WHEN IS SEX BECAUSE OF SEX? THE CAUSATION PROBLEM IN SEXUAL HARASSMENT LAW

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"[S]exual harassment is ordinarily based on sex. What else could it be based on?"

—Judge Stephen Reinhardt, in Nichols v. Frank

INTRODUCTION

In 1991, Lois Robinson, a female welder who had worked in a mostly male shipyard for over a decade, won a judgment against her employer for sexual harassment. Robinson proved that the work atmosphere was infested with pornographic pictures and graffiti, which constituted a "visual assault on the sensibilities of female workers." Male co-workers frequently made graphic sexual comments in front of Robinson, referring to this plentitude of pornography. They put misogynistic sexual graffiti on the walls in her working areas and made her the object of sexual comments. Robinson did not allege that any of this abusive sexual conduct was in the nature of a sexual "overture," or that the harassers had a particular sexual interest in her. Yet the court had no trouble concluding that the harassment was "because of sex": "[S]exual behavior directed at women will raise the inference that the harassment is based on their sex."

In July 1997, in Doe v. City of Belleville, an appellate court ruled that a sixteen-year-old boy, whose male co-workers had subjected him to sexual epithets, grabbed his testicles, and even threatened him with rape, had sufficiently established "discrimination because of sex" to proceed to trial on his sexual harassment claim under Title VII. According to the court, there would have been no question that this was sexual harassment had the plaintiff been a woman, and the court found it clear that this too was a case of "discrimination because of sex," notwithstanding that the harassers and the victim were both

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1 42 F.3d 503, 511 (9th Cir. 1994).
3 Id. at 1495; see id. at 1495-98 (listing the items creating this visual assault).
4 See id. at 1498 (detailing comments that Robinson testified were made in front of and to her, including statements such as "[t]he more you lick it, the harder it gets," and "I’d like to get in bed with that," and "I’d like to have some of that").
5 See id. at 1499 (quoting the graffiti that contained remarks such as "[l]ick me you whore dog bitch").
6 Id. at 1522.
8 See id. at 595 (holding that a reasonable factfinder could conclude that the boy’s gender played a significant role in the harassment faced).
male. In a striking example of plain good sense, the court stated: "Frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender."

Robinson and Doe differ in the obvious respect that the former involved male-on-female and the latter male-on-male, or "same sex," harassment. Yet the cases have a common theme and bookend what was an important advance in sexual harassment doctrine: the recognition that harassing sexual conduct may be motivated by something other than sexual attraction toward the victim. Instead, courts were coming increasingly to the understanding that "why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point." This notion was embodied in what might be called the "sex per se" rule: that whatever other conduct might constitute sexual harassment, and whatever other elements might be required to prove actionable sexual harassment, sexual conduct per se established the "causation" element necessary under Title VII to prove that the conduct was "because of sex."

In the year following Doe, the law of sexual harassment underwent major development in both doctrine and academic theory. Four leading theoretical articles on sexual harassment by progressive "second generation" feminist scholars "sought to reconceptualize the wrong of sexual harassment so as to correct conspicuous errors and set the claim on a sound future course." As the last of these was being published, at the end of the 1997-1998 Term, the U.S. Supreme Court issued three opinions on workplace sexual harassment. One of these, Oncale v. Sundowner Offshore Services, Inc., held that a Title VII plaintiff

9 Id. at 580.
10 Id. at 580.
11 Id. at 578.
12 As will be explained further, the term "causation" is used in antidiscrimination law to refer to an intent requirement rather than, as in tort law, a nexus between the tortious act and the plaintiff's damages. Infra text accompanying notes 37-39.
14 Abrams, supra note 13, at 1171.
could state a claim for sexual harassment notwithstanding that the harasser was of the same sex.  

The coincidence of these Supreme Court decisions and the related works of scholarship suggested "the arrival of a jurisprudential moment characterized by reinvigorated theorizing about the appropriate legal response to sexual harassment." One federal appellate court paid a noteworthy tribute to these articles, which "reexamine the theoretical underpinnings of sexual harassment law," and pronounced that, due to the conjunction of this scholarship and the Supreme Court rulings, "we are witnesses to the birth of a second generation of sexual harassment law." 

Ironically, in the aftermath of these significant developments it is no longer clear—as it was prior to 1998—that a man or a woman who experiences severe or pervasive sexual epithets, crotch-grabbing, or even threatened rape has experienced "discrimination because of sex." In attempting to reconceptualize sexual harassment, both the second generation theorists and the Court reopened the question of causation and disturbed, if not rejected, the unquestioned assumption that sexual conduct in the workplace is per se "because of sex."

Second generation sexual harassment scholarship is characterized by efforts to solve various problems coming under the label "essentialism," which, in the context of sex discrimination, is the troublesome notion that womanhood is a monolithic concept, and that there is a single problem of sex discrimination that can be solved by a unified solution. For several years, feminist scholars have sought to advance beyond the classic antisubordination theory that Catharine MacKinnon articulated in Sexual Harassment of Working Women. While ac-

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17 Id. at 79. The other two opinions on workplace sexual harassment, Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries v. Ellerth, 524 U.S. 742 (1998), dealt with employer vicarious liability. A fourth decision dealt with a school's liability for a student's claim of hostile environment sexual harassment under Title IX. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that damages may not be received for teacher-student sexual harassment in an implied private action under Title IX unless certain school district officials have notice of and are deliberately indifferent to the teacher's conduct).


21 CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). MacKinnon's antisubordination theory holds that
knowing the great debt owed to MacKinnon and sharing her central idea that sexual harassment perpetuates the subordination of women in the workplace, the second generation theorists move away from MacKinnon's essentialism. In particular, these second generation scholars diverge from her underlying thesis that male sexual conduct inherently subordinates women—that male sexuality "is always, already sexist."\(^2\)

In *Oncale*, a unanimous Supreme Court cast doubt on the sex per se rule, stating that "[w]e 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."\(^2\) In so doing, the Supreme Court reexamined the question of causation, but conspicuously declined to adopt the feminist theorists' antisubordination commitments. While *Oncale*, on the surface, was a victory for the plaintiff, the Court went out of its way to avoid endorsing a theory of harassment on account of gender nonconformity and, in so doing, narrowed the avenues by which female plaintiffs in the most common sexual harassment cases can prove causation. At the same time, the *Oncale* Court embraced a sexual desire theory of causation that can be turned against gays and lesbians.

The second generation theorists, in effect, had invited the courts to reopen the question of causation in sexual harassment cases in order to solve the problems of essentialism: to embrace a prohibition on harassment on account of gender nonconformity, to broaden the understanding of harassment to include nonsexual but subordinating conduct, and to eliminate paternalistic "anti-sex" attitudes that surface in occasional harassment decisions. The *Oncale* decision joins the second generation theorists in breaking down an unexamined but useful consensus that was beginning to emerge among courts and the older theories of sexual harassment; namely, that sexual conduct is per se because of sex. But it does so without giving us the world the second generation theorists were looking for: proof of causation may now be more difficult for the H. Does and the Lois Robinsons. Thus, while it may be that the courts have accepted the invitation, they seem deter-

\(^2\) Franke, *supra* note 13, at 762.
It should come as no surprise that the Court in *Oncale* failed to pursue the antisubordination agenda once it reopened the question of the meaning of discrimination "because of sex." In this, *Oncale* exposes a problem in the antisubordination theories of sexual harassment themselves. Courts have always taken seriously the question of "causation" in employment discrimination law: the element of proof that an otherwise lawful workplace act is "because of" sex, race, or the other prohibited grounds. But recent antisubordination theorists may have paid insufficient attention to causation, particularly to the need to define "because of sex" in a way that bridges their theories to the doctrine in the courts.

In Part I of this Article, I examine what I call the "sex per se" rule. To trace its development in sexual harassment caselaw and explain the doctrinal function that it has fulfilled, I first examine the issue of causation in employment discrimination law. In cases of intentional discrimination, courts have always required some proof that the alleged discriminatory conduct was "because of" race/sex/etc. This "causation" element, which refers to proof of a conscious discriminatory intent, serves a gatekeeping function to distinguish discriminatory from presumptively lawful conduct. In harassment cases involving sexual conduct, however, the sex per se rule has emerged as an evidentiary shortcut, relieving plaintiffs of the burden of proving the harasser's motivation in targeting the plaintiff.

In Part II, I analyze the *Oncale* decision and its potential consequences. Although the plaintiff "won" in the Supreme Court, the implications in the opinion for this plaintiff on remand placed him in more of a losing position. Moreover, the ambiguous quality of the opinion extends to sexual harassment law more generally. While the opinion seems on one reading to open new opportunities for including broader categories of sexual harassment claims and claimants, it simultaneously creates the likelihood of retrenchment. The opinion seems to do away with the sex per se shortcut to proof of causation, thereby making it more difficult for many plaintiffs to prove that the harassment was "because of" sex. At the same time, *Oncale* fails to extend the protection of Title VII antiharassment doctrine to gays and lesbians. In important respects, *Oncale* looks more like a "reverse discrimination" case than a decision that furthers the rights of traditionally subordinated claimants.

In Part III, I examine three of the leading works of second generation sexual harassment theory, each of which abandons the sex per se
rule as it moves away from MacKinnon's underlying thesis that male sexual conduct inherently subordinates women. For Katherine Franke and Vicki Schultz, rejecting the "sexuality equals sexism" aspect of MacKinnon's work requires them to reject the notion that harassing conduct can be "because of sex" merely because it is sexual. While Kathryn Abrams is very committed to keeping new theories of sexual harassment connected to their traditional roots, she nevertheless does not identify a sex per se rule as something worth preserving from attack. I argue that the authors' rejection of the sex per se rule is not necessary to achieve their desired goals. Yet, rejecting the sex per se rule imposes a cost by compounding proof problems for plaintiffs and excluding claims by some of the very plaintiffs they seek to protect—like Joseph Oncale himself.

In Part IV, I analyze what I believe to be the source of the problem that has led feminist antisubordination theorists to overlook the value of the sex per se rule. Antisubordination theorists often give short shrift to the problems inherent in the causation issue in antidiscrimination law by overlooking the law's distinction between conscious and unconscious intentional discrimination. At the same time, antisubordination theorists have not fully appreciated the need to make textual arguments in addressing their theories to courts. I argue that the next stage of theoretical work on sexual harassment by feminist scholars

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24 See Franke, supra note 13, at 715 ("It is . . . disingenuous to answer that sexual harassment is conduct 'because of sex' by arguing that the 'sex' . . . refers to a class of human activity and not the identity category."); Schultz, supra note 13, at 1689 (challenging the sexual desire-dominance paradigm, which encompasses this rule).

25 See Abrams, supra note 13, at 1223 ("The based-on-sex requirement, as Franke skillfully demonstrates, needs substantial revision."). Abrams's critique, it should be noted, was aimed at Franke's What's Wrong with Sexual Harassment? and Anita Bernstein's Treating Sexual Harassment with Respect. Bernstein's important and thought-provoking article proposes replacing the "reasonable person" (or "reasonable woman") standard for evaluating the objective "severity" of the harassing conduct with a "respectful person" standard, which would focus the factfinder's perspective on the harassing conduct rather than the plaintiff's reaction to it. Bernstein, supra note 13, at 482-506. Bernstein's article differs from the others in its focus on the "severity elements" rather than the "causation" element of a sexual harassment claim. Infra notes 152, 283-84 and accompanying text. Therefore, Bernstein's argument, for the most part, falls outside the scope of mine. Bernstein herself distinguishes her focus as "narrow" compared to Franke's "ambitious reconception of sexual harassment." Anita Bernstein, An Old Jurisprudence: Respect in Retrospect, 83 CORNELL L. REV. 1231, 1232 (1998).

Additionally, while Abrams apparently wrote The New Jurisprudence before having a full opportunity to review Schultz's Reconceptualizing, she found her own views to be consistent with those of Schultz, which she briefly mentions favorably. Abrams, supra note 13, at 1171 n.7.
should be to explain the term "because of" in Title VII's text in terms broad enough to include unconscious intentional discrimination.

Finally, in Part V, I advocate a revival of the sex per se rule. The sex per se rule is a highly useful pragmatic tool for dealing with causation that can serve antisubordination purposes; it should not be abandoned by feminist scholars. Far from an example of judicial laziness, the sex per se rule is justified on both theoretical and textual grounds. On a practical level, it provides a useful means of avoiding a needlessly complex and difficult inquiry into causation for those cases involving sexual conduct. At the same time, it can help resolve, for the subset of cases involving sexual conduct, the causation issue in cases of both "same sex" and so-called "equal opportunity" harassers—cases that continue to perplex courts in the wake of Oncale.

I. THE "SEX PER SE" RULE AND THE CAUSATION INQUIRY IN SEXUAL HARASSMENT DOCTRINE

What I call the "sex per se" rule is a doctrine, developed both in the courts and in public understanding, that sexual conduct in the workplace, if it is sufficiently severe or pervasive, is discrimination because of sex. The sex per se rule does not mean that sexual conduct is automatically sex discrimination. Rather, it is addressed only to the causation element of a sexual harassment claim. Under a sex per se rule, sexual conduct in the workplace is always, without more, "because of sex."

The sex per se rule has functioned, therefore, as an evidentiary and conceptual shortcut to a detailed inquiry into discriminatory intent (called "causation" in antidiscrimination law)—an inquiry made problematic by inherent ambiguities in the relevant statutory language and in the concept of discrimination itself. The sex per se rule, which has only ever gained partial acceptance in the courts, in effect lightens a plaintiff's burden of producing evidence on the causation element.

In this Part, in order to establish some conceptual clarity, I begin by looking at two confusing issues bedeviling sexual harassment law: first, the confusion in the categories of sex, sexuality, and gender that underlies most contemporary discussion of sex discrimination; and second, the inherent ambiguity in the notion of discriminatory "intent," or "causation." I then trace the advent of the sex per se rule in sexual harassment cases.
A. Sex, Sexuality, and Gender

The law of sex discrimination reflects a great deal of confusion among the concepts and terminology of sex, sexuality, and gender. “[T]he term ‘sex’ when used in the law often means any one or a combination of the following: biological sex (female or male), core gender identity (woman or man), gender role identity (feminine or masculine), or sexual behavior (genital or reproductive behavior).” Recent feminist and queer theorists have sought to establish analytical clarity among these concepts, and the law would benefit by trying to follow their lead. I will do my own very modest part simply by trying to define the terms and make some of the relevant distinctions.

Following a number of leading scholars, I believe that the term “sex” should properly refer to the two biological sex categories typically assigned at birth based on anatomical and physiological distinctions, and that “gender” should mean the social and cultural understandings derived from sex. “Sexual orientation” refers to the human inclination “toward affectional intimacy with members of one particular sex or of both sexes.” By “sexual behavior” or “sexual conduct,” I mean physical sexual acts or communicative acts depicting sexual acts. “Sexuality” is a blanket term that includes both sexual orientation and sexual behavior.

Sex discrimination caselaw tends to use the terms “sex” and “gender” interchangeably. With the notable exception of sex-

27 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, 10 (1995); see also Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 COLUM. L. REV. 392, 394 (2001) (defining sex as “whether a person is anatomically male or female” and gender as “whether a person has qualities that society considers masculine or feminine”); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CAL. L. REV. 1, 6 nn.5-6 (1995) (defining the term ‘sex’ as denot[ing] a physical attribute of humans and defining the term gender as ‘signifying the social or cultural dimensions derived from and determined by sex’”).
28 Valdes, supra note 27, at 6 n.7.
29 Compare Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (“[T]estimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks.” (emphases added)), and id. at 237 (referring to prohibited bases of discrimination under Title VII as “gender, race, national origin, or religion” (emphasis added)), with Title VII of the Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting discrimination because of “race, color, religion, sex or national origin” (emphasis added)). Mary Ann Case has suggested that the Court’s
In sexual harassment cases, there has been some confusion between sex and sexuality. For example, Vicki Schultz has shown how nonsexual, but sex-based harassment has been eclipsed from judicial view even though Title VII prohibits discrimination "because of sex" rather than discrimination "by sexual means." Nonsexual harassing conduct has been called "sex-based" harassment or even, somewhat confusingly, "gender harassment" in order to distinguish it from harassment by means of sexual conduct. A source of confusion is, of course, the word "sex" itself, which means both biological sex assignment and sexual conduct, as in "to have sex." The confusion is compounded by the frequent use by courts of the phrase "sexual discrimination," in which they apparently mean the word "sexual" to be the adjectival form of the biological sex assignment meaning of the word "sex."

The conceptual confusion among this triad of sex, sexual orientation, and gender extends to a number of other issues that relate only tangentially to my argument. For example, courts presented with this issue typically have conflated "effeminacy"—feminine behavior or presentation by men—which is a matter of gender, with sexual orientation, thereby wrongly assuming that effeminate men are necessarily sexually oriented toward men.

