable person of the same sex"); Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998) (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993) and referring to the "reasonable person in the plaintiff's position, considering 'all the circumstances'").

147. *See* Ehrenreich, *supra* note 142, at 1213 (commentators have argued that the reasonable person approach "explicitly sets up middle-class, male values as the source of the 'objective' standard").

148. Professor Burns discusses the standard proposed by the EEOC in 1993 that considered the perspective of a "reasonable person in the same or similar circumstances." This standard includes "considerations of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability." Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should it Be Assessed After Harris v. Forklift Systems Inc.?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 390 (1994-95). *See* Chamallas, *supra* note 71, at 129 (suggesting the perspective of "a reasonable target of harassment"); Dolkart, *supra* note 146, at 154 (suggesting a test involving the "hypothetical reasonable person in the situation of the victim, with the experiences and perceptions of the victim").

While existing case law allows for the development of these or other refinements of the tests in *Harris* or *Oncale*, it is not possible, without overturning those cases, to reject any reasonableness limit to the plaintiff's subjective perception that the harassment was severe or pervasive, as some commentators have proposed. *See e.g.*, B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 27-28 (1993) (advocating that an objective test of the severity or pervasiveness need only be shown only in a limited range of sexual harassment claims). *See also* Abrams, *Transformation of Workplace Norms*, *supra* note 73, at 1209 (suggesting that the subjective response of the plaintiff should be sufficient to establish her prima facie case, although the defendant could rebut it with objective evidence showing that most people would view the claims as wholly trivial).

149. See *infra* text accompanying notes 158-69.

150. That is, the question is not how the typical person would react to the described behaviors, but how we as a society, committed to the goals of Title VII, would expect people in the plaintiff's

sor Abrams gives us such a test.[151]

Under what I will call the "Abrams test," harassing behavior should be judged from the perspective of a person who has adequate knowledge about sexual harassment, including "the barriers that women have faced and continue to face in the workplace [and] the effects sexual harassment has on the work lives of its targets."[152] This normatively reasonable person will be informed about the techniques and effects of sexual harassment and committed to eradicating patterns of gender subordination. He or she will judge the challenged behavior by whether it was likely to interfere with the target's capacity to exhibit, and to be judged on, his or her competence as a worker.[153]

While no court has yet explicitly adopted the Abrams test, one can see aspects of its approach in the decision in *Bennett v. Corroon & Black Corp.*[154] In *Bennett*, the Fifth Circuit stated that the posting in the men's room of obscene cartoons depicting the plaintiff was sufficiently offensive to meet the objective prong of the test: "Any reasonable person would have to regard these cartoons as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity."[155] Because the test is normative rather than descriptive, it avoids the gender problem. We do not ask how the typical man or the typical woman acts, or how each of them would react to the challenged behaviors. Instead, the Abrams test requires a determination of what, given the adoption of Title VII, a person is entitled to expect. Fact-finders, male or female, are not asked simply to decide how they would feel, but to educate themselves about sexual harassment and then decide how such an educated person would respond.[156]

While the 'Abrams test' cannot in itself give us the dividing line between actionable harassment and non-actionable forms of sexualized speech or conduct, it asks the proper question. It recognizes the ways in which much sexualized speech or conduct can interfere with the target's capacity to work or to be judged by her work. It simultaneously recognizes that there is a level of sexual banter or personal conversation that normally occurs in workplaces and does not have these effects.[157]

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position to have to tolerate such behaviors. *See generally* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (discussing the normative conception of reasonableness).

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

152. *Id.* at 1178.

153. *Cf.* Schultz, *supra* note 2 (constructing a competence-centered account of the harms of sexual harassment).

154. Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988).

155. *Id.* at 106.

156. I am reminded of a debate that occurred when I was a law clerk. A case had arisen in which the U.S. Customs Service had refused entry to certain material on their judgment that the materials were obscene according to contemporary community standards. One participant argued (persuasively to me, although not ultimately to the bench) that the proper question was not whether the typical member of the community would be offended if you put the material under their nose, but if they thought it a problem if the material were available to those who wished to view it. *See* United States v. Various Articles of Obscene Merchandise, 600 F.2d 394 (2d Cir. 1979).

157. For example, a company would almost surely not be liable if a supervisor gave her subor-

One of the virtues of this test, of particular importance after *Oncale*, is that it can work as effectively for same-sex as for opposite-sex harassment. The value of the Abrams test is perhaps clearest if we compare it to the variety of descriptive reasonableness tests as applied to the same-sex context. Gay supervisors, like heterosexual ones, can be guilty of quid pro quo harassment. Gay supervisors or coworkers could engage in a pattern of unwanted intimate contact or intrusive sexual questionings that amount to the creation of a hostile environment. The behaviors that cross the line from legal to illegal should be the same, however, regardless of the sexual orientation of the parties.

As the court in *Miller v. Vesta, Inc.*[158] rightly observed, the challenged behavior was insufficient to be construed as objectively hostile. The court rejected the plaintiff's argument that "the repugnant homosexuality involved in this case" was relevant to the severity question.[159] Since the actions "were not so frequent or severe, apart from their homosexual character to create a hostile environment,"[160] they were not actionable. Too often, however, fact-finders, as well as the plaintiffs themselves, may view the defendant's actions through lenses colored by conscious or unconscious homophobia. The test of "reasonableness" should be one designed to combat, rather than facilitate, this tendency.

A problem inherent to any descriptive reasonableness standard is that the individuals who will apply the test, judges and jurors, exist in a heterocentrist and homophobic wider culture.[161] They may all too readily see homosexual sexual harassment, because it is directed against someone of the same sex, as more disturbing than the identical conduct by a man toward a woman. This can be demonstrated even by those same-sex cases which were not successful, but in which an attorney thought there was sufficient merit to initiate litigation.[162] For example, in *Morgan v. Massachusetts General Hospital*,[163] the perpetrator stared at

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dinates two unwanted hugs and a gift of candy with a note signed "Love, Steph." Drew v. First Sav., 968 F. Supp. 762 (D.N.H. 1997) (dismissing case). Likewise, it would probably not be sufficient to claim that a supervisor commented twice a week that the plaintiff smelled nice or looked good in his uniform. *See* McElroy v. TNS Mills, Inc., 953 F. Supp. 1383, 1389 (M.D. Ala. 1996) (denying motion to dismiss because allegations raised a factual question of whether the harassment was sufficiently pervasive). Yet, these cases were seen as non-trivial and even potentially valid because the actors were homosexual. In effect, the courts allowed the plaintiff's homophobia to color their approach.

158. 946 F. Supp. 697 (E.D. Wis. 1996).

159. *Id.* at 711.

160. *Id.* at 711-12.

161. Heterosexual men define themselves both as not women and as not gay; if they think that a gay man finds them attractive this upsets their psychological balance. One study indicated that adolescent boys were more disturbed by being called gay than by such forms of harassment as having their clothes pulled off or being forced to engage in some sexual acts. *See* Dolkart, *supra* note 146, at 163 (citing THE FOUNDATION, HOSTILE HALLWAYS: THE AMERICAN ASS'N OF UNIV. WOMEN SURVEY ON SEXUAL HARASSMENT IN AMERICAN SCHOOLS (1993)).

