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INFERRING DESIRE

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ABSTRACT

In the course of debates over same-sex marriage, many scholars have proposed new legal definitions of sexual orientation to better account for the role of relationships in constituting identities. But these discussions have overlooked a large body of case law in which courts are already applying this model of sexual orientation, with inequitable results.

This Article examines a set of fifteen years of sexual harassment decisions in which courts have endeavored to determine the sexual orientations of alleged harassers. Under federal law, sexual harassment is actionable because it is a subspecies of sex discrimination. A man who makes unwanted sexual advances toward a woman discriminates on the basis of sex, courts presume, because he would not have made sexual advances toward another man. In 1998, the Supreme Court ruled that the same presumption is available in a case of same-sex harassment, i.e., a man harassing a man, if there is "credible evidence that the harasser was homosexual." Since then, federal courts have decided 154 cases on whether a harasser was homosexual or experienced same-sex desire, often conflating the two questions.

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Empirical assessment of these cases raises questions about legal determinations of sexual orientation and sexual desire. First, it finds that courts rely on overly simplistic assumptions about sexual orientation that are contradicted by social science research. Surprisingly, in searching for evidence of same-sex desire, courts compare the harasser's behavior to an idealized vision of romantic courtship that resonates with the picture of same-sex intimacy drawn by advocates of gay marriage. Second, these judicial inquiries into desire reinforce biases in favor of heterosexuality. Courts interpret sexually charged interactions to be devoid of desire when the harasser is involved in a heterosexual marriage, while reading desire into far less suggestive scenarios when the harasser self-identifies as nonheterosexual. And third, the judicial preoccupation with desire distracts from the purpose of sexual harassment law: eliminating invidious sex discrimination.

This study has implications for other legal doctrines that may require definitions of sexual orientation or inferences of desire. It suggests that a relationship model of sexual orientation may not be appropriate in all legal contexts, and it calls into question the project of devising any all-purpose legal definition of sexual orientation. It also argues that reformers should be wary of how inquiries into sexual desire may operate as distractions and reinforce conventional notions of sexuality.

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INTRODUCTION

Recent gay-rights victories have renewed legal interest in the question of how sexual orientation ought to be defined.[1] Influenced by the same-sex marriage debate, many scholars have argued for new definitions of sexual orientation that would emphasize the role of relationships in defining identities.[2] But these discussions have been largely theoretical, overlooking the one context in which courts routinely make determinations about individuals' sexual orientations.[3]

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1. Until extremely recently, the classification "homosexual" was used primarily for purposes of exclusion. *See, e.g.*, 10 U.S.C. § 654 (2006) (banning military service by openly gay men and lesbians), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 3516; Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 780–82 (1993) (discussing how the Immigration Act of 1990 repealed an exclusion based on "sexual deviation" that had been used to bar gay men and lesbians from immigrating to the United States). Although some states restrict adoptions by same-sex couples, only Florida still has a law on the books that bans adoption by a "homosexual" individual. FLA. STAT. ANN. § 63.042(3) (West 2012). *But see* Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010) (holding that § 63.042(3) violates the equal protection provision of the Florida Constitution).

2. *See, e.g.*, Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1002 (2012) (arguing that "sexual orientation" should be defined to include both "General Orientation," meaning the sex of the partner the individual is attracted to most of the time, and "Specific Orientation," meaning the sex of the individual's current partner); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1196–99 (2012) (arguing for a "public" and "relational" concept of sexual orientation).

3. Professor Elizabeth Glazer discusses two main examples, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996–97 (N.D. Cal. 2010), the case challenging the California initiative that barred gay marriage, and *Apilado v. N. Am. Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151, 1156 (W.D. Wash. 2011), in which bisexual individuals sued over being labeled "non-gay" by an athletic organization. *See* Glazer, *supra* note 2, at 1000–01. Although the parties litigated the plaintiffs' sexual orientations in both cases, neither court reached a finding on any specific

This Article is the first to analyze all sexual harassment cases in which courts have endeavored to infer the sexual orientations of alleged harassers since the Supreme Court held that sexual orientation might be relevant to a sexual harassment claim fifteen years ago.[4] It engages in a close reading and empirical analysis of this set of 154 cases, informed by social science research on sexuality.[5] Surprisingly, it reveals that courts are employing a model of sexual orientation that emphasizes relationships, measuring same-sex desire against a set of romantic ideals.[6] But rather than advancing equality, the effect of the doctrine is to privilege heterosexuality and distract from sexism.[7] This study demonstrates that despite recent gay-rights

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plaintiff's sexual orientation. *But see* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1311 (2011) (discussing how the Los Angeles County Men's Jail selects inmates for protective housing units based on whether the inmate is gay or transgender).

4. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

5. These cases are noted with asterisks in Appendix A. The 154 figure represents a subset of the 236 same-sex harassment cases reviewed for this Article. *See infra* note 46 and accompanying text.

6. An analysis of older case law led one scholar to conclude that judges were employing the prejudice that same-sex relationships are "predatory, lustful, or purely sexual [in] nature," and "do not reflect loving, long-term relationships." Todd Brower, *Social Cognition "at Work": Schema Theory and Lesbian and Gay Identity in Title VII*, 18 L. & SEXUALITY 1, 14 (2009). Although these old prejudices are still at work, *see infra* Part II.B, new schemas about gay identity as based in loving and long-term relationships have also surfaced, *see infra* Parts I.C, II.A.

7. In the aftermath of *Oncale*, many law review articles criticized the opinion's reasoning and made contradicting predictions about its likely effects with respect to sexual orientation. *Compare* Mary Coombs, *Title VII and Homosexual Harassment After* Oncale*: Was It a Victory?*, 6 DUKE J. GENDER L. & POL'Y 113, 150 (1999) (fearing *Oncale* would give rise to claims based on "[p]uritanism" and "homophobia"), *and* Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 195 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (theorizing that *Oncale* would result in homophobic claims), *with* Marc Spindelman, *Discriminating Pleasures*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra*, at 201, 204 (arguing Professor Halley lacked empirical support for her concerns of homophobia), *and* Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 680 (1998) ("[T]hese claims will not be used as a new tool in the oppression of gay men and lesbians under the law . . . ."), *and with* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 454 (2000) (concluding that *Oncale* had brought sexual harassment jurisprudence to a "crossroads" and hypothesizing that the increased visibility of bisexuality might "goad" courts into abandoning their focus on sexual desire). Yet little empirical analysis has focused on how courts have actually determined harassers' sexualities since *Oncale*. *But see* YVONNE ZYLAN, STATES OF PASSION 157–60, 185–90 (2011) (exploring the role of legal discourse in the construction of sexuality through analysis of same-sex sexual harassment cases); Clare Diefenbach, *Same-Sex Sexual Harassment After* Oncale*: Meeting the "Because of Sex" Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42, 56–58 (2007) (offering doctrinal analysis of a set of 105 cases on the "because of sex" requirement decided between 1998 and 2006); *cf.* Ann C. McGinley, *Creating*

victories, laws that turn on sexual orientation may still operate to reinforce conventional notions of sexuality.[8]

Understanding why liability for sexual harassment can turn on sexual orientation requires some background on the development of sexual harassment doctrine. No federal statute specifically forbids sexual harassment in the workplace. In fact, the term "sexual" harassment is a misnomer.[9] Sexual harassment law derives from Title VII's prohibition on discrimination against any individual "because of such individual's . . . sex."[10] Title VII uses the term "sex" in the sense of male or female, not in the sense of erotic activity.[11] Thus, to prevail on a sexual harassment claim, a woman must show she was harassed because she is female.[12] It is not enough to show that the harasser's conduct was sexual in nature.[13] The Supreme Court has reasoned that in the typical case of an unwanted sexual advance by a man toward a woman, the harasser discriminated "because of sex" because he would not have made sexual advances toward the plaintiff had she been a man.[14] Courts presume such male harassers are heterosexual. In the 1998 decision, *Oncale v. Sundowner Offshore Services, Inc.*,[15] the Supreme Court held that a male plaintiff alleging another man harassed him could make out a claim of sexual harassment under the same theory if he had "credible evidence that the harasser was homosexual."[16] Again, the inference is that the harasser would not have made sexual advances toward the plaintiff had he been a

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Masculine Identities: Bullying and Harassment "Because of Sex," 79 U. COLO. L. REV. 1151, 1151, 1167–91 (2008) (applying research on masculinities and bullying to argue that forms of harassment that are "not overtly sexual or gendered" are "because of sex").

8. For purposes of this Article, I use the term "sexuality" to refer both to sexual orientation, as commonly understood to mean heterosexual, homosexual, or bisexual, and the presence or absence of sexual desire. As discussed in Part I, these two questions are frequently conflated in sexual harassment jurisprudence.

9. Throughout this Article, I use the term "sexual" in the sense of the common understanding of the term "erotic." I use the term "sex" to refer to notions of maleness or femaleness understood to be biological, and the term "gender" to refer to notions of masculinity or femininity understood to be cultural.

10. 42 U.S.C. § 2000e-2(a)(1) (2006).

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

12. *Id.*

13. *Id.*

14. *Id.*

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

16. *Id.* The Court left the door open for plaintiffs to advance other theories about how same-sex harassment might be "'because of . . . sex,'" holding that the "sexual desire" theory was just one possibility. *Id.* at 80–81 (quoting 42 U.S.C. § 2000e-2(a)(1)). However, most prevailing plaintiffs have relied on a sexual desire theory. *See infra* Figure 1.

woman. Many lower courts have interpreted *Oncale* to require that they look into the hearts and minds of harassers for evidence of sexual desire.[17]

This Article argues that the resulting decisions are problematic on three main grounds. First, they essentialize sexuality, making unfounded assumptions about sexual orientation and same-sex desire. Although social science researchers have not agreed on any all-purpose definition of sexual orientation, most courts have implicitly defined gay identity as public announcement and acceptance—in other words, being out of the closet at work. Courts assume that sexual orientations are binary, static, and transparent. They infer sexual orientation from desire, and vice versa. Unless a purported harasser identifies as nonheterosexual, courts are loath to characterize same-sex interactions as motivated by desire. Courts measure sexual orientation against a particular conception of same-sex relationships—comparing a harasser's actions to an idealized vision of romantic courtship that resonates with the picture of same-sex intimacy drawn by advocates of gay marriage. Under these doctrines, the possibility of same-sex desire is negated if a court concludes that a harasser intended to humiliate, threaten, or engage in mere horseplay with a plaintiff. In contrast, the same conduct would likely be actionable harassment had a plaintiff and harasser not been of the same sex.

This Article's second main ground of criticism is that the same-sex harassment cases reinforce heterosexism, in other words, discrimination in favor of cross-sex orientations and relationships. Confirming some of the fears of early critics,[18] this empirical assessment reveals that the doctrine resulting from *Oncale* privileges heterosexuality. It does so in more complicated ways than scholars initially predicted, however. When holding that no inference of same-sex desire is possible, courts often emphasize that harassers are involved in heterosexual marriages with children. The reasoning is not simply the (demonstrably false) assumption that a person who is involved in a cross-sex marriage could never harbor same-sex desire. Rather, the courts in these cases seem to be concerned about the high stakes of a legal finding of same-sex desire, which not only imposes a stigmatized nonheterosexual identity on the harasser, but also poses a

17. *See infra* Part I.A.

18. *See, e.g.*, Coombs, *supra* note 7, at 114; Halley, *supra* note 7, at 195.

threat to the harasser's spouse and children.[19] In effect, these decisions give purported heterosexuals license to experiment with same-sex sexuality in the workplace without undermining their heterosexual status. These cases stand in stark contrast those in which a harasser is "openly gay." When a harasser is openly gay, courts infer desire with ease, reinforcing stereotypes about gay men, lesbians, and bisexuals as overly sexual. In almost every case in which a court found credible evidence of homosexuality, it held that a jury could infer the harasser desired the same-sex plaintiff.[20] This doctrine, in which liability turns on an employee's openness about his or her sexual orientation, creates incentives for employers to discourage employees from coming out at work.[21] It also invites invasive discovery practices aimed at determining the sexualities of alleged harassers.

Third, the judicial preoccupation with sexuality undermines the goals of sex-equality law. Legal scholars have engaged in extensive debate about why sexual harassment is discrimination "because of sex."[22] Their theories can be grouped into three main ideas: (1) that sexual harassment is sexual domination, (2) that sexual harassment is the perpetuation of gendered expectations for certain workers, and (3) that sexual harassment is deviation from the norm of sex blindness.[23] This Article does not take a side in the debates among these theories. Nor does it advance a new theory about why harassment is "because of sex." Rather, it argues that under any of the three main normative theories, judicial inquiries into the sexualities of harassers are distractions from the harm of sex discrimination.

This is not to say *Oncale*'s ultimate holding, that Title VII bars same-sex harassment, is incorrect. Rather, this Article takes issue with *Oncale*'s suggestion that homosexual desire is what transforms

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19. *Cf.* Yoshino, *supra* note 7, at 449 ("[C]ourts may believe that where any ambiguity exists, it is better to let the guilty homosexual go free than to convict the innocent heterosexual.").

20. *See infra* notes 371–73 and accompanying text.

21. *See infra* Part II.D.

22. *See, e.g.*, Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1217 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 762 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998).

23. Others have argued that sexual harassment is harmful for reasons apart from sex discrimination. *See infra* note 445. Although they still operate as background norms, these justifications rarely surface in federal cases, because sexual harassment law is grounded in Title VII's prohibition on sex discrimination.

workplace interactions into sexual harassment. It argues that courts and advocates should not equate desire or sexual orientation with discriminatory intent. Superficially, sexuality may seem to be an appealing proxy for discriminatory motive at a time when courts are raising the bar for proof that sex discrimination still exists.[24] But examination of the cases reveals that determining sexuality is not so simple. In inferring desire, courts uncritically rely on reductive notions of sexual orientation as a heuristic for determining discriminatory intent, rather than considering alternative presumptions that might better target sex-based harassment.[25] Instead of endorsing any single alternative to the desire-based rule, this Article provides a set of potential rules that make sense from each normative standpoint.[26]

The sexual harassment cases have lessons for other legal contexts involving classifications based on sexual orientation or the regulation of desire generally. By challenging the assumption that determining an individual's sexual orientation is an easy doctrinal shortcut, these cases suggest caution with respect to legal efforts to classify individuals by sexual orientation. They shed light on questions such as whether proposed laws to prohibit discrimination on the basis of sexual orientation should require a plaintiff to prove her sexual orientation to show she is part of the "protected class."[27] The harassment cases also suggest caution with respect to the regulation of desire more generally, in contexts such as family and criminal law. Despite the growing consensus in favor of gay rights, regulatory regimes that turn on sexuality are likely to be carried out in ways that privilege heterosexual identities and conventional relationships.

This Article proceeds in four parts. Part I argues that the same-sex harassment cases rest on dramatically undertheorized notions of

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24. *See* Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 103–04 (2004) (defending the presumption that sexual desire is discriminatory on practical grounds).

25. *See infra* Part III.

26. *See infra* Figure 2.

27. Twenty-one states and the District of Columbia prohibit discrimination on the basis of sexual orientation in employment. *See Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN (June 19, 2013), http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf. Legislation to amend Title VII to prohibit discrimination on the basis sexual orientation is proposed almost every year. Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012).

sexual orientation and desire. Part II shows how determinations of sexual orientation and sexual desire raise troubling normative concerns by reinforcing heterosexism. Part III demonstrates that sexuality determinations are a distraction from the goals of sexual harassment law, under any plausible account of the doctrine. It also discusses a set of doctrinal alternatives for courts and advocates. Finally, Part IV draws out the implications of this study for other judicial or governmental efforts to determine sexual identity or to make desire the focal point of regulation.

I. ESSENTIALIZING SEXUALITY

In this Part, I will explain how courts have come to focus on desire in same-sex harassment cases and argue that these courts are applying essentialist notions of both sexual orientation and same-sex desire. But before proceeding, a word on what I mean by "essentializing." I do not argue that sexual desires or sexual orientations, insofar as orientation is defined as desires for one sex or both, have no biological basis. By essentialism, I mean a certain set of assumptions about sexuality.[28] First is the assumption that the categories homosexual, heterosexual, and bisexual are a natural and necessary way of dividing up biological phenomena like desires.[29] Second is the idea that every individual has a stable essence that can be neatly classified as heterosexual, homosexual, or bisexual, and

28. *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 22–27 (1990) (explaining how sexual orientation is an "inconceivably coarse ax[is] of categorization" such that "even people who share . . . our own positioning[] along [this] crude ax[is] may still be different enough from us, and from each other, to seem like all but different species"); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1242–43 (2011) (discussing types of antiessentialist arguments); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 275–77 (Carole S. Vance ed., 1984) (discussing "sexual essentialism").

29. *See, e.g.*, LISA M. DIAMOND, SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRE 21–24, 246–53 (2008); RITCH C. SAVIN-WILLIAMS, THE NEW GAY TEENAGER 27–28 (2005). I do not intend to make the ontological claim that such experiences are entirely socially constructed without any physiological or psychological basis; rather, I make the epistemological claim that our understanding of such experiences is mediated through law, society, culture, and discourse. *Cf.* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 866–68 (2002) (reading Professor Judith Butler not as claiming "there is no biological substrate to sex," but rather as claiming "there may be a biological component to sex, but that we will never be sure what that biological component is, as we can only apprehend it through culture (that is, gender)").

discerned through common sense.[30] And last is the assumption that members of each of these three groups share a common set of distinguishing characteristics and typical experiences.[31] This Part will argue that sexual desires and orientations are complex, variable, and susceptible to many definitions.[32] It will also argue that in the same-sex harassment context, courts operate under essentialist assumptions about sexuality that are descriptively inaccurate.

A. Conflating Sexual Orientation, Desire, and Discrimination

By way of background, this Section will briefly explain how courts have found themselves determining the sexual orientations of alleged harassers in adjudicating sexual harassment cases, and conflating that question with the issue of whether the harasser desired the plaintiff.

To prove a claim of sexual harassment, a plaintiff must generally establish four elements: (1) that the harassment was because of sex, (2) that it was severe or pervasive, (3) that it was unwelcome, and (4) that there is a basis for employer liability.[33] A harasser's sexuality is relevant to the first element—whether the harassment was "because of sex." It is important to recall that the term "sex" here is used in the sense of identity as a man or woman, not in the sense of erotic in content. *Oncale* clarified:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[34]

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30. *See* PAUL BLOOM, HOW PLEASURE WORKS: THE NEW SCIENCE OF WHY WE LIKE WHAT WE LIKE 9 (2010) (defining essentialism as "the notion that things have an underlying reality or true nature that one cannot observe directly and it is this hidden nature that really matters").

31. *Cf.* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (discussing this sort of essentialism with respect to the category of "women").

32. To say that sexual orientations are complex is not to say they can be freely chosen. *See* DIAMOND, *supra* note 29, at 249–53.

33. *E.g.*, Bonds v. Leavitt, 629 F.3d 369, 385 (4th Cir. 2011).

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

In *Oncale*, the Supreme Court gave three illustrations of how a plaintiff might prove sexual harassment was "because of sex" in a same-sex harassment case. First, when a plaintiff alleges "explicit or implicit proposals of sexual activity," an inference of sex discrimination would be supported if "there were credible evidence that the harasser was homosexual."[35] Second, such an inference would be supported "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[36] And third, an inference of sex discrimination would be supported by "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[37] Lower courts have interpreted these three illustrations as evidentiary routes plaintiffs might pursue.

Oncale did not hold that its three examples were exhaustive, and some circuits have recognized same-sex harassment to be "because of sex" based on other theories.[38] For example, many courts consider whether harassment was a result of sex stereotyping—that is, whether it was intended to enforce gender conformity.[39] This theory is based on the Supreme Court's decision in *Price Waterhouse v. Hopkins*[40] that discrimination may include adverse treatment of an individual for failing to meet stereotypes associated with her group—in that case, a female accountant who was not promoted due to her failure to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[41] A handful of

35. *Id.*

36. *Id.*

37. *Id*. at 80–81.

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

39. *E.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290–92 (3d Cir. 2009); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762–66 (6th Cir. 2006); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000).

These courts have not gone so far as to hold that all animus based on sexual orientation is reducible to sex stereotyping. *See, e.g.*, *Vickers*, 453 F.3d at 763. Rather, they require evidence that the discrimination was based on a plaintiff's gender presentation. *See, e.g.*, *id.* So, for example, a plaintiff might survive summary judgment if he were harassed with both antigay slurs and insults suggesting he failed to "look, speak, and act" in a masculine manner. *Prowel*, 579 F.3d at 292. In other cases, however, courts have viewed sexual-orientation discrimination as swamping other motives and precluding a sex-discrimination claim. *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 207 & n.17 (2009).

40. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

41. *Id.* at 235.

courts have allowed cases to proceed on yet other theories.[42] For example, the Ninth Circuit has held that unwelcome sexual touching is per se "because of sex."[43]

Although the Supreme Court held that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,"[44] in practice, it has been difficult for plaintiffs to establish causation based on any other theory.[45] For purposes of this Article, I reviewed 236 published and unpublished federal-court decisions in which courts reached a conclusion on the "because of sex" element of a same-sex harassment case from the time of the *Oncale* decision in March 1998 until March 2013.[46]

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42. *See* Bradford v. Dep't of Cmty. Based Servs., No. 09-206-DLB-CJS, 2012 WL 360032, at *9 (E.D. Ky. Feb. 2, 2012) (holding that harassment is based on sex if it is "explicitly sexual and patently degrading to women," meaning "that a reasonable person, regardless of gender, would consider the sexually offensive conduct and comments more offensive to women than men"); Vargas-Cabán v. Caribbean Transp. Servs., 279 F. Supp. 2d 107, 111 (D.P.R. 2003) (denying the defendant's motion to dismiss when the female plaintiff alleged a female supervisor harassed her out of jealousy over a relationship the plaintiff had with the defendant's male president).

43. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067–68 (9th Cir. 2002) (en banc); *see also* Bligh-Glover v. Rizzo, No. 1:08CV2788, 2012 WL 4506029, at *13–14 (N.D. Ohio Sept. 30, 2012) (concluding a jury could find harassment was because of sex based on "sexually inappropriate comments" and "physical contact"); Breitenfeldt v. Long Prairie Packing Co., 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999) ("[A] reasonable fact-finder could conclude from the sexually explicit quality of the verbal and physical assaults, especially the frequent references to homosexual sex acts, that Plaintiff's gender was one motivating factor of the offensive behavior."); Bacon v. Art Inst. of Chi., 6 F. Supp. 2d 762, 766–67 (N.D. Ill. 1998) (holding that evidence that an aggressor "continually touched or grabbed [the plaintiff's] buttocks and other of [his] body parts," "[ran] his fingers through [the plaintiff's] hair," and "rubbed his penis against [the plaintiff]" was sufficient to create a jury question as to whether harassment was because of sex). For discussion of cases in which male-on-male touching of genitalia was not considered "because of sex," however, see *infra* notes 228–33 and accompanying text.

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

45. Confusion on this point is so persistent that the First Circuit recently found it necessary to "repeat previous reminders to the bar and bench that the harassing action need not be inspired 'by sexual desire' to be redressable under Title VII—the only requirement is that the action must be because of the victim's sex." Medina-Rivera v. MVM Inc., 713 F.3d 132, 138 n.4 (1st Cir. 2013) (citing *Oncale*, 523 U.S. at 80).

46. These cases are cited in Appendix A. The Appendix includes only cases decided by federal courts under Title VII or parallel federal or state employment-discrimination statutes from March 4, 1998 through March 31, 2013. It does not include cases in which the "because of sex" element appears not to have been contested, or in which the court did not reach any conclusion on that issue. It includes only dispositive motions, mostly summary judgment rulings, although I also reviewed a small number of decisions on discovery disputes, discussed in Part II.D. I attempted to collect all cases meeting these criteria, but I do not purport to have assembled a comprehensive list. I identified these cases through a number of traditional legal research methods, including broad searches in the "All Federal Cases" Westlaw database using a variety of search terms. I also independently reviewed all cases referenced in the secondary

Figure 1 sets forth the number of cases in which plaintiffs prevailed on each theory of why same-sex harassment is "because of sex." Plaintiffs have relied on the theory that the harasser acted out of discriminatory sexual desire in the majority of these decisions. My research has uncovered just two opinions in which a plaintiff alleging same-sex harassment survived summary judgment exclusively based on the second evidentiary route—general hostility toward men or women in the workplace.[47] With respect to the third route—evidence of more favorable treatment of one sex—the Seventh Circuit explained, "That evidence may be difficult, if not impossible, to obtain when the plaintiff and his harasser work in the kind of single-sex work environment that the Supreme Court confronted in *Oncale*; and it is in that kind of environment where same-sex harassment frequently occurs."[48] And although the sex-stereotyping theory is on the ascendance, it is not uniformly recognized or consistently considered by courts.[49]

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literature on this topic, including many of those cases collected by Clare Diefenbach. *See supra* note 7.

47. McCarthy v. R.J. Reynolds Tobacco Co., 819 F. Supp. 2d 923, 932 (E.D. Cal. 2011); Bailey v. Henderson, 94 F. Supp. 2d 68, 75 (D.D.C. 2000); *cf.* Amezaga v. Potter, No. 04-1944 (RLA), 2007 WL 1387287, at *7 (D.P.R. May 8, 2007) (denying summary judgment in a case in which a female harasser insulted a female plaintiff's "body and physique" and "denigrated her intellectual capacity and professional qualifications" based on both the second and third *Oncale* theories). *See generally* Ramit Mizrahi, Note, *"Hostility to the Presence of Women": Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 157 (2004).

48. Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999); *see, e.g.*, McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 543–44 (8th Cir. 2003); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 520 (6th Cir. 2001); *cf.* EEOC v. Nat'l Educ. Ass'n, 422 F.3d 840, 846–47 (9th Cir. 2005) (holding that the "accident of a mostly female workplace" could not insulate an employer from liability for male-on-female harassment).

49. *See* EEOC v. Boh Bros. Const. Co., 689 F.3d 458, 461–62 (5th Cir. 2012) (declining to decide whether to recognize a sex-stereotyping theory, observing "there is at least some resistance to allowing, in same-sex harassment suits, evidence that does not fall within any *Oncale* category"); Borski v. Staten Island Rapid Transit, No. 04 CV 3614(SLT)(CLP), 2006 WL 3681142, at *1 (E.D.N.Y. Dec. 11, 2006) (failing to consider a sex-stereotyping theory in a case in which the harassment included an implication that the male plaintiff wore women's clothes). Routinely, courts simply proceed mechanically through each of the three *Oncale* theories, even in jurisdictions that recognize sex-stereotyping claims. *See, e.g.*, Donaldson v. Norfolk S. Ry., No. 10-cv-1556, 2011 WL 3568843, at *5 (M.D. Pa. Aug. 15, 2011).

Figure 1. Plaintiffs Prevailing on Theories of why Same-Sex Harassment was Because of Sex[50]

Theory	Sexual Desire / Homosexuality (*Oncale* #1)	Hostility Toward One Sex (*Oncale* #2)	Different Treatment of Sexes (*Oncale* #3)	Sex-Stereotyping (*Price Waterhouse*)	Other
Number of Cases	41	5	16	8	9

Thus, plaintiffs are most successful arguing they were harassed due to discriminatory sexual desire—*Oncale*'s first theory. In analyzing this theory, courts have conflated the question of a harasser's sexual orientation with the question of a harasser's sexual desire for a particular plaintiff. Although no court has explicitly formulated the rule in these terms, my review of the cases shows a plaintiff can prevail on *Oncale*'s first theory by showing *either* that (1) the same-sex harasser sexually desired her *or* (2) the harasser was homosexual. Some courts state that they require plaintiffs to demonstrate both of these elements.[51] But in practice, courts treat these two inquiries as overlapping, to the point of being circular.[52] I have found only one case in which a court expressly held that conduct was not "because of sex" when the plaintiff could demonstrate the same-sex harasser's sexual desire for him but failed to make an

50. These cases are cited in Appendix B. I note that these plaintiffs did not necessarily prevail on every issue. They merely prevailed on the question of whether the harassment was "because of sex" by having sufficient evidence or allegations, depending on the applicable procedural standard. These decisions do not include those in which courts did not specify any theory. *See, e.g.*, Wright v. Porters Restoration, Inc., No. 2:09-CV-163-PRC, 2010 WL 2559877, at *3 (N.D. Ind. June 23, 2010) (denying a defendant's motion to dismiss a same-sex harassment claim without noting any *Oncale* theory because the plaintiff had met the pleading standard by "rais[ing] the possibility of a right to relief above a speculative level").

51. *See, e.g.*, *Shepherd*, 168 F.3d at 1010–11.

52. *See id.* (concluding that "[a]lthough none of these incidents [of harassment] necessarily proves that [the male harasser] Jemison is gay, the connotations of sexual interest in [the male plaintiff] Shepherd certainly suggest that Jemison might be sexually oriented toward members of the same sex" while "readily acknowledg[ing] that the factfinder could infer from [evidence that Jemison also harassed a woman] that Jemison's harassment was bisexual and therefore beyond the reach of Title VII" (citations omitted)); *see also* Davidson-Nadwodny v. Wal-Mart Assocs., Inc., No. CCB-07-2595, 2010 WL 1328572, at *4 (D. Md. Mar. 26, 2010) (concluding, from the "sufficiently intimate nature" of the harassment, that a factfinder could infer "an underlying sexual attraction" that was "motivated by some degree of homosexual desire towards [the plaintiff]" (alteration in original) (quoting Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1069 n.2 (8th Cir. 2005)) (quotation mark omitted)).

independent showing of the harasser's homosexual orientation.[53] The general trend is toward a rule that requires only a showing that the harasser sexually desired the plaintiff, without any independent showing of the harasser's homosexuality.[54] Alternatively, many courts hold that credible evidence of homosexuality is sufficient, interpreting *Oncale* to allow an inference of desire to be drawn from the fact that the harasser was homosexual.[55]

Courts have also conflated the question of orientation/desire with the question of discrimination. Decisions that require only a showing of desire without any showing of homosexuality raise a logical dilemma: What if the harasser was bisexual and did not discriminate on the basis of sex in her desires?[56] Such a "defense" has

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53. *See* Myers v. Office Depot, Inc., No. 06-CV-11252, 2007 WL 2413087, at *4 (E.D. Mich. Aug. 21, 2007) (dismissing a case at summary judgment when the plaintiff did "not offer any evidence that [the alleged harasser] is a homosexual and thus allegedly attempted to kiss the plaintiff because of sex").

54. *See* Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 188 (5th Cir. 2012) (holding that "if a plaintiff presents evidence that he was harassed by a member of the same sex, and that the harassment was sexual rather than merely humiliating in nature, that evidence is sufficient to support a verdict in the plaintiff's favor"); Dick v. Phone Directories Co., 397 F.3d 1256, 1265 (10th Cir. 2005) (holding that one "evidentiary route turns on whether the harasser acted out of sexual desire," and that "[a] plaintiff who makes this showing establishes that the harassment took place because of her sex, regardless whether she has also demonstrated that her harasser is homosexual"). Courts have found evidence of same-sex sexual desire or erotic conduct sufficient without independent evidence of the harasser's general sexual orientation in several other recent cases. *E.g.*, Robinson v. Carefocus, Inc., No. 1:10-CV-208, 2011 WL 2672037, at *7 (E.D. Tenn. July 8, 2011); Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745, 757 (N.D. Ill. 2010); Cragle v. Werner Enters., Inc., Nos. 3:07cv2132, 3:07cv2133, 2010 WL 936774, at *6 (M.D. Pa. Mar. 11, 2010).