These confusions have undoubtedly played a role in the development of the sex per se rule. Although (as I will argue) the sex per se rule is theoretically justifiable, the notion that sexual conduct is "because of sex" follows for many judges from the notion that men, who are presumptively heterosexual, only direct sexual conduct toward women, whereas sexual conduct by apparently heterosexual men di-

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35 Infra Part III.A.
34 E.g., Doe v. City of Belleville, 119 F.3d 563, 575 (7th Cir. 1997).
35 See, e.g., Grube v. Lau Indus., Inc., 257 F.3d 723, 727 (7th Cir. 2001) (characterizing disparate treatment claim based on sex but not involving sexual harassment as a claim of "sexual discrimination"). A LEXIS search for the phrase "sexual discrimination" as of April 29, 2002, would have called up in excess of 1000 cases.
36 See DeSantis, 608 F.2d at 327 (reporting Strailey v. Happy Times Nursery School as a consolidated action and concluding that "homosexuals are not a 'class' within the meaning of § 1985(3)" in a claim of discrimination based on the failure to comply with stereotypical gender-role expectations); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 330 (5th Cir. 1978) (affirming the dismissal of sex discrimination claims because "[t]here was no showing that Smith was a member of any class beyond the 'effeminent' [sic] group"); Case, supra note 27, at 46-61 (discussing how Smith and Strailey conflate discrimination on the basis of effeminacy with sexual orientation discrimination); Valdes, supra note 27, at 138-44 (describing Smith as "the first Title VII ruling expressly on the conflationary association of sex and gender with sexual orientation").
stereotyping cases, courts rarely distinguish between biological sex assignment and gender identity or gender roles. Undoubtedly, this is based on the unexamined assumption that biological sex and gender go together naturally. To be sure, the distinction need not be made in order to reach the proper decision in many, perhaps most, sex discrimination cases.

Sexuality in discrimination law is understood either as a motivation for sex-based behavior—sexual conduct is motivationally directed toward persons of a particular sex, depending on the actor's sexual orientation—or as a status to determine entitlement to the law's protection. Specifically, discrimination on account of "sexual orientation" has been held to fall outside of Title VII's prohibition of sex discrimination, with the result that gays, lesbians, and bisexuals, who bear the brunt of such discrimination, are typically unprotected by current Title VII doctrine.

common usage of "gender" in sex discrimination cases results largely from Ruth Bader Ginsburg's efforts as an academic and litigator in the 1970s to substitute the word "gender" in order to "ward off distracting [i.e., sexual] associations" with the word "sex." Case, supra note 27, at 10.

But see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination.").

There can be no serious question that sexual orientation discrimination falls predominantly upon gays, lesbians, and bisexuals; while the occasional charge of "reverse" sexual orientation discrimination against heterosexuals is little more than the rare but newsworthy "man bites dog" story. In one study of professionals in specific U.S. cities, "between 27 and 68% of self-identified lesbians and gay men surveyed reported [having experienced] employment discrimination at some point during their lives." M.V. Lee Badgett, Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination, ANGLES (Inst. for Gay & Lesbian Strategic Studies, Wash., D.C.), Sept. 1997, at 1. Widespread employment discrimination against gays, lesbians, and bisexuals appears to be reflected in lower wages: lesbians earn approximately eighteen percent less than heterosexual women, and gay/bisexual men earn seven percent less than their heterosexual counterparts. M.V. Badgett, The Wage Effects of Sexual Orientation Discrimination, 48 INDUS. & LAB. REL. REV. 726, 733 (1995).

See Simonton v. Runyon, 292 F.3d 33, 35-36 (2d Cir. 2000) (evaluating legislative history and caselaw to conclude that claims of same-sex sexual harassment motivated by the victim's sexual orientation rather than her sex "remains non-cognizable under Title VII"); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation."); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-32 (9th Cir. 1979) (rejecting the appellant's argument that Congress intended Title VII to protect against discrimination on the basis of sexual orientation). But see Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259-61 (1st Cir. 1999) (suggesting that although Title VII does not prohibit discrimination against sexual orientation, it may reach a similar result through its prohibition of sex
rected toward other men is not really sexual. The attack by second
generation sexual harassment theorists on this muddled and readily
falsifiable assumption has contributed to the demise of the sex per se
rule.

B. Causation and Intent in Title VII

When courts or commentators discuss whether an act of harass-
ment is "because of sex," just as when they discuss whether an adverse
employment decision is "because of race" or one of the other enu-
merated grounds of prohibited discrimination, there is a great likeli-
hood that the discussion will either be misunderstood or analytically
faulty. The reasons for this include inherent ambiguities in the
phrase "because of" as well as difficulties inhering in the meaning of
discrimination itself. By making these conceptual difficulties explicit,
we can begin to see both why the sex per se rule arose and how it
functioned in sexual harassment doctrine.

1. The Ambiguous Meanings of "Discrimination" and "Because of"

The operative "antidiscrimination" language of Title VII appears
in Section 703(a):

It shall be an unlawful employment practice for an employer—(1) to fail
or refuse to hire or to discharge any individual, or otherwise to discrimi-
nate against any individual with respect to his compensation, terms,
conditions, or privileges of employment, because of such individual's
race, color, religion, sex, or national origin . . . .

The phrase "because of" implies a causal connection between the em-
ployer's action and the employee's race, color, religion, sex or na-
tional origin. But the statute does not specify whether the causal role
of the prohibited factors should be a consciously racist or sexist mo-
tive or something else—perhaps even something not "intentional" at
all. What is clear, however, is that causation—which surfaces in the
caselaw as a "causation requirement" or causal "element" of a plain-
tiff's discrimination claim—fulfills a gatekeeping function, allowing
courts to distinguish actions prohibited by Title VII from those which,
though harmful from the employee's point of view, would be legally
permissible. An ordinary personnel decision, or even an act of har-
assment, that is not "because of" one of Title VII's prohibited grounds
does not violate the statute.

Calling this step in the discrimination law analysis “causation” is arguably something of a misnomer; in any event, it is not the same as causation in tort law. The causation question posed in tort cases is whether the defendant’s negligent or intentional act caused damage to the plaintiff. In discrimination cases, the relationship between the defendant’s action and harm to the plaintiff is usually not in controversy. Rather the question is whether the “cause” of the defendant’s act was the protected characteristic of the plaintiff; put another way, causation in discrimination cases asks whether the harm to the plaintiff was discriminatory in nature.

In so-called “disparate treatment”—i.e., intentional discrimination—cases, causation is really another way of framing the question of intent to discriminate. Here, the Title VII causation inquiry has been variously formulated. Sometimes the courts have used a “but for” test: whether the allegedly discriminatory decision affecting the plaintiff would “pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’” In other cases, the courts require proof that “the [employment] decision was in reality racially premised.”

An ambiguity has arisen in the caselaw concerning “how much” of the employment decision has to be shown to have been race- or sex-based to prove discrimination. In the classic McDonnell Douglas/Burdine framework for “pretext” cases, the parties litigate the “real” reason for the contested employment decision: the plaintiff must prove “that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”

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59 See Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1988) (“When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of’ sex.”).


premise of these cases is that an employment decision is motivated either by discrimination or by something else, but not by a combination of the two. In *Price Waterhouse v. Hopkins*, the Court recognized an alternative "mixed motive" framework, in which a plaintiff could prove discrimination where the employment decision comprised both discriminatory and nondiscriminatory reasons.\[^{3}\] Congress, in amending Title VII in 1991, codified this "mixed motive" framework by providing that a plaintiff can prove discrimination by showing that the impermissible consideration of race or sex "was a motivating factor for any employment practice."\[^{4}\] Strangely, the selection of a "pretext" versus a "mixed motive" framework is made to turn, not on the realities of human motivation, but rather on the happenstance of whether the evidence of discrimination is deemed "direct" or "circumstantial."\[^{5}\] For present purposes, the main point is that prevailing law requires that the plaintiff prove discriminatory intent, understood in terms of the motive of the decisionmaker or harasser.\[^{6}\]

Although we now have a rather vast body of caselaw striving to explain the ins and outs of these versions of causation (i.e., discriminatory intent), there remains a dearth of real understanding of what discrimination itself means. Is it differential treatment of male and female, or white and black employees? Or must the discrimination be "invidious"? The cases point in various directions. The stock-in-trade of intentional discrimination cases is comparative evidence; in order to succeed, one needs to show that a similarly situated employee not in the plaintiff's group (a man in a sex discrimination case brought by a woman, or a white employee in a race discrimination claim by an African-American employee, for instance) was treated more favorably than the plaintiff. There are two overlapping, but distinct, ways to view comparative evidence. One is to equate comparative evidence with discrimination in itself. For example, Justice Ginsburg's dictum

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\[^{3}\] *Price Waterhouse*, 490 U.S. at 244-47.

\[^{4}\] Title VII of the Civil Rights Act of 1964 § 703(m), 42 U.S.C. § 2000e-2(m) (1994). In *Price Waterhouse*, the Court went on to hold that an employer could defeat liability by proving it would have taken the same action even in the absence of the impermissible factor. 490 U.S. at 258. This aspect of the decision was overruled by the 1991 Civil Rights Act, which held that the so-called "same decision defense" would not defeat liability, but only limit the plaintiff's remedies. Title VII § 703(m), 42 U.S.C. § 2000e-2(m).


\[^{6}\] *Infra Part I.B.2-3.*
in her concurrence in *Harris v. Forklift Systems* raises just this implication: "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." Moreover, the generally accepted doctrinal label for "intentional discrimination" is "disparate treatment," which naturally implies treating similarly situated men and women (or whites and nonwhites) differently.

But there is another way to view comparative evidence. If the critical issue in discrimination cases is whether race or sex was a "motivating factor," then proof of differential treatment is reduced to the role of circumstantial evidence of discriminatory intent. Two employees, one black and one white, or one male and one female, are similar in all respects, but one gets preferential treatment over the other. This is said to raise an inference of discrimination. The Supreme Court described the function of circumstantial evidence in pretext cases in *Furnco Construction Corp. v. Waters*:

> [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

The intellectual exercise of finding the employees to be "similarly situated" is another way of eliminating the nondiscriminatory reasons: if the employees are not similarly situated, then there is a nondiscriminatory reason for treating them differently, but if they are similarly situated, then there can be no such nondiscriminatory reason. We are left with the inference that "more likely than not" the reason for the employment decision is discrimination.

True enough, this second, "comparative evidence" approach is so pervasive a method for proving discrimination that it is easy to substitute it for the wrong of discrimination itself. The equation of these

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48 See, e.g., *Reeves*, 530 U.S. at 153 ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").
two concepts does not matter in the ordinary case where there are white or male "comparators," but it can raise serious proof problems for the plaintiff where there are no comparators in the relevant work unit.

While courts and commentators often assume that discrimination is the same as comparative evidence of differential treatment, no case has in fact held that comparative evidence is always required to prove discrimination. Cases that expressly focus on the need to prove discriminatory intent often look to other forms of evidence, one common form of which, of course, consists of sexist or racist remarks, which are taken to reflect the discriminatory animus of an employer. Courts rely on such evidence, in part, because there may not always be comparative evidence. A plaintiff may find herself targeted by virtue of her race or sex under circumstances unprecedented for that employer; or perhaps the entire work unit consists of a single sex or racial group. Joseph Oncale, for instance, worked in an all-male environment. Or, it may be that comparisons to other employees simply make no sense. In Price Waterhouse, the Court concluded that denial of plaintiff's promotion to partnership because of her insufficiently feminine demeanor was virtually direct evidence of sex discrimination because it relied upon obviously stereotypical views of women that worked to limit their employment opportunities. There was no discussion of "comparative evidence," in the sense of male comparators who also received partnership evaluations. What, after all, would the

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51 See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (finding that sex-specific remarks showing hostility to women in the workplace is "because of sex"). Courts have viewed racist or sexist remarks as arrayed on a spectrum with "circumstantial" evidence at one end and "direct" evidence on the other. Where the remark falls on that spectrum depends on the closeness of the connection between the remarks and the discriminatory personnel decision: whether the remarks were made by the allegedly discriminatory decisionmaker, about the plaintiff, or in reference to or at the time of the decision. E.g., Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581-83 (1st Cir. 1999). These "factors" for determining whether remarks are "direct" or "circumstantial" evidence derive from Justice O'Connor's concurrence in Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1988) (O'Connor, J., concurring). If the evidence is deemed "direct," then the plaintiff is entitled to the more favorable Price Waterhouse "mixed-motive" framework for proof rather than the McDonnell Douglas "pretext" framework. Fernandes, 199 F.3d at 579-81. Arguably, the distinction between direct and circumstantial evidence is somewhat arbitrary, since the evidence almost never consists of an admission of race- or sex-based decisionmaking. Moreover, as Judge Posner has observed in this context, "all knowledge is inferential." Visser v. Packer Eng'g Ass'n, 924 F.2d 655, 659 (7th Cir. 1991) (en banc).

52 Price Waterhouse, 490 U.S. at 273.
proper comparison have been? Male partnership candidates who were promoted despite their lack of feminine traits? Or male partnership candidates who were promoted despite their having feminine traits (gender nonconformists)? Such comparisons raise absurdities, and in any event were unnecessary because proof of the stereotype showed that Ann Hopkins' sex was "a motivating factor" in the decision.53

And yet, the concept of discrimination, based as it is on a foundation of equality, contains some kind of implicit comparison that may be unavoidable. The notion of men being treated better surely existed in Price Waterhouse, not as "comparative evidence," but as a broadly understood background truth that most men are not denied opportunities due to their failure to conform to gender stereotypes; whereas women often can find their job opportunities frustrated both if they deviate from prevailing female stereotypes and if they conform to them. The McDonnell Douglas framework does not inherently require proof that a terminated female employee was replaced by a man, was terminated instead of a man, or was terminated for reasons for which a man was retained. Similarly, there are cases recognizing that discrimination may be proven even if the plaintiff was replaced by someone in the same protected group.54 It may be that a proper understanding of discrimination requires the law to allow the comparison to be with a hypothetical or idealized comparator, rather than an actual co-worker.

2. Conscious and Unconscious Intent

Title VII doctrine divides discriminatory acts into two categories: intentional discrimination, known as "disparate treatment," and unintentional discrimination, known as "disparate impact."55 Adopted by the Supreme Court in 1971,56 and confirmed by Congress in subse-

53 Id. at 287.
54 See O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 308 (1996) (rejecting the argument that the replacement of the plaintiff by another person over forty defeated the inference of age discrimination); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 353 (3d Cir. 1999) ("[S]even of the eight federal courts of appeals to have addressed it have held that a plaintiff need not prove, as part of her prima facie case, that she was replaced by someone outside of the relevant class.").
56 See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").
When is Sex Because of Sex?

Recent amendments to Title VII,\(^5\) disparate impact theory holds that actionable discrimination may arise out of facially sex- or race-neutral employment practices that disproportionately weed out women or racial minorities from employment opportunities.\(^5\) No showing of an intent to discriminate need be made. If the plaintiff can demonstrate the disparate impact, usually through statistics, then the burden shifts to the employer to show that the practice is “consistent with business necessity.”\(^5\)

Most employment discrimination cases are based on disparate treatment theory, alleging intentional discrimination. Yet, the notion of discriminatory “intent” in Title VII has been remarkably underanalyzed and undertheorized. The prevailing understanding of intentional discrimination is that the defendant must be shown to have consciously targeted the plaintiff for disadvantageous treatment because of her race or sex. Although some cases seem to acknowledge the idea of “unconscious” discrimination, there has been little or no doctrinal or theoretical recognition by courts of unconscious but intentional discrimination. Instead, as Linda Krieger has shown, most courts assume that discrimination is the result of a conscious choice by a self-aware decisionmaker—someone who knows he is discriminating because of race or sex.\(^6\)

The *McDonnell Douglas/Burdine* framework’s focus on the employer’s “true” reason for the employment decision plainly assumes the existence of a reasoned, self-aware decision-making process.\(^6\)


\(^6\) For example, a height or weight requirement may have a disparate impact on women. See Dothard v. Rawlinson, 433 U.S. 321, 322 (1977) (upholding a statute setting minimum height and weight requirements for prison guards while nonetheless recognizing the statute’s disparate impact on women). A standardized test instrument may have a disparate impact on minorities. See, e.g., Connecticut v. Teal, 457 U.S. 440, 442 (1982) (holding that an employment test that was not job related and resulted in excluding a disproportionate number of black applicants constituted employment discrimination). To date, no case has recognized a claim for “reverse disparate impact,” that is, a claim that a facially neutral practice tends to weed out a disproportionate number of whites or men.


\(^6\) See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (“[O]nce the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.” (emphasis added) (citing Furnco Constr.
Similarly, in mixed-motive cases, despite the more realistic recognition that a single human action results from a multiplicity of motives, the assumption of conscious discrimination remains. The plaintiff must prove that the employer "relied upon sex-based considerations in coming to its decision," which reflects a conscious discriminatory intent: "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." Even though the courts acknowledge that the employer who unlawfully discriminates is unlikely to give a truthful answer to that question, the evidence demanded in both the pretext and mixed-motive frameworks is still aimed at finding that answer. As *Furnco* makes clear with its assumption that "we generally assume that [the employer] acts only with some reason," the Supreme Court views discrimination as a "reason" for acting, meaning a conscious, intentional motivation. Additionally, circumstantial evidence of discrimination typically involves the elimination of nondiscriminatory reasons for the action. Whatever form it takes, the circumstantial evidence is deemed to give rise to an inference of conscious discrimination.

But, as Charles Lawrence and Linda Krieger have persuasively argued, a great deal of discrimination is unconscious: the decisionmaker may not be aware that he is discriminating on the basis of race or sex. Unconscious discrimination often takes the form of "cognitive bias," a set of thought processes in which people use unconscious stereotypes to perceive, organize, and recall information. Such biases can lead to discriminatory personnel decisions even where the decisionmaker has no conscious animosity toward women or racial

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62 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 250 (1988); see also Krieger, *supra* note 60, at 1172 ("[A] careful reading of *Price Waterhouse* reveals that there, as in pretext cases, the concepts of motive, intent, and causation are confounded and liability is premised on the presence of conscious discriminatory animus.").