162. In general, the reported same sex cases seem to involve relatively mild forms of harassment. Courts split over whether the allegations are sufficient to withstand motions for summary judgment. *See, e.g.*, Drew v. First Sav., 968 F. Supp. 762, 765 (D.N.H. 1997) (dismissing case); *McElroy*, 953 F. Supp. at 1389 (allowing case to proceed). Cases involving more egregious forms of same-sex harassment by allegedly gay harassers may not appear in the casebooks because defendants, recognizing how homophobic fact-finders may react, quickly settle.

163. 712 F. Supp. 242 (D. Mass. 1989).

the plaintiff and stood behind him when he was mopping, causing the plaintiff to bump into him.[164] The plaintiff understood this as grounds for a sexual harassment complaint after the perpetrator asked the plaintiff to dance with him at the Christmas party.[165] In *Diiorio v. Perry*, the perpetrator twice stood near the plaintiff and rubbed his own genital area, while staring at the plaintiff "to be sure [he] was looking at him" and once commented on how little musculature the plaintiff had.[166] In *Hopkins v. Baltimore Gas & Electric Co.*, the alleged harassing incidents included telling the plaintiff he looked nice, picking up his tie and examining the back of it, trying to kiss the plaintiff in the receiving line at plaintiff's wedding and two very mild bits of sexual teasing: once he held a magnifying glass over plaintiff's crotch and asked, "where is it?" and once he pretended to lock the door of the men's room and said "alone at last."[167] Although none of the plaintiffs in these cases succeeded, the facts alleged in *Morgan* and *Diiorio* are so extraordinarily thin, with *Hopkins* not too far behind, as a description of hostile environment that they would almost surely never have even gotten to court had the perpetrator treated a woman in the same way.[168]

The heterosexual plaintiffs in these cases subjectively viewed even the mildest forms of sexualized behavior directed toward them by same-sex gay plaintiffs as automatically hostile and offensive. The descriptively reasonable person, regardless of gender, is presumptively heterosexual as well. Explicitly or implicitly, the reasonable person may be constructed to have the same emotionally charged discomfort, if not revulsion, about being the target of (presumed) same sex sexual advances.

If, however, we must judge the severity and pervasiveness of the conduct by the normatively reasonable standard of the Abrams test,[169] there will be no place in the doctrine for consideration of the defendant's sexual orientation or of the target's homophobia. Behaviors such as those described above cannot possibly be characterized as a means of enforcing gender subordination. They cannot reasonably be construed as designed to, or capable of, interfering with the plaintiff's capacity to operate as a competent worker. Rather, they are the same kinds of banter and personal conversation that everyone understands as an ordinary part of the workplace when engaged in across the gender line. All these aspects of the Abrams test properly remain identical in the same-sex context.

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164. *See id*. at 246.

165. *See id*. at 257.

166. No. XM-93-006, 1994 WL 741630 at *1 (EEOC Nov. 22, 1994).

167. 77 F.3d 745, 747-48 (4th Cir. 1996), *cert. denied* 117 S. Ct. 70 (1996).

168. Where a female plaintiff files suit based on the actions of another woman, the pattern is similar to the homosexual male-on-male cases. In *Huddleston v. Lumbermens Mut. Cas. Co.*, 942 F. Supp. 504, 507 (D. Kan. 1996), the perpetrator invited plaintiff to engage in social activities outside the office and once had her blouse partly unbuttoned so that part of her breast was visible. In *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 708-09 (E.D. Wis. 1996), a coworker left the plaintiff notes, indicating her interest in a lesbian relationship. After plaintiff complained to management, the perpetrator was admonished and agreed to desist. Her only subsequent behavior was sending plaintiff a birthday card, allegedly following her into the restroom and "continually star[ing] at her." *Id*. at 709. It is hard to imagine the plaintiffs believing they had been subjected to objectively severe and pervasive sexual harassment if men had engaged in similar behavior toward them.

169. *See supra* text accompanying notes 152-53.

C. Was the Harassing Behavior "Unwelcome"?

The third conceptually distinct element of a sexual harassment claim is that the challenged behavior be unwelcome.[170] The EEOC Guidelines define sexual harassment as: "*Unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" under the conditions specified in the remainder of the definition.[171] The Supreme Court cited these Guidelines approvingly when it recognized a Title VII cause of action for sexual harassment in *Meritor Savings Bank v. Vinson*.[172] It held that in determining whether alleged conduct constitutes sexual harassment, "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome."[173] Unwelcomeness has been defined as a requirement that the plaintiff-employee show that she "did not solicit or incite [the conduct that she] . . . regarded as undesirable or offensive."[174]

There are two reasons for such a limitation. First, no matter how egregious the conduct, it is not a legally cognizable harm to a willing participant. Imagine that two consenting adults engage in explicit, even lurid and disgusting, sexual behaviors at the workplace.[175] While others may be offended and the company may have a legitimate complaint about the misuse of company time and resources, neither of the participants was sexually harassed. Given the generally relatively narrow definitions of what behaviors are sufficiently severe and pervasive to constitute sexual harassment, it might seem unlikely that anyone would find them "welcome."[176] A court might, however, rule for a defendant on the unwelcomeness issue and avoid reaching the question of severity or pervasiveness if the former seemed a simpler question.[177]

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170. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

171. 29 C.F.R. § 1604.11(a) (1998) (emphasis added). The inquiry is essentially one of fact, with relatively little doctrinal guidance. The Guidelines go on to state that the EEOC "will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis." 29 C.F.R. § 1604.11(b) (1998); *see also* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992).

172. 477 U.S. 57, 62-65 (1986) (citing the Equal Employment Opportunity Commission's Guidelines on Discrimination because of sex).

173. *Id.* at 68. Mechelle Vinson had claimed that her supervisor's demands for sexual favors and other actions of a sexual nature constituted sexual harassment. In adopting the test of unwelcomeness, the Court rejected the defendant's argument that she would have to prove that "her actual participation in sexual intercourse was voluntary." *Id.*

174. *Henson*, 682 F.2d at 903.

175. *See* KENNETH STARR, THE STARR REPORT: THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT (1998).

176. Note also that the person who allegedly found the harassing behaviors welcome at the time is now filing suit and necessarily claiming that they were unwelcome. The determination of unwelcomeness is inextricably linked to a finding that the plaintiff is not credible.

177. Insofar as the unwelcomeness requirement is about whether the plaintiff subjectively found the behavior disturbing it can be seen as another way of stating the subjective prong of the requirement that the behavior be sufficiently severe or pervasive. Under either mode of analysis the court might conclude that this plaintiff has no claim although a reasonable person would have, had the behavior been directed toward her. *Cf.* Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1164 (M.D. Pa. 1982) (rejecting sexual harassment claim without resolving the factual question and indicating that the alleged harasser's "actions were not undesired nor unwanted").