55. *See* EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 n.6 (6th Cir. 2001) ("When the harasser is a homosexual, however, the conclusion that the harassment was gender based is defensible."); Ellsworth v. Pot Luck Enters., Inc. 624 F. Supp. 2d 868, 877 (M.D. Tenn. 2009) (holding that "because there is no dispute that all of the alleged harassers in the present case were homosexual, there is an inference that their conduct was based on sexual desire, and thus, sex"); *cf.* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262, 264 (3d Cir. 2001) (stating that one way a plaintiff can allege sexual harassment is to demonstrate that "the harasser was motivated by sexual desire," and that the inference of desire is "reasonable" when the harassment is "sexually charged" and the harasser is "gay or lesbian"); Hunter v. Allvac, No. 10-CV-941S, 2012 WL 3746270, at *5 (W.D.N.Y. Aug. 28, 2012) ("Nor is there any evidence from which to infer that any of the coworkers who allegedly harassed Plaintiff were homosexual, which would give rise to an inference of discrimination based on sexual desire." (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998))).

56. This dilemma preoccupied the Supreme Court for some time during the oral argument over *Oncale*. Transcript of Oral Argument at 8–12, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 751912.

succeeded only once.[57] More often, this problem arises without resolution.[58] Courts and commentators have been bothered by the "two wrongs don't make a right" aspect of this theoretical bisexuality loophole since the inception of sexual harassment jurisprudence.[59] Their concern begs the question of what the harm is that sexual harassment law aims to address—sexist or sexual conduct in the workplace?[60] In any event, the loophole for the "bisexual harasser" is quite narrow—those courts that recognize it will still find discrimination so long as the harasser subjected members of one sex to qualitatively or quantitatively different treatment.[61]

Although few defendants raise bisexual-harasser defenses, a constant problem in these cases is the "equal-opportunity harasser"—a harasser who behaves in a sexually charged manner with both men and women in the workplace, but does not claim to be bisexual, and

57. *See* Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) ("[B]ecause Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit."). In *Holman*, bisexuality was not technically raised as a "defense," rather, the plaintiffs had pleaded themselves out of court by alleging that both plaintiffs (a married couple) suffered the exact same course of harassment. *Id.* at 405.

58. *See, e.g.*, Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 468 (6th Cir. 2012) ("We need not delve into what inferences—if any—might be drawn from a harasser's bisexuality."); La Day v. Catalyst Tech., Inc., 302 F.3d 474, 480 n.6 (5th Cir. 2002) (noting, without resolving, the "difficult question of the status of bisexual harassers").

59. *See* Yoshino, *supra* note 7, at 442–43 (noting that the lack of defendants employing the bisexuality defense may be a result of their fear that courts are not comfortable with the "double for nothing" reasoning). *Compare* EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 (6th Cir. 2001) (commenting that the bisexual-harasser defense "should make for some interesting workplace notices posted by employers: 'We do not tolerate sexual harassment; but if you must, make sure you are equally gross with both sexes'"), *with Holman*, 211 F.3d at 404 ("Surely attorneys will not advise their employer-clients to instruct their employees to harass still more people—to commit, in most cases, state law torts—which could subject their clients to lawsuits and themselves to claims of malpractice and charges of professional misconduct.").

60. *See infra* note 445.

61. Katz, *supra* note 24, at 130; Yoshino, *supra* note 7, at 445–46. Quantitatively different harassment could vary in frequency based on the victim's sex. For example, a harasser might flash both a man and a woman, but the woman might only get flashed once, while the man gets flashed "four or five times weekly." *See* Shepherd v. Slater Steels Corp., 168 F.3d 998, 1011 (7th Cir. 1999) (requiring evidence of harassment of both sexes "in the same way and to the same degree" to support the bisexual-harasser defense). Qualitatively different harassment might vary in kind or severity. For example, women might be harassed by men "draping their arms around" them "and making suggestive comments," whereas men might be harassed by "painful physical assault on their genitalia." Breitenfeldt v. Long Prairie Packing Co., 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999).

does not admit she was motivated by any sort of desire.[62] Courts distinguish bisexual harassers, who harass out of sexual desire, from equal-opportunity harassers, who harass out of generalized vulgarity or misanthropy. Because *Oncale* instructed that not all sexually charged conduct is harassment because of sex, courts must determine whether the harassment arose from sexual desire or some other motive. As the following sections will demonstrate, this determination often turns on whether a harasser *identifies* as gay, lesbian, or bisexual, as do the results in other scenarios in which a harasser's intent is ambiguous.[63] The next two sections will argue that courts apply essentialist notions both in assigning sexual orientations and in determining whether a jury could infer a harasser acted out of sexual desire.

B. Reductive Definitions of Sexual Orientation

How do courts determine who is gay? *Oncale* did not explain what sort of evidence might suffice to demonstrate homosexuality, or what definition of "homosexual" courts might use. Contrary to popular wisdom, there is no unitary definition. The practice of organizing all persons into the categories of heterosexual, homosexual, and bisexual based on their sexual desires is by no means universal; it is both culturally[64] and historically[65] contingent. It

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62. *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) ("[The harasser] was just an indiscriminately vulgar and offensive superior, obnoxious to men and women alike.").

63. *Compare, e.g.*, Smith v. Hy-Vee, Inc., 622 F.3d 904, 906–08 (8th Cir. 2010) (per curiam) (holding that a harasser who did not self-identify as gay or bisexual was not engaged in sexual harassment when she harassed both men and women), *with* Kampmier v. Emeritus Corp., 472 F.3d 930, 934, 940–41 (7th Cir. 2007) (holding that a harasser who self-identified as "queer" sexually harassed female employees, even though she also had also "grabbed two male employees' buttocks"). *Hy-Vee* and *Kampmier* are discussed in greater detail in Parts II.A and II.B, respectively.

64. *See generally* JOSEPH A. MASSAD, DESIRING ARABS (2007); AFSANEH NAJMABADI, WOMEN WITH MUSTACHES AND MEN WITHOUT BEARDS: GENDER AND SEXUAL ANXIETIES OF IRANIAN MODERNITY (2005); JASBIR PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007); Gilbert H. Herdt, *Ritualized Homosexual Behavior in the Male Cults of Melanesia, 1862–1983: An Introduction*, *in* RITUALIZED HOMOSEXUALITY IN MELANESIA 1 (Gilbert H. Herdt ed., 1984); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97 (2002). I am indebted to Professor Katherine Franke's work for pointing me to these sources.

65. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 568 (2003) ("[A]ccording to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century."). *See generally* JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY

may even be outdated. As psychologist Ritch Savin-Williams has observed, "[T]eenagers are increasingly redefining, reinterpreting, and renegotiating their sexuality such that possessing a gay, lesbian, or bisexual identity is practically meaningless."[66] Some individuals resist categorization based on the sex of their preferred sexual partner, opting instead for a sort of "it's complicated"[67] response to questions about sexual-orientation status.[68] Others identify as asexual or gray-sexual.[69]

Researchers have defined sexual orientation along at least three axes: self-identification, sexual behavior, and desires.[70] They have also recognized that an individual's sexual orientation, as defined along

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(1995); MICHEL FOUCAULT, 1 HISTORY OF SEXUALITY (Robert Hurley trans., Pantheon Books ed. 1978) (1976); SEDGWICK, *supra* note 28.

66. SAVIN-WILLIAMS, *supra* note 29, at 1.

67. *Cf.* Clare Suddath, *Your Facebook Relationship Status: It's Complicated*, TIME (May 8, 2009), http://www.time.com/time/business/article/0,8599,1895694,00.html (discussing Facebook's options for designating "relationship status," including "single, in a relationship, engaged, married, it's complicated, and in an open relationship").

68. *See* SAVIN-WILLIAMS, *supra* note 29, at 30 ("Members of the younger generation doubt that their sexual orientation can be reduced to *either* homosexual *or* bisexual *or* heterosexual."); Ruth Colker, Response, *Hybrid Revisited*, 100 GEO. L.J. 1069, 1072–73 (2012) (describing "sexual orientation resisters" who oppose the notion that "the biological sex of one's partner is of key importance in matters of self-identity"); Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES, Jan. 10, 2013, at E1 ("[T]his generation is seeking something more radical: an unbending of gender roles beyond the binary of male/female. The core question isn't whom they love, but who they are—that is, identity as distinct from sexual orientation."). The problem of individuals who respond with "other" or "something else" to questions regarding sexual orientation is endemic to social science research in this area. *See, e.g.*, SAVIN-WILLIAMS, *supra* note 29, at 31 (discussing the "staggering" number of young survey respondents who answer questions regarding sexual orientation with "don't know," "not sure," "none," "queer," or "all of the above"); Anjani Chandra, William D. Mosher, Casey Copen & Catlainn Sionean, *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006–2008 National Survey of Family Growth*, NAT'L HEALTH STAT. REP., Mar. 3, 2011, at 1, 33–35 (2011), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf (noting the difficulty in compiling national estimates of sexual identity and behavior due to the relative frequency of the "something else" response).

69. *See* SIMON LEVAY & JANICE BALDWIN, HUMAN SEXUALITY 230–31 (4th ed. 2012) (providing an overview of research regarding asexuality). *See generally* Elizabeth Emens, *Compulsory Sexuality*, 66 STAN. L. REV. (forthcoming 2014) (manuscript at 5–11) (discussing the emerging understanding of asexuality as an identity category), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2218783.

70. *See, e.g.*, Donna Brogan, Erika Frank, Lisa Elon & Katherine A. O'Hanlan, *Methodologic Concerns in Defining Lesbian for Health Research*, 12 EPIDEMIOLOGY 109, 109 (2001) ("Consensus is building that sexual orientation can be defined along three dimensions: self-identification, sexual behavior, and sexual attraction or desire." (footnotes omitted)); Ritch C. Savin-Williams, *Who's Gay? Does It Matter?*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 40, 40 (2006) (detailing the same).

any of these three dimensions, may vary over time.[71] To further complicate matters, survey evidence demonstrates that these three definitions do not always yield the same result.[72] These definitional difficulties have led some to suggest that researchers should "forsake the general notion of sexual orientation altogether and assess only those components relevant for the research question."[73]

With rare exception, courts have not endeavored to theorize which definition of sexual orientation is best suited to determining whether workplace harassment is discrimination because of sex.[74] Rather, they rely on assumptions that social science researchers have concluded "are patently false: that homosexuality is a uniform attribute across individuals, that it is stable over time, and that it can be easily measured."[75]

This Section will critically analyze how courts examine facts related to sexual orientation along each of these three axes—self-identification, conduct, and desire—as well as a fourth category considered legally relevant, which I will refer to as "reputation." The cases reveal that courts are generally wary of concluding that an individual is homosexual unless that individual identifies as such in the workplace. They privilege a model of sexual orientation based on public announcement and acceptance, in other words, being out of the closet at work.

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71. Brogan et al., *supra* note 70, at 109.

72. *See* Luis F. Morales Knight & Debra A. Hope, *Correlates of Same-Sex Attractions and Behaviors Among Self-Identified Heterosexual University Students*, 41 ARCHIVES SEXUAL BEHAV. 1199, 1199 (2012) (collecting surveys which provide "clear evidence of the disconnect between these variables" through the marked difference in the percentage of respondents who identify as lesbian, gay, or bisexual, and of those who reported same-sex attraction or behavior); Zhana Vrangalova & Ritch C. Savin-Williams, *Mostly Heterosexual and Mostly Gay/Lesbian: Evidence for New Sexual Orientation Identities*, 41 ARCHIVES SEXUAL BEHAV. 85, 86 (2012) (collecting studies demonstrating discrepancies among sexual-orientation components).

73. Ritch C. Savin-Williams & Geoffrey L. Ream, *Prevalence and Stability of Sexual Orientation Components During Adolescence and Young Adulthood*, 36 ARCHIVES SEXUAL BEHAV. 385, 393 (2007). Rather than one universal definition of sexual orientation, researchers could define the term in accord with the purpose of the research, "[f]or example, to assess HIV transmission, measure sexual behavior; to assess interpersonal attachments, measure sexual/romantic attraction; and to assess political ideology, measure sexual identity." *Id.*

74. One such exception, discussed below, is *Shepherd v. Slater Steels Co.*, 168 F.3d 998, 1011 (7th Cir. 1999). *See infra* notes 569–72 and accompanying text.

75. EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 283 (2000).

1. *Self-Identification*. Many decisions regard self-identification as the litmus test of sexual orientation.[76] Often, the harasser's homosexuality was simply not contested by the employer-defendant.[77] In other cases, courts look to statements made by alleged harassers indicating same-sex preferences or relationships.[78]

But as a general matter, courts apply rules of strict construction to admissions of gay identity, going to great lengths to avoid allowing juries to read hints, subtleties, or innuendos as expressions of the love that dare not speak its name. As literary critic Eve Sedgwick has written, "The speech acts that coming out . . . can comprise are . . . strangely specific."[79] Courts are wary of assigning a homosexual orientation to anyone who has not expressly chosen that identity and "come out" of the closet by following a very particular cultural script.

For example, in *Love v. Motiva Enterprises LLC*,[80] the Fifth Circuit affirmed a district court's refusal to consider evidence that a coworker had heard the alleged harasser, a woman, "state loudly several times that the reason the men did not like her was because she was gay or female."[81] The court did not consider this "clear and credible proof that [the alleged harasser] is homosexual sufficient to defeat summary judgment," because the statement could be construed as reflecting the coworker's uncertainty about which of the two conditions was stated as the reason men did not like the alleged harasser—perhaps the coworker could not recall if the harasser said

76. *See, e.g.*, Bradley v. Bates Acquisition, LLC, No. 1:09-cv-1153, 2010 WL 3220647, at *4 (W.D. Tenn. Aug. 13, 2010) ("[N]either the Plaintiff nor anyone else he has discussed self-identifies as homosexual . . . ."); English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 846 (E.D. Va. 2002) ("[Plaintiff] also concedes that [the alleged harasser] never told [Plaintiff] that he was a homosexual."). A plaintiff may lose her case if she fails to secure an admission of homosexuality from the alleged harasser. *See* EEOC v. Family Dollar Stores, Inc., No. 1:06-CV-2569-TWT, 2008 WL 4098723, at *13 (N.D. Ga. Aug. 28, 2008) (granting summary judgment for an employer when the plaintiff could not depose the alleged harasser to establish his sexuality).

77. *E.g.*, Russell v. Univ. of Tex. of Permian Basin, 234 F. App'x 195, 201 (5th Cir. 2007); Caravantes v. 53rd St. Partners, LLC, No. 09 Cv. 7821(RPP), 2012 WL 3631276, at *11 (S.D.N.Y. Aug. 23, 2012); Brief of Defendant-Appellee at 6, Kampmier v. Emeritus Corp., 472 F.3d 930 (7th Cir. 2007) (No. 06-1788), 2006 WL 2024101, at *6; Reply Brief in Support of Defendants' Motion for Partial Summary Judgment at 6, Smith v. Pefanis, 652 F. Supp. 2d 1308 (N.D. Ga. 2009) (No. 1:08-CV-1042).

78. *See, e.g.*, Adeshile v. Metro. Transit Auth., No. H-06-3480, 2008 WL 112103, at *6 (S.D. Tex. Jan. 9, 2008) ("Green's discussion of her sexual preferences and exploits with women provides some evidence supporting a homosexual orientation.").

79. SEDGWICK, *supra* note 28, at 3–4.

80. Love v. Motiva Enters. LLC, 349 F. App'x 900 (5th Cir. 2009) (per curiam).

81. *Id.* at 904.

the men did not like her because she was gay, or if she said the men did not like her because she was female.[82] It was also possible that the harasser's statement only reflected that the men thought she was gay, not that she self-identified as such.[83] In another case, *Warner v. USF Holland*,[84] an alleged harasser turned to the plaintiff in the restroom while the two men were standing side by side at urinals and, with his genitals exposed, said, "If I was gay, I would like to be with somebody like you."[85] The district court gave this statement a close grammatical analysis, concluding that "read literally, the subjunctive 'if I was gay' would mean that [the alleged harasser] was *not* gay."[86]

Some courts defer to an alleged harasser's self-identification as heterosexual, even in the face of admissions of same-sex desire. In one case, a court reconciled an alleged harasser's self-identification as "heterosexual" with his statements that "he liked males, told [the male] plaintiff he 'wanted' him, and once asked plaintiff if he 'had a big dick' and said that he 'liked that sort of thing,'" by reasoning that there was no evidence the harasser "made such comments often."[87] Courts will disregard even same-sex sexual contact when it conflicts with heterosexual identification.[88]

One assumption behind this reliance on self-identification is that heterosexually identified individuals never desire same-sex sexual conduct or engage in same-sex sexual behaviors. This is demonstrably false. Indeed, the category of men who engage in same-sex sexual activity but do not identify as gay or bisexual is significant enough

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82. *Id.*

83. *Id.*

84. Warner v. USF Holland Inc., No. 08 C 6823, 2012 WL 245190 (N.D. Ill. Jan. 25, 2012).

85. *Id.* at *6.

86. *Id. But see* Mann v. Lima, 290 F. Supp. 2d 190, 195 (D.R.I. 2003) (holding that an alleged harasser's statement that she was "a lesbian" at a family gathering "so her mother would stop trying to fix her up with people" was enough "to support an inference, however strained, that [the alleged harasser] is a homosexual").

87. Hubbard v. Bimbo Bakeries USA, Inc., No. 06-43-JE, 2006 WL 2863222, at *12 (D. Or. Oct. 4, 2006), *aff'd*, 270 F. App'x 607 (9th Cir. 2008).

88. *See* Bradley v. Bates Acquisition, LLC, No. 1:09-cv-1153, 2010 WL 3220647, at *1, *4 (W.D. Tenn. Aug. 13, 2010) (disregarding the harassers' "consensual same-sex sexual behavior, including stroking one another's penises and nipples, kissing, dancing, and humping each other" because they "never actually exposed themselves to one another"); Kreamer v. Henry's Marine, No. Civ.A.03-3139, 2004 WL 2297459, at *1 (E.D. La. Oct. 7, 2004) (holding that harassment was not "because of sex" even though the harasser grabbed the plaintiff's genitals), *aff'd*, 150 F. App'x 378 (5th Cir. 2005); English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 846 (E.D. Va. 2002) (holding that harassment was not "because of sex" even though the harasser placed his genitals on the plaintiff's shoulder).

that public-health researchers denominate this group with the acronym MSM: "men who have sex with men."[89] According to a 2011 national telephone survey, only 3 percent of men and 5 percent of women self-identified as lesbian, gay, or bisexual,[90] although 6 percent of men and 13 percent of women reported experiencing same-sex sexual contact,[91] and 6 percent of men and 16 percent of women reported feeling same-sex attraction.[92] Of course, self-reporting is notoriously suspect due to the continued stigma attached to nonheterosexual identities—it is likely that same-sex contact and attraction are underreported.[93]

Another assumption underlying this reliance on self-identification is that every individual is consciously aware of and certain about his or her sexual orientation.[94] In one case, a female plaintiff argued that her alleged harasser was homosexual based on an incident in which the harasser rubbed the plaintiff's leg, another time when she stared at the plaintiff's breasts, and a conversation in which she asked the plaintiff, "[H]ow do you know if you prefer men over women sexually[?]"[95] One interpretation of this conduct is that the alleged harasser was questioning her own sexual orientation. This is no idle possibility: research suggests that, for women in particular, sexual desires may form that are inconsistent with prior sexual orientations, and identification as lesbian or bisexual may be a process.[96] But the court refused to consider such an interpretation

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89. *See* Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1465 n.3 (2009) ("[MSM] was first adopted by public health scholars and workers who recognized the significant community of men who had sex with men but do not identify as gay.").

90. Chandra et al., *supra* note 68, at 29 tbl.12, 30 tbl.13. This study's data came from an automated telephone survey of a national sample of 55,556 males and 56,032 females aged eighteen to forty-four in the United States. *Id.* at 31 tbl.14.

91. *Id.* at 31 tbl.14.

92. *Id.* at 12, 28 tbl.11.

93. LAUMANN, *supra* note 75, at 284; SAVIN-WILLIAMS, *supra* note 29, at 37.

94. This presumption runs counter to long traditions in psychology and literature. *See* SEDGWICK *supra* note 28, at 26 ("[W]here would the whole, astonishing and metamorphic Western romance tradition (I include psychoanalysis) be if people's sexual desire, of all things, were even momentarily assumed to be transparent to themselves?").

95. Reissner v. Rochester Gas & Elec. Corp., No. 02-CV-6353-CJS, 2004 WL 941645, at *1–2 (W.D.N.Y. Apr. 22, 2004).

96. *See, e.g.*, Lisa M. Diamond, *What Does Sexual Orientation Orient? A Biobehavioral Model Distinguishing Romantic Love and Sexual Desire*, 110 PSYCHOL. REV. 173, 173 (2003) ("[I]ndividuals can develop novel sexual desires—even desires that contradict their sexual orientations—as a result of falling in love."); *id.* at 183 (detailing case studies from a longitudinal study). *See generally* KRISTIN G. ESTERBERG, LESBIAN AND BISEXUAL IDENTITIES: CONSTRUCTING COMMUNITIES, CONSTRUCTING SELVES (1997) (providing narrative accounts

because the alleged harasser had "unequivocally denied being homosexual, denied ever having sexual relations with other women, and affirmatively stated that her sexual orientation was heterosexual."[97]

2. *Reputation*. Although the *Oncale* Court did not provide instructions on how a plaintiff might prove a harasser's homosexuality, it did caution that the plaintiff's evidence had to be "credible," perhaps to ward off arguments based on speculation or stereotypes about gay men and lesbians.[98] Accordingly, courts routinely reject bald speculation or arguments explicitly based on stereotypes about the demeanor and dress of gay men and lesbians.[99] Courts also hold that "rumor"[100] and "gossip"[101] are not credible evidence of homosexuality.[102]

However, courts frequently remark on the absence of reputation evidence establishing the harasser to be homosexual as if it would be expected that coworkers would know if a harasser really were gay.[103] For example, one court considered affidavits from twelve of the alleged harasser's coworkers that indicated that none "believed [the harasser] was a homosexual or had reason to believe [the harasser] was gay."[104] These courts may have taken *Oncale*'s instruction that evidence of homosexuality be "credible" as a requirement that a

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showing that although some women consider themselves "lesbians from birth," others came to see themselves as lesbian or bisexual as those terms became culturally and socially available).

97. *Reissner*, 2004 WL 941645, at *9.

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

99. *See, e.g.*, Alleman v. La. Dep't of Econ. Dev., 698 F. Supp. 2d 644, 660 (M.D. La. 2010) (rejecting the plaintiff's argument that an alleged harasser "was homosexual based on her voice and appearance"); Smith v. Cnty. of Humboldt, 240 F. Supp. 2d 1109, 1117 (N.D. Cal. 2003) (rejecting "bald assertions" of homosexuality "supported by nothing more than [the plaintiff's] speculation about lesbian fashion").

100. Aguilera-Corona v. Kefro LLC, No. Civ. 04-6283-AA, 2006 WL 696091, at *3 (D. Or. Mar. 14, 2006).

101. *Reissner*, 2004 WL 941645, at *9.

102. Courts may exclude such statements under the Federal Rules of Evidence. *E.g.*, Dick v. Phone Directories Co., 397 F.3d 1256, 1266 n.5 (10th Cir. 2005); Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1069 (8th Cir. 2005).

103. *See, e.g.*, Warner v. USF Holland Inc., No. 08 C 6823, 2012 WL 245190, at *5 (N.D. Ill. Jan. 25, 2012) ("Plaintiff has no independent evidence (from, say, co-workers or [the alleged harasser's] friends) that he was gay or bisexual.").

104. English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 846 (E.D. Va. 2002); *see also* Lavack v. Owen's World Wide Enter. Network, Inc., 409 F. Supp. 2d 848, 855 (E.D. Mich. 2005) ("[The alleged harasser] lived with other male employees of Autofocus who have not experienced anything that would indicate that [he] is homosexual.").

harasser be "openly" gay[105]—meaning that he holds himself out as gay to the community. These courts go beyond requiring evidence that a harasser self-identifies as gay to require evidence that the harasser is out of the closet at work.

Along these lines, some courts require that the plaintiff subjectively believed the harasser to be homosexual. They impose this requirement by refusing to find credible evidence of homosexuality if the plaintiff is unable to testify to the harasser's sexual orientation. When deposed about their harassers' motives, plaintiffs frequently respond that they just "don't know" why harassers behaved the way they did.[106] For example, one plaintiff lost his case because, although an alleged harasser had thrust his hips into the plaintiff's groin area, when asked at his deposition, the plaintiff stated he did not believe the harasser to be homosexual.[107]

In *Love v. Motiva Enterprises*, the Fifth Circuit held the plaintiff had failed to adduce evidence from which to infer her harasser's homosexuality, even though the plaintiff stated that she had seen the alleged harasser kissing another woman for thirty seconds in a truck outside the worksite, and that the harasser had tried to kiss the plaintiff.[108] The court refused to consider this evidence, because during her deposition, the plaintiff had stated she did not "know anything about [the harasser's] sexual orientation."[109] The plaintiff

105. *See, e.g.*, Ellsworth v. Pot Luck Enters., Inc. 624 F. Supp. 2d 868, 872, 876 (M.D. Tenn. 2009).

106. *See Pedroza*, 397 F.3d at 1067 (when asked about her harasser's orientation, plaintiff stated "I don't know which way she may go" (quotation mark omitted)); Noto v. Regions Bank, 84 F. App'x 399, 402 (5th Cir. 2003) (plaintiff "admit[ed] she [did] not know whether [the alleged harasser was] a lesbian"); McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 543 (8th Cir. 2003) (plaintiff "did not understand what motivated [the alleged harasser's] behavior"); Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1123 (D.C. Cir. 2002) (plaintiff admitted "I don't know if [the alleged harassers] were asking me to have sexual relations with them. I don't really know what they were saying").

107. Ballard v. Union Pac. R.R., No. 8:06CV718, 2008 WL 1990787, at *2 (D. Neb. May 5, 2008). *But see* Shepherd v. Slater Steels Corp., 168 F.3d 998, 1011 (7th Cir. 1999) (holding the victim's perception of the harasser's sexual orientation to be largely "irrelevant"); Tepperwien v. Entergy Nuclear Operations, Inc., 606 F. Supp. 2d 427, 440 (S.D.N.Y. 2009) (noting that the victim's perception of the harasser's orientation is not dispositive), *aff'd*, 663 F.3d 556 (2d Cir. 2011).

108. Love v. Motiva Enters. LLC, 349 F. App'x 900, 903 (5th Cir. 2009) (per curiam).

109. *See* Love v. Motiva Enters. LLC, No. 07-5970, 2008 WL 4286662, at *7 (E.D. La. Sept. 17, 2008), *aff'd*, 349 F. App'x 900 (5th Cir. 2009) (per curiam).

argued that she interpreted the deposition question to be asking whether the harasser had admitted to a lesbian identity.[110]

The plaintiff's explanation makes sense if sexual orientation is defined by the specific act of coming out of the closet. Sedgwick tells a story about two friends, a man and a woman.[111] Although the woman had long been aware that her male friend's "eroticism happen[ed] to focus exclusively on men," she did not feel comfortable referring to him as a "gay man" until ten years into their relationship, when he stated to her, in casual conversation, that he had "com[e] out" to another acquaintance.[112] The plaintiff in *Love* may have had this understanding of sexual orientation. Thus, her contention that she did not "know anything" about her harasser's "sexual orientation" was not inconsistent with her claim that she had seen her harasser kissing another woman.

The requirement that a harasser be known by the plaintiff and other coworkers to be gay, lesbian, or bisexual is therefore even more limiting than the requirement that the harasser self-identify as such. Coming out can be a long process.[113] And even those who have come out in certain contexts may have incentives to remain in the closet at work.[114] This high bar for credible evidence of homosexuality may be rooted in a negative view of gay identity: the idea that a court should not deviate from the presumption of heterosexuality without overwhelming evidence because homosexuality is thought to be inferior, morally suspect, or stigmatized.

3. *Sexual Behavior*. A few courts apply conduct-based definitions of homosexuality. These courts look to past behavior or sexual relationships as credible evidence of homosexuality.[115] For

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110. *Id.* On appeal, the dissent pointed out that the plaintiff likely thought she was being asked for "a clinical opinion." *Love*, 349 F. App'x at 908 n.5 (Dennis, J., dissenting). I note that "homosexuality" has not been a diagnosis since 1973. *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 40 (1987).

111. SEDGWICK, *supra* note 28, at 3–4.

112. *Id.* at 4 (emphasis omitted).

113. *See* LAUMANN, *supra* note 75, at 291 ("Development of self-identification as homosexual or gay is a psychologically and socially complex state, something which, in this society, is achieved only over time, often with considerable personal struggle and self-doubt, not to mention social discomfort.").

114. *See* Pizer, *supra* note 27, at 735–37 (documenting "[n]umerous studies" that have found "many LGBT people conceal their sexual orientation and/or gender identity in the workplace").

115. *See, e.g.*, Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1067 (8th Cir. 2005) ("It is undisputed that [the alleged harasser] had five children by a former marriage and was in a long-term, live-in, heterosexual relationship with her boyfriend. There was no other evidence

example, one court considered an admission that a harasser had previously engaged in same-sex "affection[s]" while "intoxicated."[116] Another considered "comments allegedly made by [the harasser to the plaintiff] in reference to possible homosexual activity during [the harasser's] time in the Navy."[117] It is possible that these alleged harassers would have fallen into the category of "situational bisexuality," engaging in sex with same-sex partners, but only in certain contexts or institutions, like single-sex schools, prisons, or the military.[118] Nonetheless, these courts were willing to allow nonheterosexual identities to be ascribed to the harassers. The reasoning here is akin to a "one-drop" rule for bisexuality: that any same-sex sexual contact, regardless of how isolated or incidental, gives rise to a bisexual identity from which a jury could infer same-sex desire for the plaintiff.[119]

But most courts have refused to adopt a one-drop rule, holding that evidence of past same-sex sexual behavior alone is insufficient evidence of homosexuality. In another case, the lawyers were left to quibble over the following exchange at a deposition of an alleged male harasser:

> Q. Okay. When you say in response to the two questions that I just gave you, you say you might have bumped into somebody, do you understand that my question refers to intimate sexual contact with a man prior to October 23, 2000?
>
> A. Yes, I understand your question.
>
> Q. Okay. And is that your answer, you may have bumped into somebody?

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regarding [the alleged harasser's] sexual history or preferences."); King v. Super Serv., Inc., 68 F. App'x. 659, 663 (6th Cir. 2003) ("The record contains no evidence that any of [the plaintiff's] male coworkers had ever been involved in homosexual relationships or distinctly homosexual conduct.").

116. *See* Ogilvie v. N. Valley EMS, Inc., No. 07-485, 2008 WL 4761717, at *2–3 (E.D. Pa. Oct. 29, 2008) (finding a dispute as to the harasser's sexual orientation in a case in which the harasser allegedly admitted that "when he was intoxicated he had 'the tendency to engage in affection from members of the same sex'" although he "denie[d] being homosexual").

117. *See* Thomas v. Willie G's Post Oak Inc., No. H-04-4479, 2006 WL 1117959, at *7 (S.D. Tex. Apr. 25, 2006) (finding credible evidence of homosexuality).

118. *See* SAVIN-WILLIAMS, *supra* note 29, at 171 tbl.8.3; *see also* MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 30 (1995) (noting scholarly typologies of bisexuality); Amy Sohn, *Bi for Now*, N.Y. MAG., Feb. 10, 2003, at 118 (discussing "hasbians," women who used to date women but have switched to men).

119. *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 600 n.29 (2007) (discussing this analogy).

> A. Yes, that is my answer.
>
> Q. All right. That's your same answer to the question [regarding] having homosexual contact with men prior to October 23, 2000?
>
> A. That is my same answer.[120]

The court held that this answer could be construed as an admission that the alleged harasser had "prior 'intimate sexual contact' with men," but noted the harasser had also "testified that he had a girlfriend during 2000," around the time of the alleged same-sex harassment.[121] The court concluded that this evidence alone "does not definitely support the plaintiff's conclusion that [the alleged harasser] is currently a *practicing* homosexual."[122] However, the court concluded a jury could infer that this harasser was still "practicing" homosexuality because there was also evidence he had "rubb[ed] his penis against the plaintiff's buttocks."[123]

It is unlikely the court would have inferred the harasser's homosexuality from this action alone had there been no evidence of his history of same-sex intimate behavior to give the act a "homosexual" context. Many courts have dismissed cases in which male harassers exposed their genitalia[124] or "rub[bed]" their genitalia up against the plaintiff,[125] concluding these actions are not motivated by the desire for sexual gratification.[126] The exception is when the

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120. Jones v. Potter, 301 F. Supp. 2d 1, 5 n.3 (D.D.C. 2004).