63 438 U.S. at 577.

64 See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987) (arguing that in order to remove effectively racial prejudice from governmental decisionmaking, legal theorists must consider unconscious motivation); Krieger, *supra* note 60, at 1186-1217 (arguing that current Title VII doctrine is sufficient to address deliberate discrimination, but is not adequate for dealing with more subtle, unconscious forms of discrimination); see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902, 970-71 (1993) (advocating a negligence standard for liability for unconscious discrimination in employment decisions).

minorities, and no consciousness of race or sex as a "factor" in the decision.

3. Causation and Intent in Sexual Harassment Cases

Although sexual harassment is often accompanied by a discriminatory discharge from employment, the textual hook for the sexual harassment cause of action under Title VII is the phrase "or otherwise... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."66 The Supreme Court in Meritor Savings Bank v. Vinson67 established that sexual harassment creating a hostile environment "[w]ithout question" discriminates with respect to "terms, conditions, or privileges,"68 a phrase that the court construed as designed "to strike at the entire spectrum of disparate treatment of men and women in employment."69 In this sense, sexual harassment is discrimination because the victim's conditions of employment are significantly worse than are those of her co-workers simply because of her "sex." Notwithstanding the separate listing of "fail[ure] or refus[al] to hire or discharge," the subsequent phrase, "or otherwise to discriminate," indicates that the former are simply examples of a larger, unified concept of employment discrimination.70

Yet in an important sense, harassment (whether based on sex or race) differs from other kinds of employment actions in a way that bears directly on the causation inquiry. As previously noted, the function of the causation/intent inquiry is to determine whether conduct comes within the purview of Title VII. It thereby fulfills a gatekeeping function that separates the subset of unlawful discriminatory personnel decisions from the mine run of lawful ones. Employers have to make numerous personnel decisions in order to carry out their businesses; courts, based on an implicit rule of deference to business judgment, tend to presume that lawful personnel decisions are efficient or profit maximizing. Therefore, a case alleging discrimination based on a personnel decision (such as a discharge or a promotion) challenges activity that the court would presume to be socially produc-

68 Id. at 64.
69 Id. (quoting City of L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
tive if done in a nondiscriminatory way. Harassing conduct, however, is nonproductive behavior. The kind of conduct directed toward Lois Robinson, H. Doe, or Joseph Oncale does not typically advance the employer's interest in the accomplishment of assigned work, and consequently, there will not be a legitimate business rationale for the discrimination. Insofar as the employer's business judgment is not implicated in harassment cases—in contrast to cases involving arguably rational personnel decisions—the need for a causation analysis to fulfill the gatekeeping function is considerably less.

At the same time, the traditional mode of analyzing causation in intentional discrimination cases—whether race or sex motivated the employment decision—does not quite fit harassment cases. In typical harassment cases, there is no “decision” in the sense of a rational employment action intended to advance the employer's business. As discussed above, there is some likelihood that unconscious bias will inform reasoned decisions. It is even more likely that nonrational, harassing actions will reflect such unconscious bias, since there is no call to engage in a conscious process of reasoned decisionmaking in order to harass. Accordingly, many, perhaps most, harassers may well act out of intentional but unconscious bias based on a lack of self-awareness or reflection. In other words, a harasser may not act with specific intent to keep women out of the workplace, but may engage in intentional conduct that has that effect, albeit motivated (on a level closer to consciousness) by sexual interest, misogyny, personal vendetta, misguided humor, or boredom, to paraphrase the court in Doe.

Perhaps for these reasons, sexual harassment cases have developed with less attention to the intent of the discrimination. While some early cases looked for evidence that the harasser targeted the plaintiff consciously because of her sex, the general trend, at least in opposite-sex cases, was to put the issue in the background, thereby

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71 See, e.g., Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994) (“An employer could never have a legitimate reason for creating a hostile work environment.”).

72 It is, of course, possible in particular circumstances that sex- or race-based harassment could be a rational means of furthering a policy of discouraging the advancement of women or minorities. See Burlington Indus. v. Ellerth, 524 U.S. 742, 757 (1998) (describing an instance where an “employer has a policy of discouraging women from seeking advancement and 'sexual harassment was simply a way of furthering that policy’” (quoting Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1075 (M.D. Ala. 1990))).

73 Doe v. City of Belleville, 119 F.3d 563, 578 (7th Cir. 1997).
moving away from a conscious discrimination theory in the sexual harassment context.\textsuperscript{74} Whereas the sexual desire theory of causation is very much about circumstantial evidence of a conscious targeting “because of sex,” the sex per se rule is less clear about its causation/intention theory. Arguably, this feature of the sex per se rule could be a result of the acceptance by courts of a watered-down MacKinnonism: male sexual conduct in itself subordinates women.\textsuperscript{75} Alternatively, some courts may have implicitly adopted a disparate impact theory—sexual conduct in the workplace disproportionately harms women.\textsuperscript{76} The sex per se rule could also have grown out of a recognition of the historical role sexual harassment has played in the workplace.\textsuperscript{77} Or, a sex per se rule could even be based on a tort notion of general, rather than specific, intent: a defendant is liable for intentional conduct irrespective of whether he intends it to have particular—in this context, sexist—consequences.\textsuperscript{78} These theories are all related in that each rejects an intent-based inquiry.

C. The Emergence of a Sex Per Se Rule

The earliest precedents recognizing a Title VII cause of action for sexual harassment relied on a sexual-desire-based notion of causation. In both quid pro quo and hostile environment cases, harassing sexual conduct was “because of sex” because it was seen as motivated by the heterosexual impulses of the male harasser. The plaintiff’s “job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male,”\textsuperscript{79} and the harassment therefore would not have been directed at the plaintiff “but for her gender."\textsuperscript{80} Under this sexual-desire-based understanding of

\textsuperscript{74} See infra Part I.C (discussing the difference between conscious and unconscious intent in discriminatory acts).
\textsuperscript{75} See infra Part II.B (describing courts’ treatment of the sex per se rule).
\textsuperscript{76} See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991) (holding sexual conduct in the workplace to be discriminatory because it “is disproportionately more offensive or demeaning to one [i.e., the female] sex”).
\textsuperscript{77} See Doe, 119 F.3d at 572 (“[T]he historic imbalance of power between men and women in the workplace offers a very compelling reason why the sexual harassment of a woman by a male superior or co-worker should be understood as sex discrimination.”).
\textsuperscript{78} See, e.g., Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (noting that “Title VII is not a fault-based tort scheme” and is therefore not “aimed at the . . . motivation” of harassers (quoting Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971))).
\textsuperscript{79} Barnes v. Costle, 561 F.2d 983, 989 (D.C. Cir. 1977).
\textsuperscript{80} Id. at 989 n.49. The reasoning in Barnes, a quid pro quo case, was extended to “hostile environment” cases in Bundy v. Jackson, 641 F.2d 934, 945-46 (D.C. Cir. 1981).
causation, the causal mechanism bringing harassment within the prohibition of Title VII is the heterosexual feelings of attraction, lust, or desire that motivate the male harasser to act upon a female employee. Discrimination in the sense of exercising a preference—here a sexual preference for women rather than men as sex objects—becomes sex discrimination in the invidious sense because the targeted woman is disadvantaged relative to her male co-workers. So argued Catharine MacKinnon in her pathbreaking *Sexual Harassment of Working Women.*

Despite, or perhaps because of, its simplicity, this sexual-desire-based understanding of causation in sexual harassment cases dominated early judicial thinking and continues to be a prevailing component of sexual harassment doctrine.

This desire-based “but for” causation theory, however, has serious shortcomings. First, it places too much emphasis on the subjective motivation and sexual behavior of the harasser. Factual inquiry into the harasser’s actual motivation could mean an intrusion into his inner mind: such an inquiry would likely be murky, unduly psychological, and traumatic for everyone involved—not just the alleged harasser, but also the other participants in the litigation who would undergo the ordeal of learning more than they would want to know about the harasser’s psyche. Alternatively, or in addition, this inquiry could center on the harasser’s sexual conduct outside the workplace. In order to prove that the harasser’s “motive” or “intent” is sexual desire for the plaintiff, the plaintiff might be entitled fairly to open discovery into the harasser’s sex life to identify how, and toward whom, he makes sexual overtures. Yet, in the end, the complexities of sexuality might render this unseemly and difficult inquiry indeterminate.

Second, the desire-based causation theory could, if rigorously applied, exclude from Title VII coverage a great deal of harassing conduct that suppresses women’s employment opportunities even though

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_Barnes_ and _Jackson_ are widely regarded as the leading cases launching the sexual harassment cause of action. See Franke, _supra_ note 13, at 707-11 (discussing _Barnes_ as the first decision to recognize employment benefits in exchange for sexual services as sex discrimination); Schultz, _supra_ note 13, at 1703 (noting that the _Barnes_ court was the first to adopt the reasoning that “sexual advances were the core of sexual harassment, that such advances were driven by sexual motivations, and that such motivations supplied an inference of gender discrimination”).

81 MACKINNON, _supra_ note 21, at 198-200.

82 See _Oncale v. Sundowner Offshore Servs., Inc_., 523 U.S. 75, 80-81 (1998) (using the sexual-desire-based theory); Franke, _supra_ note 13, at 707-14 (describing how the courts were slow in accepting the hostile environment theory of sexual harassment).

83 See _Fed. R. Evid._ 404(b) (providing that evidence of “other . . . acts” is admissible to show motive or intent).
it is not motivated by sexual desire. It has long been broadly acknowledged "that men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire." Psychological studies, for example, have correlated workplace sexual harassment with strong beliefs in sex-role stereotypes. In cases like *Harris v. Forklift Systems, Inc.* and *Robinson v. Jacksonville Shipyards, Inc.*, in which the plaintiffs were subjected to offensive physical touching and sexual innuendoes, the harassers' motivation was to humiliate a woman co-worker; there was no contention in either case that the harassing co-workers were interested in sexual relations with the plaintiffs. A great deal of what has come to be considered garden-variety sexual harassment could potentially be left without a remedy under a strictly desire-based theory of causation.

Without a great deal of candid discussion of the subject, legal doctrine developed a sex per se rule that resolved this problem. In 1980, the EEOC issued guidelines on "Sexual Harassment" as part of its general *Guidelines on Discrimination Because of Sex.* According to the EEOC:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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84 Franke, *supra* note 13, at 743.
85 *Id.* at 742-43 (citing John B. Pryor et al., *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 *J. VOCATIONAL BEHAV.* 68, 75-76 (1993)).
89 *See,* e.g., L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 *OHIO ST. L.J.* 819, 843-44 (1997) ("[E]ven sexual advances often appear to be motivated by... hostility toward women."). To be sure, many cases falling outside a sexual-desire-based theory of causation could be shown to be because of sex under a comparative evidence approach—proof that men were not similarly subjected to the offending sexual conduct—even without a sex per se rule. *Infra* Part II.B.1.
91 *Id.* § 1604.11(a) (footnote omitted).
The provisos numbered one through three are meant to adopt the "quid pro quo" and "hostile environment" theories posited by feminist theorists and that were beginning to emerge in the caselaw. They do not explain why "conduct of a sexual nature" is "because of sex," even though early leading cases recognized causation as one of the elements of a prima facie claim of sexual harassment. In the EEOC Guidelines, sexual conduct appears to be "because of sex" per se.

Federal courts gradually created a "sex per se" rule of causation by treating conduct that fell within the second sentence of the EEOC Guidelines as harassment because of sex without requiring further proof. In Henson v. City of Dundee, an early leading case, the court rejected the idea of adopting the McDonnell Douglas "circumstantial evidence" framework used in typical disparate treatment cases. In contrast to the elusive factual question of intentional discrimination in such cases, the case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive. Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based

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92 See MACKINNON, supra note 21, at 32-47 (exploring these two theories). MacKinnon used the term "condition of work" harassment to refer to what became known as the "hostile environment" theory. Id. at 40.

93 See Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982) (discussing the EEOC Guidelines on sexual harassment and expanding upon the elements of such a claim to include causation); Franke, supra note 13, at 719 (explaining the elements of a sexual harassment case as set out in Henson).

94 See Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1, 14-15 & n.61 (1992) (concluding that EEOC Guidelines hold that sexual conduct is because of sex irrespective of whether the harasser was motivated by the victim's sex).

95 See Franke, supra note 13, at 718 ("[I]n cases where the plaintiff alleges hostile conduct of a sexual nature, most courts . . . are willing to infer, if not conclude, that the conduct was based upon sex . . . ."); see also, e.g., Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (explicitly rejecting the "because of sex" element of the Henson test); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (omitting "because of sex" as a separate element of proof).

96 682 F.2d at 897.

97 Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). Together, McDonnell Douglas and Burdine established a framework by which a plaintiff could prove, through circumstantial evidence, that a facially neutral employment decision was in fact taken because of an intent to discriminate on the basis of race, sex, or some other comparable characteristic.
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upon sex. We therefore see no reason to suggest a specific prima facie case for the hostile environment claim.\footnote{Henson, 682 F.2d at 905 n.11.}

While *Henson*’s reference to a “bisexual supervisor” suggests the desire-based notion that the slant of the harasser’s sexual orientation is determinative of causation, the case nevertheless represented a major step in the direction of a sex per se rule by implying that any sexual conduct—whether or not the conduct could be seen as a sexual “advance” or “overture”—would suffice.

When the U.S. Supreme Court first took up the issue of sexual harassment in *Meritor Savings Bank v. Vinson*,\footnote{477 U.S. 57 (1986).} the Court took a similar step in the direction of a sex per se rule. Because *Meritor* involved harassment arising out of a sexual relationship gone bad, the desire-based motivation of the harasser was implicit. Nevertheless, the focus of the Court’s holding was its validation of the “hostile environment” theory of harassment. In contrast to quid pro quo cases, which by definition involve sexual advances, hostile environment encompasses cases such as *Jacksonville Shipyards* and *Harris*, where allegations of desire-based conduct are absent. In that context, the *Meritor* Court’s broad conclusion that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminates’ on the basis of sex”\footnote{Id. at 64.} could well be seen by lower courts as a suggestion that they might take the causation element for granted and focus their attention on the other elements of the harassment claim. Moreover, the *Meritor* Court broadly endorsed the EEOC Guidelines, which the Court understood in sex per se terms: where sufficiently severe to create a hostile or abusive working environment, “such sexual misconduct” (the Court’s summary of the EEOC’s phrase “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”) violates Title VII.\footnote{Id. at 65 (quoting EEOC Guidelines found in 29 C.F.R. § 1604.11(a) (2001)).}

A subsequent phase in the development of the sex per se rule was a tendency of courts to be silent on the causation issue in cases where the facts did not suggest a desire-based narrative, and where the plaintiff made no such allegation. In *Harris*, the Supreme Court was considering what factors made an environment hostile, rather than what made harassing conduct “because of sex.” Yet the Court’s silence on
that issue in a case involving no allegation of sexual desire by the harasser, again, is suggestive for the lower courts: it would have been odd for the Court to uphold a sexual harassment claim if an essential element were missing.\footnote{To be sure, in \textit{Harris}, the harasser rounded out his offensive comments with sex-specific derogatory language (such as the notorious "dumb ass woman" statement), and the facts further suggested that the plaintiff was treated differently from her male colleagues, a point emphasized in Justice Ginsburg's concurrence. \textit{See} Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (citation omitted)). Also, the causation issue was not raised by the defendant. For these reasons, I view \textit{Harris} as a step toward a sex per se rule, rather than an endorsement of it.}

Eventually, a number of courts became more or less explicit in stating that sexual conduct is per se because of sex. For example, the Third Circuit stated that

\begin{quote}
the intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual [sic] derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.\footnote{Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990); \textit{see also} Doe v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1997) (citing cases applying such an analysis); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 805-06 n.2 (5th Cir. 1996) (finding that comments by co-workers regarding plaintiff's "proclivity to engage in sexual activity" constituted "harassment that was unquestionably based on gender"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("[S]exual behavior directed at women will raise the inference that the harassment is based on their sex.").}
\end{quote}

Or, as the Ninth Circuit has put it most plainly, "sexual harassment is \textit{ordinarily} based on sex. What else could it be based on?"\footnote{Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994). Some courts expressly declined to adopt a sex per se rule. \textit{See} Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir. 1999) ("[A]lthough the explicitly sexual or vulgar nature of the harassment complained of 'may often take a factfinder a long way toward concluding that harassing comments were in fact based on gender,' the inference is not inevitable." (quoting Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997))).}

The sex per se rule emerged in sexual harassment doctrine without any discernable effort by courts to explain its rationale or theoretical basis. But it would be a mistake to write off the sex per se rule as sloppy thinking or judicial "laziness."\footnote{\textit{See} Franke, \textit{supra} note 13, at 694 (characterizing the judiciary's reliance on the sex per se rule as "jurisprudential laziness").} The rule seems to be an advance over a sexual-desire-based "but for" causation theory. There is a connection between the sex per se rule and the conclusion, stated by...
many courts, that the specific motivation of a sexual harasser should not matter. The worst that can be said is that the courts failed to articulate a theoretical rationale for an important—and surely correct—insight.