Second, the requirement of unwelcomeness can serve as a form of notice both to the perpetrator and to the employer. The question is not merely whether the plaintiff subjectively found the conduct unwelcome, but whether her behavior was such that an observer of her actions and reactions would understand that she found it unwelcome.[178] In effect, then, the alleged perpetrator is protected if he proceeds with caution and refrains once the target signals that his behaviors are unwelcome.[179] In this sense the unwelcomeness requirement operates in tandem with the rule that the behavior must be severe or pervasive; if it is not severe, the target's response can let the actor know whether repeated behavior will trigger liability.[180] This individual notice of unwelcomeness may be particularly important where the target/plaintiff has changed her attitude towards sexual behaviors by the perpetrator. Behavior once welcome can become legally actionable, but courts will expect the target to indicate clearly to the perpetrator that they are no longer welcome.[181]

In addition, the unwelcomeness requirement can be linked to the rules regarding employer liability. Employers may legally forbid all expressions of sexuality at the workplace; they are adequately protected under Title VII if they effectively forbid only that conduct which is unwelcome. Failure to take advantage of well-designed policies and procedures can reasonably lead the employer to conclude that all the employees involved find the conduct welcome and are willing participants.[182] The EEOC has stated that "[w]hen there is some

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178. *See generally*, Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to the Federal Rules of Evidence 412*, 48 VAND. L. REV. 1155, 1165 (1995) (citing *Henson*, 682 F.2d at 903 (setting forth a two-part test for determining welcomeness)). The doctrine has put the burden on the plaintiff to signal that the behavior is unwelcome. Even if she has not done anything to invite sexual advances, they may be construed as "uninvited-but-welcome" and thus not actionable. *See* Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1977).

179. The extent of the necessary caution is a function of the extent to which the "objective" prong of the unwelcomeness inquiry takes the perspective of the typical female victim or of the typical male perpetrator, who may be oblivious to all but the most blatant signals of unwelcomeness. *See* Fitzgerald, *supra* note 85, at 5-9. *But see* Jeffrey Rosen, *In Defense of Gender-Blindness*, THE NEW REPUBLIC, June 29, 1998 at 25, 30 (suggesting that the plaintiff should have an obligation to communicate to the "boorish" perpetrator and thus inform him that she and other women do not share his perception that the challenged behavior is acceptable).

180. That is, if liability hinges on repeated, relatively mild behavior (pervasiveness) rather than a single outrageous incident (severity), the response of the target to the earlier occasions is crucial. A criminal sexual assault is presumed unwelcome and one such incident is sufficient. A series of hugs and fanny pattings may also constitute sexual harassment, but not if the plaintiff consistently indicated that she welcomed them.

181. *See* Babcock v. Frank, 729 F. Supp. 279, 288 (S.D.N.Y. 1990) ("Babcock, after ending her relationship with Musso, 'had the right, like any other worker . . . to reject her employer's sexual advances without threat of punishment'") (citation omitted). *But see* Evans v. Mail Handlers, 32 Fair Empl. Prac. Cas. (BNA) 634, 637 (D.D.C. 1983) (suggesting that the alleged harassing conduct was not substantially unwelcome, although the sexual relationship with the alleged harasser had begun to deteriorate at the time of the conduct that formed the basis for the suit). The EEOC has suggested that "particularly" where a prior consensual relationship or other behaviors may lead the alleged harasser to believe his overtures are welcome "it is important for the victim to communicate that the conduct is unwelcome." EEOC Guidance, *supra* note 123, at 3228.

182. *See* Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1211 (D.R.I. 1991) ("[a]n important factor in determining whether the plaintiffs welcomed the sexual advances is the availability and practical viability of an employer's grievance procedure"); *see also* Weinsheimer v. Rockwell

indication of welcomeness . . . the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest."[183]

The likelihood that claims that meet the other doctrinal requirements will fail because of the welcomeness requirement depends, of course, on how that criteria is interpreted. What kinds of actions by the harasser will be effectively presumed unwelcome? What kinds of behavior by the target will be considered relevant to rebutting that presumption or to proving unwelcomeness where it is not presumed? Relevant evidence may include the plaintiff's verbal or other responses to the challenged conduct. It is more likely that she will be seen as welcoming if she responds to the harassment in ways that are seen as friendly or sexualized or if she fails to complain to management.[184]

A defendant seeking to show that the challenged conduct was not unwelcome may also be permitted to raise (and, therefore, to explore in discovery) the plaintiff's own use of sexualized speech,[185] sexual display or sexual conduct[186] on the theory that these provide evidence of what kind of person she is and, therefore, how she would respond to the defendant's conduct. It is unclear how wide-ranging this inquiry can be. At its narrowest, the welcomeness inquiry focuses only on the plaintiff's behavior vis-a-vis the harasser.[187] It may be extended to include her behavior in the workplace generally,[188] or behavior specifically directed towards others who are not the subject of her complaint.[189] At its

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Int'l Corp., 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (considering failure of plaintiff to complain specifically and promptly to management in concluding that the behavior was not unwelcome). As Fitzgerald notes, only a small percentage of women who experienced behavior as harassing and unwelcome complained formally. Thus, the inference of welcomeness from failure to complain is empirically unwarranted. *See* Fitzgerald, *supra* note 85, at 10.

183. EEOC Guidance, *supra* note 123, at 3228. At least where grievance procedures are well-designed and publicized, the lack of complaint permits the inference that the behavior was not unwelcome. *See generally* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (allowing employers an affirmative defense to Title VII liability in a typical hostile environment case if they have such procedures and the plaintiff unreasonably failed to take advantage of them).

184. *See, e.g.*, Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991) (finding that plaintiff had shown "enthusiastic receptiveness to sexually suggestive jokes and activities" and that she had never complained of sexual harassment); *see generally* Fitzgerald, *supra* note 85, at 13-14; Schultz, *supra* note 2, at 1730-31 (discussing *Reed*).

185. *See* Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987); *see also* Weinsheimer, 754 F. Supp. at 1563-64.

186. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986) (determining that complainant's sexually provocative speech or dress is relevant); Burns v. McGregor Electronic Indus., Inc., 955 F.2d 559, 565 (1992) (posing for nude photos).

187. In *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149, 1164 (M.D. Pa. 1982), the court found that the allegedly harassing behavior (a kiss), if it had occurred, would have been welcome since the plaintiff "continued to invite [the perpetrator] to her house for dinner" even after the incident.

188. For example, in *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1211-12 (D.R.I. 1991), the court observed that the defendant urged, unsuccessfully, that the sexual advances by the supervisor were welcome because the plaintiffs had "contributed to the general tone of sexual innuendo" at the plant. *See id.* Sexually provocative dress would fit within this category, for example, as might the use of vulgar language and telling of dirty jokes when these behaviors were not directed at the harasser(s) in particular. *See, e.g.*, Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1110-11 (7th Cir. 1994); *Swentek*, 830 F.2d at 556.