121. *Id*. at 4 n.3.

122. *Id.* at 5 n.3 (emphasis added). The term "practicing homosexual" invokes a religious discourse in which homosexual behavior (the sin) is distinguished from homosexual identity (the sinner). The first Google result for a search for the words "practicing homosexual" is Larry Tomczak*, 6 Reasons Why Practicing Homosexuals Can't Be Christians*, CHARISMA NEWS (May 31, 2013, 8:00 AM), http://www.charismanews.com/opinion/39696-six-reasons-why-gays-can-t-be-christians.

123. *Jones*, 301 F. Supp. 2d at 4.

124. EEOC v. Boh Bros. Constr. Co., 689 F.3d 458, 460, 463 (5th Cir. 2012); Warner v. USF Holland Inc., No. 08 C 6823, 2012 WL 245190, at *5–6, *9 (N.D. Ill. Jan. 25, 2012); Sisco v. Fabrication Techs., Inc., 350 F. Supp. 2d 932, 936, 944 (D. Wyo. 2004).

125. Taylor v. H.B. Fuller Co., No. 06cv854, 2008 WL 4647690, at *1, 8 (S.D. Ohio Oct. 20, 2008); *Sisco*, 350 F. Supp. 2d at 936, 944; English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 837, 848 (E.D. Va. 2002); s*ee also* McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 541, 544 (8th Cir. 2003) (holding that the harasser's "grinding his genitals against [the plaintiff's] buttocks in simulated intercourse" was "inappropriate and vulgar" but "insufficient evidence to demonstrate that [the harasser's] conduct towards [the plaintiff] was based on sex").

126. *Compare* Bradley v. Bates Acquisition, LLC, No. 1:09-cv-1153, 2010 WL 3220647, at *4 (W.D. Tenn. Aug. 13, 2010) (holding that harassment by same-sex coworkers, many of whom were married, was motivated to entertain, not for "sexual desire or gratification"), *with* Smith v. Pefanis, 652 F. Supp. 2d 1308, 1325–26 & n.13 (N.D. Ga. 2009) (holding that a jury could

plaintiff alleges that the harasser had an erection.[127] For example, in *Shepherd v. Slater Steels Co.*,[128] the Seventh Circuit confronted a harasser who had "rubbed himself into an erection while [the plaintiff] was laying on his stomach with cramps," and then threatened to "crawl on top of [the plaintiff] and fuck [him] in the ass."[129] The court held that the "context" of this harassment left "room for the inference that the sexual overlay was not incidental."[130] Nor do courts dismiss harassing behavior as merely crude entertainment in cases in which the alleged harasser engaged in masturbatory activity in same-sex company.[131]

In searching for evidence of sexual gratification, courts distinguish "simulated" sex acts from the real thing.[132] The distinctions drawn by courts in these cases are reminiscent of the notoriously difficult task of drawing lines between soft- and hard-core pornography.[133] In one case, a plaintiff alleged his harasser had

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conclude that the defendant harassed men for sexual "gratification" when it was "undisputed that [the defendant was] homosexual").

127. Shepherd v. Slater Steels Co., 168 F.3d 998, 1009 (7th Cir. 1999); *see* Thorne v. Sprint/United Mgmt. Co., No. 00-0913-CV-W-6, slip. op. at 11 (W.D. Mo. Dec. 23, 2008) ("It would seem that the act of rubbing a man's shoulder with an erect penis would be 'credible evidence' that a man is homosexual."); *cf.* Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745, 752, 757 (N.D. Ill. 2010) (holding that the trier of fact could find sexual desire in a case in which "[the alleged harasser] forced [the plaintiff] to engage in oral sex").

128. Shepherd v. Slater Steels Co., 168 F.3d 998 (7th Cir. 1999).

129. *Id.* at 1009 (quotation marks omitted).

130. *Id.* at 1011.

131. *See, e.g.*, *id.* at 1009; *cf.* Gray v. Fed. Express Corp., No. 3:07-CV-00374, 2009 WL 305521, at *5 n.4 (N.D. Ind. Feb. 7, 2009) (holding that a jury could infer harassment was "because of sex" in a case in which the plaintiff alleged that the harasser "groped herself in [the plaintiff's] presence").

132. *Compare* Smith v. Hy-Vee, Inc., 622 F.3d 904, 905 (8th Cir. 2010) (per curiam) (dismissing a case in which the alleged female harasser "pushed [the plaintiff] up against a wall for ten to fifteen seconds while rubbing her hands and body up against [her]"), *and* Miller v. Kellogg USA, Inc., No. 8:04CV500, 2006 WL 1314330, at *6 (D. Neb. May 11, 2006) ("[The harasser's] alleged behavior in positioning himself behind [the plaintiff] and simulating a sexual act . . . represent[s] boorish behavior that was tinged with offensive sexual connotations, which is not sufficient to create a jury question under the based [on] sex requirement."), *with* La Day v. Catalyst Tech., Inc., 302 F.3d 474, 476 (5th Cir. 2002) (denying summary judgment in a case in which the alleged harasser "fondled [the plaintiff's] anus," in a way the plaintiff described "as similar to 'foreplay with a woman'"), *and* Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745, 757 (N.D. Ill. 2010) ("A reasonable trier of fact could find that Vijay's alleged acts of forcing Benitez to engage in oral sex, propositioning him for sex, and groping Reyes's genital parts were motivated by sexual desire.").

133. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (concluding that hard-core pornography may be "indefinable" but asserting, "I know it when I see it"); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143

touched his arm and commented on his muscle tone, poked him in the stomach and on the rear end, and gave him an "unwanted neck massage."[134] The plaintiff also alleged the harasser "'fondled' himself in the plaintiff's presence" by touching the crotch area of his shorts.[135] This harasser, however, self-identified as heterosexual.[136] The court expressly refused to accept the plaintiff's characterization of the behavior as "fondl[ing]," concluding that the plaintiff's deposition testimony only supported his claim that the harasser "'play[ed] with himself' and/or engaged in the 'continual readjustment of his privates' by touching his shorts in the crotch area."[137] The court regarded this latter characterization as nonmasturbatory behavior consistent with heterosexuality.[138] Clothing may make the difference. In dismissing a claim, one court found it relevant that a harasser had been "clothed" when he forced the plaintiff's face to his groin "to give the impression that [the plaintiff] was performing fellatio."[139]

As social science researchers have noted, defining sexual orientation based on conduct is problematic. This is not only because there is no agreed-upon standard for what conduct counts as sexual.[140] Additionally, conduct-based definitions exclude virgins and those who experience same-sex attractions but have only engaged in cross-sex sexual activity, and miscount individuals who are heterosexual by all other definitions but have engaged in same-sex sexual behaviors under coercion or for other reasons unrelated to their preferences.[141]

U. PA. L. REV. 111, 168 (1994) ("Thus, soft-core pornography, of the sort that appears in *Playboy* or *Penthouse*, obeys careful strictures . . . . Most pictorials depict women only, either alone or in pairs. Where men enter the picture, their genitals are generally obscured; if a penis is displayed, it is never erect. And actual penetration is virtually never depicted. Hard-core pornography, by contrast, is full of erect penises and penetration.").

134. Nguyen v. Buchart-Horn, Inc., No. Civ.A. 02-1998, 2003 WL 21674461, at *1 (E.D. La. July 15, 2003).

135. *Id.* at *1 n.1.

136. *Id.* at *1.

137. *Id.* (alteration in original).

138. This was because the plaintiff testified that he did not understand the behavior to be "sexual harassment" until an Equal Employment Opportunity Commission (EEOC) officer informed him of his potential claim. *Id.* at *2.

139. Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 665 (7th Cir. 2005).

140. *See* SAVIN-WILLIAMS, *supra* note 29, at 144 (noting that "which behaviors are deemed 'sexual'" varies depending on age, sex, sexual orientation, and other circumstances); SEDGWICK, *supra* note 28, at 25 ("Even identical genital acts mean very different things to different people. To some people, the nimbus of 'the sexual' seems scarcely to extend beyond the boundaries of discrete genital acts; to others, it enfolds them loosely or floats virtually free of them.").

141. LAUMANN, *supra* note 75, at 291; Savin-Williams, *supra* note 70, at 40.

In court, behavioral definitions require troubling evidentiary excursions into an alleged harasser's sexual history on the questionable assumption that past conduct amounts to current preferences.[142] Such assumptions have been rejected in other contexts.[143]

4. *Desire*. Other courts seem to regard the essence of sexual orientation to be sexual desire. Desire is a difficult object for legal determination because it refers to an internal state and a longing for something absent, rather than something present.[144] That something absent might be sexual activity (lust), romantic intimacy (love), or some combination of the two.[145] Thus, courts must interpret a harasser's statements and conduct to determine whether a jury could reasonably infer the harasser harbored same-sex preferences.

Some social science researchers consider measures of genital arousal as markers of sexual desire and indicia of sexual orientation.[146] Thankfully, in deciding harassment cases, no U.S. court has followed the Czech model of determining sexual orientation by requiring the subject to submit to a medical procedure testing for physical signs of genital arousal in response to same-sex stimuli.[147] Physical signs of

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142. *See, e.g.*, Ogilvie v. N. Valley EMS, Inc., No. 07-485, 2008 WL 4761717, at *6 (E.D. Pa. Oct. 29, 2008) (refusing to consider hearsay evidence that two male employees had engaged in consensual sexual relationships with an alleged male harasser).

143. *See* FED. R. EVID. 412(b)(2) (providing a heightened standard for the relevance of evidence of a victim's sexual history in civil cases).

144. It is a cliché of postmodern literary theory that "the thing about desire is that there is no there there." JEFFREY EUGENIDES, THE MARRIAGE PLOT 48 (2011). Consider Tennessee Williams's metaphor for desire as streetcar. *See generally* Katheleen Hulley, *The Fate of the Symbolic in* A Streetcar Named Desire, *reprinted in* TENNESSEE WILLIAMS'S A STREETCAR NAMED DESIRE 111, 116 (Harold Bloom ed., 1988).

145. Social science researchers divide desire into two sorts: sexual and romantic. *See, e.g.*, Stephanie Cacioppo, Francesco Bianchi-Demicheli, Chris Frum, James G. Pfaus & James W. Lewis, *The Common Neural Bases Between Sexual Desire and Love: A Multilevel Kernel Density fMRI Analysis*, 9 J. SEXUAL MED. 1048, 1049 (2012); Ritch Savin-Williams, *How Many Gays Are There (It Depends)*, *in* CONTEMPORARY PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL IDENTITIES 5, 10 (Debra A. Hope ed., 2009); *cf.* SEDGWICK, *supra* note 28, at 25 ("For some people, it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their lives; for other people, it is important that they not be; to others it doesn't occur that they might be.").

146. *See generally, e.g.*, Kurt Freund, *Diagnosing Homo- or Heterosexuality and Erotic Age-Preference by Means of a Psychophysiological Test*, 5 BEHAV. RES. & THERAPY 209 (1967).

147. *See generally* ORG. FOR REFUGE, ASYLUM & MIGRATION, TESTING SEXUAL ORIENTATION: A SCIENTIFIC AND LEGAL ANALYSIS OF PLETHYSMOGRAPHY IN ASYLUM & REFUGEE STATUS PROCEEDINGS (2011), *available at* http://www.oraminternational.org/images/stories/PDFs/oram%20phallometry%20paper%202010-12-15%20--for%20download.pdf

sexual arousal, such as erections, may occur without any triggering event and be outside an individual's control or contrary to her desires.[148] However, one court was persuaded that a harasser might be gay by conduct including his request for gay pornography from the plaintiff, who, so it happened, distributed pornography around the office.[149] The assumption here—that the relationships between fantasy, pornography, and sexual orientation are corresponding and linear—is not necessarily true.[150]

Some courts conclude that homosexuality can be inferred from the harassing conduct itself when that conduct amounts to a genuine "sexual advance," that is, a proposition to engage in sexual activity.[151] Such propositions are evidence of desire. This appears to be a broad definition that would allow a jury to infer homosexuality from even a single same-sex sexual proposition, regardless of how the alleged harasser identifies or whether she has ever engaged in same-sex sexual behavior. For researchers, there is no agreement on "what proportion of an individual's attractions must be directed toward same-sex others, or how strong the attractions must be to count as homosexual."[152] Although this seems to be a broad definition, as discussed in the next Section, courts narrowly construe sexual advances.

(criticizing the Czech Republic's use of phallometry to verify an asylum applicant's claim of persecution based on sexual orientation); U.N. HIGH COMM'R FOR REFUGEES, UNCHR'S COMMENTS ON THE PRACTICE OF PHALLOMETRY IN THE CZECH REPUBLIC TO DETERMINE THE CREDIBILITY OF ASYLUM CLAIMS BASED ON PERSECUTION DUE TO SEXUAL ORIENTATION 1 (2011), *available at* http://www.unhcr.org/4daed0389.pdf.

148. LEVAY & BALDWIN, *supra* note 69, at 232, 248.

149. Walton v. Van Ru Credit Corp., No. 10-344, 2011 WL 6016232, at *3, *7 (N.D. Ill. Dec. 2, 2011).

150. *See* DIAMOND, *supra* note 29, at 91 (describing a woman who "pursues casual sex with men and sometimes watches gay male pornography, but . . . has only fallen in love and formed meaningful relationships with women"); LEVAY & BALDWIN, *supra* note 69, at 233–34 ("Does [fantasizing about the same sex] mean all these people were actually sexually attracted to same-sex partners in real life? Not if we are to go by their self-identification as heterosexual, which by definition means they are attracted only to the other sex."); *see also* LAURA KIPNIS, BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA x (1998) (arguing against policies "enacted on the basis of the most simplistic assumptions about the role of fantasy in the human psyche (that fantasy is synonymous with intent, for instance)").

151. *See, e.g.*, La Day v. Catalyst Tech., Inc., 302 F.3d 474, 480 (5th Cir. 2002).

152. Savin-Williams, *supra* note 70, at 40.

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In sum, although a minority of courts will conclude there is credible evidence of homosexuality based on an alleged harasser's past or current behavior or indications of desires, the majority will not conclude that an individual is "homosexual" unless that individual identifies as such in the workplace.

C. Fictions Regarding Same-Sex Desire

How do courts determine if a harasser experienced sexual desire for a plaintiff if that harasser does not identify as gay? As discussed, if a court finds credible evidence that a harasser is homosexual, it may automatically infer that the harassment was because of sex.[153] But courts rely on a narrow, self-identification-based definition of homosexual identity. Thus, courts often find themselves deciding whether a reasonable jury could infer that the ostensibly heterosexual harasser harbored sexual desire for the plaintiff based only on that harasser's conduct toward the plaintiff. This may be part of the circular inquiry into whether a harasser is gay, or it may be considered a replacement for that inquiry.[154] This Section will describe how courts analyze desire in such cases.

Courts undertaking this inquiry have created an elaborate set of fictions about what types of motives are consistent with same-sex desire, comparing the conduct at issue to an idealized sort of romantic courtship, which takes the form of earnest solicitations, in private settings, without mixed emotion or hostility. These fictions mirror the images of model gay couples portrayed by same-sex marriage advocacy groups, in "long term, committed, marriage-like relationships, whose personal narratives appeal[] to middle America."[155] Such relationships are simple love stories. Thus, courts hold that a harasser cannot both loathe and desire her object. They read sexual propositions as insincere mockery, rather than acknowledging the element of insincerity in many forms of flirtation.

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153. *See supra* note 55 and accompanying text.

154. *See supra* Part I.A.

155. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 33 (2010); *see also* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (describing the public performance required of "respectable" and "domesticated" same-sex couples: "lining up in pairs outside of City Hall the moment the Mayor deems the marriage registry open to homo business; placing your wedding announcement in the New York Times; posing model homo families—our perfect plaintiffs—before the media").

They understand aggression, hostility, and threats as inimical to desire. And they see public displays as devoid of sexuality.

It is tempting to understand this set of cases as a result of the fact that federal judges have very limited imaginations when it comes to sexuality, particularly of the same-sex variety.[156] But a close reading reveals an active judicial imagination infused with preconceptions, myths, and stereotypes about sex (meaning both stereotypes about men and women and stereotypes about what is erotic) and sexual orientation. Courts imagine that only those who are truly gay might harbor same-sex desire. Gay identity is determined based on whether the individual performs a certain cultural script about what it means to be gay.[157] One such script is performed by coming out of the closet,[158] being "openly" gay, and working to recruit straight coworkers.[159] But there is another, newly available cultural script about gay identity as romantic: a search for same-sex relationships that fulfill "yearnings for security, safe haven, and connection."[160] For the most part, judicial decisions hold same-sex desire to one or the other of these two standards. Same-sex desire is not understood as complicated, paradoxical,[161] humorous, or otherwise exhibiting the full range of the human experience.[162]

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156. *See* RICHARD A. POSNER, SEX AND REASON 1 (1992) ("[J]udges know next to nothing about [sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much . . . screened out of the judiciary . . . .").

157. A foundational text on the idea of scripts about sexual identity is JOHN H. GAGNON & WILLIAM SIMON, SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY (1973).

158. *See supra* Parts I.B.1–2.

159. *See infra* Part II.B.

160. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) ("Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."); *see also* Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1400 (2005) (describing "*Goodridge*'s constitution of lesbian and gay male identities" as "immaculate[], cleansed identities, scrubbed clean not only of the homophobic lies (the good news), but also of a certain truth (not so good): that sex, even, or especially, sex in relationships, same-sex and cross-sex both, can—and, at times, does—cause harm").

161. *See* ZYLAN, *supra* note 7, at 184–85 ("Indeed, one way to make sense of the odd and conflictual behavior often observed in these cases is as a scene of gender and sexual confusion, as desire in contestation with efforts to make sense of one's own identifications.").

162. *Cf.* Rubin, *supra* note 28, at 282 ("[H]eterosexual encounters may be sublime or disgusting, free or forced, healing or destructive, romantic or mercenary. As long as it does not violate other rules, heterosexuality is acknowledged to exhibit the full range of human experience."). Psychologists describe this phenomenon as the "out-group homogeneity effect." *See* Thomas M. Ostrom & Constantine Sedikides, *Out-Group Homogeneity Effects in Natural and Minimal Groups*, 112 PSYCHOL. BULL. 536, 536 (1992).

My point in highlighting the complexities of same-sex desire is not to argue that courts should allow cases to proceed to juries in all of these circumstances.[163] Deciding whether any of these plaintiffs ought to have prevailed requires a first-order normative framework for thinking about why harassment is sex discrimination and a second-order set of legal rules that correspond with that framework. This Article is agnostic on these questions, although possibilities are explored in Part III. Additionally, it is impossible to reach a conclusion on whether any of these cases should have survived summary judgment given that the focus on desire by litigants and courts obscured other ways of thinking about how harassment might be "because of sex," impoverishing the record. The purpose of this Section is to expose the incoherence of the desire inquiry in the same-sex harassment context by examining various fictions underlying that inquiry. This in turn sets up the argument that desire should not be the test of whether harassment is discriminatory.[164]

1. *Disgust Is Inconsistent with Desire*. In determining whether same-sex scenarios might be interpreted as sexual advances, courts measure those scenarios against an idealized version of mutually affirming romantic love. Thus, they hold that disgust, pity, revulsion, shaming, humiliation, and insult all indicate the absence of desire. As one court quite awkwardly put it, the essence of a claim is "proof of non-humiliating sexual contact of some kind with the claimant."[165]

For example, in *Love v. Motiva Enterprises*, the plaintiff, Connie Love, alleged that she had been harassed by her coworker, Jeanne Sirey, while the two women worked together in the "coker unit" at Motiva's plant in Norco, Louisiana.[166] The Fifth Circuit described the record as follows:

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163. Additionally, in describing the facts of the various cases discussed in this Article, I do not represent that any events alleged are true. Rather, I describe the facts from the plaintiff's perspective. This is because the bulk of these cases resolve a defendant's motion for summary judgment. At summary judgment, courts are required to consider the facts in the light most favorable to the nonmoving party. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

164. *See infra* Part III.

165. Love v. Motiva Enters. LLC, No. 07-5970, 2008 WL 4286662, at *4 (E.D. La. Sept. 17, 2008), *aff'd*, 349 F. App'x 900 (5th Cir. 2009) (per curiam); *see also* Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 188 (5th Cir. 2012) (holding that harassment must be "sexual rather than merely humiliating in nature").

166. Love v. Motiva Enters. LLC, 349 F. App'x 900, 902 (5th Cir. 2009) (per curiam).

> Sirey derided Love, frequently calling her a "stupid bitch," "fat cow," and "disgusting." She allegedly told Love that she was a "sorry excuse for a woman because she did not make the coker conducive for women to work in;" that she was a "failure as a woman;" and that "You think that's a body you have? You should be ashamed." Sirey also allegedly touched Love with her hands on two occasions. On the first, Sirey confronted Love in the changing room and ran her finger under Love's bra strap and her underwear near her hip while at the same time calling Love "fat" and "disgusting." On another occasion, Sirey began rubbing Love's shoulders and back while Love was at the lunch table. When Love protested, Sirey said she was "just being friendly." Love testified that Sirey also would seek her out at company functions, stand next to her, and touch her arm to let her know Sirey was present.[167]

The court concluded that Sirey's behavior was inconsistent with sexual attraction.[168] Rather, Sirey's "consistent insults" and expressions of "negative feelings about Love and her appearance" were "more indicative of humiliating or bullying behavior."[169] In response, Love argued that after she had gastric-bypass surgery and returned to work, "she was obviously more attractive to Sirey, and that Sirey's inappropriate conduct was no longer accompanied by negative remarks."[170] She alleged Sirey attempted to hug her, rubbed her breasts against her when reaching for a log book in Love's workspace, and locked Love in the bathroom, telling Love that she would not free her unless Love did "favors for her."[171] This was not enough for the court, which held that "Sirey had a long history of insulting Love, which cannot be ignored or explained away by the overly simplistic view that Love's surgery rendered her desirable to Sirey."[172] As evidence of Sirey's sexual interest, Love argued that Sirey had licked her lips and made comments such as "'[y]ou think you're a woman,'" and "'[j]ust be aware. Always look over your shoulder.'"[173] The district court concluded: "[W]hile licking one's lips

167. *Id.*
168. *Id.*
169. *Id.* at 903.
170. *Id.*
171. *Id.*
172. *Id.*
173. Love v. Motiva Enters. LLC, No. 07-5970, 2008 WL 4286662, at *5 (E.D. La. Sept. 17, 2008), *aff'd*, 349 F. App'x 900 (5th Cir. 2009) (per curiam).

may be sexually suggestive in some contexts, when combined with this threatening language, the sexual connotation disappears."[174]

The dissent observed: "The majority ignores that love-hate relationships, for example, are quite common and well documented."[175] Indeed, American popular culture is saturated with representations of the eroticization of relations of dominance and submission, humiliation, and shame.[176] The interrelationship between sex and humiliation was well recognized by early sexual harassment cases[177] and is no barrier to the success of plaintiffs alleging cross-sex harassment.[178] One factor the Supreme Court has recognized for determining whether harassment is severe or pervasive is whether the conduct is "humiliating."[179] Part of the reason the majority in *Love* could not see desire could be that it had difficulty imagining (or taking seriously) a woman as a sexual aggressor and as an agent of an undomesticated brand of sexual desire.[180] This scenario does not match a certain ideal of lesbian sexuality, which "tend[s] to cede raw sexuality to men, equate femininity with intimacy rather than sexuality, and argue for the purity of lesbian sex as a full expression of feminism, egalitarianism, and the joys of mutual desire untainted by the power dynamics inherent in patriarchal heterosexuality."[181]

Courts also draw an artificial line between "gay bashing" and same-sex desire. *Wheatfall v. Potter*[182] was a Texas case in which the male plaintiff, a self-described "gay American,"[183] alleged he had been harassed when a male manager "would come into his office and initiate conversations with sexual overtones."[184] For example, the

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174. *Id.*

175. *Love*, 349 F. App'x at 907 n.3 (Dennis, J., dissenting).

176. *See, e.g.*, Jeffrey A. Trachtenberg, *20 Million Shades of Green: Racy Book Hits Milestone*, WALL ST. J., July 9, 2012, at B1 (describing *Fifty Shades of Grey*, a book series about a sadomasochistic relationship, as "this year's pop-culture phenomenon"); RIHANNA, *S&M*, *on* LOUD (Def Jam Recordings 2010) (radio hit about sadomasochism).

177. *See* Marianne C. DelPo, *The Thin Line Between Love and Hate: Same-Sex Hostile Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1, 17–19 (1999) (discussing cases).

178. *E.g.*, Eich v. Bd. of Regents for Cent. Mo. State Univ., 350 F.3d 752, 761 (8th Cir. 2003).

179. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

180. *Cf.* Timothy Kaufman-Osborn, *Gender Trouble at Abu-Ghraib?*, 1 POL. & GENDER 597, 616–17 (2005) (analyzing the domestic reaction to a female soldier photographed abusing male Iraqi prisoners as deviating from norms regarding proper feminine and feminist conduct).

181. JUDITH HALBERSTAM, FEMALE MASCULINITY 135 (1998).

182. Wheatfall v. Potter, No. H-07-1937, 2010 WL 2854284 (S.D. Tex. July 19, 2010).

183. *Id.* at *4.

184. *Id.* at *1.

manager invited the plaintiff "to his ranch 'to ride [his] horse until [the plaintiff] was sore.'"[185] But the manager also allegedly called the plaintiff a "motherfucking faggot."[186] The manager asserted he was "exclusively heterosexual."[187] The court concluded that a jury could not infer sexual desire from this interaction because the manager "inten[ded] to humiliate" the plaintiff.[188] The assumption, again, is that humiliation and desire are incompatible. The particular assumption here is that antigay attitudes are not compatible with same-sex sexual desire.[189] This assumption is false, of course: some of the most outspoken opponents of gay rights have ended up embroiled in same-sex scandals.[190] A Freudian might argue that homophobia results from the repression of same-sex desire.[191] An individual struggling to repress his own same-sex desires transfers his shame onto others and acts out his guilt through gay bashing, thus publicly reaffirming his heterosexuality. Some empirical research bears out this theory.[192] This is not to say that all homophobia is at base

185. *Id*. (first alteration in original).

186. *Id.* at *2.

187. *Id.* at *1.

188. *Id.* at *5 (citing La Day v. Catalyst Tech., Inc., 302 F.3d 474, 480 (5th Cir. 2002)). The court also pointed out that the plaintiff did not provide "any evidence that [the manager] propositioned other male employees" and thus failed to show the manager was motivated by a "desire to have sex with [the plaintiff]." *Id.*

189. *See* Silva v. E.U.A. Nova, No. 97-117ML, 1999 U.S. Dist. LEXIS 22977, at *2, *12 (D.R.I. Jan. 22, 1999) (holding, in a case in which the plaintiff endured many forms of antigay harassment, including a request from his supervisor to "[g]et on your knees and suck my dick," that there was "no evidence that either [the harasser or the plaintiff] actually engages in homosexual activities, and no evidence that the statement was made as a serious proposition").

190. *See* Richard M. Ryan & William S. Ryan, *Homophobic? Maybe You're Gay*, N.Y. TIMES, Apr. 27, 2012, at SR12 (discussing scandals involving evangelical leader Ted Haggard, Senator Larry Craig, and Young Republican leader Glenn Murphy, Jr.). This is not to say that the assumption was necessarily false with respect to the manager in *Wheatfall*; rather, it is to point out the flaw in the court's categorical reasoning.

191. *See id.* (discussing Freud's theories).

192. *See* Henry E. Adams, Lester W. Wright, Jr. & Bethany A. Lohr, *Is Homophobia Associated with Homosexual Arousal?*, 105 J. ABNORMAL PSYCHOL. 440, 441 (1996) (using survey questions regarding homophobia and measuring sexual arousal in response to pornographic videos with penile plethysmography); Netta Weinstein, William S. Ryan, Cody R. DeHaan, Andrew K. Przybylski, Nicole Legate & Richard M. Ryan, *Parental Autonomy Support and Discrepancies Between Implicit and Explicit Sexual Identities: Dynamics of Self-Acceptance and Defense*, 102 J. PERSONALITY & SOC. PSYCHOL. 815, 828 (2012) (studying reaction time tasks and concluding that "discrepancy between implicit and explicit sexual orientation measures[] was . . . shown to relate to greater self-reported homophobia"). I do not mean to imply that penile plethysmography, a technique for measuring erections, and implicit attitudes are definitive indicators of sexual desire. *See supra* notes 147–48 and accompanying

homoerotic, but rather, that homophobic attitudes do not necessarily undercut the inference of desire if, for example, the harasser made a statement that could be construed as a sexual proposition.

The idea that disgust is opposed to desire is not one courts indulge in cross-sex harassment cases.[193] For example, in a 2010 First Circuit case in which the male harasser engaged in a persistent campaign of professional intimidation against the plaintiff, including daily complaints that her attire was too revealing in violation of the dress code, the court found a jury could infer that harassment was based on the plaintiff's sex.[194] Although it held the plaintiff did not have to prove she was the object of the harasser's sexual interest, it noted that the unusual fervor of the harasser's frustration suggested to another employee that he might have "a crush" on the plaintiff.[195]

2. *Humor Is Inconsistent with Desire*. Many cases dismissing same-sex harassment claims label the conduct at issue "'male-on-male horseplay,'" "'simple teasing or roughhousing among members of the same-sex,'"[196] "indiscriminate[] vulgar[ity],"[197] and "juvenile

text. But these studies at least call into question the assumption that homophobia and homosexuality are inherently opposed.

193. *See, e.g.*, EEOC v. Donohue, No. 2:09cv280, 2011 WL 4572020, at *7, *12 n.4 (W.D. Pa. Sept. 30, 2011) (holding that discriminatory intent was implicit, even though a male harasser had told a female plaintiff he thought she was "fat").

194. Rosario v. Dep't of Army, 607 F.3d 241, 245, 248–49 (1st Cir. 2010).

195. *Id.* at 248.

196. English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 844 (E.D. Va. 2002) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)). I note that these quotations come from *Oncale*'s discussion of whether harassment is "severe or pervasive," not whether it is "because of sex." Nonetheless, many courts have conflated the two questions. *See, e.g.*, Peone v. Cnty. of Ontario, No. 12-CV-6012 CJS, 2013 WL 775358, at *6 (W.D.N.Y. Feb. 28, 2013) (concluding that an incident in which a supervisor wrestled the plaintiff to the ground and "'grind[ed]' his 'pelvis'" against the plaintiff's leg was not "because of sex" because it was "'male-on-male horseplay'" (quoting *Oncale*, 523 U.S. at 81)). *But see* Tepperwien v. Entergy Nuclear Operations, Inc., 606 F. Supp. 2d 427, 441 (S.D.N.Y. 2009) (refusing to decide, at summary judgment, whether the harasser's conduct in grabbing the plaintiff's genitals was "teasing or hazing" or "sexually threatening"), *aff'd*, 663 F.3d 556 (2d Cir. 2011).

197. Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001); *see also* EEOC v. Boh Bros. Const. Co., 689 F.3d 458, 459 (5th Cir. 2012) (dismissing the claim by characterizing the harasser as "a world-class trash talker and the master of vulgarity in an environment where these characteristics abound"); EEOC v. McPherson Cos., Inc., 914 F. Supp. 2d 1234, 1245 (N.D. Ala. 2012) (characterizing harassment as mere "[b]arracks humor").

provocation."[198] These courts are looking for "earnest . . . solicitation"[199] in the form of sincere "proposal[s] for sex."[200]

However, even when they find proposals of sex, often, courts do not take them seriously.[201] In a 2012 Sixth Circuit case, the alleged male harasser, Paul Ottobre, touched the male plaintiff "in a sexual manner" by "grabbing his buttocks" and "poking him in the rear with a hammer handle[] and . . . a long sucker rod."[202] When the plaintiff protested, Ottobre "inflamed the situation with comments such as 'you've got a pretty mouth,' 'boy you have pretty lips,' and 'you know you like it sweetheart.'"[203] After the plaintiff quit, Ottobre left him a voicemail stating "'I miss holding you. I miss spooning with you. I love you. Please call me back.'"[204] The plaintiff testified that he knew Ottobre was married to a woman but thought Ottobre harassed him because Ottobre was bisexual.[205]

The Sixth Circuit affirmed the district court's grant of summary judgment for the employer. It held simply that the plaintiff failed to offer "'credible evidence'" of Ottobre's "sexuality," as required by *Oncale*.[206] It did not remark on why Ottobre's sexually charged conduct toward the male plaintiff could not be construed by a jury to evince a bisexual orientation. Likely, the court of appeals found it obvious that, as the district court held, Ottobre harassed the plaintiff because he thought it "was funny, not sexually gratifying."[207] Perhaps this is explained by the fact that Ottobre, a convicted felon standing

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198. *English*, 190 F. Supp. 2d at 845.

199. *Lack*, 240 F.3d at 261; *see also* Atkins v. Computer Scis. Corp., 264 F. Supp. 2d 404, 410 (E.D. Va. 2003) (discussing "earnest sexual solicitation"); Pedroza v. Cintas Corp., No. 6-01-3247-CV-S-RED, 2003 WL 828237, at *9 (W.D. Mo. Jan. 9, 2003), *aff'd sub nom.* Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063 (8th Cir. 2005) (contrasting "teasing motivated by a mutual dislike" with "earnest sexual solicitation").

200. *English*, 190 F. Supp. 2d at 845; *see also* Love v. Motiva Enters. LLC, 349 F. App'x 900, 902 (5th Cir. 2009) (per curiam) (noting that the harasser never made any "explicit proposals" for sexual activity); EEOC v. Belle Glade Chevrolet-Cadillac-Buick-Pontiac-Oldsmobile, Inc., No. 07-80169-CIV, 2008 WL 62159, at *3 (S.D. Fla. Jan. 3, 2008) (holding that a jury could find that sexually explicit propositions indicated the alleged harasser was "sincerely interested in beginning a relationship").

201. *See supra* note 87 and accompanying text.

202. Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 465 (6th Cir. 2012).

203. *Id.*

204. *Id.* at 466.

205. *Id.* at 465, 468.

206. *Id.* at 468 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

207. Wasek v. Arrow Energy Servs., Inc., No. 09-11350-BC, 2010 WL 3904697, at *6 (E.D. Mich. Sept. 29, 2010), *aff'd*, 682 F.3d 463 (6th Cir. 2012).

six foot five and weighing 330 pounds, did not match stereotypes of bisexual men.[208] The district court saw Ottobre as a "bully" who enjoyed "mentally and physically tormenting weaker people around him."[209] It read his come-ons as sarcastic rather than genuine, exploiting the plaintiff's sensitivity toward suggestions that he was gay.[210] No other interpretation would be reasonable.

In *English v. Pohanka of Chantilly, Inc.*,[211] the alleged harasser, Joseph Dutchburn, engaged in a "daily, albeit brief, campaign of lewd behavior directed at English [the male plaintiff]."[212] For example, Dutchburn told English that he "'wanted to plant his salami between [English's] cheeks,' while walking behind English."[213] On another occasion, "Dutchburn walked up behind English, wrapped his arms around English and said 'I'm going [to lunch] with you.'"[214] At lunch, Dutchburn wanted to discuss the men's sex lives, a topic that made English "uncomfortable."[215] Later that day, Dutchburn told English "'they needed to bond,'" and then "approached English from behind while English was seated at his desk and pressed his genitals against English's shoulders."[216] The next day, after English called Dutchburn a "wacko," "Dutchburn retorted 'I love you,' winked and then added 'like a step son.' Dutchburn then asked English 'if he'd like to put his meatballs on [English's desk].'"[217] Later that afternoon, "Dutchburn approached English from behind, stuck his finger in English's side

208. *See id.* at *1; *see also* Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 665 (7th Cir. 2005) (noting that the harasser, who was "six inches taller and at least 100 pounds heavier" than the plaintiff, forced the plaintiff to perform simulated sex acts simply "to demonstrate physical domination"); Farren v. Shaw Envtl., Inc., 852 F. Supp. 2d 352, 359 (W.D.N.Y. 2012) (concluding that repeated threats of sexual assault were motivated by "simple malice" rather than desire when "both men were similarly described as 'large' and 'imposing'" and the alleged harasser was a "tough guy"), *aff'd on other grounds*, 510 F. App'x 44 (2d Cir. 2013). In another decision, a district court seemed to regard a plaintiff's large stature as evidence of impenetrability to harassment. *See* Beseau v. Fire Dist. No. 1, No. 05-2162, 2006 WL 2795716, at *2 (D. Kan. Sept. 26, 2006) (noting that the harasser was much smaller than the plaintiff, who "is 6′2″ tall and weighs approximately 315 pounds with a chest measurement of about 52″").

209. *Wasek*, 2010 WL 3904697, at *7.

210. *Id.*

211. English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833 (E.D. Va. 2002).

212. *Id.* at 837.

213. *Id.* (alteration in original).

214. *Id.* (alteration in original).

215. *Id.*

216. *Id.*

217. *Id.* at 838 (alteration in original) (citation omitted).

and said 'next time it would be [my] 9MM.'"[218] After noticing English was unhappy with his behavior, "Dutchburn asked English to go for a walk so they could 'smoke the peace pipes,' looked down at his lap and said, 'you know, the bones.'"[219]

The court held no reasonable jury could read sexual innuendo into these comments. For example, the court held that the "smoke the peace pipes" comment "could mean anything from an invitation to mend fences to smoking illicit drugs."[220] The court concluded this conduct was not an "earnest sexual solicitation."[221] Rather, it amounted to "horseplay," or "expressions of juvenile provocation and offensive behavior driven by Dutchburn's desire to tease or humiliate English and others," analogous to use of the phrase "kiss my ass" among men.[222] The court saw Dutchburn as "juvenile" and hence asexual, not the sort of "grown man" who might experience sexual desire.[223] The court would not infer desire from the harassment because it concluded that the acts were no more than "casual obscenity," akin to "'a friendly slap on the buttocks.'"[224]

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218. *Id.* (alteration in original).

219. *Id.*

220. *Id.* at 845. Another judge refused to interpret the expression "ass breath" as having any "homosexual connotation," even though it was uttered in the context of a series of colorful descriptions of sexual activities associated with gay men. EEOC v. McPherson Cos., 914 F. Supp. 2d 1234, 1237 (N.D. Ala. 2012).

221. *English*, 190 F. Supp. 2d at 845.

222. *Id.* at 848.

223. *Id.*; *see also McPherson Cos.*, 914 F. Supp. 2d at 1237 (describing a litany of antigay insults by the harasser as "childish").

224. *English*, 190 F. Supp. 2d at 846 (quoting Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir. 1999)) (quotation mark omitted); *see also McPherson Cos.*, 914 F. Supp. 2d at 1242 (analogizing the harassment at issue to the hazing the judge received from his "grizzled veteran drill sergeant during basic training").

The reference to a slap on the buttocks may be a misinterpretation of a passage from *Oncale* in which Justice Scalia wrote: "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). This passage does not speak to whether such conduct was "because of sex"; it is about a different question, whether the harassment was "severe or pervasive." *See supra* note 196. Additionally, the passage suggests that sexual touching "back at the office," of exactly the sort that occurred in *English*, might give rise to a harassment claim.

One must wonder whether the Court would use the football example today, in the wake of sexual abuse scandals involving football coaches and players. *See* Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES, June 23, 2012, at A1; Amos Kamil, *Great Is the Truth, and It Prevails*, N.Y. TIMES MAG., June 10, 2012, at 26.

One interpretation of these decisions is that they reflect an impoverished view of how sexual desires are expressed and how such desires are formed in their expression, ignoring how humor is often a mode of flirtation, a way to probe boundaries and express desire without commitment. The very value of flirtation may lie in its ambiguity, openness, and suspense.[225] This does not mean it is opposed to serious desire; rather, flirtation is a way of relating to things serious.[226] One might argue judicial modes of interpretation are ill-equipped to integrate a liminal category like flirtation.

On the other hand, all schoolchildren know teasing often results from crushes. You need not be a Freudian to recognize that desires are not always fully conscious. Courts have no trouble understanding male come-ons to women as sexual harassment, no matter how absurd. For example, in a 2010 Fourth Circuit case, the court easily concluded that a remark by a male harasser that he wanted to help the nursing female plaintiff pump breast milk was a "proposal[] of sexual activity," notwithstanding the harasser's reputation around the office as a "shock jock" who "made offensive remarks in front of both male and female audiences."[227] Courts, however, have difficulty fathoming same-sex desire of this sort, expressed through humor rather than earnest request. They view these jokesters as certain archetypes: asexual juveniles and hypermasculine bullies. Neither is consistent with the stereotype of the adult, effeminate gay man.

3. *Aggression Is Inconsistent with Desire*. In the same-sex context, courts view sexualized threats, aggression, and hostility as inconsistent with desire. This is evident in cases in which courts must decide whether a man's touching another man's genitals could be characterized as sexual. Courts look to the nature of the touch, distinguishing the rough from the tender. The verbs courts use are telling. "[S]triking,"[228] "slapping,"[229] "grabbing,"[230] "goosing,"[231]

225. *Cf.* ADAM PHILIPS, ON FLIRTATION xvii–xix (1994) ("[F]lirtation . . . exploits the idea of surprise. From a sadistic point of view it is as though the known and wished-for end is being refused, deferred or even denied. But from a pragmatic point of view one could say that a space is being created in which aims or ends can be worked out . . . .").

226. *See id.* at xvii ("The fact that people tend to flirt only with serious things—madness, disaster, other people—and the fact that flirting is a pleasure, makes it a relationship, a way of doing things, worth considering.").

227. EEOC v. Fairbrook Med. Clinic, 609 F.3d 320, 327 (4th Cir. 2010).

228. Linville v. Sears, Roebuck & Co., 335 F.3d 822, 824 (8th Cir. 2003).

229. Lavack v. Owen's World Wide Enter. Network, Inc., 409 F. Supp. 2d 848, 851 (E.D. Mich. 2005).

"tap[ping] and swat[ting],"[232] are considered nonsexual. Thus, the following male-on-male harassment could not be interpreted as motivated by sexual desire:

> *[G]rabbing* [the plaintiff] by the waist, chest and buttocks; *grinding* his genitals against [the plaintiff's] buttocks in simulated intercourse; telling [the plaintiff] to "squeal like a pig, or a woman," and making other lewd comments; attempting to *stick* the handle of a shovel and a tape measure in [the plaintiff]'s anus; and *kicking* [the plaintiff] in the buttocks.[233]

The more threatening the behavior, the less likely courts are to find sexual desire.[234] For example, consider this scenario from *Shafer v. Kal Kan Foods*,[235] which the Seventh Circuit held evinced "physical domination" rather than desire:

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230. EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 514 (6th Cir. 2001); Barrows v. Seneca Foods Corp., No. 09-CV-6554, 2012 WL 268339, at *3 (W.D.N.Y. Jan. 30, 2012), *vacated*, 512 F. App'x 115 (2d Cir. 2013); Taylor v. H.B. Fuller Co., No. 06cv854, 2008 WL 4647690, at *2 (S.D. Ohio Oct. 20, 2008); Collins v. TRL, Inc., 263 F. Supp. 2d 913, 920 (M.D. Pa. 2003).

231. *Harbert-Yeargin, Inc.*, 266 F.3d at 503.

232. *See Barrows*, 2012 WL 268339, at *2 (holding that conduct was not "because of sex" in a case in which the supervisor would "frequently tap and swat [Plaintiff's] penis," and on one occasion, "while Plaintiff was pushing a wheel barrow weighing approximately four hundred pounds, his supervisor . . . grabbed his testicles by his hands in a vice like grip causing extreme pain and embarrassment to Plaintiff").

233. McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 541–42 (8th Cir. 2003) (emphases added).

234. *See* Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1121 (D.C. Cir. 2002) (holding that conduct was not "because of sex" in a case in which harassers made crotch-grabbing gestures and "used a phrase describing oral sex," slashed plaintiff's tires, and threatened plaintiff's life); Strishock v. Swift & Co., No. Civ.A.04CV2603PSFCBS, 2005 WL 1587300, at *1 (D. Colo. July 5, 2005) (holding that conduct was not "because of sex" in a case in which the plaintiff's supervisor "wrestled [the plaintiff] to the ground, bound his hands and feet, pulled his pants down, spanked him with his bare hand 35 times, wrote 'Happy Birthday' in black magic marker across his bare buttocks and smeared birthday cake on his face," then took a photo, and "left him lying bound for a period of time during which he told co-workers not to help him or cut him loose or else that person would be next" (quotation marks omitted)). In two recent cases, courts drew the line at conduct reported by the plaintiff as "assault." Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745, 752, 753 (N.D. Ill. 2010) (denying a motion for summary judgment in a case in which the harasser allegedly "forced [the plaintiff] to engage in oral sex" and three male employees filed police reports); Reagan v. City of Knoxville, No. 3:07-cv-189, 2010 WL 2639933, at *1 (E.D. Tenn. June 28, 2010) (denying a motion for summary judgment in a case in which the alleged harasser twice kneed the plaintiff in the groin and once pinned him against a truck and "simulated sexual acts on him," and the plaintiff informed his supervisor "that he had been assaulted and required medical attention"). *But see* Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 666 (7th Cir. 2005) (holding that state tort law claims for assault and battery alone were insufficient to give rise to a sexual harassment claim).

235. Shafer v. Kal Kan Foods, Inc., 417 F.3d 663 (7th Cir. 2005).

> In June 2001 Dill, who earlier had remarked that Shafer has a "cheerleader ass" that "would look real nice on my dick," forced Shafer's face down to his crotch (while clothed), moving his groin to give the impression that Shafer was performing fellatio. A few weeks later, in the same company, Dill grabbed Shafer's hand and moved it to his crotch (again while clothed) while moaning as if Shafer were masturbating him. The force was enough to put Shafer in fear that Dill would break his arm. The next month Dill approached Shafer in the locker room when Shafer was not wearing a shirt and pulled a handful of hair from Shafer's chest, causing considerable pain. Finally, in August 2001 Dill bit Shafer in the neck hard enough to raise welts, though not to penetrate the skin.[236]

Even when a male coworker threatens to rape a male plaintiff, courts may conclude the motive is "simple malice" rather than desire.[237] In one case, a court did not find desire even though the male harassers repeatedly grabbed the plaintiff's genitals and buttocks, simulated sex acts with the plaintiff, and subjected the plaintiff to repeated viewings of the "male-on-male rape scene from *Deliverance*."[238]

Such holdings are not limited to cases involving male-on-male harassment. In one case involving a female harasser and a female plaintiff, the court held that sexual desire was lacking even though the harasser stated she was attempting to simulate a "rape."[239] In another, the female harasser "pressed her breasts against plaintiff," and, on several occasions, "grabbed plaintiff in a full body hug that plaintiff

236. *Id.* at 665.

237. *See* Farren v. Shaw Envtl., Inc., 852 F. Supp. 2d 352, 356, 359 (W.D.N.Y. Feb. 10, 2012) (holding that there was no evidence the defendant, the plaintiff's coworker, felt any sexual desire toward the plaintiff, even though he repeatedly threatened sexual abuse by saying, for example, "'I'm going to fuck you, and tell everyone I fucked you,'" and "would grab himself in front of [plaintiff] and say I have a big schwanz and it'll go up in you; I'll bend you over and fuck you"), *aff'd on other grounds*, 510 F. App'x 44 (2d Cir. 2013); *cf.* King v. Super Serv., Inc., 68 F. App'x. 659, 661, 663 (6th Cir. 2003) (holding that conduct involving taunts about oral sex and homosexuality, and "grabbing, punching, and kicking" by two self-identified heterosexual men, was not motivated by desire because it was borne of "animus, power, or whatever it is that drives bullies to single out others for taunting and ridicule").

238. Taylor v. H.B. Fuller Co., No. 06cv854, 2008 WL 4647690, at *2 (S.D. Ohio Oct. 20, 2008).

239. *See* Smith v. Hy-Vee, Inc., 622 F.3d 904, 905 (8th Cir. 2010) (per curiam). For further discussion of *Hy-Vee*, see *infra* Part II.A.

described as brutal and unwelcome," but the court did not find desire, since there were no "direct[] . . . proposition[s] for sexual favors."[240]

It need hardly be said that courts consider male-on-female genital touching to be "because of sex," especially when violent and aggressive.[241] The first Supreme Court case recognizing sexual harassment involved a female plaintiff's allegations that her male harasser had "forcibly raped her on several occasions."[242] That courts do not see hostile forms of male-on-male genital touching as sexual is perhaps not surprising considering the cultural invisibility of male victims of sexual assault.[243] As Professor Bennett Capers has written, even some male victims of rape do not view their experiences in sexual terms, assuming that "rape was something that only happens to women."[244] The failure to see female-on-female forms of violence may stem from a failure to understand women as serious threats.[245]

4. *Exhibitionism Is Inconsistent with Desire*. One final fiction courts use to screen out cases is that same-sex sexual desire is

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240. Atkins v. Computer Scis. Corp., 264 F. Supp. 2d 404, 410 (E.D. Va. 2003); *see also* Klen v. Colo. State Bd. of Agric., No. CIVA05CV02452EWNCBS, 2007 WL 2022061, at *2, *14 (D. Colo. July 9, 2007) (holding that harassment was not "because of sex" in a case in which coworkers pulled the plaintiff's hair, "threw pens and paperclips at her," "flicked their hands in her face," "bumped Plaintiff's chair," "'snapped' Plaintiff's neck," and "elbowed Plaintiff in the head"). *But see* Chavez v. Thomas & Betts Corp., 396 F.3d 1088, 1094, 1097 (10th Cir. 2005) (holding that a jury could find harassment was "because of sex" in a case in which the harasser "reached over and pulled open Plaintiff's shirt exposing her chest and bra to coworkers," and the harasser did not treat male employees similarly), *overruled on other grounds as recognized in* Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164 (10th Cir. 2006).

241. *See, e.g.*, Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1242–43 (10th Cir. 2001) (concluding that a jury's finding of a sexually hostile work environment was reasonable in a case in which the male harasser "knocked [the female plaintiff] to the ground, undressed her and digitally penetrated her, bit and choked her, and repeatedly threatened to kill her"); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998) (affirming a jury verdict in favor of a female sexual harassment plaintiff in a case in which male customers "grabbed [the plaintiff] by the hair" and one customer "then grabbed her breast and placed his mouth on it").

242. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).

243. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1263 (2011).

244. *Id.* at 1268.

245. In various studies in which participants are given vignettes about domestic violence and the researchers vary the sex of the victims and perpetrators, participants rate violence in the context of same-sex relationships as less serious than male-on-female violence in heterosexual relationships. *See generally* Michael J. Brown & Jennifer Groscup, *Perceptions of Same-Sex Domestic Violence Among Crisis Center Staff*, 24 J. FAMILY VIOLENCE 87 (2009); Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 J. FAMILY VIOLENCE 363 (2005); Amy J. Wise & Sharon L. Bowman, *Comparison of Beginning Counselors' Responses to Lesbian vs. Heterosexual Partner Abuse*, 12 VIOLENCE & VICTIMS 127 (1997).

manifested only in private. For example, in *Bradley v. Bates Acquisition, LLC*,[246] the plaintiff alleged "he witnessed several of his male co-workers engaging in consensual same-sex sexual behavior, including stroking one another's penises and nipples, kissing, dancing, and humping each other."[247] The court concluded the plaintiff could not demonstrate that these coworkers were homosexual, because "they were just 'putting on a show'" intended to entertain.[248] "Thus, the primary purpose of and motivation for the behavior in which [they] engaged appears not to have been sexual desire or gratification."[249] In *English v. Pohanka*, the court concluded that the harasser's act of "pressing his genitals against English's shoulder" was not an earnest sexual solicitation, because it "was done in view of other coworkers and was not followed by a proposal for sex."[250] All of the conduct complained of in that case "occurred on a showroom floor" where sales consultants worked in "office cubes" and "had little privacy."[251] The harasser even got a "few laughs" out of those coworkers, to his "twisted delight."[252] Some of them "implicitly encouraged" his behavior.[253]

In these cases, the conduct is compared to the sort of private, at-home vision of sexuality protected by the Supreme Court in *Lawrence v. Texas*.[254] Of course, sexual desire can be and often is displayed in public settings,[255] for entertainment,[256] and in groups.[257] And, like the

246. Bradley v. Bates Acquisition, LLC, No. 1:09-cv-1153, 2010 WL 3220647, at *1 (W.D. Tenn. Aug. 13, 2010).

247. *Id.* at *1.

248. *Id.* at *4. It was also relevant to the court that some of the alleged harassers were married. *Id.*

249. *Id.*; *see also* Collins v. TRL, Inc., 263 F. Supp. 2d 913, 920 (M.D. Pa. 2003) (concluding that a harasser who grabbed the plaintiff's genitals was not motivated by sexual desire, in part because "[i]t appears from the record that actions that [the harasser] took were performed in the presence of others who would then laugh regarding what happened").

250. English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 845 (E.D. Va. 2002).

251. *Id.* at 847.

252. *Id.* at 846.

253. *Id.* at 847.

254. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding that the Constitution protects the "most private human conduct, sexual behavior, and in the most private of places, the home").

255. *See* MICHAEL WARNER, THE TROUBLE WITH NORMAL 149–93 (1999).

256. *See supra* note 133.

257. *See* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 301 (2004) (discussing "the scope, terms, and structures of polyamory today" and "portray[ing] several polyamorous relationships").

other fictions described in this Section, the assumption that sexual desire is only expressed in private is not generally made in cross-sex cases.[258]

* * *

Thus, courts have developed a set of rules about what constitutes credible evidence of homosexuality that implicitly requires evidence that the harasser held him or herself out as gay, lesbian, or bisexual in the workplace. Absent that, courts may infer homosexuality from desire for a same-sex plaintiff, but only when that desire manifests itself in accord with a certain idealized picture of same-sex intimacy that matches the image promoted by gay-marriage advocates.[259] Courts do not see desire in scenarios involving disgust, humor, violence, or exhibitionism, because they understand the agents of harassment in those cases as heterosexual or asexual archetypes: bullies, clowns, and perpetual children. These holdings have now taken on a life of their own as precedents about what constitutes same-sex desire.[260]

II. REINFORCING HETEROSEXISM

This Part will discuss how this notion of "homosexuality" as being openly gay, lesbian, or bisexual at work, combined with the set of fictions that flatten same-sex desire into a simple, earnest, gentle, private emotion, work to privilege heterosexual identities and protect heterosexual marriage. The cases act to preserve the reliance interests of spouses and children in heterosexual marriage. They also protect the interests of plaintiffs in defending their heterosexual identities against threats by "openly" gay coworkers. These cases, in which desire is inferred from gay identification, punish expressions of gay identity at work. When alleged harassers self-identify as gay, courts find it easy to see same-sex desire, even if it is not simple, earnest,

258. Gallagher v. C.H. Robinson Worldwide, 567 F.3d 263, 271 (6th Cir. 2009) (rejecting the argument that indiscriminate harassment is not based on sex if it occurred in an "open forum where men and women worked together").

259. *See supra* note 155 and accompanying text.

260. *See, e.g.*, Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1069–70 (8th Cir. 2005) (applying the fiction that humor and play are desexualized to a female harasser, and rejecting the plaintiff's argument that "because such bawdy, 'locker room' behavior is not as commonplace among females, a reasonable jury could more readily infer actual sexual desire based on similar statements or acts by females").

gentle, or private. The doctrine has spawned invasive litigation practices in which workers must sit for depositions regarding their sexual orientations, employers routinely ask for sworn affirmations of heterosexuality, and plaintiffs' lawyers appeal to homophobia.[261] This Part will explain how the doctrine serves to reinforce heterosexism.[262]

A. Privileging Straight Marriages

In analyzing pre-*Oncale* decisions, Professor Kenji Yoshino argued that the concept of bisexuality would undermine the doctrinal focus on homosexual identities.[263] Once courts recognized bisexuality, they would no longer allow a harasser to negate the possibility that he experienced same-sex desire by arguing that he experienced cross-sex desire.[264] Courts would then shift the focus of inquiry from status (homosexual identity) to behavior (homosexual advances).[265] But this has not occurred. Today, bisexuality is ubiquitous.[266] Yet courts continue to indulge the argument that a harasser who has been involved in a heterosexual marriage would not experience same-sex desire.[267]

A frequent refrain in cases dismissing sexual harassment claims is that the alleged harasser, "who is married and has children, asserts that he is heterosexual."[268] It should be well known by now to any

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261. *See infra* note 428 and accompanying text.

262. One response might be that Title VII does not prohibit heterosexism, or any form of discrimination based on sexual orientation, for that matter. This may not be true for long. *See, e.g.*, Pizer, *supra* note 27, at 719–20. In any event, my argument in this Part should appeal to anyone who questions whether the state should endorse heterosexual over nonheterosexual identities and unions.

263. Yoshino, *supra* note 7, at 450–51.

264. *Id.* at 454.

265. *Id.* at 452.

266. Glazer, *supra* note 2, at 1000.

267. Courts do not see a harasser's marital status as relevant to a claim of cross-sex harassment. *See, e.g.*, EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 993, 1000–01 (9th Cir. 2010) (affirming a claim against a married harasser); Moser v. MCC Outdoor, LLC, 256 F. App'x 634, 637, 645 (4th Cir. 2007) (same).

268. Hubbard v. Bimbo Bakeries USA, Inc., No. 06-43-JE, 2006 WL 2863222, at *3 (D. Or. Oct. 4, 2006), *aff'd*, 270 F. App'x 607 (9th Cir. 2008); *see* Cherry v. Shaw Coastal, Inc., No. 08-228-JJB, 2010 WL 3035758, at *2 (M.D. La. Aug. 3, 2010), *vacated*, 668 F.3d 182 (5th Cir. 2012); Sillars v. Nevada, No. 3:07-CV-00041-LRH-RAM, 2008 WL 4540457, at *5 (D. Nev. Oct. 6, 2008), *aff'd*, 385 F. App'x 669 (9th Cir. 2010); Cole v. Kone Elevators, Inc., No. CV-05-1969-PHX-FJM, 2006 WL 3313707, at *2 (D. Ariz. Nov. 14, 2006); Beseau v. Fire Dist. No. 1, No. 05-2162, 2006 WL 2795716, at *3 (D. Kan. Sept. 26, 2006); Lavack v. Owen's World Wide Enter. Network, Inc., 409 F. Supp. 2d 848, 855 (E.D. Mich. 2005); Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1274, 1365–66 (D. Kan. 2002); *cf.* Ashmore v. J.P. Thayer Co., 303 F. Supp. 2d

follower of American politics or celebrity gossip that a heterosexual marriage is no barrier to same-sex desire.[269] Some courts have rejected the argument that straight marriage is a defense to same-sex desire,[270] while others recognize the fallacy of such reasoning, but partially rely on it anyway.[271] Perhaps these courts are assuming that most people, especially those who are married to cross-sex partners, do not experience same-sex desire. But even if this were a safe assumption, why would it hold true for the subset of married people accused of same-sex sexual harassment?[272] This Section will suggest that one possible explanation is a concern about how a finding of same-sex desire might threaten a marriage and the interests of the harasser's spouse and children.[273] The claim that courts are protecting heterosexual marriage is supported by cases in which courts seem to draw implicit comparisons between cross-sex marriages and propositions for same-sex trysts at the office. But regardless of whether this holds true as a causal explanation, this Section argues that the effect of these cases is to allow married heterosexuals to engage in harassing conduct that would be illegal but for their marital and sexual-orientation status, thus privileging heterosexual marriage.

For example, in *Smith v. Hy-Vee*,[274] the plaintiff, Dru (Dani) Smith, worked in a bakery with another woman, Sherri Lynch, who "engaged in rude, vulgar, sexually charged behavior toward Smith."[275]

1359, 1365 (M.D. Ga. 2004) (finding no evidence the harasser was "actually homosexual" in a case in which "Plaintiffs testified that [the harasser's] obnoxious behavior included descriptions of his sexual relationship with his wife").

269. *See, e.g.*, David Greenberg, *Sex and the Married Politician*, ATLANTIC, Oct. 2011, at 53, 53.

270. *See* Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 299–300 (S.D.N.Y. 2011); Provensal v. Gaspard, No. 10-4276-SS, 2011 WL 2004416, at *3 & n.1 (E.D. La. May 23, 2011); Davidson-Nadwodny v. Wal-Mart Assocs., Inc., No. CCB-07-2595, 2010 WL 1328572, at *4–5 (D. Md. Mar. 26, 2010); Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745, 752, 757 (N.D. Ill. 2010).

271. *See* Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1069 n.2 (8th Cir. 2005); Bradley v. Bates Acquisition, LLC, No. 1:09-cv-1153, 2010 WL 3220647, at *4 (W.D. Tenn. Aug. 13, 2010).

272. *Cf.* Yoshino, *supra* note 7, at 449 (arguing that the judicial presumption of heterosexuality may "be defended on the grounds that we believe the majority of the population to be straight," but that defense "may be insufficient, in that courts are not dealing with the general population, but with the subset of that population whose same-sex conduct has given rise to a claim of harassment").

273. *Cf.* Wendy C. Ortiz, *Newly Wed and Quickly Unraveling*, N.Y. TIMES, July 29, 2012, at ST6 (discussing her experience as "part of that population of 30-something people who come out, and, unintentionally, take down a couple of people (or more) in the process").

274. Smith v. Hy-Vee, Inc., 622 F.3d 904 (8th Cir. 2010) (per curiam).

275. *Id.* at 905.

The Eighth Circuit described an incident in which Lynch pretended to rape Smith:

> In May 2006, Smith observed Lynch "dry humping" a male Hy-Vee manager. After the manager left, Smith said, "God, Sherri, it's like you practically raped him." Lynch replied "[n]o Dani, if I were going to rape someone, it would be like this." Lynch then pushed Smith up against a wall for ten to fifteen seconds while rubbing her hands and body up against Smith.[276]

On another occasion, Lynch "rubbed her fingers against Smith's fingers and told Smith '[t]hat's what a penis feels like.'"[277] Lynch also "smacked [Smith] on the buttocks approximately six times."[278] The court held that Lynch's conduct was not "motivated by a particular attraction to Smith because Lynch exposed both men and women to the same behavior."[279] Lynch also "made sexually explicit cakes for male-Hy-Vee employees," "'dry humped' the same [male] manager about once a week," "put her hands in this manager's pockets and said 'hey there big boy,'" and "hit several male employees on the posterior on several occasions."[280]

Although it did not resolve the question, the court made reference to a debate between the parties about Lynch's sexual orientation. Smith argued that Lynch was a lesbian or bisexual based on her observations of Lynch's conduct: kissing another female employee, smacking that woman on the buttocks, and dry humping a third female employee.[281] Lynch denied that she was a lesbian or bisexual.[282] The court observed that Lynch had "been married to the same man for sixteen years and [had] two daughters."[283] In affirming the dismissal, the court did not conclude that Lynch was a bisexual harasser, whose desires were strictly sex blind.[284] It did not hold that the case had to be dismissed because Lynch treated men and women equally badly. Rather, it concluded that Lynch's behavior was not a serious sexual advance, citing a case holding that the use of crude

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276. *Id.* (alteration in original).
277. *Id.* (alteration in original).
278. *Id.*
279. *Id.* at 908.
280. *Id.* at 906.
281. *Id.*
282. *Id.*
283. *Id.*
284. *See supra* notes 56–63 and accompanying text.

humor in the presence of both men and women did not constitute sex discrimination.[285]

The *Hy-Vee* court seems to have drawn an implicit contrast between Lynch's nonserious workplace vulgarity and her serious marriage, which it noted was to the "same man" for sixteen years, to underscore the stability of the monogamous relationship.[286] It did not hold that a married woman could not experience same-sex desire,[287] but its interpretation of the facts seems to have been shaded by its interest in protecting the stability of Lynch's heterosexual identity and marital status, as well as the interests of her husband and children.[288] The doctrine's requirement that the court assign a sexual-orientation status to the alleged harasser upped the ante. The court was not willing to disrupt Lynch's heterosexual identity based on workplace indiscretions.[289] But for Lynch's marriage and claim to heterosexual status, the outcome might have been different.[290]

Another example is *Sillars v. Nevada*.[291] In that case, the female plaintiff and the alleged harasser, Patsy Cave, worked together for a Nevada state agency.[292] The plaintiff had been promoted and was

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285. *Hy-Vee*, 622 F.3d at 908 (citing Barekman v. City of Republic, 232 S.W. 3d 675, 681 (Mo. Ct. App. 2007)).