D. Doe v. City of Belleville

In Oncale, the Supreme Court identifies Doe v. City of Belleville as the leading example of cases that "suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations." With its issuance of Oncale, the Court vacated and remanded Doe for reconsideration in light of Oncale. This is unfortunate because, in my view, Doe is the most sophisticated and well-reasoned sexual harassment decision to date. Although it discusses a "sex per se" rule, it is not properly reducible to a sex per se holding, since the decision in some ways goes beyond that and in some ways stops short of that. It deserves separate consideration not only because of its analytical merits and its pertinent discussion of sex per se, but also because the Supreme Court used Doe as a vehicle for its arguable rejection of a sex per se rule.

Doe was a sexual harassment claim brought by twin brothers (called "J. Doe" and "H. Doe" in the opinion) who had been hired at age sixteen to cut weeds and grass at the municipal cemetery. "From the first, both young men were subjected to a relentless campaign of harassment by their male co-workers." H., who wore an earring, was targeted by one Jeff Dawe, "a former marine of imposing stature," who constantly referred to H. as "'queer,' ''fag'" and his "'bitch.'" With the encouragement of other co-workers, Dawe quickly escalated the harassment to constant musings and threats of taking H. "out to the woods" to rape him. The verbal taunting turned physical when Dawe said to H., "'I'm going to finally find out if you are a girl or a guy,'" and then grabbed his testicles. At that point, H. Doe believed that Dawe was actually willing to sexually assault him, and the brothers

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106 See Doe, 119 F.3d at 578 ("Regardless of why the harasser has targeted the woman, her gender has become inextricably intertwined with the harassment.").
109 Doe, 119 F.3d at 566.
110 Id. at 567.
111 Id.
112 Id.
quit their jobs shortly after that incident.\textsuperscript{113}

The trial court had granted summary judgment for the defendant on the ground that the harassment was not "because of sex," but the court of appeals reversed.\textsuperscript{114} The appellate court's most prominent line of reasoning, though, was not a sex per se theory, but rather a sex-stereotyping theory:

If H. were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment. And if the harassment were triggered by that woman's decision to wear overalls and a flannel shirt to work, for example—something her harassers might perceive to be masculine just as they apparently perceived H.'s decision to wear an earring to be feminine—the court would have all the confirmation that it needed that the harassment indeed amounted to discrimination on the basis of sex. The fact that H. is male changes the analysis not at all . . . .

The harassers discriminated against H. Doe "because of sex" by targeting him for his failure to conform to stereotypical gender roles associated with his biological sex.

\textit{Doe's} sex-stereotyping theory relies, of course, on \textit{Price Waterhouse v. Hopkins},\textsuperscript{116} the case in which the Supreme Court has given its clearest statement of the idea that an employer's imposition of sex stereotypes violates Title VII. There, plaintiff Ann Hopkins was rejected in her bid for partnership by the accounting firm she worked for on the grounds that her demeanor and appearance were insufficiently feminine.\textsuperscript{117} The Court reasoned that the employer's apparent requirement that women conform their behavior to traditional sex-role expectations—that an employee's gender-role behavior match her sex—was discrimination because of sex:

\textit{[W]}e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire

\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 568.
\textsuperscript{115} \textit{Id.} (citation omitted).
\textsuperscript{116} 490 U.S. 228 (1989).
\textsuperscript{117} The evidence of discrimination included statements by decisionmakers that she was too "macho" and aggressive, that she should take "a course at charm school," and that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up [and] have her hair styled." \textit{Id.} at 235. A four-Justice plurality joined by Justice O'Connor in a concurring opinion agreed that this "sex stereotyping" was direct evidence of discrimination under Title VII. \textit{Id.} at 250-51.
spectrum of disparate treatment of men and women resulting from sex stereotypes.\textsuperscript{118}

It is a short analytical step from \textit{Price Waterhouse} to a sexual harassment case based on a sex-gender "mismatch." If, rather than deny Ann Hopkins a promotion, her partners had instead subjected her to a stream of verbal and physical abuse to demonstrate their disapproval of her insufficient "femininity," the same reasoning would plainly control: harassment would be nothing more than another form of "disparate treatment . . . resulting from sex stereotypes."\textsuperscript{119} By the same token, it takes only a second very short step to conclude that \textit{Price Waterhouse} should control a case of same-sex harassment, where a male employee is harassed because his co-workers perceive him as insufficiently masculine. That is, abusive conduct directed at an employee because of his or her failure to conform to traditional gender norms is harassment because of sex.

Relying on \textit{Price Waterhouse}, the \textit{Doe} court simply could have concluded that but for the sex of the plaintiff, his gender behavior would not have triggered the harassment. However, the court went on to consider what type of proof is needed to show "because of sex" in same-sex harassment cases. While the court acknowledged that a sexual-desire-based theory of causation could be accepted, it is not an exclusive means of proof: "We have never made the viability of sexual harassment claims dependent upon the sexual orientation of the harasser, and we are convinced that it would be both unwise and improper to begin doing so."\textsuperscript{120} Nor did the court believe it was necessary for a plaintiff to show differential treatment: "[W]e must question whether it is appropriate to view sexual harassment as actionable sex discrimination only when the plaintiff is able to show that she was harassed because she was a woman \textit{rather than} a man, or vice versa."\textsuperscript{121}

The court came close to adopting a sex per se theory in a manner more explicit than any court had previously done. The court stated that "[i]t is not clear why such proof [of differential treatment of men and women] is needed when the harassment has explicit sexual overtones,"\textsuperscript{122} and expressed "considerable skepticism . . . [toward] the no-

\textsuperscript{118} \textit{Id.} at 251 (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Doe}, 119 F.3d at 575.

\textsuperscript{121} \textit{Id.} at 577.

\textsuperscript{122} \textit{Id.} at 576.
tion that same-sex harassment that is overtly sexual and sex-based is only sex discrimination when the plaintiff can produce proof that the harasser chose him specifically because he is male.” At the end of the day, however, *Doe* “[a]ssumes arguendo that proof other than the explicit sexual character of the harassment is indeed necessary” and relies on the extensive record of explicit comments showing that H. Doe “did not conform to his co-workers’ view of appropriate masculine behavior.” In sum, although providing some argument in support of a sex per se theory, *Doe* ultimately relies on a sex-stereotyping theory, where gender-specific language provides the evidence of causation.

II. **ONCALE AND THE SEX PER SE RULE IN THE COURTS**

One would think that an opinion as short as *Oncale*—four pages in the *Supreme Court Reporter*—and unanimous at that, would have to be clear and simple. However, it is far from either. In the words of Kathryn Abrams, writing shortly after the decision was announced, “*Oncale* is in many respects an enigma.” At first blush, the Supreme Court’s decision in *Oncale* seemed like a victory for those who would extend Title VII to protect against discrimination on account of gender non-conformity. After all, the plaintiff won; same-sex sexual harassment was recognized as actionable under Title VII. The Court reached the result urged (in amicus briefs) by leading feminist scholars who understood *Oncale* as a case of a man harassed by heterosexual co-workers who were questioning the plaintiff’s masculinity.

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123 *Id.* at 580.
124 *Id.*
125 *Id.*
126 Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1258 (1998). Even the pronunciation of the plaintiff’s name is difficult to discern. This was a problem for me, anyway, as a latecomer to the case, having missed Nina Totenberg’s report on National Public Radio and encountered the opinion primarily through print media and in conversations with people who, on this point, were no better informed than I. After hearing and trying several pronunciations, I finally called Joseph Oncale’s lawyer, Nicholas Canaday, and got the correct pronunciation: “On” as in “on-off,” and “cal” as in “California.” The first syllable is stressed. Telephone Interview with Nicholas Canaday, III, counsel for Joseph Oncale, Canaday Law Firm (June 15, 2000).
127 See *Brief of Law Professors as Amici Curiae in Support of Petitioner* at 17-20, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) [hereinafter Franke & Hunter Brief] (arguing that Oncale was targeted for harassment because he was “Perceived To Be Insufficiently Masculine”); *Brief of National Organization on Male Sexual Victimization, Inc.* et al. as Amici Curiae in Support of Petitioner at 10,
On further reflection, Oncale is a highly problematic case that presents a very mixed result. Like the second generation feminist theorists, the Court apparently felt impelled to respond to the pressure of the growing number of male-on-male harassment claims, and the lower courts' confused treatment of them, by reexamining the question of what it means to be harassed “because of sex.” It is probably no surprise, however, that the Court did not approach the same-sex harassment issue with an antisubordination agenda. As I will argue, the Court’s agenda was far different: attempting to resolve the same-sex issue in a manner consistent with formal equality principles while at the same time trying to avoid extending Title VII protection to gender nonconformists. Thus, while the Court, like the second generation feminist theorists, found it appropriate to question the sex per se rule, it seems to have done so for very different reasons. Post-Oncale doctrine gives cause for concern not only about marginalized claimants like H. Doe, but also about plaintiffs such as Lois Robinson in core sexual harassment cases like Jacksonville Shipyards, who have benefited from the sex per se rule.

A. Oncale, Take One

1. The Holding

Joseph Oncale worked for Sundowner Offshore Services on one of its offshore oil rigs. In this rough, all-male work environment, Oncale was subjected to violent sexual hazing by his male co-workers. In a factual summary omitting the “precise details” to serve “the interest of both brevity and dignity,”2 the Supreme Court’s unanimous opinion in Oncale tells us that “[o]n several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen, and Johnson in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape.”3 After his complaints to his supervisors proved unavailing, Oncale quit. After some discovery was taken, the district court granted summary judgment against his case,4 and the

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Oncale (No. 96-568) [hereinafter MacKinnon Brief] (“Often it is men perceived not to conform to stereotyped gender roles who are the targets of male sexual aggression.”).

128 Oncale, 523 U.S. at 76-77.

129 Id. at 76-77. It is not clear exactly whose dignity is being safeguarded by the bowdlerized fact summary. Infra notes 179-80 and accompanying text.

court of appeals affirmed.\textsuperscript{131} Both courts held as a categorical rule that Title VII affords no cause of action to a male employee harassed by male co-workers.\textsuperscript{132}

The Supreme Court reversed, stating that "[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."\textsuperscript{133} The conclusion stands to reason: the prohibition against sex discrimination in Title VII had long been held to "protect[] men as well as women,"\textsuperscript{134} and the Court had long refused "to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."\textsuperscript{135} Title VII's prohibition, therefore, must "extend to sexual harassment of any kind"—male/female or same-sex—"that meets the statutory requirements."\textsuperscript{136}

The "statutory requirements," of course, include those articulated in \textit{Meritor} and \textit{Harris}\textsuperscript{137} that the harassing conduct be "severe or pervasive enough to create an objectively hostile or abusive work environment."\textsuperscript{138} But the requirement of particular concern to the \textit{Oncale} court was that the harassment be "because of . . . sex."

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimination . . . because of . . . sex." . . . "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."\textsuperscript{139}

The Court went on to explain that factfinders have found it "easy" to infer that "most male-female sexual harassment situations" are sex-based ("because of sex"), "because the challenged conduct typically involves explicit or implicit proposals of sexual activity" that probably "would not have been made to someone of the same sex."\textsuperscript{140} This "easy" inference is not available in the same-sex case, however, and the

\textsuperscript{131} \textit{Oncale} v. Sundowner Offshore Servs., 83 F.3d 118, 118 (5th Cir. 1996).
\textsuperscript{132} \textit{Oncale}, 1995 U.S. Dist. LEXIS 4119, at *4-5; \textit{Oncale}, 83 F.3d at 120.
\textsuperscript{133} \textit{Oncale}, 523 U.S. at 79.
\textsuperscript{134} Id. at 78 (quoting Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 682 (1983)).
\textsuperscript{135} Id. at 78 (quoting Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 682 (1983)).
\textsuperscript{136} \textit{Oncale}, 523 U.S. at 81 (citing \textit{Harris}, 510 U.S. at 21).
\textsuperscript{138} \textit{Oncale}, 523 U.S. at 81 (citing \textit{Harris}, 510 U.S. at 21).
\textsuperscript{139} Id. at 80 (quoting Title VII of the Civil Rights Act of 1964 § 703(a)(1) (alterations in original) and \textit{Harris}, 510 U.S. at 25 (Ginsburg, J., concurring)).
\textsuperscript{140} Id.
Court offers three “evidentiary route[s]”\textsuperscript{[141]} for a same-sex plaintiff like Oncale to prove that his harassment was because of sex.

First, “the same chain of inference” the Court deems typical in male-female cases—implicit or explicit proposals of sexual activity that would not have been made to someone of the other sex—"would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual."\textsuperscript{[142]} Second, same-sex harassment might be proven “for example, 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.”\textsuperscript{[143]} Third, a “same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”\textsuperscript{[144]}

The Court reiterates the bottom line: “Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination . . . because of . . . sex.’”\textsuperscript{[145]} For good measure, Justice Thomas, in a one sentence separate opinion, concurred with the otherwise unanimous decision “because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination ‘because of . . . sex.’”\textsuperscript{[146]}

2. The Opportunities: Marginalized Claimants and Nonsexual Harassment

Joseph Oncale, the plaintiff, won his case in the Supreme Court, which reached the result advocated in amicus briefs by feminist theorists—including Franke and MacKinnon—and civil rights groups.\textsuperscript{[147]} The initial comments on the case by feminist theorists were at least guardedly optimistic.\textsuperscript{[148]} There are at least two features of the opinion

\begin{itemize}
\item \textsuperscript{[141]} Id. at 81.
\item \textsuperscript{[142]} Id. at 80.
\item \textsuperscript{[143]} Id.
\item \textsuperscript{[144]} Id. at 80-81.
\item \textsuperscript{[145]} Id. at 81 (alterations in original) (citation omitted).
\item \textsuperscript{[146]} Id. at 82 (Thomas, J., concurring) (alterations in original) (citation omitted).
\item \textsuperscript{[147]} Franke & Hunter Brief, supra note 127, at 30; Brief of Lambda Legal Defense and Education Fund et al. as Amici Curiae in Support of Petitioner at 29, \textit{Oncale} (No. 96-568) [hereinafter Brief of Lambda LDF]; MacKinnon Brief, supra note 127, at 4-5.
\item \textsuperscript{[148]} Kathryn Abrams, briefly analyzing the decision shortly after its publication,
for civil rights advocates to celebrate.

First, *Oncale* can be read as consistent with a theory that sexual harassment violates Title VII when the harassing conduct is based on sex stereotyping. The evidence in the case supports a theory that *Oncale* was harassed because, in the view of his co-workers, he did not conform to their stereotypical version of maleness. Moreover, the opinion "contains a remarkable call for contextualization in the assessment of sexual harassment." The Court emphasized "that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" In a male-male harassment case, it would naturally have been unsuitable to announce a "reasonable woman" standard, the desirability of which has been the subject of some debate among feminist commentators. But *Oncale*'s formulation arguably resolves this controversy in the best way feasible: it appears to demand of the factfinder a particularized exercise in empathy that drops much of the baggage of stereotypical notions of reasonable manhood or womanhood. A person in plaintiff's position "considering all the circumstances" holds the potential for recognizing personhood in all its variety. Notwithstanding Justice Scalia's limited imaginative horizon, his example comparing a football coach's "smack[] on the buttocks" administered alternately to a male player on the football field and to a female secretary at the coach's office, establishes the liberating notion that the same conduct not abusive in one context may be severely hostile or abusive in another. Abrams may well be correct that *Oncale*

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149 But see infra Part II.B.4 (discussing why the Court refused to invoke their sex-stereotyping approach to sexual harassment in *Oncale*).

150 Abrams, supra note 126, at 1258.

151 *Oncale*, 523 U.S. at 81 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

152 The debate over the "reasonable woman" standard has spawned extensive commentary. The primary lines of argument concern whether, on the one hand, a "reasonable woman" standard is needed to combat male-centered judgments of how severe the harassing conduct is or, on the other, such a standard is irretrievably "essentialist" and would privilege the perspective of middle- and upper-class white heterosexual women. For a discussion of that debate, see, for example, Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 1995 DISSERT 48; Franke, supra note 13, at 747-48. Anita Bernstein has advocated throwing out a reasonableness standard entirely for the sexual harassment prima facie case, and replacing it with a "respectful person" standard that asks whether the harasser behaved respectfully toward the plaintiff rather than whether a "reasonable" plaintiff would have perceived the harassment as severe. Bernstein, supra note 13, at 449-53.
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“throws the door open to an entirely new—and heretofore almost entirely marginalized—group of claimants”;\textsuperscript{155} namely, men who have “been subjected to punishing verbal and physical harassment because of [their] perceived gender nonconformity.”\textsuperscript{154}

Second, in reviewing the divided views on same-sex harassment in the lower courts, the \textit{Oncale} opinion disapproves of those cases that “suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.”\textsuperscript{155} The Court asserts, “[w]e 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.”\textsuperscript{156} Later, the Court flatly states that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination.”\textsuperscript{157} Thus, \textit{Oncale} can be read as moving toward adoption of Vicki Schultz’s argument in \textit{Reconceptualizing Sexual Harassment}, that the sexual desire-dominance paradigm should be replaced by a theory that recognizes claims for nonsexual but sex-based harassment: nonsexual hazing, shunning, verbal abuse, denial of peer mentoring and cooperation, and a variety of other nonsexual but harassing conduct that has suppressed women’s opportunities, particularly in male-dominated job environments.\textsuperscript{158} Indeed, \textit{Oncale} has been recognized by some lower courts in just this way.\textsuperscript{159}

\textsuperscript{155} Abrams, \textit{supra} note 126, at 1259.