189. *See* Weiss v. Amoco Oil Co., 142 F.R.D. 311, 316 (S.D. Iowa 1992) (determining that "sexual

broadest, it would permit examination of her sexual behavior outside the workplace.[190]

In the typical male-on-female sexual harassment claim the unwelcomeness question can deny effective legal relief in ways that are in conflict with the underlying purposes of Title VII. Quite egregious conduct may be legally condoned because the plaintiff first reacted by trying to ignore it or to "fit in" by participating in trashy sex talk,[191] rather than by confronting her tormentors and risking making her situation in the workplace even more unpleasant or tenuous.[192] Insofar as her conduct vis-a-vis others, inside or outside the workplace, is deemed relevant to the welcomeness inquiry, women may be deterred from bringing even valid claims because they do not want their sexual history made a subject of discovery[193] or they fear the fact-finder may deem them "bad girls" unentitled to the protections of Title VII.[194]

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conduct with other employees of Defendant during her employment and of which [the perpetrator] had knowledge" was relevant and therefore discoverable). *See also* Gan v. Kepro Cir. Sys., 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982) (considering plaintiff's sexually explicit conversations with other employees in finding the alleged harassment not actionable). *But see* Swentek, 830 F.2d at 562 (reversing trial court determination that conduct was not unwelcome based on plaintiff's foul language at the workplace, where there was no evidence the perpetrator knew of this behavior). The *Swentek* court concluded that "[u]nder these circumstances, it was improper for the trial judge to suggest that Swentek's past conduct meant that she welcomed Ludlam's behavior." *Id.*

190. *See* Burns, 955 F.2d at 565 (determining that evidence Plaintiff had posed for nude photos published in a motorcycle magazine could be relevant to the unwelcomeness issue, though remanding because trial court had failed to consider all the evidence that Plaintiff found the behavior unwelcome under a "totality of the circumstances" test); *cf.* Cronin v. United States Serv. Stations, Inc., 809 F. Supp. 922, 932 (M.D. Ala. 1992) (rejecting relevance of plaintiff's subjection to domestic violence and holding that her "experiences at home have no general bearing on whether [Plaintiff] was subjected to sexual harassment at work").

191. *See* Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1561 (M.D. Fla. 1990). For example, in *Weinsheimer*, the alleged harassing actions by co-worker Stoner included grabbing at her crotch and breast, frequently asking her to "suck him" or "give him head" and pointing at her crotch and saying "give me some of that stuff," as well as such physical violence as holding a knife to her throat and pushing her into a filing cabinet. *Id.* at 1561. The court denied her claim, however, finding that her "willing and frequent involvement in the sexual innuendo" showed that "she did not find the majority of such conduct" unwelcome. *Id.* at 1564. As an example of her reaction, the court noted that when Stoner asked her to "give me some of that stuff," while pointing at her crotch, she said "No, that's my boyfriend's, and it's just like new, hardly been used." *Id.*

192. Furthermore, women's signals that they find behavior unwelcome may not be understood by the male harasser—or by the courts. *See, e.g.*, Antonia Abbey, *Misperceptions of Friendly Behavior as Sexual Interest: A Survey of Naturally Occurring Incidents*, 11 PSYCH. WOMEN Q. 173 (1987).

193. This approach has many of the deleterious effects that an examination of the woman's sexual history had until recently in rape law. *See, e.g.*, SUSAN ESTRICH, REAL RAPE 50-52 (1987); *see also* Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1577 (1992) (arguing that Rule 412 can provide "a basis to argue against the introduction of prior sexual history in sexual harassment cases"); Sanchez v. Zabihi, 71 Fair Empl. Prac. Cas. (BNA) 835, 836 (D.N.M. 1996) (applying the policy of FED. R. EVID. 412 in entering a protective order under FED. R. CIV. P. 26 limiting the discovery of plaintiff's sexual and romantic history with other co-workers).

194. *See* Estrich, *supra* note 67, at 827-28; Reed v. Shepard, 939 F.2d 484, 486 (7th Cir. 1991) (denying the plaintiff's claim on the grounds that the behavior was not unwelcome). The behavior directed toward Reed was extreme: she was handcuffed to the toilet, had her head forced into a co-worker's lap and had an electric cattle prod forced between her legs. *See id.* Yet the court found that she, unlike ordinary people, was not bothered by such behavior since she "reciprocat[ed] in

In striking contrast, heterosexual male plaintiffs bringing claims of same-sex harassment will likely face no such barriers, although the doctrine is formally identical. First, the doctrine is likely to be applied in dissimilar ways. Behavior that would be seen as ambiguous, and thus requiring evidence of unwelcomeness, when directed toward a woman, may be seen as presumptively unwelcome when directed toward a man, just as the concrete application of the severity and pervasiveness test will be different when homophobia is added to the mix.[195] Second, evidence of the plaintiff's sexual behavior in other contexts will likely be deemed irrelevant to the unwelcomeness query so long as it does not raise questions about his sexual orientation. A heterosexual male plaintiff's sexual banter or rough language with others at the workplace will not be considered, though it might be if the plaintiff were a woman.[196] Defendants will not be permitted to engage in discovery to determine if the plaintiff was known to be highly (hetero)sexually active, inside or outside the workplace. A man's posing nude for *Playgirl* would be irrelevant to whether he found the sexual advances or homosexual sex talk of a male coworker welcome.[197]

Furthermore, even if the unwelcomeness doctrine were applied to heterosexual male plaintiffs in precisely the same way as in opposite sex cases, it would not have the same problematic effects. Men are less likely to be deterred from filing suit for fear that their high level of sexual activity will be discovered. They are less likely to be labeled unworthy of protection by fact-finders because of such promiscuity.

Finally, heterosexual men are likely to make their negative response to unwanted sexual advances by other men quite clear. While women are socialized

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kind." *Id.* The behavior by Reed which in effect immunized her coworkers comprised rough language, exhibiting a sexual scar on her abdomen and coming to work braless. *See id.* at 487. The court either found these two sets of behavior equivalent in their offensiveness or, more plausibly, determined that a woman who engaged in the latter could not be offended by anything. *Cf.* Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1991) (reversing judgment for defendant and noting that Plaintiff's "words and conduct cannot be compared to those of the men and used to justify their conduct and exonerate their employer"). The EEOC has indicated that a charging party's use of sexual terms or off-color jokes will not be read to bar a finding that more extreme and abusive comments or physical assaults are unwelcome. *See also* EEOC Guidance, *supra* note 123, at 3229.

195. As Catharine MacKinnon noted, "[m]any men . . . find it credible that homosexual advances are unwanted, unsolicited, and coercive, and blame the perpetrator" while presuming, absent the clearest contrary signals, that women find heterosexual advances welcome. MACKINNON, *supra* note 2, at 205; *cf.* Kinman v. Omaha Public School Dist., 94 F.3d 463 (8th Cir. 1996). In *Kinman*, a Title IX same sex sexual harassment case, the plaintiff, a high school student, had renewed and continued her relationship with the defendant, a lesbian teacher, after Kinman's high school graduation. *See id.* at 465-66. Nonetheless, the court found that there was sufficient evidence of unwelcomeness, noting that Kinman, like many gay teenagers, had attempted suicide and had told her mother that she "did not want to be gay." *Id.* at 465. The court concluded that "if Kinman's opposition to the idea of being gay was as strong as she alleges, it is possible that any advances by a member of her own sex would have indeed been unwelcome." *Id.* at 468. In effect, the plaintiff's homophobia becomes evidence of the unwelcomeness of any homosexual sexual conduct.

196. *Compare* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 565 *and* Weinsheimer, 754 F. Supp. at 1563-64 (behavior vis-a-vis others can be relevant), *with* Swentek, 830 F.2d at 557 (behavior with others, unknown to perpetrator, is not relevant).