286. *See id.* at 906.

287. The Eighth Circuit has stated that a cross-sex marriage does not preclude a jury from finding that a harasser "was motivated by some degree of homosexual desire." *See* Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1069 n.2 (8th Cir. 2005).

288. *Cf.* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1415–16 (2004) ("The landscape post-*Lawrence* is not one that makes formal legal distinctions between heterosexual and homosexual practices, but rather one that likely renders different legal treatment to those who express their sexuality in domesticated ways and those who don't—regardless of orientation.").

289. The doctrine functions like the "queen-for-a-day" exemptions to the military's former ban on gay service members, protecting those who engage in "isolated" incidents of same-sex eroticism based on "immaturity, curiosity or intoxication." JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 46–47 (1999) (quotation marks omitted); *see also id.* (explaining the exemption "protect[ed] heterosexual persons from any status-like consequences of their homosexual acts").

290. *Compare Hy-Vee*, 622 F.3d at 906, 908, *with* Kampmier v. Emeritus Corp., 472 F.3d 930, 934 (7th Cir. 2007). For further discussion of *Kampmier*, see *infra* Part II.B. My argument is not that the outcome *should* have been different. Whether one sees this case as troublesome depends on one's theory of what harm sexual harassment law should address. *See infra* Part III. My argument is that the focus on sexual desire results in unequal outcomes insofar as liability turns on whether harassers are married. *See supra* note 267.

291. Sillars v. Nevada, No. 3:07-CV-00041-LRH-RAM, 2008 WL 4540457, at *1 (D. Nev. Oct. 6, 2008), *aff'd*, 385 F. App'x 669 (9th Cir. 2010).

292. *Id.*

training Cave to take over her former job.[293] Over the course of the training, the two struck up a friendship.[294] On one occasion, Cave visited the plaintiff's house, and

> during the course of their conversation, they drank one or two margaritas. Cave informed Plaintiff that she "had feelings for someone in the office," and Plaintiff began naming male employees to determine who the person was. Cave said that it was no one that Plaintiff had named. At some point during the conversation, Cave began to cry.[295]

A few nights later, "Cave called Plaintiff in tears stating, 'I don't want you to think bad of me.' She asked if she could come to Plaintiff's home and talk to her, but Plaintiff said, 'No, it's late at night.'"[296] The plaintiff contended that after this incident she noticed Cave would stand too close to her and stare at her breasts.[297] Cave denied having feelings for the plaintiff.[298] Although the court was evaluating a summary judgment motion,[299] it credited this denial, holding the plaintiff had "no evidence demonstrating that Cave is homosexual. Instead, Cave is married and has several children. There is no evidence that she has ever been in, or intends to be in, a homosexual relationship, and Cave denies having romantic feelings for Plaintiff."[300] Why did the court conclude that no reasonable jury could infer desire from Cave's late-night visit to the plaintiff's house and odd confession? The incident described by the court is a *scène à faire* of unrequited desire.[301] The decision protects Cave's marriage from a

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293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at *5.

299. *Id.* at *4.

300. *Id.* at *5. The court also may have been under the mistaken impression that *Oncale* requires that harassment be in "'sex-specific and derogatory terms.'" *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1997)). This quotation comes from *Oncale*'s description of how a plaintiff might prove harassment was motivated by "general hostility to the presence of women in the workplace," which was not at issue in *Sillars*. *See Oncale*, 523 U.S. at 80.

301. ROLAND BARTHES, A LOVER'S DISCOURSE: FRAGMENTS 44 (Richard Howard, trans., Hill and Wang 2001) (1977) ("[S]o that a long series of verbal contentions (my 'politenesses') may suddenly explode into some generalized revulsion: a crying jag (for instance), before the other's flabbergasted eyes, will suddenly wipe out all the efforts (and the effects) of a carefully controlled language.").

one-time lapse, a near confession of same-sex desire over too many margaritas.

Myers v. Office Depot[302] is a similar example, this one involving men.[303] The story began at an employer-sponsored "Kickoff event" in Orlando, Florida, which was intended to motivate Office Depot's sales force.[304] During the event, the male plaintiff, described by the court as "openly homosexual," became involved in an "intense conversation" at the bar with a coworker, Ron Sorey.[305] After the conversation, the plaintiff went into the bathroom and entered a stall, where Sorey grabbed him and tried to kiss him.[306] The plaintiff rebuffed the advance.[307] Later, Sorey became the plaintiff's supervisor.[308] Sorey was confrontational with the plaintiff and tried to pressure him to leave the company.[309] The court dismissed the case, holding that the "[p]laintiff [did] not offer any evidence that Ron Sorey [was] a homosexual and thus allegedly attempted to kiss the plaintiff because of sex."[310] The court also made a cryptic reference to "calls to female co-workers," which proved that "Sorey was an equal opportunity harasser, which is not actionable."[311] The "calls" to which the court referred were drunken calls from Sorey during another corporate event to the hotel room of two female coworkers.[312] During those calls, Sorey informed the women that "his wife doesn't like anal sex," and they all shared a laugh.[313] Here, as in *Sillars*, the court

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302. Myers v. Office Depot, Inc., No. 06-CV-11252, 2007 WL 2413087, at *1 (E.D. Mich. Aug. 21, 2007).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at *4. The court also dismissed the case because the single incident of the "attempted kiss" did not meet the requirement that harassment be "severe or pervasive." *Id.* at *5. There was no quid pro quo claim because Sorey was not the plaintiff's supervisor at the time of the alleged harassment. *Id.*

311. *Id.* at *4.

312. *Id.*

313. *See* Plaintiff's Response to Defendant's Motion for Summary Judgment at 9 & Ex. B, *Myers*, 2007 WL 2413087 (No. 06-CV-11252). One of the coworkers, Mary Miller, testified that when Sorey first called, she told him, "Ron, you need to go to sleep, you're drunk." *Id.* Ex. B. Sorey hung up but called again, and "began to tell [her] how his wife doesn't like anal sex." *Id.* Miller responded, "Ron, have you ever heard of lubricant," and the two laughed. *Id.* Miller testified "it wasn't—there was no insinuation of him and I or anything like that." *Id.* The next day, Miller told Sorey, "We do stupid things when we're drunk and, you know, you had one too

refused to understand a one-time lapse as sexual desire that would give rise to a bisexual or gay identity. The implicit comparison is between sex in a public restroom and marriage.

The set of fictions narrowly construing evidence of same-sex desire discussed in Part I.C apply with special force in cases in which harassers are married. *Kreamer v. Henry's Marine*[314] is an example of a case in which a court refused to read conduct as evincing sexual desire when the alleged harasser was involved in a heterosexual marriage.[315] The plaintiff, Thomas Kreamer, worked as a deckhand on a boat.[316] He alleged he had been harassed by a coworker, Carroll Carerre, a man whose "language was consistently profane and . . . [who] had been known to engage in excessive horseplay."[317] The plaintiff testified that on eight occasions, Carerre grabbed him in the crotch, and "[o]n the third or fourth time, Carrere allegedly told plaintiff that 'he would like to compare packages.'"[318] The plaintiff told Carrere to stop.[319] Carrere also attempted to annoy the plaintiff by throwing the rope off the bit of his boat when the plaintiff was attempting to tie two boats together.[320] After the plaintiff complained, Carrere blew him a kiss.[321] On another occasion, "Carrere allegedly burned plaintiff's wrist with a hot Zippo lighter that Carrere was allegedly trying to put between plaintiff's legs."[322] The plaintiff also related a strange story about an incident in his sleeping quarters:

> [O]ne morning during the time in question, Carrere entered his sleeping quarters on the *Bacchus*. Plaintiff stated that when he awoke, Carrere was standing next to plaintiff's bed, just looking at plaintiff. Carrere did not say anything, did not touch plaintiff and did not attempt to get into plaintiff's bed. When plaintiff told Carrere to "get the hell out," Carrere left without saying anything.[323]

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many. Don't worry about it." *Id.* When asked if she ever made a formal complaint, Miller said, "There was no reason to. It wasn't offensive to me; it was funny." *Id.*

314. Kreamer v. Henry's Marine, No. Civ.A.03-3139, 2004 WL 2297459 (E.D. La. Oct. 7, 2004), *aff'd*, 150 F. App'x 378 (5th Cir. 2005).

315. *Id.* at *1.

316. *Id.*

317. *Id.*

318. *Id.* at *1, *6.

319. *Id.* at *1.

320. *Id.* at *2.

321. *Id.*

322. *Id.*

323. *Id.* at *3 (citations omitted).

When the plaintiff later came into contact with Carrere, Carrere whistled at him and made "offensive gestures."[324] Near the end of his time on this particular job, "Carrere approached plaintiff from behind as he was bent over slightly over the engines, grabbed his sides and said he 'would like to f**k that piece of ass.'"[325] The plaintiff pushed him away and left the engine room.[326]

The court concluded, as a matter of law, that this evidence, "as a whole, reveals an intent of Carrere to humiliate plaintiff for reasons unrelated to a sexual interest, rather than an actual intent to have sexual contact."[327] The court refused to read Carrere's statement that he would like to "f**k that piece of ass" literally.[328] Because Carrere was leaving that day, the court reasoned, the incident must have been "nothing more than a final parting shot directed at plaintiff" rather than "a realistic sexual proposition of the type necessary to be actionable under Title VII."[329]

This raises the question: How much time did the court think a sexual encounter between the two men might take? Is the court assuming that sexual propositions are only made in an effort to start long-term relationships? One fact the court highlighted was that "Carrere never asked [the plaintiff] out or expressed an interest in him socially outside of work."[330] The court held that nothing salacious could be inferred from the odd incident in which the plaintiff awoke to find Carrere standing in his sleeping quarters, silently staring at him.[331] The court would not read desire into this pointed silence.[332] The explanation, most likely, is that the court considered this evidence in light of the fact that "Carrere, who is married with

324. *Id.*

325. *Id.* (quotation mark omitted).

326. *Id.*

327. *Id.* at *6.

328. *Id*. at *3, *6 & n.14.

329. *Id.* at *6.

330. *Id.* at *7.

331. *See id.* ("When this one incident is considered in light of all the other summary judgment evidence, plaintiff has simply failed to present any proof indicating that Carrere was acting out of any bona fide homosexual interest.").

332. *Cf.* SEDGWICK, *supra* note 28, at 3 ("'Closetedness' itself is a performance initiated as such by the speech act of a silence—not a particular silence, but a silence that accrues particularity by fits and starts, in relation to the discourse that surrounds and differentially constitutes it.").

children, has denied that he is homosexual."[333] On comparison, Carrere's conduct toward Kreamer looks insignificant; at most it was a brief flirtation with the idea of a same-sex tryst, not the sort of effort to initiate a relationship that might lead to a same-sex marriage.

Thus, comparison between same-sex trysts and marriage is made part of the doctrine by the set of fictions narrowly construing evidence of same-sex desire. These fictions serve to protect straight marriages from the disruption that ascription of gay, lesbian, or bisexual identity to a spouse can effect.

B. Defending Straight Workers from Gay "Recruitment"

The doctrine not only protects heterosexual identities from internal threats, it defends them against external threats as well, in the form of "predatory homosexual conduct" that could convert the straight victim to a gay or lesbian identity.[334]

In *Kampmier v. Emeritus Corp.*,[335] the female plaintiff, Shannon Kampmier, alleged she had been harassed by another woman, Lena Badell, when the two worked together as nurses.[336] The Seventh Circuit observed that Badell had "referred to herself as 'queer little old me,'" and described sexual activities with her "girlfriend."[337] Notable here is the court's choice of the term "girlfriend." The briefs described the woman as Badell's "domestic partner of more than 20 years."[338] The plaintiff made much of the fact that, notwithstanding this domestic partnership, Badell had previously carried on "a homosexual affair with a female subordinate" and "kissed and sexually touched said female employee while at work."[339]

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333. *Kreamer*, 2004 WL 2297459, at *7. *But see* Cherry v. Shaw Coastal, Inc., No. 08-228-JJB, 2010 WL 3035758, at *2–3 (M.D. La. Aug. 3, 2010) (holding that a married man did not desire the male plaintiff), *vacated*, 668 F.3d 182, 188 (5th Cir. 2012).

334. *See* EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 519 (6th Cir. 2001). Courts and parties frequently refer to "homosexual advances," rather than simply "sexual advances," as though the "homosexual" nature of the advance rendered it more threatening. *See, e.g.*, Redd v. N.Y. Div. of Parole, 678 F.3d 166, 179 (2d Cir. 2012).

335. Kampmier v. Emeritus Corp., 472 F.3d 930 (7th Cir. 2007).

336. *Id.* at 934.

337. *Id.*

338. Brief of Defendant-Appellee at 6, *Kampmier*, 472 F.3d 930 (No. 061788), 2006 WL 2024101, at *6; *see also* Brief for Appellant at 6, *Kampmier*, 472 F.3d 930 (No. 06-1788), 2006 WL 1497454, at *6 (using the term "live-in partner").

339. Brief for Appellant, *supra* note 338, at 7. The defendant characterized it as "a consensual romantic relationship." Brief of Defendant-Appellee, *supra* note 338, at 7.

The plaintiff alleged that Badell continuously grabbed her buttocks, hugged her, grabbed her around the arms, jumped in her lap, kissed her on the cheek, and rubbed up against her.[340] Badell also told the plaintiff "that she could turn any woman gay ten to twelve times," described sex acts she had performed with her "girlfriend," and stated she could do the same with the plaintiff.[341] The plaintiff's initial complaint about this conduct was, "'What's up with our executive director? She is really touch-feely. She is always talking about being gay,'" to which her supervisor responded, "'I know. I know. She's like that with everybody.'"[342]

The employer made the "equal opportunity harasser" argument—introducing evidence that Badell had also "grabbed two male employees' buttocks" and sexually propositioned another man, who agreed to go out on a date with Badell, but then stood her up.[343] The court rejected the employer's argument that Badell was an "equal opportunity harasser" because it concluded that the plaintiff endured more "severe and prevalent" harassment than the men.[344] It reasoned that "Badell made constant references to female employees at the Loyalton, made comments about their 'boobs,' and told the women at the Loyalton that she could turn any woman gay. . . . [A]nother Emeritus employee[] also testified that she heard Badell claim to be able to turn any woman gay."[345] The court was quite concerned with Badell's statement that she could "turn any woman gay," a fact it repeats four times throughout the opinion.[346]

The court's fixation on Badell's offer to turn any woman gay resonates with the old stereotype of gays and lesbians as recruiters and seems to imply that the threat of recruitment, in other words, the threat to these women's heterosexuality, is what makes this

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340. *Kampmier*, 472 F.3d at 934.

341. *Id.* at 941–42.

342. Brief of Defendant-Appellee, *supra* note 338, at 10. The parties disputed the point at which Kampmier complained about the conduct as sexual harassment. Brief for Appellant, *supra* note 338, at 8.

343. *Kampmier*, 472 F.3d at 940. Badell told the man the next day, "'I was waiting and ready for you. If you did not want it and did not want to be bothered by me, then you should have said something.'" *Id.*

344. *Id*.

345. *Id.* at 940–41.

346. *Id.* at 934, 940–41; *see also* Harris v. PetSmart, Inc., No. 2011-94, 2012 WL 5289392, at *1, *3 (E.D. Ky. Oct. 23, 2012) (concluding summarily that harassment was "because of sex" in a case in which the male harasser told the male plaintiff that he was "homosexual" and stated that he could make the plaintiff "go gay").

harassment "because of sex."[347] The plaintiff's brief made this argument expressly: "Badell was a homosexual, and her agenda was to 'recruit people,' even though she had a live-in female partner, as is evidenced by her affair with her female Marketing Director at the Loyalton."[348]

Badell's harassment discriminated against women because her desire for them was of a same-sex nature, threatening to undo their heterosexual identities. Badell expressed desire to date both men and women at work, but only threatened the sexualities of women. By contrast, when ostensibly straight men harass other straight men by threatening their sexualities, courts conclude the harassment was based on sexual orientation, not sex, and is therefore not actionable under federal law.[349] In *Hamm v. Weyauwega Milk Products*,[350] also a Seventh Circuit case, the plaintiff, who identified as heterosexual, alleged that his coworkers thought he was gay based on the fact that he was single and had a close friendship with a male coworker.[351] As a result, they referred to him as a "'faggot'" and threatened to "snap his neck."[352] The court dismissed the claim, holding that this harassment was because of Hamm's perceived sexual orientation (gay), not his sex (male).[353]

The distinction is that in *Hamm*, the plaintiff's coworkers did not sexually desire him (they only threatened to kill him). Accordingly, although courts do not understand aggressive male-on-male genital touching as the type of "predatory homosexual conduct" that could ground a Title VII claim,[354] they will see desire in physical contacts that include hand holding,[355] massages,[356] "fondl[ing],"[357] and

347. *See* RUBIN, *supra* note 28, at 271 (discussing moral panic in the 1970s over the threat of gay recruitment of children).

348. Brief for Appellant, *supra* note 338, at 34 (citation omitted). It is not clear from the brief whether the statement "'recruit people'" was Kampmier's characterization of Badell's behavior or a quotation attributed by Kampmier to Badell herself. *Id.*

349. *See generally* Kramer, *supra* note 39.

350. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003).

351. *Id.* at 1060.

352. *Id.*

353. *Id.*

354. EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 519 (6th Cir. 2001); *see also supra* Part I.B.3.

355. Knobbe v. Artco Casket Co., Inc., No. 4:10CV322 CDP, 2010 WL 2947731, at *1–2 (E.D. Mo. July 22, 2010).

356. Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 296 (S.D.N.Y. 2011); Thorne v. Sprint/United Mgmt. Co., No. 00-0913-CV-W-6, slip op. at 4 (W.D. Mo. Dec. 23, 2008); Tainsky v. Clarins USA, Inc., 363 F. Supp. 2d 578, 582 (S.D.N.Y. 2005); Mann v. Lima,

"caress[ing]."[358] In *Cherry v. Shaw Coastal, Inc.*[359] the alleged male harasser sent the male plaintiff text messages stating "'I want cock'" and "'your missing the dipper,'" referring to his penis.[360] The district court held that these text messages, although "regarding sexual matters, are not propositions."[361] The Fifth Circuit disagreed.[362] It emphasized that the harasser "repeatedly physically touched and caressed Cherry's body."[363] The harasser had placed his hand on the plaintiff's buttocks, knee, and thighs, and "rubbed [plaintiff's] shoulders and stroked his hair."[364]

In *Cherry*, a witness stated the harasser had touched Cherry "'like I do my wife.'"[365] This echoes another Fifth Circuit decision, in which the court held a jury could infer sexual intent when a male harasser "approached [the plaintiff] from behind while he was bending down and fondled his anus," in a contact the plaintiff described "as similar to 'foreplay with a woman.'"[366] These courts saw the harasser's conduct as sexual, and hence injurious, because the harasser treated the plaintiff like a woman. As Yoshino has explained, these types of interactions are injurious because they are homo*erotic*, as opposed to homo*social*.[367] Homoerotic interactions are ways of "unmaking men," in which men are revealed to be "'inverts'—that is, as women trapped inside men's bodies."[368] By contrast, homosocial interactions are ways of "making men," "insofar

290 F. Supp. 2d 190, 192 (D.R.I. 2003). *But see* Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1274 (D. Kan. 2002) ("[C]ontinu[ing] to rub Plaintiff's shoulders after Plaintiff asked him to stop . . . [was not] 'credible evidence' that [the alleged harasser] is homosexual or his conduct is motivated by sexual desire.").

357. La Day v. Catalyst Tech., Inc., 302 F.3d 474, 476 (5th Cir. 2002).

358. Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 188 (5th Cir. 2012); Cromer-Kendall v. District of Columbia, 326 F. Supp. 2d 50, 57 (D.D.C. 2004).

359. Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012).

360. *Id.* at 185. The harasser also offered the plaintiff the opportunity to spend the night at his house and borrow his clothes and underwear. *Id.*

361. Cherry v. Shaw Coastal, Inc., No. 08-228-JJB, 2010 WL 3035758, at *2 (M.D. La. Aug. 3, 2010), *vacated*, 668 F.3d 182 (5th Cir. 2012).

362. *Cherry*, 668 F.3d at 188.

363. *Id.*

364. *Cherry*, 2010 WL 3035758, at *2.

365. *Cherry*, 668 F.3d at 189. The court pointed to this statement in explaining why the harassment met the "severe or pervasive" requirement for a sexual harassment claim. *Id.*

366. La Day v. Catalyst Tech., Inc., 302 F.3d 474, 476 (5th Cir. 2002).

367. Yoshino, *supra* note 7, at 448.

368. *Id.*

as the men who can take (and dish out) hazing, razzing, or horseplay are constituted as 'real' men."[369]

But it is more than simply that the harassers are treating men like women. Sexualized violence against women has often been understood in terms of desire. And courts apply the same horseplay exemption to cases involving women harassing women.[370] In these cases, harassers are not just treating men like women, they are treating men tenderly and with affection, like women they might want to marry. This threat to heterosexuality is one that courts recognize.

C. Punishing Self-Identification as Lesbian, Gay, or Bisexual

When the alleged harassers are "openly homosexual," some courts hold there is an automatic "inference that their conduct was based on sexual desire, and thus, sex."[371] I have found only one case in which a court held there was credible evidence of homosexuality, but nonetheless concluded the harassment was not "because of sex."[372] That case involved a female harasser who did not specifically target the plaintiff with her alleged harassment. In every other case in which a court found credible evidence that the harasser was gay, it concluded the harassment was because of sex.[373] These courts did not require that the alleged harasser express her desire in a way that was

369. *Id.*

370. *See, e.g.*, Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1070 (8th Cir. 2005).

371. Ellsworth v. Pot Luck Enters., Inc., 624 F. Supp. 2d 868, 872, 877 (M.D. Tenn. 2009); *see also supra* note 55.

372. Adeshile v. Metro. Transit Auth., No. H-06-3480, 2008 WL 112103, at *6 (S.D. Tex. Jan. 9, 2008). In a similar case, the alleged harassers were two female coworkers engaged in a romantic relationship with each other. Baugham v. Battered Women, Inc., 211 F. App'x 432, 439 (6th Cir. 2006). The female plaintiffs alleged they were subjected to vulgar comments and behavior related to this same-sex relationship. *Id.* Without specifically remarking on the alleged harassers' sexual orientations, the court held that the female plaintiffs did not present any evidence to support the claim that they were subjected to harassment because of sex. *Id.* at 439; *see also* Espinosa v. Burger King Corp., No. 11-62503-CIV, 2012 WL 4344323, at *7 (S.D. Fla. Sept. 21, 2012) (dismissing plaintiff's claim because she alleged that her gay coworkers harassed her because she was heterosexual, not because she was a woman, without reaching a conclusion as to whether the jury could infer the harassers were in fact gay).

373. I have found twenty-two cases in which plaintiffs prevailed on the question of whether harassment was "because of sex" with sufficient allegations or evidence of a harasser's homosexuality. They are noted with an asterisk in Appendix B. In three other cases finding evidence of desire, the court noted that alleged harassers self-identified as nonheterosexual without reaching any holding on the question. Kampmier v. Emeritus Corp., 472 F.3d 930, 934 (7th Cir. 2007); Harris v. PetSmart, Inc., No. 2011-94, 2012 WL 5289392, at *1 (E.D. Ky. Oct. 23, 2012); Rogers v. Johnson, No. C08-4395 TEH, 2010 WL 1688564, at *1 (N.D. Cal. Apr. 26, 2010).

simple, sincere, gentle, and private.[374] Because courts rely so heavily on self-identification, together with reputation, as the marker of homosexuality, the effect of this doctrine is to punish expressions of gay identity, imposing an implicit "don't tell" requirement in the workplace. Theoretically, homosexual identification might be a shield against liability in cross-sex harassment cases too, but this has not been a significant phenomenon.[375]

The Tenth Circuit's decision in *Dick v. Phone Directories Co.*[376] illustrates how self-identification as gay can create a nearly automatic inference that harassment was because of sex. There, the plaintiff, Diane Dick, worked in a sales office consisting mostly of female employees. She alleged she was sexually harassed by several of her female coworkers.[377] As the district court noted, "One central theme animating Ms. Dick's memorandum is her insistence that a strong lesbian atmosphere prevailed in the office, and that the Vernal Office was known as the 'lesbian factory.'"[378] As evidence that her harassers were homosexual, Dick pointed out "that the office bulletin board was decorated in rainbow colors—which symbolizes gay pride."[379] She also alleged that two of her female coworkers would "lock themselves into various rooms at the office for extended periods of time."[380] Dick admitted to being "upset" that she was not informed that a coworker was a lesbian, because Dick's granddaughter had often babysat for that coworker's children.[381]

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374. *See, e.g.*, *Kampmier*, 472 F.3d at 940.

375. I have found one decision, *Lewis v. North General Hospital*, 502 F. Supp. 2d 390 (S.D.N.Y. 2007), in which the male plaintiff (who, incidentally, self-identified as "gay"), alleged that his female harasser, also "gay," had "brushed up against him" and "rubbed her breast on him." *Id.* at 403. The court dismissed the claim because the plaintiff failed to argue he had been harassed because he was a man. *Id.* at 404. However, another district court allowed a claim to proceed in which the harasser was an "openly homosexual" man and the plaintiffs were female. *See* Francois v. Washmonbo, Inc., No. 05-23368-CIV, 2007 WL 1362796, at *4 (S.D. Fla. May 9, 2007) ("[The harasser] allegedly grabbed Plaintiffs from behind on many different occasions and would tell them to 'dame la lengua' or 'give me your tongue.'").

376. Dick v. Phone Directories Co., 397 F.3d 1256 (10th Cir. 2005).

377. *Id.* at 1260.

378. Dick v. Phone Directories Co., 265 F. Supp. 2d 1274, 1278 n.4 (D. Utah 2003), *rev'd*, 397 F.3d 1256 (10th Cir. 2005).

379. *Dick*, 397 F.3d at 1261. In noting this evidence, the Tenth Circuit reversed the district court's holding that the plaintiff's assertion that the office used "'rainbow colors . . . symbolizing gay pride'" on a bulletin board did not raise a "disputed factual issue" as to the "lesbian atmosphere" in the office. *Dick*, 265 F. Supp. 2d at 1278 n.4 (alteration in original).

380. *Dick*, 397 F.3d at 1261.

381. *Id.*

Dick described the alleged harassment in terms of "'a working environment permeated by sexually explicit banter, insults, lewd jokes, gestures, games, and devices.'"[382] The only physical conduct directed at Dick, however, involved two incidents in which Camie Hinkle, a female coworker, attempted to pinch her breasts, but was rebuffed, and one incident "at a novelty shop over the lunch hour [in which] Ms. Hinkle shoved a sex toy in the shape of a penis toward Ms. Dick."[383] Dick alleged that she was referred to as "'Ivanna Dick'" and "'Granny Dick,'" and that another female coworker "often would point to Ms. Dick's collection of stuffed cats on her desk and say that Ms. Dick had a 'pussy.'"[384] Her coworkers made crude jokes about oral sex, simulated sex with a stuffed bear, and played vulgar rap music in front of her.[385] The district court noted that Dick admitted that this was the "office environment" and that the vulgarity also seemed to offend a male coworker, a returned missionary.[386] The record also included evidence that Dick was harassed out of dislike, due to jealousy over her professional success, as a result of her comment expressing concern that the coworker who hired her granddaughter as a babysitter was a lesbian, and because she had a reputation as a "busybody."[387]

Nonetheless, the Tenth Circuit found enough evidence of sexual desire to reverse the district court's grant of summary judgment.[388] The court did not understand the coworkers' insults ("'Granny Dick'") as evidence of disgust that would cancel out any desire. It did not conclude that the evidence suggesting the harassers disliked Dick proved that they did not desire her.[389] It did not characterize the humor in the office as "horseplay."[390] And it was not concerned that

382. *Id.* at 1260 (quoting *Dick*, 265 F. Supp. 2d at 1275).

383. *Id.* at 1261.

384. *Id.*

385. *Id.*

386. *Dick*, 265 F. Supp. 2d at 1282 (quotation mark omitted).

387. *Dick*, 397 F.3d at 1265–66.

388. *Id.* at 1270.

389. *Id.* at 1261, 1266. This stands in contrast with cases involving ostensibly straight harassers in which courts viewed disgust and dislike as inconsistent with desire. *See supra* Part I.C.1.

390. *Dick*, 397 F.3d at 1267 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)). This stands in contrast with cases involving ostensibly straight harassers in which courts viewed humor as inconsistent with desire. *See supra* Part I.C.2.

the harassment was put on for show.[391] Referring to Hinkle's two rebuffed efforts at touching Dick's breasts, the Tenth Circuit held that "Ms. Hinkle touched, on more than one occasion, one of the most intimate parts of Ms. Dick's body—an act seldom carried out without some sort of sexual motivation."[392] The fact that differentiates *Dick* from the many cases in which courts have not interpreted sexual touching as evidence of desire is that in *Dick*, the alleged harassers had previously engaged in consensual same-sex relationships in the workplace.[393] Contrast this with a case such as *Kreamer*, in which the court held that no inference of desire was reasonable when a married man grabbed the plaintiff's crotch eight times and later stood over him, watching him as he slept.[394] The *Dick* court concluded that evidence that two other female coworkers had locked themselves in various rooms suggested tolerance for "sexually motivated conduct in the workplace," supporting an inference that the harassment of the plaintiff resulted from sexual desire.[395] The court implied that the problem was tolerance of same-sex workplace sexuality, even of the consensual variety, rather than discriminatory harassment. Thus, expressions of lesbian identity and relationships exposed the employer to liability for harassment.[396]

Courts will not understand male-on-male conduct as humorous "horseplay" when the harassers are gay, even when the plaintiff understood that conduct as "horseplay" rather than a manifestation of desire. In *Johnson v. Dollar General Corp.*,[397] the harassing conduct consisted of an incident in which three alleged male harassers held

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391. *Dick*, 397 F.3d at 1265–66. This stands in contrast with cases involving ostensibly straight harassers in which courts viewed exhibitionism as inconsistent with desire. *See supra* Part I.C.4.

392. *Dick*, 397 F.3d at 1266. In discussing the evidence of desire, the court also referred to evidence that the same harasser had "shoved a sex toy in the shape of a penis toward Ms. Dick" "at a novelty shop over the lunch hour." *See id.* at 1266, 1261.

393. *See id.* at 1266 ("[The harassers] engaged in same-sex sexual conduct with other people in the workplace."). By contrast, other courts have viewed aggressive sexual touching as inconsistent with desire. *See supra* Part I.C.3.