\textsuperscript{154} Id. at 1259 n.14. For a recent, more jaundiced view of \textit{Oncale}’s implications, see L. Camille Hébert, \textit{Sexual Harassment as Discrimination “Because of... Sex”: Have We Come Full Circle?}, 27 OHIO N.U. L. REV. 439, 463-64, 484 (2001).

\textsuperscript{155} \textit{Oncale}, 523 U.S. at 79. The Court cites \textit{Doe v. City of Belleville}, 119 F.3d 563 (7th Cir. 1997), \textit{vacated} by 523 U.S. 1001 (1998), as such a case. As argued below, that characterization of \textit{Doe} is somewhat misleading.

\textsuperscript{156} \textit{Oncale}, 523 U.S. at 80.

\textsuperscript{157} Id.

\textsuperscript{158} \textit{Oncale} was issued as Schultz’s article went to press; although she did not have a full opportunity to consider its implications, she expressed the view that “the result and reasoning of the case conform to, and in fact provide added support for” her analysis. Schultz, \textit{supra} note 13, at 1685 n.†.

\textsuperscript{159} See, \textit{e.g.}, \textit{Williams v. Gen. Motors Corp.}, 187 F.3d 558, 565-66 (6th Cir. 1999) (holding that conduct underlying a sexual harassment claim need not be overtly sexual in nature); \textit{Butler v. Ysleta Indep. Sch. Dist.}, 161 F.3d 263, 270 (5th Cir. 1998) (analyzing a sexual harassment claim, not in terms of sexual nature of allegedly harassing conduct, but rather in terms of whether conduct was designed to undermine a woman’s competence); \textit{see also O’Shea v. Yellow Tech. Servs.}, 185 F.3d 1093, 1097 (10th Cir. 1999) (relying on pre-\textit{Oncale} authorities for holding that nonsexual and facially neutral abusive conduct can support a finding of gender animus sufficient to sustain a hostile environment claim).
3. Clouds of Doubt: Joseph Oncale’s Fate on Remand

Supreme Court opinions are often unreliable guides to their own aftermath. Joseph Oncale “won” his case in the Supreme Court, in that the Fifth Circuit’s holding categorically barring same-sex harassment cases was reversed. Other than that, the United States Reports tell us only that “the case is remanded for further proceedings consistent with this opinion.” What would those proceedings look like? Would Oncale be able to prove that his harassment was “discrimination . . . because of . . . sex” under any of the three “evidentiary route[s]” suggested by the Court?61

The answer would seem to be “no.” The first route, sexual advances motivated by the desire of a “homosexual” harasser, would require Oncale to produce “credible evidence that the harasser was homosexual.”62 Such evidence does not jump out of the opinion; nor would it seem to fit a theory of the case as a story of sexual violence to enforce heterosexist gender norms.

The second route—sex-specific derogatory language showing the harasser’s hostility to that sex in the workplace63—matches the facts even less. It is doubtful that any of Oncale’s harassers expressed a general hostility to men in the workplace. The notion seems far-fetched in a male-dominated work world, and that may well explain why the Court illustrated this evidentiary approach with an example of “a female victim . . . harassed in such sex-specific and derogatory terms by another woman.”64 The story of a woman who breaks into a male-dominated job and later opposes subsequent women entrants—a hostility likely born out of the frustration of limited opportunity—is as familiar as a male version of that story is fanciful. The third route—“direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed sex workplace”65—also appears unavailable to Oncale. The oil rig was an all-male environment. On closer examination, then, it would appear that Oncale would have to settle for the largely symbolic personal satisfaction of winning a reversal in the U.S. Supreme Court since he seemed destined to lose on remand.

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60 Oncale, 523 U.S. at 82.
61 Id. at 81.
62 Id. at 80.
63 Id.
64 Id.
65 Id. at 80-81.
The reality was more complicated. On remand, Sundowner moved for summary judgment, making the argument outlined above: that Oncale could not prove discrimination under any of the three "evidentiary routes" outlined by the Court. Although Oncale argued in opposition that the three evidentiary routes were mere examples that were not intended to be exhaustive of the ways to prove harassment because of sex, he fell back on two of the routes set forth in the opinion. First, Oncale argued that sexual conduct by a male harasser directed to a male victim was prima facie evidence of homosexuality—"a homosexual is as a homosexual does," so to speak—and should be sufficient evidence to rebut any "presumption of heterosexuality" and survive summary judgment. The employer's evidence, if any, that the harassers had no sexual desire for Oncale and engaged in heterosexual relations outside of work, would simply raise an issue of fact for the jury. Second, Oncale argued that there was comparative evidence in a limited sense: women worked in Sundowner's corporate offices, and the employer took their complaints of sexual harassment seriously, whereas Oncale's complaints were disregarded. Sundowner's motion for summary judgment was denied, and three days before trial the case ended in a confidential settlement without further published decision.

One might feel disappointment that Oncale's attorneys really did not fight to establish new "evidentiary routes" to prove "because of sex," instead of trying to shoehorn the facts into the routes stated in the opinion. The comparative evidence argument stretches the facts, and suggests crabbed possibilities for other plaintiffs. The argument that the harassers were in fact homosexual leaves a bad impression, as though Oncale took the low road: there is a gay-bashing quality to a legal doctrine that seems to call for a "homosexual" villain, and that story does not really seem to match up with Oncale's experience anyway. But Oncale and his attorneys can hardly be blamed for trying to win their case. Courts that have been reversed are rarely in an innovating mood on remand; this district court might well have decided that the three routes outlined in Oncale were the only three. Given this state of affairs, Oncale's attorneys made clever arguments that

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166 For a post-Oncale decision accepting just this argument to deny summary judgment, see Fry v. Holmes Freight Lines, 72 F. Supp. 2d 1074, 1078-79 (W.D. Mo. 1999).
168 Telephone Interview with Nicholas Canaday, III, counsel for Joseph Oncale, Canaday Law Firm (June 15, 2000).
served their client's interest. The blame must fall squarely on the Supreme Court.

B. Oncale, Take Two

*Oncale*, indeed, is a decision that looks worse and worse on each successive reading. On further reflection, it may be more accurate to characterize it as a "reverse discrimination" case than one that extends Title VII protection to marginalized claimants.

1. Proving "Because of Sex" Without a Sex Per Se Rule

*Oncale* repeatedly stresses the need to prove causation: the conduct, to be actionable sex discrimination, must be because of sex. The legal analysis section in *Oncale* is nine paragraphs long; the phrase "because of . . . sex" appears six times, perhaps only two or three repetitions short of obsessive. The repetitive attention to this phrase from Title VII's operative Section 703(a)(1) defining the unlawful employment practice ("discrimination . . . because of [etc.]") emphasizes Justice Scalia's authorship, and in particular his textualist credo based on the idea that the words of the statute generate determinate meanings that govern judicial interpretations. *Oncale* conveys the impression that this ambiguous phrase will gain a fixed meaning from its forceful repetition alone. The sex per se rule provided a useful evidentiary shortcut by which sexual harassment plaintiffs could establish causation. Recognizing these virtues, two of Oncale's supporting amici urged the adoption of a rule that, whatever other conduct might also qualify as harassment because of sex, sexual conduct is per se because of sex. But the Court demurred, stating that "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely be-

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169 *Oncale*, 523 U.S. at 78-81.

170 *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29, 16-35 (1997) (providing a textualist approach to statutory interpretation in which "the objective indication of the words, rather than the intent of the legislator, is what constitutes the law").

171 *Supra* Part I.C.

172 *See* MacKinnon Brief, *supra* note 127, at 18 ("Sexuality is gendered in societies of sex inequality. As a result, for better or worse, in most instances it is the essence of sexual conduct between two individuals that the one initiating or inviting the conduct normally does so because of the other's sex." (citations and internal quotations omitted)); Brief of Lambda LDF, *supra* note 147, at 5-8 (arguing that conduct of a sexual nature is inherently because of sex).
cause the words used have sexual content or connotations." Instead, the sexual nature of harassing conduct, Oncale implies, will be relevant only when based on sexual desire. The Court reasoned that it is "reasonable to assume" that "explicit or implicit proposals of sexual activity" targeted at a person by the opposite sex by a (presumed) heterosexual or at a person of the same sex by a (proven) homosexual is because of sex. In cases like Jacksonville Shipyards or Harris, involving abusive sex-specific language and physical touching but no "proposals of sexual activity," there will presumably have to be some further proof that the conduct is "because of sex." What will this proof look like?

Of two remaining evidentiary routes, one is itself comparative evidence. The other evidentiary route, "sex specific and derogatory remarks" showing "general hostility to the presence of women in the workplace," suggests the sort of evidence at work in mixed-motive cases. Called "direct" evidence in the caselaw, it is actually circumstantial evidence into the harasser's discriminatory mind. The Court does not say these examples were exhaustive, and it would have been helpful had the opinion reaffirmed more clearly that the critical issue is discriminatory intent, however proved. Although the Oncale evidentiary routes seemingly should not be viewed as exhaustive, since the issue is discriminatory intent, lower courts have predictably divided on the issue to date.

The emphasis on comparative evidence becomes problematic both in single-sex workplaces, such as Oncale's, and cases in which the employer can claim that the harasser targeted both men and women. What happens, for example, in a case like Jacksonville Shipyards, where the work atmosphere is permeated by degrading sexual language and images but is not necessarily "targeted" at members of one sex rather than another? Under a sex per se rule, the causation element would have been taken for granted; under Oncale, however, it is not clear that any of the evidentiary routes would apply.

173 Oncale, 523 U.S. at 80.
174 Id.
175 Id.
176 Compare Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (asserting that Oncale's examples of evidence of causation are instructive, not exhaustive), with Mims v. Carrier Corp., 88 F. Supp. 2d 706, 714-15 (E.D. Tex. 2000) (suggesting that the three routes are exhaustive).
2. The Civility Code Problem

Why did the *Oncale* Court find it necessary to shun the sex per se rule? The Court stated explicitly its view that proof of causation is perhaps the key feature that prevents Title VII from becoming "a general civility code for the American workplace."\(^{178}\) Presumably, a sex per se rule would run the risk of creating such a civility code by making a federal case out of even the mildest sexual banter. This is, however, at best a half-truth.

Given the facts of the case, *Oncale* was hardly an appropriate vehicle to illustrate the danger of a sex per se rule transforming Title VII into a civility code. The abuse to which Oncale was subjected, according to his testimony, was not mere "incivility."\(^{179}\) It was rape.\(^{180}\) The

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\(^{178}\) *Oncale*, 523 U.S. at 80.

\(^{179}\) The facts were summarized in the MacKinnon amicus brief as follows:

John Lyons began his sexual advances and sexual objectification of Oncale early in his employment. Dep. at 40:8-9 ("You know you got a cute little ass, boy."). Lyons said he was going to "fuck me in my behind." Aff. at 1. He threatened to rape him. Dep. at 41-42. ("If I don't get you now, I'll get you later. I'm going to get you. You're going to give it to me. . . . [H]e said that I would have sex with him before it was over."). Such remarks were constant.

On October 25, 1991, Oncale was first sexually attacked physically. Aff. at 1. Pippen grabbed him, pulled him down, and held him immobile in a squatting position on his knees while Lyons unzipped his pants, pulled out his penis, and stuck it onto the back of Oncale's head. Dep. at 49-52. Oncale asked them to quit. Dep. at 53:2-3. Lyons and Pippen laughed. Dep. at 53:8-9. Oncale later that day learned that most of his co-workers had seen the assault. Dep. at 53:2-3; Aff. at 2.

The next day, Brandon Johnson chose a dangerous moment on the job to grab Oncale and force him to the ground again. Dep. at 55. Lyons pulled his penis out and put it on Oncale's arm. Dep. at 57. Oncale complained to superiors. Aff. at 1.

That same night, Lyons and Pippen attempted to rape Oncale as he was taking a shower. Pippen grabbed him, lifting him off the ground by the knees, while "John Lyons grabs the bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me . . . ." Dep. at 58. Oncale struggled and got away. Dep. at 60. He believed the intentions of Lyons were "to rape me" and those of Pippen were "to assist and/or help . . . rape me, too." Dep. at 72.

Oncale complained further and tried to arrange to get off the oil rig. The sexual advances and sexual threats continued. John Lyons said: "You told your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway." Dep. at 74. Oncale "felt that if I didn't leave my job, that I would be raped or forced to have sex . . . that if I didn't get off the rig, that I would be sexually violated." Dep. at 73.


\(^{180}\) The harassment directed at Oncale by his co-workers and supervisors was, in fact, criminal. Under Louisiana law, Lyons could have been charged with sexual bat-
notion that a restrictive interpretation of causation is needed to keep cases like this from turning Title VII into a "civility code" ignores the other requirements of a sexual harassment claim, namely, that the conduct must be severe or pervasive. Trivial sexual incivilities were not considered sexual harassment, even by courts that adhered to a sex per se rule, because they are not severe or pervasive. Additionally, as a matter of logic it would seem that the need to screen out mere incivility should be handled by the severity requirement rather than the requirement of intent to discriminate. Thus, the civility code "problem" that seems to have irritated the Court need not have been solved by disapproving the sex per se rule.

3. Comparative Evidence and the Equal Opportunity Harasser

A so-called "equal opportunity harasser defense" is based on the idea that harassment cannot be "because of sex" if the harassing conduct is directed at both men and women. Technically, it is not an affirmative "defense" that must be pleaded and proved by a defendant, but rather a name given to a defendant's argument that the plaintiff has failed to meet her burden of establishing causation. The notion of such a defense argument was raised by the court in the first opinion to recognize a sexual harassment claim, Barnes v. Costle, which noted that "[i]n the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." In Barnes's context of a quid pro quo claim based on sexual advances, the issue was framed in terms of a "bisexual harasser," but the notion of an "equal opportunity" harasser has been debated in the caselaw for some time since Barnes. Oncale's emphatic repetition of "because of sex," combined

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

Id. at 990 n.55.

Compare Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) ("[I]nstances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because
with its emphasis on “comparative evidence,” suggests that the Supreme Court is leaning heavily toward those courts holding that employers can avoid liability for harassment by pointing to harassment of members of the opposite sex of the plaintiff.

One such case is Holman v. Indiana,¹ in which a married couple employed by the state alleged that their supervisor sexually harassed each of them with physical touching and sexual propositions.¹² The court dismissed these claims at the pleading stage, reasoning that “Title VII does not cover the ‘equal opportunity’ or ‘bisexual’ harasser, then, because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).”¹³ In reaching this conclusion, the court relied heavily on “Oncale’s emphasis on the statutory requirement of discrimination,”¹⁴ and in particular on Oncale’s heavy reliance on Justice Ginsburg’s dictum that differential treatment of the sexes is “the critical issue” in sex discrimination cases.¹⁵ The Holman court found it entirely appropriate “for a Title VII remedy to be precluded when both sexes are treated badly,” and expressed concern only for opportunistic equal opportunity harassers who might try to “manufacture additional harassments to attempt to avoid Title VII liability”—“[i]n such cases the harasser is not a bona fide ‘equal opportunity’ harasser,” and might be precluded from the benefit of the so-called defense.¹⁶

Significantly, the “equal opportunity harasser defense” has not been limited to cases where the harasser actually harasses members of both sexes. Combining the emphasis on comparative evidence with a recognition that it is ultimately intent that matters, some courts have dismissed harassment claims based on evidence—sometimes very thin evidence—that the harasser would hypothetically be inclined to subject

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¹ Holman v. Indiana, 184
² See id. at 401 (detailing plaintiffs’ claims).
³ Id. at 403.
⁴ Id.
⁵ Id. (quoting Oncale, 523 U.S. at 80 (quoting Harris, 510 U.S. at 25 (Ginsburg, J., concurring))).
⁶ Id. at 404. Need it be observed that the notion of a bona fide (that is, “good faith”) equal opportunity harasser is somewhat ludicrous?
members of the other sex to similar abuse. In *Shepherd v. Slater Steels Corp.*, the district court had dismissed a same-sex harassment claim based on the plaintiff's belief that the harasser had a propensity to harass both men and women. Although the court of appeals reversed on the ground that the speculative and hearsay evidence of such "equal opportunity harassment" was not strong enough to grant summary judgment for the defendant, the court did adhere to the argument that equal opportunity harassment escapes Title VII liability. Moreover, this example does bespeak a defense strategy—the hypothetical equal opportunity harasser—that can be successful in some courts.