197. *Cf.*, Burns, 955 F.2d at 565 (nude photos of female plaintiff in Easyrider magazine "may be relevant" to welcomeness question in a male-to-female case).

to respond to unwanted sexuality indirectly and civilly, male socialization is likely to lead them to respond forcefully to unwanted homosexual advances.[198] Even if the response to (perceived) homosexual advances is less clear, courts will likely construe it through a homophobic lens and thus see expressions of unwelcomeness more clearly when the behavior is, in effect, a questioning of the plaintiff's heterosexual identity.[199]

We thus have the rather peculiar situation that in the male-on-female cases that are closer to the "principal evil Congress was concerned with when it enacted Title VII,"[200] some otherwise legitimate claims may be lost or never brought because of the operation of the unwelcomeness doctrine. In contrast, when the plaintiff is a heterosexual male complaining of same-sex harassment, the unwelcomeness inquiry is likely to have as meaningless an impact as the requirement that an individual show that they are a member of a protected class.[201]

III. THE IMPACT OF A SAME-SEX SEXUAL HARASSMENT CAUSE OF ACTION ON THE GAY EMPLOYEE AND HIS EMPLOYER

Gay and lesbian employees are not protected at the national level from discrimination on the basis of their sexual orientation.[202] Bills designed to provide such protection have never passed even one House of Congress.[203] A substantial

198. *See* Koppelman, *supra* note 64, at 235 (asserting that heterosexual men who are the object of sexual advances are rendered effeminate and thus degraded). The sense of attack, combined with men's socialization to respond forcefully will lead them to make the unwelcomeness of such perceived invitations clear. *See e.g.*, Johnson v. Hondo Inc., 125 F.3d 408 (7th Cir. 1997) (finding that plaintiff knocked another employee on his back during a fight and then continued to strike him with a bat); Morgan v. Massachusetts Gen. Hosp., 712 F. Supp. 242 (D. Mass. 1989) (finding that plaintiff hit another employee so hard he broke three bones in his face, allegedly in a reaction to the other man staring at him and inviting him to dance at the staff Christmas party). Others respond clearly but without physical violence. *See, e.g.*, Martin v. Runyon, No. 01934718, 1994 WL 746784 (E.E.O.C. Sept. 29, 1994) (having a strong verbal reaction to being called "bitch" and "sweetie pie"); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 542 (M.D. Ala. 1983) (stating that "plaintiff repulsed the terminal manager and stated that he would resign before submitting to the homosexual advances"). *But see* Levit, *supra* note 111, at 1064 (suggesting that men are less willing to complain of sexual harassment and, when they do, "often face ridicule").

199. *Cf.* Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368 (C.D. Cal. 1995). The plaintiff in *Easton* alleged that she was the victim of sexual harassment when her female supervisor and coworkers led discussions about female bodies, compared breasts sizes and shapes and examined each other's breasts and used such terms as bitch, slut and whore, which the court construed as "crass terms of endearment." *Id.* at 1373. The *Easton* court found that unwelcomeness had been shown. *Id.* at 1381. It also, however, noted that there was no claim that the defendants were lesbians, presumably assuming that the same actions might be construed as sufficiently hostile, or the plaintiff's response sufficient to indicate unwelcomeness, if they had been. *See id.* at 1373.

200. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

201. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

202. *Cf.* Mary I. Coombs, *Lowering One's Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 VA. L. REV. 1099, 1108 (1990) (discussing usefulness of citation signal "will not see in" for statements such as this).

203. The Employment Non-Discrimination Act of 1997 would forbid employment discrimination "on the basis of sexual orientation." *See* H.R. 1858, 105th Cong. (1997) and S. 869, 105th Cong. (1997) (neither have been reported out of committee). The Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996) was introduced on the Senate floor and failed by a vote of 49-50 on Sept. 10, 1996, during the debate on the Defense of Marriage Act. Its introduction and near-passage,

proportion of employees, however, do work in locations where state statutes or local ordinances include sexual orientation among the categories as to which discrimination in employment is forbidden.[204] In theory, employers subject to those laws cannot fire someone or refuse to hire them because of their sexual orientation.[205] Furthermore, insofar as such laws are read, like Title VII, to forbid harassment based on any of the proscribed characteristics, gay employees would be protected against harassment based on their sexual orientation.[206]

Even where employers are not legally required to provide equal treatment to their gay and lesbian employees, they are free to do so. They can choose to treat sexual orientation as irrelevant to employment decisions. They can choose to protect their gay employees from harassment based on their sexual orientation.[207] They are also, however, free not to do so.[208]

Employers may conclude that keeping gay and lesbian workers on their payroll is economically disadvantageous because homophobic co-workers or customers may prefer not to interact with gay employees. An employer might

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however, was of no more than symbolic value, since the likelihood of passage in the House at that time (or this) was essentially zero.

204. Such laws are in effect in seven states (California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont and Wisconsin) and the District of Columbia, plus a number of cities and counties elsewhere, (including such large cities as Detroit, New Orleans, Tampa and Pittsburgh), so that altogether a significant percentage of the United States population lives and works in places subject to such protective legislation. *See Non-discrimination Law: Private Sector* (last modified Oct. 9, 1995) <http://www.nyu.edu/pages/sls/gaywork/municip.html>; James W. Button et al., *Where Local Laws Prohibit Discrimination: Based on Sexual Orientation*, 77 PUB. MGMT., Apr. 1995, at 9, 10. Federal government employees are also now protected under Executive Order 13087, issued May 28, 1998. *See* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (1998).

205. *See, e.g.*, CALIF. LABOR CODE § 1102.1(a)(1998) ("Sections 1101 and 1102 prohibit discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation."); CONN. G. S. A. § 46a-81c (1998) ("It shall be a discriminatory practice in violation of this section: (1) For an employer . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation"); D.C. STAT. ch. 25, § 1-2512 (including sexual orientation among the list of characteristics as to which an employer may not discriminate in hiring, firing, or "with respect to compensation, terms, conditions, or privileges of employment").

206. Thus, they might have a claim when the harassment was seen as based on the perpetrator's dislike for their homosexuality as such rather than on their gender presentation. *Cf.* Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992); Carreno v. IBEW Local No. 226, No. CIV.A. 89-4083-5, 1990 WL 159199 (D. Kan. Sept. 27, 1990) (rejecting such claims under Title VII as not "because of sex").

207. *Cf.* Whitaker v. Board of Review, No. 96APE02-167, 1996 WL 362081 (Ohio App. 10 Dist. June 25, 1996) (employee who used racist, sexist and homophobic slurs against fellow employees was terminated for good cause, since such behavior "could disrupt, and had in the past disrupted, the work environment").