394. Kreamer v. Henry's Marine, No. Civ.A.03-3139, 2004 WL 2297459, at *6–7 (E.D. La. Oct. 7, 2004), *aff'd*, 150 F. App'x 378 (5th Cir. 2005).

395. *Dick*, 397 F.3d at 1266.

396. *See* Brower, *supra* note 6, at 32–33 ("The specter of a hardworking Utah grandmother employed in a 'lesbian factory' is a fairly vivid image. Accordingly, the schema of lesbian sexuality interposed itself and led the court to find a same-sex desire-based harassment case where it did not exist.").

397. Johnson v. Dollar Gen. Corp., No. 2:06-CV-173, 2008 WL 2781660 (E.D. Tenn. July 14, 2008).

the plaintiff down while they attempted to pull off his pants.[398] Earlier, the harassers had admitted to the plaintiff that they were gay[399] and had made comments to the plaintiff such as "'if you've got big feet, you've got to have a bigger penis.'"[400] According to a witness, precipitating the "pantsing" incident was a conversation about body piercing, in which the plaintiff said he would never allow his penis to be pierced unless "someone caught him and held him down."[401] Thereafter, one of the harassers began "chasing Plaintiff around the store," and eventually caught him and pulled him into an office.[402] Once there, two of the harassers held the plaintiff's arms back while the third pulled his pants down but was unable to pull down his boxers.[403] The plaintiff had testified that he had no reason to think that the harassers were sexually aroused during the alleged incident, but rather, that they "'just thought it was something funny to do.'"[404] Nonetheless, the court did not address the defendants' argument that the case was simply "crude male horseplay" of the sort routinely dismissed when the alleged harassers do not self-identify as gay.[405]

Thus, liability turns on status, defined as being out of the closet. The not-so-implicit message of these cases is that it is not acceptable to be out at work. The cases use the term "openly homosexual" almost as an epithet; indeed, the plaintiff's brief in *Kampmier* went so far as to describe the harasser's homosexuality as "blatant."[406] In penalizing nonheterosexual identities, the doctrine creates incentives for employees to cover or downplay nonheterosexual identities at work.[407] Workers might be cautious to display symbols of gay pride or engage in consensual same-sex relationships in the view of coworkers,

398. *Id.* at *1.

399. Memorandum in Support of Response to Motion for Summary Judgment with Imbedded Motion To Amend Complaint Caption at 4, *Johnson*, 2008 WL 2781660 (No. 2:06-CV-173), 2008 WL 3853708 (summarizing the plaintiff's deposition testimony that two harassers admitted they were gay and that the plaintiff had seen one of them kissing a man he referred to as his husband).

400. *Johnson*, 2008 WL 2781660, at *1.

401. *Id.* at *1 n.2.

402. *Id.* at *1 & n.2.

403. *Id.* at *1.

404. Reply Brief in Further Support of Defendant Dollar Gen. Corp.'s Motion for Summary Judgment at 10, *Johnson*, 2008 WL 2781660 (No. 2:06-CV-173), 2008 WL 3853709.

405. *Id.* For a discussion of other "horseplay" cases, see *supra* Part I.C.2.

406. Brief for Appellant, *supra* note 338, at 34.

407. *See* Yoshino, *supra* note 29, at 772, 836–65 (describing the harms of "covering").

lest they be hauled into court as alleged harassers, as in *Dick*.[408] On the flip side, workers have added incentive to talk up their cross-sex marriages, which detract from the inference of desire, and to emphasize heterosexual longings, which suggest the harasser is not "openly gay." Some courts understand heterosexual banter as negating the possibility of same-sex desire, for example, by dismissing a same-sex harassment claim in which the alleged male harasser "would often grace those in his company with his opinions regarding the sexual desirability of various women who worked" alongside them.[409]

D. Forcing the Closet Door Open

Shortly after *Oncale* was decided, Professor Janet Halley argued that the case had the potential to turn Title VII into a tool of "homosexual panic," used by purported "victims" of benign, but unwanted, same-sex sexual overtures in the workplace to label gay men or lesbians harassers.[410] Professor Marc Spindelman, defending *Oncale*, argued that Halley's claim lacked empirical support, insofar as she could not point to any cases in which homophobic plaintiffs "were permitted to sue."[411] The issue, however, is not that plaintiffs are winning these cases, or even that they are getting to trial, considering the high rate of settlement.[412] Civil litigation today is

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408. Dick v. Phone Directories Co., 397 F.3d 1256, 1261 (10th Cir. 2005).

409. King v. Super Serv., Inc., 68 F. App'x. 659, 663 (6th Cir. 2003); *see also* Armintrout v. Bloomingdale's Pizza, Inc., No. 04 C 313, 2007 WL 837279, at *9 (N.D. Ill. Mar. 13, 2007) (observing, with respect to an alleged male harasser's sexuality, "it is uncontroverted that Luis would pinch and grab female employees on the buttocks, that other employees did not perceive Luis as a homosexual, and that Luis openly talked with other employees 'about girls' and asked one of the female waitresses out on a date"); English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 845 n.10 (E.D. Va. 2002) (concluding the alleged male harasser's "frequent comments about his girlfriends and [the male plaintiff's] relations with his wife further undercut any reasonable inference that [the harasser] sought to initiate an affair with [the plaintiff]").

410. Halley, *supra* note 7, at 195.

411. *See* Spindelman, *supra* note 7, at 204 ("It would, of course, be worrisome if homophobic plaintiffs, wrongly claiming sexual harassment that never occurred, were permitted to sue. [Halley] predicts just such an 'alarming class of cases' will arise under *Oncale*, but cites not one example." (quoting Halley, *supra* note 7, at 192)).

412. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 123–24 (2009) (discussing the "dominance of settlement" in all types of cases, including employment discrimination); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 693–95 (discussing the high rates of dismissal due to settlement in employment discrimination cases).

dominated by discovery, which occurs prior to summary judgment. The problem is that plaintiffs, some with questionable motives, are now able to subject alleged harassers to inquisition about their sexual histories and desires through discovery. Moreover, because employers, not individuals, are the defendants in Title VII cases, accused harassers now find themselves asked by their employers to testify to their heterosexuality. Discovery gives plaintiffs tools to harass coworkers with the threat of outing. In addition to discovery abuses, in constructing their summary judgment arguments to courts, some plaintiffs' lawyers expressly draw on antigay biases and stereotypes.[413]

Many same-sex harassment cases seem to have been filed due to the plaintiffs' discomfort with homosexuality, if not outright homophobia. In some cases, courts quote statements from plaintiffs suggesting the plaintiff brought the case because he or she was "uncomfortable" with the alleged harasser's homosexuality, rather than because he or she thought sex discrimination was afoot.[414] In one case, the plaintiff had referred to her alleged harasser as a "'fat lesbian.'"[415] In another, the harassment complained of was that a customer's employee had made "'unmanly gestures'" by wiggling his fingers and had given the plaintiff a "'gay look'" with "'googling eyes.'"[416] In response, the plaintiff "asked a non-receptive, married, female employee for a dinner date" just to demonstrate he was "not 'gay.'"[417]

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413. *See, e.g.*, Dale Carpenter, *Same-Sex Sexual Harassment Under Title VII*, 37 S. TEX. L. REV. 699, 705 n.26 (1996) ("At least one practitioner has admitted to me that she exploits anti-gay prejudice in her efforts to induce the court to recognize same-sex harassment in the context of unwelcome sexual advances."). For examples of antigay rhetoric from the plaintiffs' briefs in *Kampmier v. Emeritus Corp.* and *Dick v. Phone Directories Co.*, see *supra* notes 338–39, 348, 378, and 406.

414. *See* Sillars v. Nevada, No. 3:07-CV-00041-LRH-RAM, 2008 WL 4540457, at *2 (D. Nev. Oct. 6, 2008) (noting that the plaintiff informed her supervisor that it "'just really made [her] uncomfortable, to have a female that [she] considered a friend have romantic feelings toward [her]. [She] didn't know what to do about it. [She] was looking for guidance'" (alterations in original)), *aff'd*, 385 F. App'x 669 (9th Cir. 2010); Jones v. Potter, 301 F. Supp. 2d 1, 8 (D.D.C. 2004) ("Plaintiff testified that he is a Christian man and therefore, in his view homosexuality is a sin, and it makes him '[r]eal uncomfortable.'" (alteration in original)).

415. Reissner v. Rochester Gas & Elec. Co., No. 02-CV-6353-CJS, 2004 WL 941645, at *3 (W.D.N.Y. Apr. 22, 2004).

416. Higgins v. Vitran Express, Inc., No. 1:09-cv-228, 2011 WL 3652253, at *2–3 (S.D. Ohio June 6, 2011).

417. *Id.* at *1.

In other cases, the alleged "harassment" is so insignificant as to suggest that the plaintiff was motivated by homophobic panic.[418] For example, in *Budenz v. Sprint Spectrum, L.P.*,[419] the plaintiff's "primary complaint" of harassment was that his male colleague repeatedly gave him shoulder massages, lasting from one to five seconds, while he was working at his computer in his cubicle.[420] Shoulder massages may be unwelcome, but they certainly do not rise to the level of severe or pervasive harassment.[421] The plaintiff thought the massage constituted sexual harassment because it was not "normal for a guy to massage another guy's back."[422] The plaintiff's problem was his fear that the harasser was gay (not "normal"). He pointed to the fact that his harasser had friends with "'alternative lifestyles.'"[423] In another case, the Eleventh Circuit observed that a male plaintiff "found certain behavior sexual that no reasonable person would, perhaps because it was coming from a gay man."[424] These cases are consistent with research that suggests same-sex sexual overtures toward men are more likely to be perceived as harassment than opposite-sex overtures toward men.[425]

Before these cases are weeded out at summary judgment, homophobic accusations become occasions for employers and their

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418. *See, e.g.*, Thomas v. Corrs. Corp. of Am., Inc., No. CIV-07-1378-D, 2010 WL 565272, at *5 (W.D. Okla. Feb. 11, 2010) (asking the plaintiff about her marital status and inviting her out for a drink); Berkeley v. Potter, No. CIV A 06-4490(NLH), 2008 WL 746602, at *1 (D.N.J. Mar. 18, 2008) (invading the plaintiff's "personal space," brushing against his chest, and giving the plaintiff a "'strange and unusual, queer gaze,'" all on a single occasion); Landrau Romero v. Caribbean Rests., Inc., 14 F. Supp. 2d 185, 189 (D.P.R. 1998) (winking and smiling on several occasions).

419. Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261 (D. Kan. 2002).

420. *Id.* at 1266.

421. Sometimes even heads of state give unwelcome shoulder massages. *See* Warren St. John, *The Politics of Good Touch, Bad Touch*, N.Y. TIMES, July 23, 2006, at H1 (discussing a "diplomatic goof" in which President George W. Bush gave German Chancellor Angela Merkel a shoulder massage at the 2006 G8 summit).

422. *Budenz*, 230 F. Supp. 2d at 1266 (quotation mark omitted).

423. *Id.*

424. Corbitt v. Home Depot U.S.A., Inc., 589 F.3d 1136, 1154 n.11 (11th Cir. 2009), *vacated and reh'g en banc granted*, 598 F.3d 1259 (11th Cir. 2010), *appeal dismissed*, 611 F.3d 1379 (11th Cir. 2010). In that case, the issue was not whether the harassment was "because of sex," but whether it met the "severe or pervasive" requirement. The court rejected the suggestion that "the fact that the touchings were same-sex somehow makes them more severe." *Id.* at 1155. However, the opinion was vacated by an order granting rehearing en banc, and the parties agreed to dismiss the case before it could be reheard.

425. *See generally* Margaret S. Stockdale, *Perceptions of the Sexual Harassment of Men*, 5 PSYCH. MEN & MASCULINITY 158, 165 (2004).

lawyers to investigate the sexuality of alleged harassers. For example, as a result of the shoulder massages in *Budenz*, the alleged harasser found himself having to "den[y] that he is [a] homosexual or that he has ever desired a homosexual experience."[426] Employers, not individuals, are liable under Title VII.[427] Employers may not have any reason to protect the interests of accused harassers in discovery. It is common practice for employers to seek declarations of heterosexuality from accused harassers, whether in the form of written affidavits or deposition testimony.[428] An employer may even ask an alleged harasser to testify about her sexual orientation at trial.[429]

Citing *Oncale*, courts hold such discovery is plainly relevant.[430] It is true that courts are increasingly requiring a plaintiff to show only that her harasser sexually desired *her*, rather than "credible evidence of homosexuality."[431] One reason for this trend is that courts are concerned that "credible evidence of homosexuality" will be too hard for the plaintiff to come by.[432] But the trend toward requiring only

426. *Budenz*, 230 F. Supp. 2d at 1266.

427. 42 U.S.C. § 2000e(a) (2006).

428. *See, e.g.*, Noto v. Regions Bank, 84 F. App'x. 399, 402 n.2 (5th Cir. 2003); Hinton v. Tenn. Dep't of Children's Servs., No. 3:11-0158, 2012 WL 3626773, at *2 (M.D. Tenn. Aug. 21, 2012); Davidson-Nadwodny v. Wal-Mart Assocs., Inc., No. CCB-07-2595, 2010 WL 1328572, at *4 (D. Md. Mar. 26, 2010); Ogilvie v. N. Valley EMS, Inc., No. 07-485, 2008 WL 4761717, at *3 (E.D. Pa. Oct. 29, 2008); Reissner v. Rochester Gas & Elec. Co., No. 02-CV-6353-CJS, 2004 WL 941645, at *2 (W.D.N.Y. Apr. 22, 2004); Nguyen v. Buchart-Horn, Inc., No. Civ.A. 02-1998, 2003 WL 21674461, at *1 (E.D. La. July 15, 2003); Smith v. Cnty. of Humboldt, 240 F. Supp. 2d 1109, 1117 (N.D. Cal. 2003); Pedroza v. Cintas Corp., No. 6-01-3247-CV-S-RED, 2003 WL 828237, at *9 (W.D. Mo. Jan. 9, 2003), *aff'd*, 397 F.3d 1063 (8th Cir. 2005); Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1266 (D. Kan. 2002); Pavao v. Ocean Ships, Inc., No. C-97-4059-VRW, 1998 WL 917528, at *3 (N.D. Cal. Dec. 30, 1998). In one case, an employer collected affidavits from twelve of an alleged harasser's coworkers stating that none had any reason to believe the alleged harasser was homosexual. English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 846 (E.D. Va. 2002).

429. *See* Redd v. N.Y. Div. of Parole, 923 F. Supp. 2d 393, 409 (E.D.N.Y. 2013) (ruling on a motion in limine).

430. Smith v. Café Asia, 256 F.R.D. 247, 252 (D.D.C. 2009); Sorrell v. District of Columbia, 252 F.R.D. 37, 41 (D.D.C. 2008); *see* Herron v. Chisolm, No. CV412-041, 2012 WL 4753394, at *2 (S.D. Ga. Oct. 3, 2012) (dictum) ("The *discoverability* [o]f sexual orientation has long been relevant in Title VII cases. Such information can be used to prove, for example, the invidious discriminatory intent of same-sex defendants in sexual-harassment based, Title VII cases.").

431. For opinions demonstrative of this trend, see *supra* note 54.

432. *See* Dick v. Phone Directories Co., 397 F.3d 1256, 1265 (10th Cir. 2005) ("[W]e find it would often be extremely difficult to obtain evidence tending to show a person's sexual orientation."); Thorne v. Sprint/United Mgmt. Co., No. 00-0913-CV-W-6, slip op. at 10 (W.D. Mo. Dec. 23, 2008) ("[E]vidence that a sexual harasser is gay may be hard to come by.

evidence of desire has not made the issue of sexual orientation irrelevant; indeed, as discussed, assumptions about sexual orientation determine the result in cases in which courts must decide whether the harasser desired the plaintiff.[433]

In cases in which the Equal Employment Opportunity Commission (EEOC) is the plaintiff, it may be the government, rather than the employer, asking for discovery on an employee's sexual orientation. In *EEOC v. Glenview Car Wash*,[434] the EEOC issued an interrogatory asking an employer to identify the alleged harasser's "'sexual orientation.'"[435] The court had rejected the parties' attempts to enter a protective order limiting public access to the court files in that case.[436] The EEOC argued that *Oncale* requires inquiry into the "harasser's gender preference," because "[i]t would seem an odd situation where the fact to be proven is that the harasser is homosexual, but it may not be proven by an admission from the harasser."[437] The EEOC clarified that it did "not believe that the sexual orientation of harassers *ought* to be a matter of concern in Title VII sexual harassment litigation," but stated it was "concerned, however, that if it [did] not inquire as to the sexual orientation of the harasser it [would] be foregoing the most efficient and effective method of providing 'credible evidence' that the harasser is a homosexual to the fact finder."[438] The court deferred decision on this motion several times until the case was settled.[439]

In one particularly egregious case, *Vaughn v. St. Tammany Parish School Board*,[440] the plaintiff accused his former supervisor, a

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Unfortunately, many homosexuals take great care to hide their sexual orientation from those with whom they work for fear that disclosure may lead to humiliation or even physical harm.").

433. *See supra* Parts I.C & II.C.

434. EEOC v. Glenview Car Wash, Inc., No. 05 C 5568 (N.D. Ill. consent decree entered July 5, 2006).

435. Defendant's Sur-Reply to EEOC's Motion To Compel at 1–3, *Glenview Car Wash, Inc.* (No. 05 C 5568) (N.D. Ill. May 9, 2006), 2006 WL 1773265.

436. *Id.* at 3.

437. EEOC's Brief on Discovery Disputes at 3, *Glenview Car Wash, Inc.* (No. 05 C 5568) (N.D. Ill. May 2, 2006), 2006 WL 1773264.

438. *Id.* at 6.

439. *See* Consent Decree, *Glenview Car Wash, Inc.* (No. 05 C 5568) (July 5, 2006); *see also* Docket Nos. 44, 64, 66, 68, *Glenview Car Wash, Inc.*, No. 05 C 5568 (N.D. Ill.) (deferring decision on the motion).

440. Vaughn v. St. Tammany Parish Sch. Bd., No. 04-1633, 2006 WL 950109 (E.D. La. July 5, 2006).

male, of sexual harassment. Citing *Oncale*, the plaintiff submitted the following two requests for admission to his alleged harasser:

> No. 2: Admit or Deny that you ever desired to have sex or sexual relations with Plaintiff.
>
> No. 3: Admit or Deny that you have had sex or sexual relations with another man at any time during the period of your employment by the St. Tammany Parish School Board.[441]

The plaintiff went so far as to oppose the defendant's request that any response be submitted under seal, a fact that made clear to the court that the requests were "intended to humiliate, oppress and harass the defendant."[442] Although the court did not allow the discovery requests to proceed, the questions themselves stand as accusations.

Thus, civil discovery has become a tool for plaintiffs to accuse alleged harassers of homosexuality in contexts, such as education, in which the stigma of that label might carry extreme professional consequences. Even if a plaintiff does not intend to intimidate her alleged harasser, she has every incentive to seek discovery on her harasser's sexual orientation to bolster her case. Thus, those accused of same-sex harassment are subjected to questioning about their sexual histories and desires, by strange lawyers, in the formal, stifling, and intimidating context of a deposition. They are asked to sign sworn statements, most likely drafted by their employers' lawyers, attesting to their heterosexual identities, desires, and relationships.

It might be objected that sexual harassment law has privacy implications in cross-sex cases as well, for example, by allowing female plaintiffs to publicly impugn the professionalism and marital fidelity of alleged male harassers with frivolous charges. Although this may be true, the privacy implications noted here are of a different nature because these cases not only accuse harassers of a lack of professionalism or possible infidelity, but also of possessing a stigmatized gay identity. The law reaffirms that stigma by placing a harasser's sexual orientation at the fulcrum of a same-sex harassment claim and immunizing harassment by ostensible heterosexuals, while punishing the same conduct if perpetrated by "open" homosexuals. The harm is not merely that the law requires exposure of matters considered by most people to be deeply personal and private. In this

441. *Id.* at *1 (denying a motion to compel due to constitutional concerns regarding the second request and overbreadth concerns regarding the third request).

442. *Id.* at *2.

context, the doctrine and discovery procedures act to reinforce the normative value and privilege of heterosexual identification, while underscoring the danger and stigma for anyone who might acknowledge experiencing same-sex desire.

III. DISTRACTING FROM DISCRIMINATION

In effect, in same-sex harassment cases, liability turns on whether a harasser identifies as gay. This doctrine protects the stability of heterosexual marital unions while punishing expressions of nonheterosexual identity or desires that may threaten a plaintiff's heterosexuality. This is not simply because the doctrine requires "credible evidence that the harasser was homosexual."[443] It results even in cases in which courts refuse to determine the harasser's sexual-orientation status, and ask instead whether the harasser desired the plaintiff.[444] These disparate results are part and parcel of the doctrine's focus on desire. This should be troubling for anyone concerned about gay rights or queer theories. But what about those whose concern is sex discrimination? Some may argue that the presumption that desire fulfills the "because of sex" requirement for a sexual harassment claim is necessary to accomplish the aims of sex discrimination law. Analyzing this argument requires a closer look at the harms that sexual harassment law is intended to address. This Part examines theories of the harm of sexual harassment, and argues courts and lawyers should abandon the presumption that desire is a proxy for sex discrimination.[445]

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

444. *See, e.g.*, Dick v. Phone Directories Co., 397 F.3d 1256 (10th Cir. 2005). For discussion of *Dick*, see *supra* Part II.C.

445. Many people consider the harm of sexual harassment to be something other than discrimination against men or women. Because sexual harassment law is generally grounded in Title VII's prohibition on sex discrimination, I do not discuss these theories at length. I am skeptical of these views and the legal rules they would require for reasons beyond the scope of this Article. But due to the fact that these alternative accounts of the harm of harassment may ground state laws and employer policies and may lurk behind the outcomes in federal cases, it is worth sketching out my bases for skepticism here.

Some consider sexual harassment harmful based on generalized disapproval of sexual desire, particularly when expressed outside of traditional marriage and the home. *See* Rubin, *supra* note 28, at 278. I am skeptical of these theories because, as Professor Martha Nussbaum has described, projective disgust at sexual desire has operated in the service of group subordination in many eras and contexts. MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 107–14 (2006).

Others consider the harm of sexual harassment to be the threat that sexuality in the workplace poses to productivity. Professor Vicki Schultz has demonstrated how corporate

This Part will not offer a singular normative theory of the harm of harassment.[446] It is beyond the scope of this Article to defend a position on what theory or combination of theories, and what corresponding set of legal rules and presumptions, would best accomplish the statutory purpose. Rather, I argue that under any defensible theory, the focus on sexual orientation and desire distracts from sex discrimination, and precludes alternative legal presumptions that might expose whether harassment is sex discrimination. This results from what anthropologist Gayle Rubin has described as the "fallacy of misplaced scale" in which "[s]exual acts are burdened with an excess of significance."[447] When desire is treated as a proxy for discrimination, same-sex desire and its threat to the plaintiff's heterosexuality become seen as the principal harms, thereby displacing discrimination. This Article's claim is that sexual orientation and desire are not adequate proxies for discrimination in sexual harassment law. Although this Article criticizes cases for how they analyze evidence of sexual desire, it does not take a position on how any particular sexual harassment case should be resolved, because that question ultimately depends on one's normative theory of harassment.

For purposes of this discussion, I group views on why sexual harassment is sex discrimination into three perspectives: (1) sexual domination, (2) gender disadvantage, and (3) sex differentiation. This taxonomy of theories is a stylized one, intended for purposes of analysis of whether the presumption that desire is discriminatory is necessary to target the harm of sexual harassment. It is not intended for all purposes. It glosses over overlaps among, internal divisions within, and complications related to these three theories that may be

managers have enlisted this view of harassment in deeply troubling ways: to fashion the workplace into a sterile site of production rather than a potential site of citizenship and community, to enforce sexual conformity, and to undercut gender equality. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2067–72 (2003).

Some regard the fundamental harm of sexual harassment not to be discrimination against men or women, but rather, disrespect of any worker. *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 452 (1997) ("Hostile environment sexual harassment . . . is a type of incivility . . . or disrespect."). My view is that, in the U.S. context, a legal rule based on this perspective is likely to occlude sex discrimination and strain the political will for any antiharassment projects. *See* Clarke, *supra* note 28, at 1252–65.

446. *Cf.* Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1258, 1267 (1998) (arguing for "a theory that directs attention specifically to the multiplicity and variability of the dynamics that characterize sexual harassment").

447. Rubin, *supra* note 28, at 278–79.

important in other contexts. Additionally, legal rules and presumptions that flow from one theory may be consistent with or find support in the other theories.

The following sections will describe each theory of the harm of harassment and will argue that the preoccupation with desire is a distraction from that harm in each case. Each section will then turn to what sexual harassment doctrine would look like, from each normative perspective, if courts were to stop searching for sexual orientation and sexual desire, and instead adopt other presumptions related to what types of harassment are discriminatory. Figure 2 lays out the various theoretical perspectives on why sexual harassment is discrimination because of sex, the paradigmatic story of sexual harassment in each case, and a nonexhaustive list of ways in which plaintiffs might establish causation without recourse to evidence regarding a harasser's desires or orientation.

Figure 2. Proving Causation in Sexual Harassment Cases Without Desire or Sexual Orientation

Theory of Sexual Harassment	Paradigm Case	Evidentiary Routes for Proving Causation
Sexual Domination	Sexual abuse in the workplace (*Meritor v. Vinson*)	1. Unwanted sexual touching 2. Quid pro quo sexual extortion 3. Threats of sexual violence
Gender Disadvantage	Exclusion based on gendered stereotypes and structures (*Harris v. Forklift Systems*)	1. Admissions of sex stereotyping 2. Sex segregation or stratification 3. Harassment patently degrading to women or men
Sex Differentiation	Differential treatment of men and women (*Oncale v. Sundowner*)	1. Comparator evidence 2. Counterfactual admissions (for example, that plaintiff would not have been hazed had he been a woman)

A. Sexual Domination

The sexual-domination theory regards sexual harassment as discriminatory because it is a mode of male domination, like other forms of sexual abuse.[448] The key here is that sexuality, in the sense of the erotic, is the mode of domination. The paradigm case for this theory is the Supreme Court's decision in *Meritor v. Vinson*,[449] in which the female plaintiff was coerced into having sex with her male supervisor forty or fifty times and "even forcibly raped."[450] The sexual domination theory might best be exemplified by the work of Professor Catherine MacKinnon.[451] MacKinnon argued that gender roles are not natural but rather part of a socially constructed hierarchy of men over women "in which women are defined as gender female by sexual accessibility to men."[452] Sexual harassment is the convergence of "men's control over women's sexuality and capital's control over employees' work lives."[453] Hence, "[s]exual harassment is discrimination 'based on sex' within the social meaning of sex, as the concept is socially incarnated in sex roles."[454] Although there are many grounds for criticism of this argument, its influence cannot be denied.[455]

The sexual-domination perspective does not support the inference of discrimination from desire. The problem, from the sexual-domination perspective, is *domination*, not desire per se. Thus, courts err by dismissing cases in which desire seems to be lacking but sexual domination is present. MacKinnon filed a brief in *Oncale* arguing not for any desire-based rule, but rather, to establish the rule that "if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties."[456]

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448. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 156–58, 174 (1979).

449. Meritor v. Vinson, 477 U.S. 57 (1986).

450. *Id.* at 60.

451. *See generally, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635 (1983).

452. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 107 (1987).

453. MACKINNON, *supra* note 448, at 174.

454. *Id*. at 178.

455. Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the* California Law Review, 100 CALIF. L. REV. 381, 404 (2012).

456. Brief for Nat'l Org. on Male Sexual Victimization, Inc. et al., as Amici Curiae in Support of Petitioner at 4, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96-568), 1997 WL 471814. The brief expressly argued that "[s]exual orientation on its face

This raises a number of questions, including, what if acts are sexual and they hurt both sexes? Or, to rephrase, what does MacKinnon's theory have to say about the bisexual and equal-opportunity harassers? The response is that these "loopholes" are generated by a sort of legal formalism that fails to comprehend how unwanted sexual aggression is a form of masculine dominance. Harassment is about power, not desire. The law "typically conceives that something happens because of sex when it happens to one sex but not the other."[457] This leads to "head counting" in which courts ask whether a particular harasser victimized only members of one sex, and it is what gives rise to the theoretical possibility of the "bisexual defense."[458] But as courts have recognized in other contexts, "both sexes can be discriminated against based on sex at the same time from a single practice."[459] Imagine, for example, a racist supervisor who harasses both black and white employees using the same racial epithet.[460] Should only the black employees have a claim? MacKinnon concluded that although "head counting can provide a quick topography of the terrain, it has proved too blunt to distinguish treatment whose meaning is based on gender from treatment that has other social hermeneutics, especially when only two individuals are involved."[461]

Gender here is about masculinity and femininity, not men and women. Women can wield masculine power just as men can be feminized. Thus, in her *Oncale* brief, MacKinnon also made an argument about the gendered power dynamics at play: that "[m]ale rape—whether the victim is male or female—is an act of male

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disposes of nothing" while acknowledging that the sexual orientations of the perpetrator and victim "both can be relevant (if sometimes only minimally)." *Id.* at 24. For another interpretation of MacKinnon's argument, see JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 293–94 (2006).

457. MACKINNON, *supra* note 452, at 107.

458. *Id.* at 107–08.

459. Brief for Nat'l Org. on Male Sexual Victimization, Inc. et al., *supra* note 456, at 22 n.6. The Supreme Court struck down, on equal protection grounds, a law that required a widower seeking to collect benefits from his wife's work-related death to prove he was dependent on his deceased wife, but presumed that widows were dependent on their deceased husbands. *Id.* (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980)). Such a law discriminates against both widowers who may be denied benefits and working women who cannot be sure their husbands will be able to collect benefits upon their deaths. *Wengler*, 446 U.S. at 146.

460. *See* Jennifer A. Drobac, *The* Oncale *Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. 1269, 1279 (1999) ("Arguably, a perpetrator who calls all workers, regardless of race, 'niggers' discriminates, and is liable to any person so called.").

461. MACKINNON, *supra* note 448, at 108.

dominance, marking such acts as obviously gender-based and making access to sex equality rights for Joseph Oncale indisputable."[462] Male here means masculine, not by men. This is the crux of the argument—that sexual harassment is male dominance, not necessarily dominance by men. The key is the act, not the actor. The argument parallels that made by feminists in the 1970s about rape: that it should not be understood as a psychological phenomenon, that is, a deviant desire for sexual gratification, but rather, as a social phenomenon, that is, a way for the rapist to express masculine dominance and aggression.[463] Whatever the motive, the effect of rape is to maintain male supremacy, just as lynching maintained white supremacy.[464] Sexual harassment is not stripped of its meaning as an act of male supremacy when the harassers are of the same sex, just as lynching would not escape its historical connotation as a technology of racial supremacy if it were done by and to people of the same race. Rather than examining the harasser's motivations, from this perspective, courts ought to be focusing on the harm to the victim.

This theory raises other questions: What does it mean for an act to be "sexual"? Do the "simulated" sexual acts referred to so often in the case law qualify?[465] What about humor and "horseplay"? Asking a coworker out on a date? More importantly, is sexuality *always* domination? Should the law treat all sexual expression in the workplace as harassment, even if welcomed?[466] Professor Katherine Franke has referred to the sexual domination theory as "anti-sex."[467] She argues that it "conflates sex and sexism."[468] The antisex position resonates with cultural conservatives and those who view all sex in the workplace as a threat to efficiency.[469] However, very few legal theorists argue that all sexual expression or conduct in the workplace is because of sex.[470] Indeed, adherents of the sexual domination theory

462. Brief for Nat'l Org. on Male Sexual Victimization, Inc. et al., *supra* note 456, at 4.

463. *E.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 15, 105 (1975).

464. *Id.* at 254–55.

465. *See supra* notes 132–37 and accompanying text.

466. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 860 (1991) (arguing for a rule prohibiting even consensual relationships).