The lower courts continue to be divided on whether equal opportunity harassment escapes Title VII liability. In *Brown v. Henderson*, the court ultimately concluded that the plaintiff, a female postal worker, was harassed due to her involvement in a union election rather than because of her sex, but rejected the idea that equal opportunity harassment as a matter of law defeats a finding of causation. In a particularly insightful opinion by Judge Calabresi, the court cited caselaw holding that discrimination claims focus on whether an individual has been mistreated due to her group-based characteristics. Thus, "discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex." From these principles, the court concluded that, although "in the absence of evidence suggesting that a plaintiff's sex was relevant" similar mistreatment of men and women may create an inference that sex was not the reason for it, "the inquiry into whether ill treatment was actually sex-based discrimination

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190 168 F.3d 998 (7th Cir. 1999).
191 See id. at 1011 ("[W]hat matters is whether Jemison in fact did sexually harass members of both genders. . . . [T]he evidence establishes nothing more than the possibility . . . ").
192 See Mendoza v. Borden, Inc., 195 F.3d 1238, 1254 (11th Cir. 1999) (en banc) (Edmondson, J., concurring) (concluding that plaintiff's sexual harassment claim based on being bumped, leered at, and followed was not because of sex, because such conduct is commonplace and "can occur whether the employees are men or women"); Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999) (dismissing sexual harassment claim of female plaintiff who was verbally abused and "thumped" on the head by her male supervisor because plaintiff testified at her deposition that she did not believe that her supervisor was motivated by the fact that she was a woman).
193 257 F.3d 246 (2d Cir. 2001).
194 Id. at 252.
cannot be short-circuited by the mere fact that both men and women are involved.\textsuperscript{195}

For it may be the case that a co-worker or supervisor treats both men and women badly, but women worse. Or, . . . a woman might be abused in ways that cannot be explained without reference to her sex, notwithstanding the fact that a man received treatment at least as harsh, though for other—non-sexual—reasons. Finally, there might even be circumstances that are actionable under Title VII when both men and women suffer sexually discriminatory harms in the same workplace, but for different reasons.\textsuperscript{196}

Despite cases like Brown, Oncale's heavy emphasis on comparative evidence and differential treatment lends support to the argument that the "equal opportunity harasser" does not violate Title VII. To see through the conceptual error of conflating differential treatment with the intent to discriminate requires a particularly focused and well-reasoned effort that lower courts may lack the time, energy, and vision to make.

4. Avoidance of a Sex-Stereotyping/Gender Harassment Theory

The facts of Oncale seem to call out for the invocation of a sex-stereotyping theory of sexual harassment, relying on Price Waterhouse.\textsuperscript{197} Such a theory was ably argued to the court in amicus briefs filed in support of Oncale,\textsuperscript{198} and a sex-stereotyping theory also was relied upon in Doe v. City of Belleville, which was likewise under review by the Supreme Court. The Oncale Court was thus well aware of the doctrinal advantages of a sex-stereotyping theory, which would have solved the two primary problems faced by the Court: how to hold that same-sex harassment was "because of sex," while clarifying that all sexual harassment claims must be "because of sex." However, nowhere in Oncale does the Court refer to the harassment as conceivably falling within the "spectrum of disparate treatment of men and women resulting from sex stereotypes."\textsuperscript{199} Indeed, the word "stereotype" does not appear in the opinion. Nor is there a citation to Price Waterhouse. Also significant is the Oncale Court's backhanded treat-

\textsuperscript{195} Id. at 254.
\textsuperscript{196} Id. at 254-55 (citation omitted).
\textsuperscript{197} Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
\textsuperscript{198} See supra note 127 (citing the briefs filed in support of petitioner Oncale).
ment of Doe, which the Court unfairly dismissed in a single sentence as a case wrongly holding “that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation or motivations.”

In light of all the ways that a sex-stereotyping theory should have come to the Court’s attention, the complete failure of the Oncale opinion to address the sex-stereotyping theory of harassment, along with its failure to identify sex-stereotyping as an “evidentiary route” for proving “because of sex,” is notable and disturbing. The sex-stereotyping theory has far-reaching potential for advancing Title VII’s goal of full workplace integration of traditionally excluded groups. As several feminist theorists have forcefully argued, the enforcement of hetero-male gender norms in the workplace excludes not only gender-nonconformists from employment opportunities, but also women generally. The sex-stereotyping of Ann Hopkins, for example, blocked her opportunities not simply because she exhibited masculine traits that the accounting partners found off-putting coming from a woman, but rather because it placed Hopkins in a “double bind.” As the Price Waterhouse Court expressly recognized, “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”

5. Homophobia

Why would the Court so blatantly snub the sex-stereotyping theory when it would serve the purposes at hand in a manner consistent with both the “because of sex” mandate and the core Title VII purpose of breaking down employment barriers for women? A number of signs point to an answer that cuts directly against Oncale’s surface appearance of including marginalized claimants. Embracing a sex-stereotyping theory in a same-sex harassment case would be tantamount to extending Title VII harassment protection to lesbians, gays,


201 See supra Part II.A.2 (discussing possible means of identifying sexual harassment other than sex per se).

202 Case, supra note 27, at 45.

and gender nonconformists. Such discrimination is inevitably based on the perception that the target of the discrimination has failed to adopt behavior—gender or sexual behavior—deemed suitable to his or her sex, and is therefore discrimination “because of . . . sex” under a plain language reading of Title VII. The Court’s resounding silence on the sex-stereotyping issue and caselaw suggest that the Court studiously avoided extending Title VII in this direction. None of the “evidentiary routes” in Oncale would seem to protect gender nonconformists from the most prevalent forms of harassment they face.

There is a further clue to the existence of this disquieting undercurrent in Oncale. The unanimous opinion was authored by Justice Scalia, who has elsewhere emphasized what he views as the importance of maintaining a strict distinction between sex and gender. Dissenting from a 1994 decision holding that sex-based peremptory challenges to women jurors constituted sex discrimination in violation of the Fourteenth Amendment, Justice Scalia noted:

Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word “gender” has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution’s peremptories). The case involves, therefore, sex discrimination plain and simple.

This may well be more than textual correctness on Justice Scalia’s part. If “sex discrimination plain and simple” is to be understood as entirely distinct from gender discrimination—discrimination based on attitudinal characteristics or sex roles—then Justice Scalia has laid the foundation for an argument that the prohibitions on sex discrimination found in Title VII and constitutional law do not protect against this emerging understanding of gender discrimination. Hence, discrimination against lesbians, gays, and gender nonconformists would not be prohibited by antidiscrimination law.

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204 Infra Part V.B.2.
205 Case, supra note 27, at 57-75; Flynn, supra note 27, at 396-408; Valdes, supra note 27, at 192.
207 The notion that Title VII’s reference to “sex” should mean biological sex, to the exclusion of gender, is a dubious one as a matter of either statutory text or legislative intent. Even Justice Scalia would find, referring to the dictionaries “in force” at
prising, therefore, that in deciding Oncale some of the Justices consciously sought to avoid opening the door to such claimants.

At the same time, Oncale seems to contemplate ways in which sexual harassment doctrine can be turned on lesbians and gays with a new intensity. Oncale approves a legal (rebuttable) presumption of heterosexuality (over the strenuous objection of several amici). While "it is reasonable to assume" that "explicit or implicit proposals of sexual activity" from a male harasser to a female victim "would not have been made to someone of the same sex," same-sex harassment will only get that inference "if there [is] credible evidence that the harasser [is] homosexual." So, whereas heterosexuality is presumed, homosexuality must be proven. Oncale thus invites the federal courts to embark on some potentially very ugly lines of factual inquiry. In a case like Oncale itself, the plaintiff must attempt to prove that a harasser who believes, or at least claims, he is heterosexual is "really" a homosexual. This, of course, will require the courts to determine what makes someone "homosexual," for sexual harassment purposes, a question that has been recognized as extremely complex by psychology experts, sociologists, and philosophers. Tests may have to be

the time of the enactment of the Civil Rights Act of 1964, a blurring of this sex-gender distinction that he found "new and useful" in J.E.B. The second definition of "sex," after biological and before sexual, was "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (unabridged ed. 1961) (emphasis added). The same dictionary defines "gender" as "sex." Id. at 944 (definition 1b). Definition two of "gender" refers to the linguistic division into masculine and feminine subclasses, but the definitions of gender nowhere refer to masculine and feminine behavior, id. at 944, which Webster's instead places within the definition of "sex," id. at 2081.


209 The definition of homosexuality may refer to "same-gender behavior, desire, self-definition, or identification or some combination of these elements . . . Development of self-identification as homosexual or gay is a psychologically and socially complex state . . . ." EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 290-91 (1994); see also 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 43 (Robert Hurley trans., Pantheon Books 1978) (1976) ("[T]he psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized . . . less by a type of sexual relations than by a certain quality of sexual sensibility . . . ."); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 610-66 (1948) (noting the difficulty of defining homosexuality and then rating and analyzing heterosexuality and homosexuality on a zero-to-six scale based on frequency of various kinds of sociosexual experiences); id. at 656 ("[N]early half (46%) of the population engages in both heterosexual and homosexual activities . . . in the course of their adult lives."); Mary McIntosh, The Homosexual Role, 16 SOC. PROBS. 182, 184 (1968) ("[S]exual behavior
devised to determine a sufficient degree of "homosexuality" to raise a presumption that sexual conduct toward the victim was motivated by "desire" rather than mere "rough-housing" or "horseplay." At the same time, recognition of same-sex harassment in conjunction with an inference of sexual desire flowing from "credible evidence that the harasser was homosexual" may open up opportunities for persecution of gays and lesbians, taking the form of the harassment claims themselves, as well as the accompanying intrusive discovery into alleged harassers' private lives to "prove" their homosexuality. Such inquiries would not be necessary regarding heterosexual harassers, whose sexual orientation is presumed and need not be supported with "credible evidence." All the while, participants in this drama will be scratching their heads trying to figure out why, as MacKinnon puts it, "Title VII access [will] now turn on the sexual feelings and imagined or real sexual identities of the perpetrators ... [why] the gender of those with whom Lyons and Pippen are sexual, when others want to be sexual with them, determine Oncale's rights against them."

A further implication of Oncale may be that while heterosexuals can abuse same-sex gay/lesbian co-workers with impunity, openly gay and lesbian employees may be especially vulnerable to harassment claims. In a particularly troubling passage, the Court describes forms of "ordinary socializing in the workplace" that do not rise to the level of discrimination: these include "male-on-male horseplay" and "intersexual flirtation." "Male-on-male horseplay" has a strong heterosexual undertone to it. It brings to mind Scalia's example of the coach slapping the football player on the buttocks and his caveat that the harassment "inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." If the football coach is straight, the buttocks slap is mere "horseplay." If he's gay, then . . .

What then for "intersexual flirtation"? Assuming that phrase means flirtation between people of the opposite sex, then what are patterns cannot be dichotomized in the way that the social roles of homosexual and heterosexual can.

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210 Oncale, 523 U.S. at 81-82.
211 Id. at 80.
212 MacKinnon Brief, supra note 127, at 25.
213 Oncale, 523 U.S. at 81.
214 Id.
215 The term "intersexual" is frequently used (like hermaphrodite) to refer to people whose genitalia are ambiguous—not clearly male or female—and whose anatomy thereby raises questions about our culture's binary assumption about biological
we to make of its juxtaposition with "male-on-male [i.e., "intrasexual"]
horseplay"? Oncale suggests that horseplay is mere "ordinary socializ-
ing" between guys, and flirtation is "ordinary socializing" between guys
and gals. So what happens when one guy flirts with another? I fear
that "careful consideration of the social context" will kick in at this
point and prevailing homophobic norms, particularly heterosexual
male hypersensitivity to "intrasexual flirtation," will serve as the "rea-
sonable person standard," ultimately creating an oppressive double
standard. Straight men can flirt with women with some leeway for
unwelcome incivilities; but gay men who flirt with men are sexual har-
assers. "The prohibition of harassment on the basis of sex requires
neither asexuality nor androgyny in the workplace," the Oncale Court
opines, but it seems to tilt heavily in favor of heterosexuality.

6. Oncale as a Reverse Discrimination Case

In the end, Oncale may be most accurately understood as a reverse
discrimination case. Who are the winners in Oncale? Women, the
core constituency of Title VII's protection against sexual harassment,
gain some and lose some. They gain increased access to the courts
with claims of nonsexual harassment, but lose the because-of-sex pre-
sumption for claims involving harassing sexual conduct that do not
involve "proposals of sexual activity" motivated by sexual desire. Les-
bians, gays, and gender nonconformists lose much and win little. Ar-
guably, heterosexual males represent the only group that gains some-
thing and loses nothing. They gain clear entree as sexual harassment
plaintiffs, contrary to the categorical rule of the Fifth Circuit. While
same-sex claims are recognized, Oncale tells us that credible evidence
of homosexuality will raise an inference that a "sexual advance" is be-
cause of sex. This standard clearly recognizes same-sex claims against
gay men, but not necessarily against straight men. As in Oncale on
remand, a plaintiff might have to cast his harasser in the ill-fitting role
of gay villain to win the case. Meanwhile, heterosexuals gain, perhaps,
an argument that "intrasexual flirtation" is actionable at a lower
threshold than "intersexual flirtation," insofar as the "reasonable" vic-

sex. Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between
Law and Biology, 41 ARIZ. L. REV. 265, 285 (1999). I would bet large sums of money
that Justice Scalia did not intend to refer to these folks.  
216 Oncale, 523 U.S. at 81. 
217 Id. 
218 Id. at 77-78 (citing Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994)).
tim standard deems gay sexual advances more offensive than straight ones.

As the analysis is framed, *Oncale* accepts the same-sex harassment claim not by recognizing an antisuondrination argument that the plaintiff’s harassment was part and parcel of an assertion of hetero-male workplace primacy. Rather, the Court was simply pursuing the same formal equality logic that has led to the acceptance of reverse discrimination claims under Title VII: the prohibition against sex discrimination protects men as well as women who can prove that they were treated differently because of their sex.

III. THE FEMINIST CASE AGAINST A SEX PER SE RULE

The second generation sexual harassment scholarship has been aimed at moving sexual harassment doctrine forward through a variety of cross-currents and pressures that developed since the Supreme Court recognized the cause of action in 1986. First, according to the research of Vicki Schultz, the sexual-desire based theory of sexual harassment, which dominated early cases and lingered as the law developed, caused courts to tend to ignore pervasive but nonsexual harassing conduct against women. Second, a popular backlash against some of the baggage associated with MacKinnon and other early feminist sexual harassment theorists emerged as a potential threat to the sustainability of robust enforcement of Title VII’s sexual harassment prohibition. Finally, an increasing number of same-sex (predominantly, male-on-male) harassment cases were surfacing in the lower courts, exposing both the problem of workplace harassment of gender nonconformists and the shortcomings of courts’ theoretical understanding of the nature of sexual harassment as a Title VII violation. The work of Schultz, Franke, and Abrams, either recently published or in final editorial stages just before the *Oncale* decision was announced at the end of the 1997-1998 Supreme Court Term, are prominent examples of theoretical efforts to deal with these issues. A theme running through all three works is the effort to broaden the understanding of sexual harassment, either to include nonsexual forms of harassment or cases of male-on-male harassment targeting

221 Schultz, *supra* note 13, at 1793-94.
222 *See* Franke, *supra* note 13, at 696-98 (citing cases).
men who fail to conform to traditional masculine gender roles; while at the same time promoting women's sexual agency by rejecting the stereotypical notion that male sexual conduct automatically victimizes women. In this Section, I examine the work of each of these theorists to show how each either expressly rejects the sex per se rule (in the cases of Schultz and Franke) or implicitly abandons it (Abrams), based on the perceived need to address these issues. However, as I go on to argue, the sex per se rule is not part of the problem and its rejection is not necessary to the solution.

A. Sexual Harassment Reconceptualized

1. Desexualizing Sexual Harassment

Vicki Schultz has argued for many years that "overtly sexual behavior" is "only the tip of a tremendous iceberg" of harassment of working women through nonsexual behavior. In *Reconceptualizing Sexual Harassment*, Schultz argues that the bulk of that iceberg has been submerged because a "sexual desire-dominance paradigm governs" the law of sexual harassment. According to then-current legal doctrine (pre-Oncale, when Schultz wrote her article), sexually harassing conduct was understood to consist of unwanted heterosexual advances. Such conduct was recognized as a violation of Title VII because it came to be seen as motivated either by sexual desire or an intent to exploit women sexually: "Either way, [the harasser's] actions are an abuse of his power and an abuse of her sex," and therefore properly understood as discrimination because of sex. The doctrine grew out of the radical feminist argument that "sexual desire and domination were inextricably linked in the institution of heterosexuality." According to Schultz, the sexual desire-dominance paradigm represented an advance when courts first adopted it, for it overcame their previous refusal to recognize sexual harassment claims at all. However, the paradigm had inherent problems that would eventually undermine its utility. The judicial interpretation of the paradigm

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224 Schultz, supra note 13.
225 Id. at 1692.
226 Id. (alteration in the original).
227 Id. at 1698.
228 Id. at 1704.
falls into the error—which Schultz also attributes to the first feminist theorists of sexual harassment, including MacKinnon—of conflating sexual exploitation and sex inequality.\(^{229}\)

Schultz argues that the desire-dominance paradigm’s insistence on sexual conduct as the defining characteristic of sexual harassment claims has led courts to disregard nonsexual conduct that also creates hostile work environments for women. The focus on sexual conduct in both judicial and popular understandings tends to distract from the inequality-producing harm fundamental to placing sexual harassment as a wrong within Title VII, and instead creates the misleading impression that sexual misconduct is the primary evil.\(^{230}\) More significant, according to Schultz, is what she calls the “disaggregation” by the courts of sexual and nonsexual harassing conduct.\(^{231}\) In some instances, courts have separated sexual and nonsexual harassing conduct into factually and legally distinct claims, and in others have dismissed the nonsexual claims altogether.\(^{232}\) Thus, as Schultz shows, in case after case, courts would artificially split into sexual and nonsexual components a single course of harassing conduct that undermined a woman employee. In *Harris v. Forklift Systems*,\(^{233}\) for example, the lower courts considered only the sexual misconduct directed at the plaintiff Theresa Harris and failed to give weight to such facts as her being the only manager at the company to be denied an individual office, company car, and allowance and that she was required to serve coffee to the other managers at meetings.\(^{234}\) One result of such disaggregation is that the plaintiff’s burden of proof is unreasonably heightened. Because a sexual harassment plaintiff must show the hostile environment to have been severe or pervasive, disaggregation would tend to make the two separate pieces of the case each seem less severe. Moreover, because the plaintiff must also prove the harassing conduct was “because of sex,” courts would often dismiss the nonsexual part of the claim as lacking in proof of sex bias.