208. Most Americans think workplace discrimination on the basis of sexual orientation is wrong. *See, e.g.*, Newsweek poll indicating that 84% of Americans support equal opportunity in employment for gays and lesbians (reported in Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a 'Simulacrum of Marriage,'* 66 FORDHAM L. REV. 1699, 1723 n.144 (1998)). Even a relatively small percentage of homophobic employers can reduce the employment opportunities for gays and lesbians, however. According to a 1987 Wall Street Journal poll, 66% of the surveyed "chief executive officers of Fortune 500 companies would hesitate to promote a homosexual employee to a management position." Thomas Weathers, Comment, *Gay Civil Rights: Are Homosexuals Adequately Protected From Discrimination in Housing and Employment?*, 24 PAC. L.J. 541, 542 (1992).

therefore rationally choose not to hire gays, even if the employer is not itself homophobic. The employer's actions result from the logical and rational decision to maximize profits and minimize workplace problems. Anti-discrimination laws are designed not only to protect against the enactment of the employer's own prejudice,[209] but also against this sort of rational response to customer or co-worker preferences.[210] Without federal protection, many employers remain legally free to respond to such prejudices against gay employees. Even where they are formally forbidden to do so under state or local anti-discrimination laws, not all discrimination is readily apparent. Thus, rules that make (forbidden) discrimination more economically rational for employers will likely lead to more discrimination in fact.[211]

If the analysis in Part II is correct, the extension of Title VII to same-sex sexual harassment may make the situation of gay and lesbian employees, as a whole, even worse. It is unclear how much it will protect them from harassment by their heterosexual colleagues.[212] Yet, it may make it relatively easy for those same colleagues to successfully charge them with harassment. Behaviors that are seen as friendly banter or horseplay when done by straight men become sexual harassment when done by gay men. Behaviors that are too mild to qualify as creating a hostile work environment when directed at women will be seen as extremely offensive when directed at a heterosexual man. These men, consciously or subconsciously homophobic, will find such behavior unwelcome, complain and sue. Employers[213] and legal fact-finders, sharing their view of the world, will concur.[214] Thus, gay men or lesbians, especially those in supervisory positions, who engage in the kind of friendliness or sexual banter that would be

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209. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (stating that Title VII remedies are a "simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees").

210. *See* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (holding that stereotype-linked customer preferences cannot serve as a justification for excluding members of one sex from a job).

211. *Cf.* Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191. Judge Posner opposes laws that would make female employees more expensive, on average, in part because they would "discourage employers from hiring . . . women, and there are many ways in which [employers] can discriminate . . . without committing detectable violations of the employment-discrimination laws." *Id.* at 197.

212. *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998), leaves it unclear whether and when such claims may be cognizable as a form of harassment under Title VII's "because of . . . sex" requirement.

213. Even an employer who is not himself homophobic might rationally decide to terminate the alleged harasser at the first complaint, or even before the first complaint. If he is not constrained by a law forbidding sexual orientation discrimination, he might pre-emptively avoid the problem by not hiring openly gay people.

214. Exacerbating the problem may be a need to bend over backwards to provide equality to the targets of gay harassment. In *Pritchett v. Sizeler Real Estate Management Co.*, No. CIV.A. 93-2351, 1995 WL 241855 (E.D. La. Apr. 25, 1995), the court found that the target of a gay female supervisor's advance had a cause of action, noting that "it seems discriminatory that a supervisor should be exempt from a Title VII sexual harassment claim solely because of that supervisor's sexual orientation . . . .To conclude that same gender harassment is not actionable . . . is to exempt homosexuals from the very laws that govern the workplace conduct of heterosexuals." *Id.* at *1. *Accord* Caldwell v. KFC Corp., 958 F. Supp. 962, 969 (D.N.J. 1997).

perfectly legal for anyone else, may be walking invitations to a Title VII suit.[215]

Sexual harassment remains a sufficiently daunting and widespread problem that it may seem perverse to worry about the negative consequences of potential over-enforcement. Most heterosexual men who (mildly) harass the women under their supervision are still relatively safe, so long as they are otherwise valuable employees.[216] But the risks are unfairly and disproportionately high for gay and lesbian employees. For example, a lesbian assistant professor was accused of sexual harassment by her former girlfriend, a graduate student two years her elder. Although the professor was ultimately exonerated, the university did not renew her contract.[217] The challenge is to reconstruct sexual harassment doctrine in a way that protects against this disproportionate burden on gay and lesbian employees without eroding needed protections for all the targets of genuine sexual harassment.

IV. PROPOSED SOLUTIONS

A. The Short-Term Answer: True Equal Treatment

The legal position of gay employees under Title VII could be improved by a commitment to applying existing doctrine and theory in a truly equal manner.

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215. As Professor Schultz notes, insofar as recovery by gay men is restricted "the cases create a biased form of justice: men who are perceived to be homosexuals are excluded from protection against sex-based harassment," but are unduly vulnerable to suits for such harassment. Schultz, *supra* note 2, at 1785; *see also* Grose, *supra* note 63, at 390-91 (suggesting that effect of cases is to make expressions of homosexuality actionable while protecting expressions of homophobia and heterocentricity).

216. Although the number of complaints filed annually with the EEOC is little more than 15,000, *Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1992 - FY 1998*, (last modified Jan., 14, 1999) <http://www.eeoc.gov/stats/harass.html>, studies indicate that the self-reported incidence rate of sexual harassment ranges from 30-90%. *See* Richard C. Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457, 458 (1998). Thus, few incidents lead to a formal complaint, let alone a successful one from the plaintiff's perspective. *See also* United States Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace* (visited Nov. 1995) <www.access.gpo.gov/mspb/image/sexhar.pdf> (only 6% of respondents to a 1994 survey of federal employees who said they had experienced sexual harassment had taken any formal action). *But see* Paci v. Rollins Leasing Corp., No. 96-295-SLR, 1997 WL 811553 (D. Del. Dec. 18, 1997). In a case where a man and a woman had charged each other with sexual harassment, the company fired the man and retained the woman. The court indicated that the man, Paci, could proceed with his claim that the company's decision constituted gender discrimination. "Paci's gender, which placed him in the 'unprotected class' created a virtually risk-free opportunity, by firing Paci, for Rollins to avoid any liability to Meara, who, because of her gender, was in the 'protected class.'" *Id.* at *5 n.3.

217. *See* Philip Weiss, *Don't Even Think About It*, NEW YORK TIMES MAGAZINE, May 3, 1998, at 60, 68; *see also* JANE GALLOP, FEMINIST ACCUSED OF SEXUAL HARASSMENT (1997) (describing extensive university investigation of female professor based on sexual harassment charges by female graduate students); *cf.* Kracunas v. Iona College, 119 F.3d 80, 84 (2d Cir. 1997) (noting that Professor Michael Palma, a heterosexual male, had not been subject to any adverse job consequences, despite the fact that there had been at least five sexual harassment complaints against him prior to the lawsuit). Sexual harassment of students by faculty in institutions of higher education, like sexual harassment in employment is widespread and primarily male-to-female; *see generally* BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS 12-16 (2d ed. 1990); Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 531 n. 30 (1987).