467. Franke, *supra* note 22, at 704.

468. *Id.* at 705; *see also* ZYLAN, *supra* note 7, at 176–79.

469. *See* Schultz, *supra* note 445, at 2063–64.

470. *But see* Estrich, *supra* note 466, at 820 (arguing that the problem with sexual harassment is that it is "sexual," and so "[n]ot only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a

of harassment argue that their brand of feminism is not a blanket condemnation of workplace sexuality.[471] Their arguments respond to the charge that radical feminism is antisex or eliminates the possibility of women's sexual agency, attributing a false consciousness to any woman who chooses sex.[472] The appropriate question, then, is how to judge whether sexual expression in the workplace is unwelcome.[473]

From this perspective, the judicial focus on desire has obscured how sexual harassment is a mode of male domination in same-sex cases. For example, in *Smith v. Hy-Vee*, the court was so preoccupied with the search for desire and its defense of the alleged harasser's heterosexual status that it failed to consider the social meaning of her simulated rape of the plaintiff—an imitation of the paradigmatic act of male dominance.[474] That the act was done by a woman to a woman, or that she had done the same thing to a man, does not change the social meaning of rape as male dominance. From the sexual-domination perspective, the fixation with desire has led courts to dismiss cases in which a harasser was motivated by disgust or aggression, allowing sexual abuse in the workplace to proceed unchecked.

What would sexual harassment doctrine look like, from this perspective, if the desire-based presumption were abandoned? Some might argue that the best solution would be to move to a "sex per se" rule that counts any unwanted sexual conduct or expression as "because of sex."[475] "Sex" here means erotic. Ten states have enacted

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reflection of the extent to which sexuality is used to penalize women"); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1728 (2002) (arguing for a revival of the "sex per se" rule, primarily for practical, rule-of-law reasons). Although MacKinnon has criticized hierarchical forms of sexual expression in the pornography context, she has not argued that sexual harassment law should prohibit all hierarchical sexual expression at work. *See* Robin West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 437–38 & n.173 (2005) ("MacKinnon has never argued (that I can find, and I have looked) that sexual harassment law should target hierarchic sex.").

471. Spindelman, *supra* note 7, at 212.

472. This charge resonates with the claim that MacKinnon has said all sex is rape. *See* Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143, 143 (1995) (book review) (denying the claim).

473. *See* Louise F. Fitzgerald, *Who Says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 7, at 94, 94; West, *supra* note 470, at 388–89.

474. *See supra* notes 274–90 and accompanying text.

475. *See, e.g.*, Schwartz, *supra* note 470, at 1702; *see also* Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER 99, 148 (2006).

statutes defining sexual harassment to include conduct of a "sexual nature."[476]

Although a sex per se rule would be less problematic than rules that turn on desire or orientation explicitly, it is not without disadvantages. A sex per se rule still requires courts to determine whether conduct is erotic or merely social, a question they are likely to answer by reference to normative notions of sexual orientation and desire, with the same disparate results they are reaching now.[477] Even in states that define sexual harassment to mean conduct of a "sexual nature," some courts have muddled the inquiry with the question of whether the harassment is motivated by desire.[478]

Another problem with these state laws is that nonsexual (meaning not erotic) harassment directed at one sex may not be cognizable as sex discrimination. For example, imagine a woman is constantly undermined and excluded from important meetings, trainings, and mentoring opportunities because she is a woman. Courts may not see nonsexual bullying of women thought to have "taken men's jobs" as discrimination.[479] Even if state courts are willing to consider nonsexual forms of harassment, they may regard them as not severe or pervasive, as compared to sexual conduct.[480] From the

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476. *See, e.g.*, CONN. GEN. STAT. ANN. § 46A-60(8) (West 2009); 775 ILL. COMP. STAT. ANN. 5/2-101(E) (West 2011); MASS. ANN. LAWS. ch. 151B, § 1(18) (LexisNexis 2008); MICH. COMP. LAWS ANN. § 37.2103(i) (West 2001); MINN. STAT. ANN. § 363A.03(43) (West 2012); N.D. CENT. CODE ANN. § 14-02.4-02(6) (West 2009); N.H. REV. STAT. ANN. § 354-A:7(V) (LexisNexis 2008); R.I. GEN. LAWS § 28-51-1(B) (2003); VT. STAT. ANN. tit. 21, § 495D(13) (2009); WISC. STAT. ANN. § 111.32(13) (West 2002); *see also* P.R. LAWS ANN. tit. 29, § 155B (2009); V.I. CODE ANN. tit. 10, § 64a(b)(4) (Supp. 2013). Some of these statutes may be interpreted to also require a plaintiff to show the harassment was "because of sex" as per *Oncale*. *See* Robinson v. Ford Motor Co., 744 N.W.2d 363, 367–70 (Mich. Ct. App. 2007) ("[P]laintiff must nonetheless show that he was subjected to a sexually hostile workplace 'because of sex.'"). *But see* Cummings v. Koehnen, 568 N.W.2d 418, 422 (Minn. 1997) ("[I]t is not necessary for a sexual harassment plaintiff to prove that the harassment occurred 'because of sex,' in addition to proving the elements of sexual harassment . . . .").

477. *Cf.* Schultz, *supra* note 22, at 1744–47 (describing courts' difficulty in determining whether particular actions or words constituted conduct of a sexual nature).

478. *See* Kalich v. AT&T Mobility, 679 F.3d 464, 472 (6th Cir. 2012) (discussing *Barbour v. Dep't of Soc. Servs.*, 497 N.W.2d 216, 218 (Mich. Ct. App. 1993) (per curiam)).

479. *See* Haynie v. State, 664 N.W.2d 129, 135 (Mich. 2003) (holding that, under Michigan law, "gender-based harassment" is not "sexual harassment" unless it took the form of "'unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature'" (quoting MICH. COMP. LAWS ANN. § 37.2103(i)). *But see* LaMont v. Indep. Sch. Dist. No. 728, 814 N.W. 2d 14, 19–21 (Minn. 2012) (rejecting the argument that Minnesota's statute limits sexual harassment claims to those alleging "conduct or communication of a sexual nature").

480. *See LaMont*, 814 N.W. 2d at 22.

sexual-domination perspective, this is deeply troubling, as it contributes to women's subordination to men.[481]

Apart from these concerns, the primary problem with a broad sex per se rule that would cover verbal and physical harassment is that the Supreme Court has rejected it. As Justice Scalia wrote in *Oncale*, "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the *words* used have sexual content or connotations."[482]

The Supreme Court has not, however, ruled out a presumption that *physical* conduct of a sexual nature is "because of sex." The Department of Education has interpreted Title IX, an analogue to Title VII in the education context, to forbid "acts of sexual violence" as "a form of sex discrimination" by definition.[483] In the Title VII context, some courts already recognize unwelcome sexual touching as per se discrimination, regardless of whether it is part of a sexual advance.[484] Courts might also recognize sexual extortion in the form of quid pro quo harassment as per se discrimination, regardless of the desires or ostensible orientations of harassers.[485] Threats of sexual assault might qualify as well. Courts might reason that these are paradigmatic forms of masculine domination—even when wielded by women, or against men. There may be room for interpretation when it comes to the meaning of "sexual touching," but doctrines that specify what types of touching are sexual (for example, intentional

481. This is even more troubling from the gender-disadvantage perspective. *See* Schultz, *supra* note 22, at 1687. Another problem is that a sex per se rule would create additional incentives for employers to ban welcome and consensual relationships on the job, creating a desexualized, sanitized, and ultimately dehumanized workplace in the service of an alienating form of managerial efficiency. Schultz, *supra* note 445, at 2087. Most sexual-domination theorists do not go so far as to take issue with welcome and consensual sex. *See supra* note 473.

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

483. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. 1 (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (defining "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent"). Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (1972) (current version at 20 U.S.C. § 1681(a) (2012)), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

484. *See supra* note 43 and accompanying text.

485. *See, e.g.*, Dear Colleague Letter from Russlynn Ali, *supra* note 483, at 1–2 (defining discrimination "on the basis of sex" under Title IX to include "rape, sexual assault, sexual battery, and sexual coercion").

touching of genitals or breasts) are preferable to those in which the sexual nature of a touch is determined by the harasser's orientation.[486] There is also room for homophobic interpretation when it comes to whether a harasser is engaged in quid pro quo harassment: explicitly or implicitly conditioning a professional opportunity on sex. But making the harasser's purported sexual orientation irrelevant to this inquiry would be an improvement over the status quo.

B. Gender Disadvantage

The gender-disadvantage school regards sexual harassment as discriminatory because it is a tool for enforcing sexist stereotypes and prejudices against men and women, just as gender stereotypes and prejudices have historically been used to exclude women from highly valued forms of work.[487] The key here is that gender, in the sense of a set of expectations regarding masculinity and femininity, is the mode of subordination.[488] The paradigm case for this school is the Supreme Court's decision in *Harris v. Forklift Systems, Inc.*,[489] in which the female plaintiff was subjected not only to sexual innuendo but also to harassing comments designed to undermine her competence as the office's only female manager. For example, she was asked, "'You're a woman, what do you know'"; she was told that "'[w]e need a man as the rental manager'"; and she was called "'a dumb ass woman.'"[490] The analogy here is to harassment based on race.[491]

From the gender-disadvantage perspective, the judicial focus on sexuality and desire misses the point entirely, as the problem is not sexuality or desire per se, but harassment designed to preserve

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486. This is not to say all sexual touching is unlawful discrimination. A plaintiff must also demonstrate that the conduct was unwelcome. *See* Caravantes v. 53rd St. Partners, LLC, No. 09 Cv. 7821(RPP), 2012 WL 3631276, at *4, *16 (S.D.N.Y. Aug. 23, 2012) (distinguishing unwanted anal and oral intercourse from a "game" involving touching of genitals "over the clothes" in which participants adhered to certain "parameters").

487. *See, e.g.*, Franke, *supra* note 22, at 771 (describing sexual harassment "as regulatory practice," that "inscribes, enforces, and polices a particular view of who women and men should be"); Schultz, *supra* note 22, at 1755 (describing a "'competence-centered' paradigm" that "understands harassment as a means to reclaim favored lines of work and work competence as masculine-identified turf—in the face of a threat posed by the presence of women (or lesser men) who seek to claim these prerogatives as their own").

488. For elucidation of the distinction between sex and gender and its implications for Title VII doctrine, see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995).

489. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

490. *Id.* at 19; *see* Schultz, *supra* note 22, at 1710–12 (discussing *Harris*).

491. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

workplaces as masculine or feminine spaces.[492] Professor Vicki Schultz has illustrated how the focus on desire has caused courts to disaggregate "sexual" forms of harassment from "nonsexual" forms of sex discrimination, and to disregard the latter or to fail to see the connections between the two.[493] Nonsexual forms of "sex harassment" might include sabotaging women's work; characterizing more desirable jobs as too physically challenging, dirty, or competitive for women; isolating women from networks of social support; or withholding opportunities for training from women.[494] The focus on sexual desire renders irrelevant evidence about "the larger structural context of the workplace, including the company's record on job segregation by sex."[495]

The focus on desire is distracting to courts and litigants. It "creates a negative dynamic that encourages women (and sometimes men) to frame their complaints in terms of sexual offense, even when much more—or much less—may be at stake."[496] Take, for example, *Love v. Motiva Enterprises*, a case previously discussed for finding that sexual desire is inconsistent with disgust.[497] The case also provides a useful example of how desire may have distracted from discrimination. Connie Love, the plaintiff, worked with Jeanne Sirey at Motiva's oil refinery in Norco, Louisiana. Love, who had a degree in nuclear engineering,[498] worked in the coker unit, monitoring production processes via computer screens.[499] At the time Love began working with Sirey, she weighed 338 pounds.[500] Sirey called Love a "stupid bitch," a "fat cow," and a "failure as a woman."[501] Sirey criticized Love for being "incapable of speaking up for herself."[502] She

492. *See* Schultz, *supra* note 445, at 2172–73 (arguing that the "proper goal is not to eliminate sexual conduct, but rather to dismantle sex discrimination").

493. Schultz, *supra* note 22, at 1689–90.

494. *Id.*

495. *Id.* at 1797.

496. Schultz, *supra* note 445, at 2152.

497. Love v. Motiva Enters. LLC, 349 F. App'x 900, 902–03 (5th Cir. 2009) (per curiam); *see supra* notes 166–75 and accompanying text.

498. Opposition to Motion for Summary Judgment at 2, Love v. Motiva Enters., LLC, 2008 WL 4286662 (E.D. La. Sept. 17, 2008), *aff'd,* 349 F. App'x 900 (5th Cir. 2009) (per curiam) (No. 07-5970).

499. Memorandum in Support of Motion for Summary Judgment at 2–3, *Love*, 2008 WL 4286662 (No. 07-5970).

500. Opposition to Motion for Summary Judgment, *supra* note 498, at 2.

501. *Love*, 349 F. App'x at 902.

502. *Love*, 2008 WL 4286662, at *1 n.2.

called Love a "sorry excuse for a woman" because Love did not make it "conducive for all women to come to the coker unit."[503] She said, "You do not deserve my respect because of the kind of woman you are" and asked, "How can you do the work you do as a woman and expect to get respect?"[504]

After analyzing Love's sexual-desire theory at great length, the district court addressed her sex-stereotyping theory almost as an afterthought.[505] The court rejected the stereotyping argument on the procedural ground that it had not appeared in Love's complaint.[506] Love's attorneys, apparently, had drafted their complaint with sexual desire, not stereotyping, in mind. The court also rejected the argument on substantive grounds. In their summary judgment brief, Love's attorneys argued that Sirey was engaged in sex stereotyping on account of Love's failure to "conform to Sirey's idea of a liberated, physically fit woman."[507] But in Sirey's comments, the court saw just Sirey's own "individual ideas" about "women's liberation and physical appearance."[508] The court refused to connect Sirey's criticisms of Love's weight to larger cultural expectations about women's bodies, although Sirey had made clear that her weight-based criticisms were connected to Love's gender, that is, her "'failure as a woman.'"[509] Nor did the court see Sirey's statements regarding Love's failure to make the coker unit conducive for other women as sex discrimination.[510] Here, Sirey faulted Love for failing to serve as a role model, representative, or pathbreaker—special requirements placed on Love because she was female. Sirey's criticism may suggest that not very many women had advanced to desirable positions in the

503. *Id.*

504. Opposition to Motion for Summary Judgment, *supra* note 498, at 6.

505. *See Love*, 2008 WL 4286662, at *9–10.

506. *Id.* at *9. This is despite the rule that "a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." Skinner v. Switzer, 131 S. Ct. 1289, 1296 (2011).

507. Opposition to Motion for Summary Judgment, *supra* note 498, at 5.

508. *Love*, 2008 WL 4286662, at *10.

509. *Id.* at *1 n.2; *see* Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 643 (2001) ("[T]he question of how entrenched the stereotype is should not be relevant, so long as it inheres in the decision-maker's mind.").

510. The court distinguished sex-stereotyping precedents on the ground that Love "stereotyped [Sirey] for not acting like a woman" rather than for acting "*like a man*." *Love*, 2008 WL 4286662, at *10. This distinction does not hold water. The sex stereotyping in *Price Waterhouse* included the criticism that the plaintiff was not meeting certain expectations for feminine behavior in her dress and demeanor. *See supra* note 41 and accompanying text.

Norco plant.[511] If the court were to take a structural account of the harm of discriminatory harassment, sex stratification of this sort could create a presumption that harassment was discrimination "because of sex."[512] However, Love did not argue, and it is not clear from the record, whether employment in the coker unit, or the refinery in general, was characterized by sex segregation or stratification.

Preoccupation with sexual desire and sexual orientation can also prevent consideration of sex stereotyping against men. In *Kalich v. AT&T Mobility, LLC*,[513] for example, a case decided by a federal court applying Michigan state law, a male supervisor mocked the male plaintiff in front of staff members by referring to him as "'Virginia, Margaret, and Peggy.'"[514] He also ridiculed the plaintiff's Yorkshire terrier, calling the dog "Fluffy or Princess."[515] He made comments to the plaintiff like, "'You should sew Kristine a quilt. Come on, Virginia. You know you can sew. Dear, you know you can do it.'"[516] He stared at the plaintiff's rear end and said, "'What? Do you not eat? You are wasting away. Your pants don't even fit you right anymore. You look like a girl.'"[517] The harasser's comments smack of gender stereotyping—that the plaintiff looked like a girl, that he should sew a quilt (traditionally women's work), and even that he had a feminine dog. This harassment communicated to the plaintiff that he had failed to live up to masculine norms while reaffirming the harasser's masculinity, a classic example of the sort of harm that sexual harassment law should address from the gender-disadvantage perspective.[518]

Despite the sex-specific nature of these comments, the Sixth Circuit saw no evidence the plaintiff was singled out "'because of' his

511. It appears from the record that most of Love's supervisors and colleagues were males. *See* Opposition to Motion for Summary Judgment, *supra* note 498, at 4.

512. *See infra* note 526 and accompanying text; *cf.* Hall v. City of Chicago, 713 F.3d 325, 332, 333 (7th Cir. 2013) (recognizing a cross-sex hostile-environment claim because the female plaintiff worked in a "traditionally male role[]" and her supervisor commented, "'I could slap that woman'").

513. Kalich v. AT&T Mobility, LLC, 679 F.3d 464 (6th Cir. 2012).

514. *Id.* at 468.

515. *Id.*

516. *Id.*

517. *Id.*

518. *See* Franke, *supra* note 22, at 769–71 (describing same-sex harassment cases in which conduct "authenticates the harassers' status as 'real men' and exiles [the victim] from the domain of men").

gender."[519] The court rejected each of the three *Oncale* theories seriatim in a conclusory paragraph.[520] Further, Michigan law, unlike federal law, has a separate element requiring that sexual harassment be erotic in form, which this was not.[521] The court parsed each of the harasser's statements and found no suggestions of sexual attraction.[522] From the gender-disadvantage perspective, it is impossible to read this discussion without thinking the court and the Michigan statute were entirely missing the point.

What would sexual harassment doctrine look like from the gender-disadvantage perspective without the inference of discrimination from desire? First, the gender-disadvantage paradigm would support a broadened understanding of *Oncale*'s holding that harassment may be because of sex "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[523] This reasoning would also apply to men who are victims of harassment for doing "women's work" in female-dominated professions such as nursing or kindergarten teaching. Second, the gender-disadvantage perspective supports the recent trend toward increased reliance on sex-stereotyping theories.[524] Under these theories, harassment designed to ensure conformity with norms for male and female comportment is discriminatory, even if the motive is not "general hostility" toward one sex.[525] Third, the gender-disadvantage perspective supports legal rules that focus on workplace structures rather than individuals, for example, by supporting a presumption that harassment in a workplace that is segregated or stratified along the lines of sex is discriminatory.[526]

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519. *Kalich*, 679 F.3d at 471.

520. *Id.* The court also noted that the harasser "knew or suspected that [plaintiff] was gay," and that "sexual orientation" discrimination was not prohibited by Michigan law. *Id.*

521. *See id.* at 471–73 (discussing *Haynie v. State*, 664 N.W.2d 129, 133 (Mich. 2003)).

522. *Id.* at 473.

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

524. See *supra* note 39 and accompanying text.

525. Additionally, hazing may aim to inculcate norms about jobs as properly masculine and to ensure group cohesion in those jobs. *See* McGinley, *supra* note 7, at 1229.

526. *See* Schultz, *supra* note 445, at 2172–83 (discussing social science evidence supporting the presumption that workers are more likely to experience sexual behaviors as discrimination in sex segregated or stratified work environments). This would remedy the difficulty many plaintiffs face in bringing suits in single-sex workplaces. *See supra* note 48 and accompanying text.

These legal rules are not mutually exclusive with those founded on the sexual-domination theory—they might be employed in the alternative or in combination. The Sixth Circuit has developed a sort of hybrid rule that combines concerns about gender disadvantage with concerns about sexual domination. Under this rule, harassment is "based on sex" if it is "explicitly sexual and patently degrading to women," meaning "that a reasonable person, regardless of gender, would consider the sexually offensive conduct and comments more offensive to women than men."[527]

C. Sex Differentiation

Finally, the sex-differentiation school regards sexual harassment as discriminatory because the harasser has taken the victim's sex into account, deviating from a norm of sex blindness.[528] The key here is that sex, in the sense of biological maleness or femaleness, is the mode of differentiation. Justice Scalia's opinion in *Oncale* may best represent this paradigm.[529]

At first glance, it seems this perspective most strongly supports the presumption that desire is discrimination. A harasser discriminates against men if (1) he only desires men and (2) he harasses the male plaintiff out of desire. However, the post-*Oncale* cases demonstrate this theory is not workable.[530] To determine whether a harasser desires only one sex, courts look to whether the harasser is "openly" homosexual.[531] Yet the group of people who are out at work does not represent the group of people with exclusively

527. Bradford v. Dep't of Cmty. Based Servs., No. 09-206-DLB-CJS, 2012 WL 360032, at *9 (E.D. Ky. Feb. 2, 2012) (citing Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 271–72 (6th Cir. 2009)). In *Gallagher v. C.H. Robinson Worldwide, Inc.*, the male harassers subjected all employees, men and women, to a sexualized environment, referring to "female customers, associates and even friends as 'bitches,' 'whores,' 'sluts,' 'dykes,' and 'cunts'"; ogling pornography; and discussing their strip-club exploits. *Gallagher*, 567 F.3d at 271. The court concluded that even though the plaintiff was not targeted because she was a woman, a reasonable person could have considered the harassment more offensive to women than to men. *Id.*

528. *See generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000) (discussing sex-blind norms in other antidiscrimination contexts).

529. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); *supra* note 34 and accompanying text.

530. Katherine Franke has pointed out that "this reasoning works only in a world populated exclusively by Kinsey [Zeros] and Kinsey Sixes, that is, people who are exclusively heterosexual or exclusively homosexual." Franke, *supra* note 22, at 737.

531. *See supra* Part I.B.

same-sex desires.[532] Other courts, recognizing the difficulties of determining sexual orientation, require only evidence of sexual desire for the same-sex plaintiff.[533] But a single instance of sexual desire does not support the inference of same-sex desires generally, let alone exclusively.[534]

Legal scholars have suggested two alternative versions of this argument. The first is the inseparability theory: that sexual desire is always discriminatory, because it is inextricably bound up with the sex of the target, even for bisexual individuals. The second is the preference theory: that courts may presume sexual desire is discriminatory because only a small percentage of people are indifferent to the sex of their object of attraction (in other words, "perfectly" bisexual).[535] But on closer examination, neither of these premises supports the blanket presumption that desire is discriminatory.

The inseparability theory posits that the law should presume that all sexual desire—all sexualized conduct in fact—is inextricably bound up with the sex of the target. Thus, even if we assume a perfectly bisexual individual, whose general preferences are sex neutral, that person's selection of any particular target will be informed by whether the target is a man or a woman, and how that target performs gender roles.[536] But this begs an unanswerable theoretical question about whether there can be sexuality outside of sex (meaning maleness and femaleness).[537] It also raises questions

532. *See supra* notes 89–93, 96, 113–114 and accompanying text.

533. *See supra* note 54 and accompanying text. As discussed, however, courts are unlikely to see same-sex sexual desire unless the alleged harasser self-identifies as gay. *See supra* Part I.C.

534. *See supra* notes 118, 152 and accompanying text.

535. By using the term "preference" here I do not mean to imply sexual orientation or desires are voluntarily chosen. I mean simply a preponderance of desires for members of one sex or the other.

536. *See* Schwartz, *supra* note 470, at 1783–84 ("To begin with, sexual conduct, whatever its motivation (desire or something else), occurs not between theoretical constructs—biological males and females lacking gender identity, or free-floating gender-role spirits—but between real people who display a complex mixture of biological sex and gender and who perceive and make assumptions about these same traits in the other. Such acts may be purged of much of their meaning if biological sex is removed from view.").

537. *Cf.* SEDGWICK, *supra* note 28, at 26 ("Some people, homo-, hetero-, and bisexual, experience their sexuality as deeply embedded in a matrix of gender meanings and gender differentials. Others of each sexuality do not."); Yvonne Zylan, *Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment*, 39 U. MICH. J.L. REFORM 391, 420 (2006) (arguing for a distinction between sexuality and gender).

about what level of causal force a discriminatory motive must have: Could it be just one motivating factor or must it be a necessary condition?[538] And whatever the quantum of causation required, it is not clear why a plaintiff should be able to rest on evidence of desire, rather than being required to point to evidence, such as statements by the harasser, indicating that the plaintiff's sex played a role in the harasser's selection of him as a target. Courts require this sort of evidence to support sex-stereotyping claims.[539]

A second argument is the preference theory: that monosexuality, meaning a sexual orientation toward only one sex (heterosexuality or homosexuality), supports the inference that the harasser took the victim's sex into account. This contrasts with bisexuality, in which sex is irrelevant to desire. To refine this argument, although some individuals might be bisexual, most nonetheless act in accord with preferences, however slight, for one or the other sex.[540] This logic assumes a Kinseyian model of sexual orientation, in which all individuals can be arrayed on a spectrum from 0 to 6, with 0 being perfectly heterosexual, 6 being perfectly homosexual, and 3 being perfectly bisexual.[541] Assuming only a small percentage of the population are Kinsey 3s, a theory of causation based on the presumption that desire is monosexual appears attractive for a legal

538. The Supreme Court has suggested it would hold that the term "because of" in Title VII, 42 U.S.C. § 2000e-2(a)(1) (2006), means but-for causation, in other words, that sex was a determinative factor. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013) (holding, in the context of Title VII's retaliation provision, that "the plain textual meaning[] . . . of the word 'because'" is but-for causation and that any contrary reasoning from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was displaced by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (interpreting the term "because of" in the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (2006), to require but-for causation). But even if a Title VII plaintiff does not have proof sex was a but-for cause of discrimination, she can still prevail by demonstrating that "sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). However, if she does so, a defendant may limit her remedies to certain forms of declaratory relief, injunctive relief, and attorney's fees and costs by establishing, as an affirmative defense, that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B). Thus, even under the "motivating factor" standard, a plaintiff's remedies are severely limited if a court concludes her sex was not a but-for cause of the harassment. *Oncale*'s desire analysis did not rest on a motivating-factor theory; rather, it rested on a notion of but-for causation: that in the typical case of male-female harassment, the "proposals of sexual activity would not have been made to someone of the same sex." Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 80 (1998).

539. *See supra* note 39 and accompanying text.

540. Katz, *supra* note 24, at 133–35.

541. *See id.* at 138–39.

doctrine seeking a shorthand for determining when conduct was because of sex.[542] Because most people have preferences for one sex or the other and act in accord with those preferences, desire should be presumed discriminatory.

But there are problems with importing the continuum model of sexual orientation into the law for this purpose. First, this model is a spatial metaphor that reduces the multiplicity of definitions of sexual orientation to a single, flat dimension.[543] Recognizing this, Kinsey himself argued that "the world is not to be divided into sheep and goats."[544] Second, the original Kinsey studies were based on self-reports (now over sixty years old).[545] We ought to be skeptical of self-reporting in the area of sexuality, even today.[546] The continuum model is premised on the notion that research could identify the valence of an individual's sexual desires—whether monosexual or bisexual—when people themselves struggle to identify their own sexual desires.[547] The stigma associated with bisexuality is likely to lead to underreporting of such feelings and experiences, even to the subject herself.[548] Third, the original Kinsey study did not purport to identify static preferences. It based its 0 to 6 designations on self-reports of whether individuals had ever experienced "psychosexual responses" or had "overt sexual experiences" with men and women.[549] An individual's past sexual experiences may not have been determined solely by internal preferences, but rather, in interaction with external

542. *See id.* (arguing for a rebuttable presumption of monosexuality).

543. *See supra* notes 70–73 and accompanying text. Additionally, the continuum model assumes that an increase in same-sex attractions corresponds with a decrease in cross-sex attractions, and vice versa. More recent research suggests a spatial model with two independent dimensions, one for same-sex attractions and one for cross-sex attractions. *See, e.g.*, Vrangalova & Savin-Williams, *supra* note 72, at 99.

544. ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 639 (1948).

545. *Id.* at 647; ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 471 (1953).

546. *See, e.g.*, Timothy L. McAuliffe, Wayne DiFranceisco & Barbara R. Reed, *Effects of Question Format and Collection Mode on the Accuracy of Retrospective Surveys of Health Risk Behavior: A Comparison with Daily Sexual Activity Diaries*, 26 HEALTH PSYCHOL. 60, 65–66 (2007) (discussing discrepancies between diary and retrospective self-reports of sexual activity).

547. *See supra* notes 94, 96, 113 and accompanying text.

548. *See supra* note 93 and accompanying text.

549. KINSEY, ET AL., *supra* note 544, at 647; KINSEY, ET AL., *supra* note 545, at 471. The Kinsey scale is not widely used by researchers today because "it suggests finer gradations of sexual orientation than are usually supported by the underlying data." LEVAY & BALDWIN, *supra* note 69, at 454. Instead, researchers use a five-point scale that includes homosexual, mostly homosexual, bisexual, mostly heterosexual, and heterosexual. *Id.*

opportunities and social contexts.[550] Subsequent research calls into question the assumption that sexual preferences remain constant over time for every individual.[551]

Another flaw in the preference theory is the presumption that harassers experience desire in accord with their general preferences. But what about those who experience desires contra their sexual preferences, for example, the Kinsey 1 (almost entirely heterosexual) who desires another man not "because of" that man's sex, but in spite of it, perhaps eroticizing the taboo?[552] In such a case, causation would be lacking for Title VII purposes.[553] Thus, the preference theory would seem to lend support to those court decisions dismissing same-sex claims in which harassers were involved in heterosexual marriages.[554] One of the tasks of this Article has been to reveal this significant loophole by cataloguing the many cases raising the issue. Some research suggests that the number of people who fall into the category of "mostly heterosexual" may be larger than those who fall under any other nonheterosexual label.[555] Moreover, this loophole exposes the normative void beneath the preference theory. Why should liability turn on orientation?

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550. *See supra* note 96 and accompanying text.

551. *See, e.g.*, Savin-Williams & Ream, *supra* note 73, at 386–87 ("Evidence to support sexual orientation stability among nonheterosexuals is surprisingly meager.").

552. The preference theory may also presume that for the majority of people, a target's sex is a necessary precondition for desire; that is, if a person were of the other sex, he or she would never have been desired. This claim is belied by the experiences of many individuals, self-identified as both hetero- and homosexual, who remain with their partners through changes in that partner's sexual or gender identity. *See, e.g.*, Sara Corbett, *When Debbie Met Christina, Who Then Became Chris*, N.Y. TIMES MAG., Oct. 14, 2001, at 84 (describing a partnership between two lesbians that continued following one partner's transition from a female to a male gender identity). *See generally* HELEN BOYD, SHE'S NOT THE MAN I MARRIED: MY LIFE WITH A TRANSGENDER HUSBAND (2007); VIRGINIA ERHARDT, HEAD OVER HEELS: WIVES WHO STAY WITH CROSS-DRESSERS AND TRANSSEXUALS (2007). The argument raises a dilemma about whether desire is about bodies or souls. *Cf.* CRAIG LUCAS, PRELUDE TO A KISS (Dramatists Play Serv. Inc. 2010) (1990) (telling the story of a young, newlywed woman whose soul switches bodies with an elderly dying man, and looking at whether her husband's desire could survive her change in sex and age).

553. *See* Katz, *supra* note 24, at 136–37 ("This is analogous to a white job applicant who fails to obtain a job at an employer that discriminates against minority applicants in favor of whites.").

554. *See supra* Part II.A.

555. *See, e.g.*, Vrangalova & Savin-Williams, *supra* note 72, at 96 ("[The mostly heterosexual identity group] was the most frequently chosen nonheterosexual identity label among both men and women. More women selected mostly heterosexual than all other nonheterosexual identities combined.").