Schultz’s corrective to this pervasive error by the lower courts is to reconceptualize sexual harassment by replacing the sexual desire-
dominance paradigm with what she calls a "competence-centered" paradigm. Sexual harassment should be understood as any conduct, whether or not sexual, "that has the purpose or effect of undermining the perceived or actual competence of women (and some men) who threaten the idealized masculinity of those who do the work." Such a broader understanding better captures the reality of workplace harassment of women, which is not necessarily motivated by "men's desire to exploit or dominate women sexually," but always has "the form and function of denigrating women's competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers." The competence-centered account would recognize the full range of harassing conduct that "subvert[s] a woman's perceived or actual competence," including nonsexual verbal denigration as well as such common nonsexual harassing techniques as denial of adequate training and mentoring, assigning unfair or impossible tasks, ostracism, and sabotage. For Schultz, then, not all workplace sexual conduct is discrimination because of sex, and more importantly not all discriminatory harassment because of sex is sexual conduct. In essence, Schultz views the idea of a direct causal nexus between sexual conduct and sex discrimination as a mistake; it is the competence-undermining effect of sexual harassment that mediates and causally connects sexual conduct to "sex."

2. Heteropatriarchy as Discrimination Because of Sex

Whereas Schultz's reconceptualization of the law is driven by the need to correct the mistake of disaggregating sexual from nonsexual harassing conduct, Katherine Franke's analysis is driven primarily by the failure of sexual harassment law to provide a coherent or principled resolution of same-sex harassment cases. In What's Wrong with Sexual Harassment?, Franke suggests that it is necessary to return to first principles in order to resolve such cases. According to Franke, "the fact that sexual harassment is a sexually discriminatory wrong is not a legal conclusion necessarily revealed in the text of Title VII. Rather it requires an argument. But courts have failed to make an argument; instead they have come to accept a sex per se rule in con-

235 Id. at 1762.
236 Id. at 1755.
237 Id. at 1764-65.
238 Franke, supra note 13.
239 Id. at 702.
clusory fashion. "[T]he conclusion that conduct of a sexual nature was 'based on sex' has come to go without saying . . . . The jurisprudential shorthand by which courts have come to assume that some sexual conduct is sex discrimination, frequently reflects a kind of jurisprudential laziness that is best stirred from its malaise."\(^{240}\)

Although Franke begins with the provocative assertion that the time has come to make a new effort to answer the "seemingly simple" question "why is [sexual harassment] sex discrimination?,"\(^{2}\) it emerges that the real focal point of her analysis is the causation element of sexual harassment claims. Hence the question she poses could properly be restated as "why is sexual conduct because of sex?" Franke sees the existing answers to this question as falling into three categories: "(1) the equality principle: the conduct would not have been undertaken but for the plaintiff's sex; (2) the anti-sex principle: the conduct was discriminatory precisely because it was sexual; and (3) the antisubordination principle: the conduct subordinated women to men."\(^{242}\) To Franke, these approaches, developed by feminist theorists and litigators, were beneficial in overcoming the initial judicial hostility to recognizing sexual harassment as a violation of Title VII, but each is flawed and incomplete as a theoretical account.

Under the equality principle, Title VII is designed to promote a meritocratic ideal by requiring workplaces to be color- and sex-blind. Franke credits Catharine MacKinnon with demonstrating that sexual harassment violates formal equality principles because it "limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions.' So understood, it amounts to disparate treatment of women based on their biological sex . . . ."\(^{243}\) This argument defines Title VII's because of sex requirement either in terms of but for cause (the conduct would not have been directed at the plaintiff "but for" her sex) or comparative disadvantage ("whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed")\(^{244}\). Although Franke herself elides these two slightly distinct analytical approaches into a single

\(^{240}\) Id. at 694.
\(^{241}\) Id. at 691.
\(^{242}\) Id. at 704.
\(^{243}\) Id. at 706 (quoting MACKINNON, supra note 21, at 40).
\(^{244}\) Franke, supra note 13, at 712 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).
"equality" approach,\textsuperscript{245} she is undoubtedly correct when she concludes that courts have overwhelmingly relied on a formal equality approach to determine whether sexual harassment is discrimination because of sex, and that they have done so because of "the natural inclination to turn to something familiar when in foreign or uncomfortable territory."\textsuperscript{246}

The problem with the formal equality approach, according to Franke, is that it begs the question of why sexual conduct directed by a man toward a woman in the workplace is because of sex. The explanation, often unstated, is that (hetero) sexual desire is only and always directed at the opposite sex, and a man's sexual advance on a woman therefore establishes that her sex is a "but for cause" of his harassing conduct. This explanation fails to explain why cases of sexual conduct not motivated by sexual desire are deemed "because of sex" in male-female harassment cases. Moreover, when a sexual-desire account is used in same-sex cases, the result is that actionable same-sex harassment is typically limited to harassment perpetrated by homosexuals.\textsuperscript{247} Harassment motivated by the impulse to coerce conformity with heterosexist gender norms usually escapes liability.

Franke has not set out to bolster the sex per se rule by providing the missing theoretical support, but rather to bury it. She thus proceeds to critique those feminist theorists who have argued, typically in conclusory fashion, that what makes sexual harassment a form of sex discrimination is "'precisely the fact that it is sexual.'"\textsuperscript{248} Courts seem to have relied in many cases on this "mere conclusion posing as argument,"\textsuperscript{249} but have failed to explain their decisions: In most cases, an allegation of sexual conduct in a harassment case means that "the inference or conclusion" of "based on sex" "is automatically drawn, and no theory is advanced as to why it is legitimate to use such an eviden-
The "anti-sex principle" identified by Franke proves to be nothing more than a vacuous version of the third argument—the "antisubordination principle"—which offers a more robust account of the idea that workplace sexual conduct amounts automatically to sex discrimination. Franke identifies antisubordination theory with that articulated by feminist theorists who were instrumental in the development of sexual harassment doctrine in the 1970s and 1980s, particularly Catharine MacKinnon and Susan Estrich. MacKinnon has argued, for example, that a discriminatory "sex stereotype is present in the male attitude, expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will, beings who exist for men's sexual stimulation and gratification." MacKinnon, according to Franke, has devoted her career to demonstrating that "male sexual behavior is, in some sense, fundamentally sexist" and "is the principal form and means of women's domination." Franke, for her part, rejects these ideas. The "impulse to collapse sexism with sex," as she calls it, reduces female sexuality to passive victimization. Moreover, says Franke, by reducing sexuality and sexual harassment to something that men do to women, MacKinnon's antisubordination theory fails to recognize the oppressive process of creation and reinforcement of gender roles that results from sexual harassment.

But even MacKinnon's flawed theory, Franke argues, is needed to make the logical link between current sexual harassment doctrine and the subordination of women. Only if sex is inherently subordinating does it make sense that harassing sexual conduct is per se because of sex. Nevertheless, Franke argues, MacKinnon's radical feminism has rarely, if ever, been accepted by courts, thus leaving the judicial recognition of a sex per se rule lacking a coherent justification.

Franke offers a revised antisubordination account to replace both

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250 Id. at 719.
251 Id. at 714-16, 725-29.
252 MACKINNON, supra note 21, at 179.
253 Franke, supra note 13, at 715, 728-29.
254 Id. at 762.
255 Id. at 762-71.
256 Id. at 728-29.
257 Franke contends that MacKinnon's argument that male sexuality inherently subordinates women "is either too complicated or too radical for most judges," who instead simply accept the conclusion that sex is sexist "according to a jaundiced analysis as to why." Id. at 729.
the theoretically vacuous formal equality theory and MacKinnon's "sex equals sexism" antisubordination theory. According to Franke, "one of the ultimate goals of antidiscrimination laws is, and I believe it should be, to provide all people more options with respect to how they do their gender." Therefore, it is necessary to account for same-sex harassment in cases such as one where the victimized man is subordinated for failing to conform to the norm of the sufficiently masculine, heterosexual male. For Franke, sexual harassment comprises those practices that police or enforce "hetero-patriarchal gender norms." Franke's argument about sexual harassment follows from her argument made elsewhere, that sex discrimination law has committed a fundamental error by assuming the existence of two immutable biological sexes, each of which carries an inextricable gender. Once biological sex and gender are disaggregated, it becomes (relatively) plain that the discriminatory pattern evident in sexual harassment cases is not biological men subordinating biological women, but rather hetero-masculine men subordinating everyone else.

Even the more nuanced feminist versions of antisubordination theory fail to account for the same-sex instances of this discriminatory pattern, Franke argues. As same-sex harassment cases began to rise to prominence in the early- to mid-1990s, Abrams, as well as Schultz and others, have tried to fit harassment of gender-nonconforming men into their antisubordination theory. Typically they have done so by theorizing such harassment as an epiphenomenon of the subordination of women: it is sexism displaced onto men, or men feminized or treated as women. Franke objects to this perspective as mistaken:

Our thinking and our theory must resist the urge to regard maleness and femaleness, and masculinity and femininity, as opposites, rather than as two locations on a spectrum of sexual and gendered identity. To label all bias against nonmasculine men as a kind of discrimination against

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258 Id. at 758.
259 Id. at 772.
260 Franke, supra note 26, at 5.
261 Abrams, supra note 20, at 2438-39; Abrams, supra note 13, at 1225-29; Case, supra note 27, at 46-57; Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 TEX. J. WOMEN & L. 95, 124-30 (1992); Schultz, supra note 13, at 1774-89.
262 See also MacKinnon Brief, supra note 127, at 10 ("Men who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors.").
women is to ignore the role that sexism plays in regulating male identity in a way that is related to, but not necessarily the same as, the role it plays in regulating female identity.\textsuperscript{263}

For Franke, it seems, viewing sexism as something men do to women tends to fall into the error long ago identified by feminists, that it is not enough simply for antidiscrimination law to remove barriers to equality—such as harassing conduct. If the baseline norm—equal to what?—remains masculine, then the nonmasculine will always be subordinate.\textsuperscript{264} But the goal of workplace equality should not be to allow everyone to be a man.

Franke contends that harassing sexual conduct is not discrimination “because of sex” on the face of it, and that the link between sexual conduct and sex discrimination requires an argument: sexual harassment is a “technology” of sexism, she argues, meaning that it is a \textit{means} to a wrong.\textsuperscript{265} What’s wrong with sexual harassment is not that it is sexual, but rather its effect of producing heteropatriarchy in the workplace. The workplace dominance of heteropatriarchy thus mediates and causally connects sexual conduct and the category “sex” protected under Title VII.

3. Broadening Traditional Antisubordination Theory

In \textit{The New Jurisprudence of Sexual Harassment}, Kathryn Abrams takes issue with reconceiving sexual harassment in ways that shift the primary focus away from the subordination of women, a flaw which she finds in the two theoretical accounts she discusses, by Franke and Anita Bernstein. Nevertheless, Abrams agrees that sexual harassment doctrine needs to be fixed: “If we hope to modify or reconstruct sexual harassment doctrine, we need a coherent account of where existing doctrine is going wrong, and, perhaps more importantly, a reconceptualization of the real problem to be remedied through sexual harassment litigation.”\textsuperscript{266}

Abrams further elaborates the antisubordination theory of sexual harassment that she has developed over several years. For example, she has argued that sexual harassment is:

\begin{itemize}
  \item Franke, \textit{supra} note 13, at 758.
  \item See Case, \textit{supra} note 27, at 72 ("[B]eing ‘feminine’ is viewed as the negation of a number of character traits classified as masculine."); Ann C. Scales, \textit{The Emergence of Feminist Jurisprudence: An Essay}, 95 \textit{YALE L.J.} 1373, 1382-83 (1985) ("Paradigmatic male values, like objectivity, are defined as exclusive . . . .").
  \item Franke, \textit{supra} note 13, at 762.
  \item Abrams, \textit{supra} note 13, at 1184.
\end{itemize}
either a form of gender discrimination against women—derision of some of the qualities that make women targets for sexual harassment—or a form of gender discrimination against men that disciplines not the group but a distinct subset for abandoning the qualities associated with men for the more socially stigmatized characteristics associated with women.

According to Abrams, sexual harassment "has emerged as a means of preserving male control over the workplace." Abrams's revised anti-subordination theory is designed to broaden the understanding of sexual harassment so that it can recognize various forms of harassing behavior and the complex identities of sexual harassment claimants. This broader understanding would include recognition of male-on-male harassment claims, even though the understanding is grounded on a theory of sex discrimination as subordination of women: Although most sexual harassment is aimed at women, male-on-male harassment also can be sexist by "asserting the primacy of male prerogatives or norms in the workplace."

Although she moves the understanding of sexual harassment beyond MacKinnon's male-sexuality-as-domination view, Abrams, unlike Franke or Schultz, does not appear at all invested in a rejection of MacKinnon. According to Abrams, it is not that MacKinnon wrongly conflates sexism with sex (as Franke contends), but rather that the social conditions have changed since MacKinnon wrote in 1979. "As more women have begun to claim equal status in society and have sought access to a wider range of jobs, male control over the workplace is no longer so hegemonic that sexualization and sexual availability are built uncontroversially into women's job descriptions," as MacKinnon had argued.

Perhaps more than anyone in recent years, Abrams has been consistently attentive to the need of sexual harassment theorists to speak in a practical way to courts. In The New Jurisprudence, Abrams takes pains to consider how her theoretical assertions should affect legal doctrine by outlining the basic elements of a hostile environment sexual harassment claim. Three points about her discussion are significant to my argument. First, Abrams identifies the unwelcomeness element—not the causation element—as the means for "the recogni-

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267 Abrams, supra note 20, at 2516.
268 Abrams, supra note 13, at 1206.
269 Id. at 1209.
270 Id. at 1206 (emphasis added).
271 Id. at 1220-21.
tion and depiction of women’s [sexual] agency,” a point with which I strongly agree, as discussed further below. However (and second), Abrams does not develop a clear position on the place of sexual conduct within the theoretical understanding of sexual harassment. Third, Abrams agrees with Franke that “[t]he based-on-sex requirement . . . needs substantial revision,” and she goes on to define that element as “connected with the enforcement of a sex and gender hierarchy.” Like Franke and Schultz, Abrams settles for a very complex definition of this threshold causation element in order to resolve the problems of essentialism, which are further discussed in the following Section.

B. The Lack of Necessity to Abandon the Sex Per Se Rule

For Franke and Schultz, the sex per se rule is inextricably associated with MacKinnon’s theory that male sexuality is inherently subordinating, making male sexual conduct in the workplace per se discrimination “because of sex.” Thus, they assert that the sex per se rule must be abandoned because it interferes with the goals they seek to advance: for Schultz, to include nonsexual claims of harassment, and for Franke (and secondarily for Schultz), to move to an understanding of harassment as gender subordination more broadly conceived. Further, both believe that a sex per se rule demeans women’s sexual agency: it necessarily conceives of women as automatic victims of sexual conduct. Abrams does not find it necessary to reject MacKinnon, yet at the same time she perceives no particular need to defend a sex per se rule; moreover, she seems in accord with Schultz and Franke’s perceived need to restructure the causation inquiry to address the problems of female sexual agency, nonsexual harassment, and same-sex harassment. On closer examination, however, it appears that the sex per se rule is not to blame for these problems, and getting rid of it is not necessary to address them.

272 Id. at 1222.
273 Abrams quotes the pre-Oncale element of a hostile environment claim as consisting of “‘unwelcome’ . . . requests for sexual favors or verbal or physical conduct of a sexual nature.” Id. at 1221. Focusing on the “unwelcomeness” aspect of the element, Abrams does not consider the inconsistency of the sexual definition of the conduct and her subsequent point that “[a]s Vicki Schultz correctly observes, for non-sexual forms of sexual harassment . . . unwelcomeness should be assumed.” Id.
274 Id. at 1223 (internal quotations omitted).
1. The Problem of Female Sexual Agency

Both Franke and Schultz express the concern that relying on sexual conduct as a touchstone for the sex-discriminatory quality of sexual harassment—equating sexuality with sexism—will repress benign sexual expression and undermine female sexual agency. Schultz argues that “[s]exual relations (heterosexual or otherwise) do not inherently enact male dominance over women,” thus aligning herself with the modern trend of “feminist scholarship that criticizes earlier feminist thought for conflating gender inequality and (heterosexual) sexual relations.” But the sexual desire-dominance paradigm, by equating sexuality with sexism, results in both an unduly paternalistic concern for women’s sexual sensibilities and unduly oppressive efforts to purge all traces of sexuality from the workplace. Such efforts, Schultz further asserts, are doomed to fail, and only will succeed in generating resistance to sexual harassment laws and give feminism a bad name. Franke puts forth a similar objection:

For both Franke and Schultz, the redefinition of the essential wrong of sexual harassment solves this problem by shifting the focus away from sexual conduct per se to subordinating conduct.