Formal equality, blind to the different gender combinations of the parties, would be both more consistent with the statute and generally better at protecting the otherwise more vulnerable.[218]

As indicated in Part II, current case law differentiates between same-sex and opposite-sex situations in its application of the (1) because of sex, (2) severe and pervasive and (3) unwelcomeness criteria. One might create equal application on the first of these by requiring or permitting proof of the sexual orientation of the parties in opposite sex cases as well. It would be perverse, however, to extend this 'appalling' discovery process to the vast majority of sexual harassment cases, involving male-on-female conduct.[219] This would also be a huge waste of time and effort, since the vast majority of perpetrators will be heterosexual.[220] Most importantly, the assumption that particular behavior is simply a manifestation of a prior and fixed orientation is no more accurate for people determined to be 'heterosexual' than those deemed 'homosexual.'[221]

The proper equalizing move, instead, would be to treat same-sex cases in much the way we do, or should, treat opposite-sex cases. The question is whether the particular behaviors can reasonably be viewed as directed toward the plaintiff because of his/her sex or gender. The motivations that lead the perpetrator to act in this way toward the target may reflect sexual desire or animus or some combination of the two. In any event, the primary focus should be on the reasonable construction of the behavior itself, not on an attempt to determine the perpetrator's sexual orientation.[222]

Determining whether a given set of actions rises to the level of 'severe and pervasive' should continue to be analyzed under the common law, case-by-case analysis which looks to the facts of a case.[223] Where precedents do not provide a determinate answer, courts should use the same measuring rod, regardless of the gender combination or sexual orientation of the parties.[224] The correct test in

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218. *See* Doe v. City of Belleville, 119 F.3d 563, 575 (7th Cir. 1997) (suggesting that a case involving male perpetrators and male plaintiffs "should not make for an entirely different analysis"); Swage v. Inn Philadelphia and Creative Remodeling, Inc., No. CIV.A. 96-2380, 1996 WL 368316 at *3 (E.D. Pa. June 21, 1996); Calleros, *supra* note 61, at 63-64 (suggesting that Title VII should equally cover all gender differentiated sexual harassment, regardless of the particular genders or sexual orientations of the parties).

219. *Cf.* Doe, 119 F.3d at 589.

220. Even if gay men were as likely as heterosexual men to engage in sexual harassment of women, sources estimate that they are no more than ten percent of the population. *See* RICHARD A. POSNER, SEX AND REASON 294-95 (1992).

221. A male perpetrator's demand that a woman provide him sexual favors remains sexual harassment even if it could be shown that the man had a sexual fling with his summer camp bunkmate or spoke admiringly of Tom Cruise's body.

222. In the case of a male making sexual overtures towards a woman, a court can generally assume they are done because of sex since there is ordinarily no plausible alternative explanation. I am thus unsure that we need a "heterosexual presumption" in such cases and making it in the case of "offensive sexual comments . . . or physical abuse" inappropriately conflates the more likely explanation—manifestations of gender animus—with heterosexual sexual desire. Franke, *supra* note 2, at 693.

223. Male to female cases should be used, along with the limited number of existing same sex cases.

224. Just as such a "gender-neutral" approach would be less solicitous of heterosexual men's homophobic responses, it would be more solicitous of the targets of heterosexual same-sex harass-

same-sex cases is not, then, the reasonable person in the plaintiff's position, which too readily translates as "the ordinary heterosexual man irrationally disturbed by homosexual sexuality." Such a test in effect provides sexual orientation discrimination protection for heterosexuals.[225] Rather, the courts, in both same-sex and different-sex cases should use a normative test, such as the Abrams test.[226]

While I believe courts could apply this test without conflict with the "reasonable person" language of *Harris* and *Oncale*, more jurisprudentially conservative trial judges could apply a descriptive test of reasonableness, but one that focuses on the protection of persons vulnerable because of their gender. Consider for a moment the impact of a formally neutral use of the reasonable woman standard. If a woman would not find this sexualized compliment or invitation harassing coming from a heterosexual man, then it is not, as a matter of law, severe or pervasive when issued by a gay man to another man.

A similar insistence that the law protect heterosexual men no more than it protects women would apply to the understanding of unwelcomeness. The unwelcomeness doctrine is based on our assumption that sometimes sexual talk or advances are welcome, even from coworkers or supervisors; the doctrine is designed to exclude such cases from the law's proscription. It would be inconsistent with this rule to allow a plaintiff in essence to say that because he is heterosexual any sexual talk or behavior by a male perpetrator is unwelcome. Rather, like a woman (who is presumed to be heterosexual and therefore to find at least some sexual talk by some men welcome), he should be expected to indicate that particular behavior is unwelcome, unless it is of the highly invasive or degrading sort that would be presumptively unwelcome between two differently-sexed heterosexuals.[227]

Such a set of rules would provide equality across lines of sexual orientation: forbidding and permitting the same behaviors regardless of the sexual orientation of the complaining parties. For example, if the charged conduct were that the supervisor put an arm around a subordinate's shoulder and emphasized conversational points with a poke in the chest or stomach, it would only be actionable if a reasonable person would deem it severe and pervasive in a cross-sex as well as a same-sex context. An invitation for a drink after work would be considered unwelcome only if the plaintiff indicated that it were—a court could not assume that such an invitation was unwelcome if it emanated from a gay

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ment. The question whether "fuck me," or "suck my dick" are sufficiently hostile would be decided by a test that was not different depending on the sex of the target. *Cf.* Levit, *supra* note 111, at 1069-71 (critiquing courts that dismiss seriousness of such behavior when directed towards men).

225. *See* Abrams, *Complex Female Subject*, *supra* note 58, at 2515 ("Courts are far more sympathetic to male sexual harassment claimants when they present the image of a normative, unambiguously male subject who receives unexpected sexual attention from another male in the workplace.").

226. See *supra* text accompanying notes 152-53.

227. In the text, I suggest that we counter-factually switch the gender of the plaintiff in asking if the behaviors would be unwelcome. Alternatively, we could switch the gender of the perpetrator. The question would become whether the plaintiff would have found these behaviors unwelcome if they were directed at him by a woman. Would he feel harassed if a woman had engaged in equally vulgar heterosexual sex talk? Or if she had complimented his physique or run her fingers through his hair or patted his bottom? If the answer is no, then he is complaining of (unprotected) sexual orientation discrimination, not of sex discrimination.

man or a lesbian unless they similarly assumed it was unwelcome coming from a heterosexual man to a woman.

Application of these rules might also facilitate a degree of empathy by men for women's workplace experiences.[228] A man subjectively disturbed by the homosexual advances or sexual talk of another man could always complain or file suit. His employer, or his attorney, however, might explain to him that the behavior is only actionable if a woman would have found it harassing. If heterosexual men as targets must understand their experiences through a woman's eyes, perhaps heterosexual men as potential perpetrators can also begin to do so.[229]

B. Long-term: Reconceptualizing Sexual Harassment

The ease with which the law can be and has been misused to find liability in the case of homosexual same-sex harassment charges suggests the need for a deeper reconceptualization. A perpetrator (perceived as) gay engaging in sexualized conduct toward a heterosexual same-sex plaintiff may too readily be determined to have violated Title VII for two reasons. First, such cases trigger homophobia in plaintiffs and fact-finders, a problem that may be dealt with in part by the modest doctrinal changes proposed above. Second, the case is seen as an easy one for liability because it is so similar to the paradigmatic heterosexual lust case. Insofar as we explode the paradigmatic status of the heterosexual lust case, we can remake sexual harassment law in ways that more closely track the real harms of sexual harassment for men and women, gay and straight.[230]

Heterosexual and homosexual lust cases have perhaps been paradigmatic in part because the law has been misled by linguistics. The needed reconceptualization of sexual harassment law is as follows. Title VII forbids sex (i.e., gender) discrimination, including sex-based (i.e. sexuality-based) harassment; such harassment can, but need not, take the form of sexualized behavior;[231] sexualized behaviors violate Title VII when, but only when, they serve as a form of gendered harassment.