Those in favor of the presumption that sexual desire or sexual conduct is discriminatory often cast their arguments as a sort of realpolitik response to a judicial need for bright-line rules to redress harms to women.[556] But the desire-based rule is not a bright line. Rather, it is a murky space within which judges allow ostensible heterosexuals to harass same-sex coworkers without risking their heterosexual identities. The bright-line rule applied by courts is that those who identify as gay must be harassing all same-sex coworkers out of sexual desire.

A move away from the desire-based rule is not likely to leave cross-sex harassment plaintiffs out in the cold. Other theories of causation are just as likely to cover the classic scenarios.[557] In the typical case of, for example, quid pro quo harassment, a man or woman should be able to demonstrate that he or she was subjected to sexual demands at work while members of the other sex were not, giving rise to an inference of discrimination.[558] Whether the motive was desire, hatred, power, or something else should not matter and is not a problem courts trouble themselves with in cross-sex cases.

The fixation with desire distracts courts from straightforward applications of the sex-differentiation principle. The logic of the sex-differentiation principle, as articulated by Justice Scalia, is that "but for" his sex, the plaintiff would not have been harassed. But in cases involving masculine horseplay or hazing, courts do not consider whether the male plaintiff would have been treated the same had he been a woman. In *EEOC v. Harbert-Yeargin*, the male plaintiffs

556. *See* Estrich *supra* note 466, at 860; Katz, *supra* note 24, at 103-04; Schwartz, *supra* note 470, at 1702.

557. *See* Figure 2.

558. For discussion of *Oncale*'s third evidentiary route, see *supra* note 37 and accompanying text. Prior to *Oncale*, some courts denied summary judgment based simply on evidence that a harasser had "single[d] out one sex" alone. Raney v. District of Columbia, 892 F. Supp. 283, 288 (D.D.C. 1995); *see also* Quick v. Donaldson Co., 90 F.3d 1372, 1374, 1379 (8th Cir. 1996) (holding that there was "a genuine issue of material fact as to whether the alleged harassment was gender based" because male, but not female, employees were exposed to harassment in the form of "bagging," which "typically involved an action aimed at a man's groin area"). For a recent decision adopting *Oncale*'s third route in a case alleging male-on-male sexual assault, see *Barrows v. Seneca Foods Corp.*, 512 F. App'x 115, 118 (2d Cir. 2013). Although this rule does not provide for liability when an employer can show men and women encountered identical courses of harassment, such cases are exceedingly rare. *See supra* notes 57, 61 and accompanying text. In all-male or all-female workplaces, a plaintiff may need to rely on other presumptions or legal rules. *See supra* note 48 and accompanying text. For example, courts might allow such claims to proceed on the theory that harassment in all-male or all-female workplaces should be presumed discriminatory, based on research suggesting sex-segregated environments are prone to harassment designed to enforce gender norms. *See supra* note 526.

worked at a construction site where all but three of the 292 employees were men.[559] The plaintiffs alleged they were subjected to "unwanted touching, poking, and prodding in their genital areas" by other men, a practice known as "goos[ing]" and thought to be male "horseplay."[560] After one plaintiff complained, he was taunted and told that if he were a "'real man,' he would address the matter in a manner other than by filing a sexual harassment complaint."[561] The three women testified that although they had daily contact with the construction workers, they were never touched inappropriately.[562] Both harassers stated that they would never have goosed the women.[563] One of the harassers testified to the effect of, "Of course I didn't do that to women. What kind of a guy do you think I am?"[564]

The court disregarded this statement as self-serving chivalry in holding the harassment was not "because of sex."[565] It compared the conduct to *Oncale*, in which it was "easy to conclude the harasser would not have been predatory toward females" because "[t]he harasser was a homosexual."[566] This was a mistake—there was no finding in *Oncale* that any harasser was homosexual. The mistake illustrates the grip that sexual desire has on judicial imaginations. Looking at this case in terms of the sex-differentiation paradigm, the court should have found sufficient evidence that the harassment was because of sex—the harassers' statements amount to direct admissions that they would not have subjected the plaintiffs to the same sort of hazing had they been women. But for their sex, the male plaintiffs would not have been harassed. Chivalry is no less disparate treatment because it favors women. This case reveals that the court conceived the real harm of harassment to be unwanted same-sex desire, not disparate treatment based on sex.

The sex-differentiation paradigm would support many of the same evidentiary presumptions as the sexual-domination and gender-disadvantage theories. It would also support finding causation when, for example, there is evidence showing no one of the opposite sex was

559. EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 503 (6th Cir. 2001).

560. *Id.* at 501–02.

561. *Id*. at 502.

562. *Id.* at 503.

563. *Id.*

564. *Id.* at 520.

565. *Id.* This is despite the rule that credibility determinations are the province of the factfinder. *See* Kansas v. Ventris, 556 U.S. 586, 594, n.* (2009).

566. *Harbert-Yeargin, Inc.*, 266 F.3d at 522.

harassed in the same manner as the plaintiff,[567] or a counterfactual admission by a male harasser that he would not have subjected the male plaintiff to the same sort of hazing had he been a woman.[568]

A pessimist might argue that it seems unlikely, at this point, that sexual desire will lose its grip on sexual harassment law. *Oncale* recognized the theory and courts continue to recite it. However, judicial opinions on this issue reflect growing concern about the difficulties inherent in determining sexual orientations. If the desire/orientation inquiry will not be abandoned, as a second-best solution, then, courts ought to abandon efforts to determine the harasser's sexual orientation for all purposes and in all contexts, and instead look for evidence of what I term the harasser's "workplace-harassment orientation." This inquiry would find that harassment was based on sex if a harasser engaged in quantitatively or qualitatively worse treatment of men or women in the workplace. The Seventh Circuit described an inquiry akin to this approach in *Shepherd v. Slater Steels Corp.*,[569] a case in which the plaintiff stated at his deposition that he believed the harasser to be bisexual.[570] The court reasoned: "Whatever beliefs [the plaintiff] may have as to [the harasser's] sexual orientation and his propensity to harass women as well as men are to a large extent irrelevant; what matters is whether [the harasser] in fact did sexually harass members of both genders."[571] The court refused to dismiss the case on the ground that the harasser did not discriminate between men and women, holding that the evidence did not show that he "harassed women at the Slater plant in the same way and to the same degree that he allegedly harassed [the male plaintiff] . . . ."[572] Such an approach would better reflect the social science on sexual orientation, which recognizes that there is no single test of sexual orientation, only various definitions that may be appropriate for various purposes.[573]

567. *See supra* note 558 and accompanying text.
568. *But see supra* notes 564–66 and accompanying text.
569. Shepherd v. Slater Steels Corp., 168 F.3d 998 (7th Cir. 1999).
570. *Id.* at 1011.
571. *Id.* (emphasis omitted).
572. *Id.*
573. *See supra* note 73 and accompanying text.

IV. IMPLICATIONS FOR OTHER CONTEXTS

This Part will draw out some lessons from the same-sex harassment cases for determinations of sexual orientation and desire in other contexts, and ask some preliminary questions about how the law ought to engage with sexual orientation and desire in those areas.

Although this study concludes that determinations of sexual desires and orientations should not function as proxies for discrimination in sexual harassment law, it does not suggest that ignoring sexual orientation is a possible or desirable goal for the law. Rather, sexual-orientation categories should be foregrounded and interrogated. In many of the cases discussed in this Article, courts purported to set aside *Oncale*'s requirement of "credible evidence of homosexuality" and look instead for evidence that the harasser desired the same-sex plaintiff.[574] But in doing so, these courts did not set aside misconceptions about sexual orientation. Rather, they presumed harassers were heterosexual, unless the harasser self-identified otherwise, and further assumed that this negated any possibility of same-sex desire.[575] On the other hand, if confronted with evidence that a harasser self-identified as gay, courts found the inference of desire nearly automatic.[576] The problem is not mere recognition of sexual-orientation categories; it is the assumption that specific desires necessarily follow or do not follow from orientations. In other areas of the law that turn on findings of sexual desire, for example, in family and criminal-law contexts, scholars, courts, and advocates might critically consider whether similar assumptions about sexual orientation are driving results.[577]

The same-sex harassment cases show that there are still dangers in legal doctrines that navigate sexuality categories, even though legal and cultural norms are shifting toward a vision of variation in

574. *See supra* note 54 and accompanying text; *supra* Part I.C.

575. *See supra* Part I.C.

576. This was the case in, for example, *Dick v. Phone Directories Co. See supra* notes 376–95 and accompanying text.

577. Recent work has critically examined how race and gender norms influence determinations of sexuality in the context of child-molestation law. *See* Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. 609, 613–14 (2013). In light of the same-sex harassment cases, we might also ask whether sexuality determinations in child-abuse cases are influenced by views about sexual orientation.

sexuality as benign or even productive.[578] The danger may not take the form of overzealous labeling of individuals as lesbian, gay, or bisexual, but rather, of undercounting those who do not fit neatly into these categories. Courts are likely to refuse to acknowledge forms of sexuality that do not fit predefined molds, particularly the farther they stray from the conventional model of sex within heterosexual marriage. Although courts may be less inclined to indulge outright homophobia, they may continue to impose normative visions of appropriate sexuality that protect traditional marriages.[579]

This study shows that definitions of sexual orientation based on self-identification may not work in all contexts.[580] When negative consequences attach to a determination of sexuality, as in sexual harassment law, definitions based on self-identification are likely to have unequal results. Those who are "openly" gay, lesbian, or bisexual will face adverse consequences, while ostensible heterosexuals who engage in the same behaviors will not. But self-identification may also be problematic when positive consequences attach to a determination that a person is gay, lesbian, or bisexual.

For example, many state and local laws protect against discrimination on the basis of sexual orientation.[581] In this context, there is a temptation to require a plaintiff to prove she is a member of a protected class (that is, lesbian, gay, bisexual, or transgender) as part of her prima facie case of discrimination.[582] The problem is that just like in the same-sex harassment context, courts rely on narrow, self-identification and reputation-based definitions, which distract from the purpose of remedying discrimination and require a plaintiff who desires the law's protection to "out" herself. New York law, for example, bars discrimination based on sexual orientation, including "perceived" sexual orientation.[583] In one harassment case under the New York antidiscrimination statute, coworkers insinuated that the

578. William Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1334–35 (2010).

579. *See supra* Part II.A.

580. This is not to say that self-identification is always inappropriate. For example, self-identification may work in identifying participants for employer-sponsored diversity programs which have the goal of ensuring a critical mass of minority employees.

581. *See supra* note 27. Proposed federal legislation would do the same.

582. *See* McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (describing the prima facie case of discrimination).

583. N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010); *see id.* § 292(27) (defining "sexual orientation" as "actual or perceived").

plaintiff was gay, taunting him for listening to "gay boy music," and calling him a "'dick smoker.'"[584] But the court dismissed the claim, because the plaintiff testified "that he is a heterosexual male, was married, fathered a child, is masculine, and has no feminine characteristics, traits, tastes or habits."[585] The harassers testified that they did not think the plaintiff was gay.[586] This case raises the question: Why are a harasser's beliefs about the plaintiff's "real" sexual orientation controlling? The law protects on the basis of "sexual orientation," not "homosexuality." The coworkers' taunts were indisputably pointed at the plaintiff's sexual orientation, whatever that orientation might have been. Moreover, their bullying promoted the stigmatization of gay identities and superiority of straight identities, with the potential to discourage the plaintiff or others from coming out at work. These forms of discrimination seem to be exactly what this type of statute was intended to address.[587]

Likewise troubling are definitions based on the idea that same-sex desire is always manifested in sincere, unambiguous, caring, private, committed relationships. These sorts of relationship-based definitions can undercount the population that needs protection.[588] For example, one basis for asylum is a likelihood of future persecution based on "membership in a particular social group,"

584. Glinski v. Radioshack, No. 03-CV-930S, 2006 WL 2827870, at *2–3 (W.D.N.Y. Sept. 29, 2006).

585. *Id.* at *11 n.12.

586. *Id.*; *see also* Akoidu v. Greyhound Lines, Inc., No. B147046, 2002 WL 399476, at *5–7 (Cal. Ct. App. Mar. 15, 2002) (holding that a plaintiff who testified that "he was not homosexual" and that his "coworkers knew he had been married and had a child" had failed to establish he "was in the protected class of homosexuals or persons perceived as homosexual"); *cf.* 1212 Rest. Grp., LLC v. Alexander, 959 N.E.2d 155, 168 (Ill. App. Ct. 2011) (upholding a finding that harassers perceived a plaintiff to be gay based on their antigay insults and statements to coworkers that they thought the plaintiff was gay). Although I agree with the court's conclusion in *Glinksi* that the harassment was not severe or pervasive, I question its conclusion that the harassment was not motivated by the plaintiff's perceived sexuality.

587. For analogous arguments in the race context, see generally D. Wendy Greene, *Categorically Black, White or Wrong: The Emergence of an "Actuality Requirement" and Identity Adjudication in Title VII Litigation*, 47 U. MICH. J.L. REFORM (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148754 (discussing claims in which an identity characteristic has been misperceived); Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010) (discussing interracial solidarity claims).

588. This is not to say relationship-based definitions are irrelevant in every context. Such definitions have obvious application in equal protection arguments for same-sex marriage. Many scholars have described how definitions of sexual orientation status that emphasize the importance of relationships to identities can support arguments for same-sex marriage. *See supra* note 2.

including sexual identity.[589] In these cases, immigrants often have incentives to hide their sexual identities, for fear of persecution.[590] Nonetheless, some tribunals have applied restrictive definitions of gay identity requiring a consistent record of self-identification and same-sex relationships. In one asylum case, although the petitioner stated he would probably engage in a same-sex relationship if returned to Morocco, the immigration judge (IJ) noted the petitioner had not had "any boyfriends or other gay encounters in Morocco," and that although he had engaged in homosexual conduct in the United States, "he has had no boyfriends" and did not "appear to be committed to any particular homosexual relationship."[591] Here the IJ evaluated the petitioner's sexual orientation by reference to an inapplicable, culturally specific model of gay identity as living openly in a committed relationship.[592]

The same-sex harassment cases demonstrate that if not provided with a specific definition of the aspect of sexual orientation relevant for the particular legal inquiry, courts will apply idiosyncratic, faulty, or one-size-fits-all definitions. Legal actors assume that knowing someone's sexual orientation is a matter of common sense. But the experience of social science researchers suggests no general definition is possible—sexual orientation is a multidimensional phenomenon.[593] It may be consistent or inconsistent, static or dynamic, acknowledged or unacknowledged, visible or invisible, a source of pride or shame, or all these things at once. Any purportedly comprehensive definition of sexual orientation will inevitably fail to match the lived experiences of many people and is unlikely to meet the purposes of the law. Rather than applying an all-purpose definition, courts ought to follow the

589. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

590. *See, e.g.*, Razkane v. Holder, 562 F.3d 1283, 1285 (10th Cir. 2009) ("[The petitioner] was not open with his friends, family members, or community about his sexuality because homosexuality is perceived as deviant behavior in Morocco. He avoided dating and kept his contacts with gay men to a minimum."); Boer-Sedano v. Gonzales, 418 F.3d 1082, 1085 (9th Cir. 2005) ("Boer-Sedano testified that he has known he was gay since the age of seven and that he could not live 'a gay life openly in Mexico' because of how he would be treated if his sexuality were known.").

591. *See Razkane*, 562 F.3d at 1286 (reversing a Board of Immigration Appeals' opinion); *see also* Ali v. Mukasey, 529 F.3d 478, 491 (2d Cir. 2008) (reversing a Board of Immigration Appeals' opinion in which the IJ stated that "no one would perceive [the petitioner] as a homosexual unless he had 'a partner or cooperating person'").

592. *Razkane*, 562 F.3d at 1286.

593. *See supra* notes 70–73 and accompanying text.

model of social scientists in disentangling the component of sexual orientation that is relevant to the legal inquiry.[594]

CONCLUSION

If the sexual harassment cases are any indication, courts are likely to presume that assignment of sexual orientations or sexual desires is a facile enterprise, without recognizing that sexual orientation might be defined along different axes for different purposes, and that such inquiries are likely to be intrusive and entail heterosexism. Courts, advocates, and legal scholars ought to abandon the search for a unitary theory of sexual orientation. They should scrutinize laws that turn on sexual desire to guard against the dangers that the resulting determinations will be descriptively inaccurate, normatively troubling, and legally irrelevant. There may be legal justifications for relying on sexual-orientation categories or inferences of desire in certain contexts. But we should not assume such determinations are simple or necessary.

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

APPENDIX A

Federal Cases on Whether Workplace Same-Sex Harassment was "Because of Sex"[595]

1. Barrows v. Seneca Foods Corp., 512 F. App'x 115 (2d Cir. 2013)*
2. McBride v. Peak Wellness Ctr., Inc., 688 F.3d 698 (10th Cir. 2012)*
3. EEOC v. Boh Bros. Const. Co., 689 F.3d 458 (5th Cir. 2012)
4. Rayford v. Ill. Cent. R.R., 489 F. App'x 1 (6th Cir. 2012)*
5. Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463 (6th Cir. 2012)*
6. Kalich v. AT&T Mobility, 679 F.3d 464 (6th Cir. 2012)*
7. Redd v. N.Y. State Div. of Parole, 678 F.3d 166 (2d Cir. 2012)*
8. Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012)*
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595. Those cases which address an alleged harasser's sexual orientation or sexual desire for the plaintiff or analyze whether a plaintiff's evidence or allegations suffice under *Oncale*'s sexual desire or sexual orientation inquiry are noted with an asterisk.

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37. Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000)
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209. Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002)*
210. Bianchi v. City of Phila., 183 F. Supp. 2d 726 (E.D. Penn. 2002)*
211. Weston v. Pennsylvania, No. CIV.A.98-3899, 2001 WL 1491132 (E.D. Pa. Nov. 20, 2001)*
212. Jones v. Pac. Rail Servs., No. 00C5776, 2001 WL 1223533 (N.D. Ill. Oct. 12, 2001)*
213. Winters v. Fla. Dep't of Corr., 203 F. Supp. 2d 1305 (M.D. Fla. 2001)*
214. Burley-Sullivan v. City of Phila., No. Civ. A. 00-2413, 2001 WL 1175127 (E.D. Pa. Sept. 17, 2001)
215. Pierce v. Mich. Dep't of Corr., No. 4:00 cv 37, 2001 U.S. Dist. LEXIS 11992 (W.D. Mich. Aug. 9, 2001)
216. Ciccotto v. LCOR, Inc., No. 99 Civ. 11646(RMB), 2001 WL 514304 (S.D.N.Y. Jan. 31, 2001)*
217. Price v. Dolphin Servs., Inc., No. CIV.A.99-3888, 2000 WL 1789962 (E.D. La. Dec. 5, 2000)
218. Preston v. City of Danville, No. 99-461, 2000 U.S. Dist. LEXIS 20565 (E.D. Ky. Nov. 22, 2000)
219. Kahill v. Unified Gov't of Wyandotte Cnty./Kan. City, 197 F.R.D. 454 (D. Kan. 2000)*
220. Dolan v. Gen. Motors Corp., No. CIV.A.00-235-A, 2000 WL 34535547 (E.D. Va. Oct. 5, 2000)*
221. Suarez v. Charlotte-Mecklenburg Schs., 123 F. Supp. 2d 883 (W.D.N.C. 2000)
222. Bailey v. Henderson, 94 F. Supp. 2d 68 (D.D.C. 2000)

223. Dandan v. Radisson Hotel Lisle, No. 97C8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000)
224. Mims v. Carrier Corp., 88 F. Supp. 2d 706 (E.D. Tex. 2000)*
225. Cox v. Denny's, Inc., No. 98-1085-CIV-J-16B, 1999 WL 1317785 (M.D. Fla. Dec. 22, 1999)
226. Pirolli v. World Flavors, Inc., No. CIV.A.98-3596, 1999 WL 1065214 (E.D. Pa. Nov. 23, 1999), *aff'd in part, rev'd in part*, 263 F.3d 159 (3d Cir. 2001)*
227. Fry v. Holmes Freight Lines, Inc., 72 F. Supp. 2d 1074 (W.D. Mo. 1999)*
228. Breitenfeldt v. Long Prairie Packing Co., 48 F. Supp. 2d 1170 (D. Minn. 1999)
229. Merritt v. Del. River Port Auth., No. CIV.A.98-3313, 1999 WL 285900 (E.D. Pa. Apr. 20, 1999)*
230. Lee v. Gecewicz, No. CIV.A.99-158, 1999 WL 320918 (E.D. Pa. May 20, 1999)
231. EEOC v. Trugreen Ltd. P'ship, 122 F. Supp. 2d 986 (W.D. Wis. 1999)
232. Carney v. City of Shawnee, 38 F. Supp. 2d 905 (D. Kan. 1999)
233. Silva v. E.U.A. Nova, No. 97-117ML, 1999 U.S. Dist. LEXIS 22977 (D.R.I. Jan. 22, 1999)*
234. Pavao v. Ocean Ships, Inc., No. C-97-4059-VRW, 1998 WL 917528 (N.D. Cal. Dec. 30, 1998)*
235. Landrau Romero v. Caribbean Rests., Inc., 14 F. Supp. 2d 185 (D.P.R. 1998)*
236. Bacon v. Art Inst. of Chi., 6 F. Supp. 2d 762 (N.D. Ill. 1998)

APPENDIX B

Federal Cases on Workplace Same-Sex Harassment: Plaintiff Prevailing on "Because of Sex" Element

Oncale *Theory 1: Sexual Desire*[596]

1. Redd v. N.Y. State Div. of Parole, 678 F.3d 166 (2d Cir. 2012)
2. Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012)*
3. Bradford v. Dep't of Cmty. Based Servs., No. 09-206-DLB-CJS, 2012 WL 360032 (E.D. Ky. Feb. 2, 2012)
4. Tepperwien v. Entergy Nuclear Operations, Inc., 606 F. Supp. 2d 427 (S.D.N.Y. 2009), *aff'd*, 663 F.3d 556 (2d Cir. 2011)*
5. Kampmier v. Emeritus Corp., 472 F.3d 930 (7th Cir. 2007)
6. Russell v. Univ. of Tex. of Permian Basin, 234 F. App'x 195 (5th Cir. 2007)*
7. La Day v. Catalyst Tech., Inc., 302 F.3d 474 (5th Cir. 2002)*
8. Shepherd v. Slater Steels Co., 168 F.3d 998 (7th Cir. 1999)*
9. Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998)*
10. Morris v. Bellevue Hosp. Ctr., No. 09-cv-5692 (SLT)(RML), 2012 WL 5932784 (E.D.N.Y. Nov. 27, 2012)*
11. Caravantes v. 53rd St. Partners, LLC, No. 09 Civ. 7821(RPP), 2012 WL 3631276 (S.D.N.Y. Aug. 23, 2012)*
12. Reid v. Ingerman Smith LLP, 876 F. Supp. 2d 176 (E.D.N.Y. 2012)
13. Owens v. Omni Hotels Mgmt. Corp., No. 1:11-cv-00699-TWT-RGV, 2012 WL 1454082 (N.D. Ga. Mar. 27, 2012), *adopted by* No. 1:11-cv-00699-TWT-RGV, 2012 WL 1432389 (N.D. Ga. Apr. 25, 2012)*
14. Walton v. Van Ru Credit Corp., No. 10-344, 2011 WL 6016232 (N.D. Ill. Dec. 2, 2011)
15. Robinson v. Carefocus, Inc., No. 1:10-CV-208, 2011 WL 2672037 (E.D. Tenn. July 8, 2011)
16. Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. 2011)*
17. Provensal v. Gaspard, No. 10-4276-SS, 2011 WL 2004416 (E.D. La. May 23, 2011)
18. Knobbe v. Artco Casket Co., No. 4:10CV322 CDP, 2010 WL 2947731 (E.D. Mo. July 22, 2010)
19. Reagan v. City of Knoxville, No. 3:07-cv-189, 2010 WL 2639933 (E.D. Tenn. June 28, 2010)
20. Rogers v. Johnson, No. C08-4395 TEH, 2010 WL 1688564 (N.D. Cal. Apr. 26, 2010)

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596. An asterisk indicates the court concluded that the plaintiff had sufficient allegations or evidence that the alleged harasser was homosexual.

21. Davidson-Nadwodny v. Wal-Mart Assocs., Inc., No. CCB-07-2595, 2010 WL 1328572 (D. Md. Mar. 26, 2010)
22. Cragle v. Werner Enters., Inc., Nos. 3:07cv2132, 3:07cv2133, 2010 WL 936774 (M.D. Pa. Mar. 11, 2010)
23. Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745 (N.D. Ill. 2010)
24. Smith v. Pefanis, 652 F. Supp. 2d 1308 (N.D. Ga. 2009)*
25. Ellsworth v. Pot Luck Enters., Inc., 624 F. Supp. 2d 868 (M.D. Tenn. 2009)*
26. Gray v. Fed. Express Corp., No. 3:07-CV-00374, 2009 WL 305521 (N.D. Ind. Feb. 7, 2009)
27. Thorne v. Sprint/United Mgmt. Co., No. 00-0913-CV-W-6 (W.D. Mo. Dec. 23, 2008)*
28. Ogilvie v. N. Valley EMS, Inc., No. 07-485, 2008 WL 4761717 (E.D. Pa. Oct. 29, 2008)*
29. Johnson v. Dollar Gen. Corp., No. 2:06-CV-173, 2008 WL 2781660 (E.D. Tenn. July 14, 2008)*
30. EEOC v. Belle Glade Chevrolet-Cadillac-Buick-Pontiac-Oldsmobile, Inc., No. 07-80169-CIV, 2008 WL 62159 (S.D. Fla. Jan. 3, 2008)
31. EEOC v. Turkey Hill Dairy, Inc., No. 06-CV-04332, 2007 WL 2407095 (E.D. Pa. Aug. 8, 2007)
32. Thomas v. Willie G's Post Oak Inc., No. H-04-4479, 2006 WL 1117959 (S.D. Tex. Apr. 25, 2006)*
33. Peraita v. Don Hattan Chevrolet, Inc., No. 04-1197-WEB, 2005 U.S. Dist. LEXIS 38565 (D. Kan. Dec. 20, 2005)
34. Warmkessel v. E. Penn Mfg. Co., No. Civ.A.03-CV-02941, 2005 WL 1869458 (E.D. Pa. July 28, 2005)*
35. Tainsky v. Clarins USA, Inc., 363 F. Supp. 2d 578 (S.D.N.Y. 2005)
36. Cromer-Kendall v. District of Columbia, 326 F. Supp. 2d 50 (D.D.C. 2004)*
37. Jones v. Potter, 301 F. Supp. 2d 1 (D.D.C. 2004)*
38. Mann v. Lima, 290 F. Supp. 2d 190 (D.R.I. 2003)*
39. Fry v. Holmes Freight Lines, Inc., 72 F. Supp. 2d 1074 (W.D. Mo. 1999)*
40. Merritt v. Del. River Port Auth., No. CIV.A.98-3313, 1999 WL 285900 (E.D. Pa. Apr. 20, 1999)*
41. Bacon v. Art Inst. of Chi., 6 F. Supp. 2d 762 (N.D. Ill. 1998)

Oncale *Theory 2: Hostility Toward One Sex*

1. Piston v. Cnty. of Monroe, No. 08-CV-6435P, 2012 WL 4490652 (W.D.N.Y. Sept. 27, 2012)
2. Bradford v. Dep't of Cmty. Based Servs., No. 09-206-DLB-CJS, 2012 WL 360032 (E.D. Ky. Feb. 2, 2012)
3. Amezaga v. Potter, No. 04-1944 (RLA), 2007 WL 1387287 (D.P.R. May 8, 2007)

4. Bailey v. Henderson, 94 F. Supp. 2d 68 (D.D.C. 2000)
5. Lee v. Gecewicz, No. CIV.A.99-158, 1999 WL 320918 (E.D. Pa. May 20, 1999)

Oncale *Theory 3: Different Treatment of Sexes*

1. Barrows v. Seneca Foods Corp., 512 F. App'x 115 (2d Cir. 2013)
2. Brown-Baumbach v. B&B Auto., Inc., 437 F. App'x 129 (3d Cir. 2011)
3. Chavez v. Thomas & Betts Corp., 396 F.3d 1088 (10th Cir. 2005), *overruled on other grounds as recognized in* Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164 (10th Cir. 2006)
4. Leake v. Ryan's Family Steakhouse, 5 F. App'x 228 (4th Cir. 2001)
5. Piston v. Cnty. of Monroe, No. 08-CV-6435P, 2012 WL 4490652 (W.D.N.Y. Sept. 27, 2012)
6. McCarthy v. R.J. Reynolds Tobacco Co., 819 F. Supp. 2d 923 (E.D. Cal. May 4, 2011)
7. Strom v. Holiday Cos., 789 F. Supp. 2d 1060 (N.D. Iowa 2011)
8. Durkin v. Verizon N.Y., Inc., 678 F. Supp. 2d 124 (S.D.N.Y. 2009)
9. Stevens v. Water Dist. One, 561 F. Supp. 2d 1224 (D. Kan. 2008)
10. Amezaga v. Potter, No. 04-1944 (RLA), 2007 WL 1387287 (D.P.R. May 8, 2007)
11. Ashmore v. J.P. Thayer Co., 303 F. Supp. 2d 1359 (M.D. Ga. 2004)
12. Bray v. City of Chi., No. 01C7770, 2002 WL 31427026 (N.D. Ill. Oct. 30, 2002)
13. EEOC v. Pentman, LLC, No. 1:01CV0043, 2002 WL 548858 (W.D. Va. Apr. 12, 2002)
14. Winters v. Fla. Dep't of Corr., 203 F. Supp. 2d 1305 (M.D. Fla. 2001)
15. Merritt v. Del. River Port Auth., No. CIV.A.98-3313, 1999 WL 285900 (E.D. Pa. Apr. 20, 1999)
16. Carney v. City of Shawnee, 38 F. Supp. 2d 905 (D. Kan. 1999)

Price Waterhouse*: Sex Stereotyping*

1. Prowel v. Wise Bus. Forms, Inc. 579 F.3d 285 (3d Cir. 2009)
2. Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001)
3. Davis v. Vt. Dep't of Corr., 868 F. Supp. 2d 313 (D. Vt. 2012)
4. EEOC v. Turkey Hill Dairy, Inc., No. 06-CV-04332, 2007 WL 2407095 (E.D. Pa. Aug. 8, 2007)
5. Warmkessel v. E. Penn Mfg. Co., No. CIV.A.03-CV-02941, 2005 WL 1869458 (E.D. Pa. July 28, 2005)
6. EEOC v. Grief Bros., No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004)
7. Fischer v. City of Portland, No. CV02-1728, 2004 WL 2203276 (D. Or. Sept. 27, 2004)
8. Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002)

Other Theories

1. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc)
2. Watts v. Lyon Cnty. Ambulance Serv., No. 5:12-CV-00060-TBR, 2013 WL 557274 (W.D. Ky. Feb. 12, 2013)
3. Bligh-Glover v. Rizzo, No. 1:08CV2788, 2012 WL 4506029 (N.D. Ohio Sept. 30, 2012)
4. Bradford v. Dep't of Cmty. Based Servs., No. 09-206-DLB-CJS, 2012 WL 360032 (E.D. Ky. Feb. 2, 2012)
5. Aguilera-Corona v. Kefro LLC, No. Civ. 04-6283-AA, 2006 WL 696091 (D. Or. Mar. 14, 2006)
6. Vargas-Cabán v. Caribbean Transp. Servs., 279 F. Supp. 2d 107 (D.P.R. 2003)
7. Burley-Sullivan v. City of Phila., No. Civ.A. 00-2413, 2001 WL 1175127 (E.D. Penn. Sept. 17, 2001)
8. Preston v. City of Danville, No. 99-461, 2000 WL 33117411 (E.D. Ky. Nov. 22, 2000)
9. Breitenfeldt v. Long Prairie Packing Co., 48 F. Supp. 2d 1170 (D. Minn. 1999)