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228. *Cf.* Abrams, *Transformation of Workplace Norms*, *supra* note 73, at 1202 (noting that men usually are in the role of perpetrators and have rarely been forced to understand how it feels to be on the receiving end of sexual harassment).

229. *Cf.* MACKINNON, *supra* note 2, at 205 ("Sexual coercion from a gay male superior presents one of the few situations in which an uninterested male employee has a chance of facing a situation similar to that which many women employees commonly confront every day.").

230. Although the most thoughtful critics of current sexual harassment law differ on how, precisely, to define the central harm of sexual harassment and thus the true core case, they agree that the lust paradigm and the focus on individualized "but for" sex cases of discrimination that tend to accompany it, are misguided. *See* Abrams, *New Jurisprudence*, *supra* note 9, at 1169 (claiming that the central norm is practices that preserve male control of workplace); Franke, *supra* note 9 (claiming that the central norm is harassment as a technique of policing gender); Schultz, *supra* note 2 (claiming that the central norm is interfering with the right of targets to be treated as competent workers).

231. The danger of the lust paradigm is well illustrated by the reaction of one perpetrator. A man who had ridiculed Lois Robinson and stated that women were only fit company for something that howls, denied her charge that he was sexually harassing her because, he explained, he hadn't asked her for sexual favors. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1498 (M.D. Fla. 1991).

Such a reconceptualization would, first, make non-sexualized gender harassment as obvious a basis for liability as sexualized harassment. Consider, for example, *Delgado v. Lehman*,[232] in which the perpetrator "was trying to protect his turf and . . . viewed women as threats. He was consistently abusive towards women, called them 'babes,' and used the term 'woman' in a derogatory manner."[233] While the court agreed that this was actionable, the fact that it did not fit the lust paradigm made it seem an extension rather than an easy, core case.[234] Second, this reconceptualization would clarify that the sexualized banter that is a normal part of many workplaces, but which is not designed to (or likely to have) a gendered effect on employee ability to fulfill their jobs, is not a violation of Title VII. Title VII does not impose a "general civility code" let alone a requirement of grim humorlessness, on American workplaces.

An examination of current Title VII law in the same-sex context helps lead us to this reconceptualization. The reconceptualization, in turn, will lead us to more coherent results, more consistent with the purposes of Title VII, in same-sex as well as opposite-sex cases. If the core of male-female sexual harassment is maintaining male dominance by defining women as fundamentally sex objects rather than competent workers, then same-sex harassment is most plausibly a violation of Title VII when it comes closest to fitting that paradigm, rather than the lust paradigm that currently dominates Title VII law.[235] The clearest case of actionable same-sex harassment is not the unwanted homosexual sexual invitation of *Dixon v. State Farm Fire and Casualty Insurance Co.*,[236] but the demeaning and physically assaultive mistreatment of a man for his perceived failure of masculinity in *McWilliams*.[237] The targets in cases such as *McWilliams*, like women, are seen as not "real workers," because they are not "real men."[238]

In contrast, lust-based harassment, whether heterosexual or homosexual, is actionable only insofar as it can be fitted within the paradigm of gendered harassment. When targets are forced to endure sexual touchings or submit to sexual

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232. 665 F. Supp. 460 (E.D. Va. 1987). Appallingly, the perpetrator was one of the equal employment opportunity supervisors at the agency.

233. *Id.* at 468.

234. "Sexual harassment need not take the form of overt sexual advances or suggestions, but may consist of such things as verbal abuse of women if it is sufficiently patterned to comprise a condition and is apparently caused by the sex of the harassed employee "*Id.*

235. *See* Schultz, *supra* note 2, at 1688 (noting parallel of lust paradigm and sexualized vision of gravamen of same-sex harassment).

236. 926 F. Supp. 548 (E.D. Va. 1996).

237. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996); *see also* Eschbach v. County of Lehigh, No. CIV.A. 95-7276, 1997 WL 109611 at *2 (E.D. Pa. Feb. 28, 1997). In a female-female case "the pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment." Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d. Cir. 1990) (citations omitted).

238. Gay men can also engage in such same-sex gender harassment, targeting the plaintiff for his failure to meet the perpetrator's demands for gendered behavior and interfering with their workplace competence. This is the best explanation for the behavior in *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996), in which a group of gay men, in control of a particular workplace, taunted the plaintiff and other young men for their heterosexuality and mockingly offered them homosexual alternatives. *See also* Caldwell v. KFC Corp., 958 F. Supp. 962, 965 (D.N.J. 1997) (verbal and physical harassment by gay male supervisor towards young heterosexual male subordinate included "remarks degrading plaintiff's masculinity").

advances as a condition of retaining their job or obtaining advancements that they would have earned on the merits, they are being treated as sexual beings rather than as workers. They are being denied the respect that they are entitled to, and would have received, if not for the harasser's mischaracterizing their workplace role as sexual being—a mischaracterization they suffer because they are of a particular gender. Such individual, lust based cases are not excluded from the protection of Title VII. But they are no longer central. This shift in focus may serve as well to shift somewhat the dividing line between actionable lust-based harassment and non-actionable sexualized workplace behaviors.[239]

The legal response to a claim of harassment should be unaffected by the gender or the sexual orientation of the harasser or the target. The question in each case should be whether the harasser's actions eroded the target's ability to work and to be seen as a worker because of the target's gender. That judgment should reflect our knowledge of workplace relations and sexual relations. But the best case for the plaintiff should be the one where the harasser expresses gendered contempt for the target by the use of terms like 'bitch' or 'pussy,' whether meant to insult a female target or a male one. And the worst case should be where the defendant expresses his or her own sexuality, for example by describing his sexual behaviors outside work, without objectifying the plaintiff as a sexual object. Neither Puritanism nor homophobia provide a basis for a Title VII sexual harassment claim.

239. This reconceptualization of core and margin reconfirms that sexuality per se is not the gravamen of the harm. Sexual banter and physical touchings occur in many workplaces, and Title VII is not meant to forbid them except insofar as they cause gender-differentiated harms. Where the actions are not denigrating or contemptuous, where they do not enact a form of sexuality that objectifies only one sex, we should be highly skeptical of claims that such behavior violates Title VII merely because the plaintiff is offended. *Cf.* Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1372 (C.D. Cal. 1995) (no Title VII violation where female plaintiff's female supervisor and coworkers led discussions about female bodies, and physically compared their breast sizes and shapes). As some commentators have noted, subordinating, objectifying, denigrating sexual speech might be assumed unwelcome, but explicitness itself is not forbidden, at least where it is not used strategically against a target who has made her attitude clear. *See* Abrams, *Transformation of Workplace Norms*, *supra* note 73, at 1213; Dolkart, *supra* note 146, at 214.