The persuasive force of these criticisms should not keep us from looking carefully at the real identity of their target. If the target is the courts or prevailing legal doctrine, then their criticism may be somewhat misplaced. Prevailing doctrine has not, in fact, seriously attempted to banish all sexual expression from the workplace. The Oncale opinion treads on familiar ground when it reminds us that “[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace.” Schultz, for her part, seems to go too far in identifying the prevailing legal doctrine in sexual harassment laws with the views of MacKinnon. The sexual desire-

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275 Schultz, supra note 13, at 1790 n.541.
276 Id. at 1793-94.
277 Franke, supra note 13, at 746.
dominance paradigm, which Schultz claims governs the law of sexual harassment, assumes that all sexually harassing conduct is motivated either by sexual attraction ("desire") or an impetus to dominate women sexually. Franke offers a more nuanced view of MacKinnon's influence, in which the prevailing doctrine of sexual harassment in the courts is a watered-down MacKinnonism stripped of its theoretical underpinnings: "One might conclude from the Meritor decision that the Court embraced the notion that sexual harassment is about sex-based power, while refusing MacKinnon's fundamental insight that the subordination of women is always sexual." To be sure, MacKinnon's equation of "sexism with sex" always raises a specter of a political alliance with the censorious, the prudish, or other conservative forces, particularly on the subject of pornography. As an empirical matter, however, it would be hard to show that this has happened in sexual harassment cases, where the courts' frequent insensitivity to gross sexual abuse of female employees has been much remarked upon by feminist commentators and employee rights advocates.

On closer examination, the Franke and Schultz argument about female sexual agency is an argument not with the courts but with MacKinnon's antisubordination theory. Given MacKinnon's stature both as a founder of sexual harassment doctrine and as a major figure in feminism, this is certainly a worthwhile argument to have. But is the sex per se rule inextricably bound up with MacKinnon's conflation of sexism and sexuality?

I think not. What I refer to as the "sex per se" rule is not MacKinnon's theory, but rather an evidentiary shortcut to a causation finding.

279 Schultz, supra note 13, at 1692.
280 Franke, supra note 13, at 727.
281 See, e.g., Steven G. Gey, Postmodern Censorship Revisited: A Reply to Richard Delgado, 146 U. PA. L. REV. 1077, 1082 n.21 (1988) (arguing that although the "odd" and "unnatural" alliance of MacKinnon-style feminist activists, conservative Republicans, and elements of the Religious Right is due mostly to practical political necessities, there are "deep theoretical similarities in the MacKinnon and conservative approaches to regulating pornography"); Howard Kurtz, New War on Pornography; Librarians Argue with Preachers over City Law, WASH. POST, July 29, 1984, at A4 (reporting that a proposed Indianapolis anti-pornography ordinance "has forged a strange alliance between the church-going conservatives... and radical feminists such as... Catharine MacKinnon"); Richard Lacayo, Give-and-Take on Pornography; After Two Court Actions, Still Tough to Ban but Easier to Banish, TIME, Mar. 10, 1986, at 67 (noting that attempts to attack pornography have had "the unusual effect of allying some left-leaning feminists and conservative moralists").
282 For an example, see Schultz, supra note 13, at 1713-20, 1744-48.
To the extent that it has gained a foothold in doctrine, that does not provide evidence of judicial acceptance of MacKinnon. Franke and Schultz both underestimate the possibility that the sex per se rule represents a judicial intuition reaching toward the broader notion that sexuality in the workplace is sufficiently likely to be, in Franke’s phrase, a “technology of sexism” that it is worthwhile to shift the factual inquiry beyond “causation” to the other elements of a sexual harassment claim.

It is worth restating some basics at this point. A claim of sexual harassment that violates Title VII has a number of elements, of which “because of sex” is only one. The plaintiff in a hostile environment case must show not only that the conduct was “because of sex,” but also that it was “unwelcome” and “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”283 The environment must be both subjectively hostile, meaning that the victim “subjectively perceive[d] the environment to be abusive,” and objectively hostile, meaning “an environment that a reasonable person would find hostile or abusive.”284 For ease of reference in my discussion it is necessary only to distinguish the causation element—whether the complained-of conduct is “because of sex”—from the remaining elements, which I will refer to collectively as the “severity” elements.

To conclude that any allegation of sexual harassment is discrimination because of sex can flow only from the conclusions that the conduct was both because of sex and that it meets the severity requirements. Courts and commentators are not always careful about maintaining the distinction between “sex discrimination,” as in the overall finding of liability, and “because of sex,” as in conduct that satisfies the causation element. Oncale is a prominent example.285 Franke and Schultz, too, seem at times to have glossed over this distinction. Schultz, for example, rejects the notion that “sexuality provides a bright-line test for delineating when harassment is gender-based” conduct on the ground that courts have a hard time agreeing on what conduct counts as sexual.286 For evidence of this, however, Schultz relies on cases examining the severity elements rather than

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286 Schultz, supra note 13, at 1744-95.
causation and shows the cases to be flawed not so much because they fail to distinguish between sexual and nonsexual conduct, but because they minimize plainly sexual conduct as not sufficiently severe or pervasive to violate Title VII. 287 Franke at times seems to treat the concepts of “discrimination” and “because of sex” as if they were interchangeable, such as when she states: “I am not inclined to conclude that the conduct was discriminatory simply because it was sexual . . . .” 288 While MacKinnon may have argued that conduct was discriminatory simply because it was sexual, the courts have not taken that position: The sexually harassing conduct still must meet the various severity elements. Hence, “[t]he prohibition of [sexual] harassment . . . requires neither asexuality nor androgyny in the workplace.” 289

Imprecision on this point can have significant consequences because it can lead to the incorrect assumption that the “because of sex” element must be defined theoretically in a way that respects female sexual agency and leaves a margin for sexuality in the workplace. The severity elements can serve that function, however, and indeed may be much better suited to the task. Some sexual conduct in the workplace is necessarily allowed by sexual harassment doctrine so long as actionable harassment is confined to conduct meeting the severity elements. Moreover, the notion of sexual agency at issue—an individual’s capacity to exercise self-determination in sexual matters—seems to inhere in the severity elements of both unwelcomeness and offensiveness. On the other hand, to the extent that causation is related to the intent of the harasser, the harassment target’s sexual agency fits far less clearly within the causation rubric.

The Court in Oncale made this error when it assumed that the “because of sex” requirement is the only thing that prevents Title VII from becoming that nightmare of employers everywhere, the “general civility code.” The distinction between “mere incivility” and abusive harassment does not turn on whether the conduct is sex-based, but is instead plainly a question of severity. Again, it is not necessary to dispense with the sex per se rule to ward off employer liability for trivial

287 See id. at 1744 (discussing Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995), which described allegedly harassing conduct as falling on a spectrum with “sexual assaults” on one end and “occasional vulgar banter” on the other); id. at 1746 n.326 (discussing Cohen v. Litt, 906 F. Supp. 957, 965 (S.D.N.Y. 1995), which determined that an explicit sexual comment was “too insignificant” to constitute actionable sexual harassment).

288 Franke, supra note 18, at 1256.

289 Oncale, 523 U.S. at 81.
sexual misconduct. The severity requirement for sexual harassment leaves plenty of elbow room for incivility.

2. The Problem of a Sexual-Desire-Based Causation Theory

Sexual desire as a touchstone for the causation inquiry has very little to recommend it. As we find in Oncale, the notion that harassment is "because of sex" when demonstrably based on sexual attraction posits a world of Kinsey zeroes and Kinsey sixes (as Franke trenchantly points out), in which everyone is sexually attracted either to someone of the opposite sex if heterosexual, or of the same sex if homosexual.290 Sexual-desire-based causation makes lust the critical motivation rather than motivations that have more to do with discrimination, such as an intent to subordinate women or to preserve hetero-male control over workplaces. This, as discussed above,291 opens the door to intrusive and ugly inquiries into the sexuality of the parties that should be irrelevant in a case of sex-based employment discrimination. Moreover, it lends itself to the deplorable "homosexuals only" rule in which gay harassers become target defendants of Title VII, whereas non-gay men can harass gender nonconforming men with impunity.292 Finally, a sexual-desire based understanding of sexual harassment contributes to the "disaggregation" error—the marked tendency to focus on sexual conduct to the exclusion of nonsexual forms of harassment—convincingly documented by Schultz.

Starting with the latter point, is it necessary to abandon a sex per se rule in order to solve the disaggregation problem? Schultz, in essence, argues that when she criticizes what she calls a "two-tiered structure of causation" in harassment cases. In this "two-tiered structure," causation (because of sex) is presumed in sexual conduct cases, but must be proven with additional evidence in other cases.293 Schultz contends that this double standard for required proof is part and parcel of the courts’ relative inattention to nonsexual harassing conduct. The solution Schultz appears to advocate is that sexual conduct cases should not be privileged in any way over nonsexual ones in terms of

290 Franke, supra note 13, at 736-37; see Kinsey et al., supra note 209, at 638-40 (rating heterosexuality and homosexuality on a zero to six scale based on the frequency of various kinds of sociosexual experiences).
291 Supra text accompanying notes 82-83, 208-32.
292 Supra text accompanying notes 212-17; see also Franke, supra note 13, at 696 (noting the way in which sexual harassment can be used by men to police gender norms).
293 Schultz, supra note 13, at 1739-40.
proof. Rejecting sexual conduct as a bright line test, Schultz would bring sexual and nonsexual harassing conduct within a single causation standard. Such conduct would be deemed "because of sex" if the conduct "makes it more difficult for women to develop and express their capability as workers.

Schultz's attack on the sex per se rule is less persuasive than her central insights about the need for courts to overcome their failure to recognize nonsexual harassment. The two-tiered structure of proof is not necessarily either cause or effect of the problem of sexual conduct overshadowing nonsexual conduct in the perception of unlawful sex-based harassment. Instead, it may be nothing more than a recognition that some evidence more clearly reveals its sex basis for Title VII purposes than other evidence, in the same way that berating a female employee as "dumb" is less obviously "because of sex" than berating her, as in Harris, as a "dumb-ass woman." There is no avoiding the problem in discrimination cases that facially sex- or race-neutral conduct in the workplace is less clearly "because of" sex or race than conduct accompanied by sex- or race-specific epithets: There always will be easy cases and hard cases where intent must be proven. But to eliminate the two tiers of causation in this context—to equalize the difficulty in proving causation—will not necessarily advance Schultz's objective of promoting recognition of nonsexual harassment. Where a female employee claims that nonsexual harassing conduct was directed at her because of sex, courts are likely to require "additional proof," either in the form of comparative evidence (similarly situated men were not treated the same way) or sex-specific remarks by the harasser. Eliminating two-tiered causation in effect by requiring similar comparative or sex-specific evidence in sexual conduct cases may accomplish nothing other than to decree that more proof of causation will be required in all cases. Sexual conduct cases will no longer be "easy" cases with regard to establishing the "because of sex" element.

It is far from clear to what extent the sex per se rule is the culprit in the courts' tendency to favor an underinclusive understanding of harassment "because of sex." Schultz does not draw a distinction between, on the one hand, harassing sexual conduct motivated by lust or a desire to "dominate women sexually," and on the other the broader notion of harassing sexual conduct that serves as a "technology" for

294 Id. at 1744.
295 Id. at 1773-74.
296 Harris, 510 U.S. at 19.
undermining women’s competence and segregating the workplace by sex. I suspect that judges who fail to acknowledge broader forms of sex-based harassment would tend also to adhere to the narrower desire-based conception of sexual harassment. In any event, as Schultz recognizes, a number of legal authorities accept a sex per se rule while at the same time recognizing nonsexual forms of harassment. Moreover, the EEOC has long taken the position that “[s]exual harassment is one type of harassment based on sex. However it is not the only type of unlawful harassment which is sex-based or which stems from sex discrimination.” Thus, the ends advocated by Schultz may be attainable by strengthening the recognition of this basic insight articulated by the EEOC, that any sort of harassment directed at women is discrimination because of sex, and that sexual harassment is merely a subset of this larger category of sex-based harassment. In other words, the disaggregation error can be corrected without abandoning a sex per se rule.

Nor, more generally, does it seem necessary to abandon a sex per se rule in order to disabuse courts of a desire-based theory of causation. A sex per se rule is not the same thing as assuming that sexual conduct must be based on desire or attraction in order to be because of sex. Since sexual conduct may be motivated by various reasons—including the motivations implicit in the notion that sexual harassment is a “technology of sexism”—to treat sexual conduct as per

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297 Schultz acknowledges that not all lower courts have been guilty of disaggregation, although she concludes that they are in the minority. See Schultz, supra note 13, at 1732-38 (“[A]ny harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.” (citing McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985))). Schultz’s assertion as to the extent of the disaggregation problem in the lower courts may be slightly overstated. She cites eight circuits that have recognized the McKinney principle to some extent, to which could be added at least one more. See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (“[W]e do not rule out the possibility both men and women working at Showboat have viable claims . . . for sexual harassment.”). Nevertheless, there is no question that erroneous disaggregating decisions have been a significant problem.

298 EEOC Compliance Manual (BNA) § 615.6, at 615:0017 (1982); see also Schultz, supra note 13, at 1732 n.246 (citing EEOC employment manuals). The proposed 1993 EEOC Guidelines on harassment were not intended to cover sex-based “harassment that is sexual in nature, which is covered by the Commission’s Guidelines on Discrimination Because of Sex,” 29 C.F.R. § 1604.11 (1992). EEOC, Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993). The Guidelines were eventually withdrawn due to political opposition. 59 Fed. Reg. 51,396 (Oct. 11, 1994).
se "because of sex" would treat all sexual conduct in the workplace as more likely than not because of sex, without distinguishing between harassers motivated by desire and those motivated to preserve the workplace as a male domain. It would, in effect, make the harasser's specific motivation irrelevant to the causation issue and thereby solve the problem of messy inquiries into the harasser's state of mind.

3. Same-Sex Harassment

A concern very much in the foreground for Franke and Abrams, and secondarily for Schultz, is to solve the conundrum of same-sex harassment cases. These cases have produced perverse results. On the one hand, courts that would probably never rely on an antisubordination theory to reject, say, a challenge to an affirmative action plan by a reverse discrimination plaintiff, seem to rely on antisubordination selectively to reject same-sex claims: Sexual harassment doctrine, they say, was designed to protect women, who traditionally have been subordinated in the workplace, not men. On the other hand, a sexual-desire-based understanding of harassment would tend to allow heterosexual males to sue gay harassers, but not the other way around. Thus, bolstered by the current exclusion of sexual orientation from Title VII protection, a class of marginalized and subordinated employees—gender nonconformists—could be targeted as defendants but left largely unprotected as plaintiffs. This type of "reverse discrimination" approach to same-sex harassment is arguably indicated by the Oncale decision.

A sex per se rule does not produce such a result, however. Again, the culprit is a theory based on sexual desire. Plaintiffs in the gender nonconformist cases, such as Doe v. City of Belleville, are almost invariably subjected to sexualized forms of abuse. They would all be able to show their harassment was "because of sex" under a sex per se rule. To be sure, so would the heterosexual plaintiff claiming unwanted sexual attention from a gay harasser. In that sense, the sex per se rule might be overinclusive (which is no doubt why Franke wants to get rid

299 "The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group." Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988); accord Ashworth v. Roundup Co., 897 F. Supp. 489, 493-94 (W.D. Wash. 1995) ("[T]his Court accepts the reasoning of the district court in Goluszek, the Fifth Circuit... , and that of the other district courts who have held that same-sex harassment is not actionable under Title VII.").
of it), although it would still be necessary for the plaintiff to show that the sexual attention was severe. However, that sort of problem—the recognition of reverse discrimination claims by members of the dominant group—would seem to be inherent in Title VII cases so long as courts follow a formal equality approach rather than an antisubordination approach to the statute.

IV. THE CAUSATION PROBLEM IN ANTISUBORDINATION THEORIES OF SEXUAL HARASSMENT

How would Lois Robinson prove that the sexual harassment she experienced was because of sex, if she were to bring her claim today? Oncale seems to negate the conclusion reached by the Robinson court that “sexual behavior directed at women [by men] will [by itself] raise the inference that the harassment is based on their sex.”\textsuperscript{500} Looking at the facts of her case in terms of the three evidentiary routes in Oncale, Robinson’s harassment did not appear to have been based on sexual desire.\textsuperscript{501} Her employer could argue that men were subjected to the same sexualized environment. And while an inference could be drawn that Robinson’s co-workers treated her the way that they did because they objected to her presence in the workplace, there will be at least a colorable defense argument that no one objected to Robinson being there so long as she, like everyone else, accepted the atmosphere of sexual hazing. Perhaps her co-workers would testify that they just wanted her to “fit in” or “be one of the guys.”

With no sex per se rule to draw upon, antisubordination theorists would shift the terms of the argument in a Robinson-type case away from the conscious intentions of the harassers to something else—and here is the problem. Antisubordination theories typically glide over the causation/intent issue. Theorists of antisubordination routinely place heavy reliance on formulae that target unconscious but intentional discrimination as illegal, yet at the same time fail to come to grips with the dominant “disparate treatment” requirement that actionable discrimination be intentional and conscious. Thus, for instance, MacKinnon states that “the only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gen-


\textsuperscript{501} Supra notes 2-6 and accompanying text.
der status." \textsuperscript{302} For Franke, "sexual harassment is sex discrimination precisely because its use and effect police heteropatriarchal gender norms in the workplace." \textsuperscript{303} Abrams defines sexually harassing actions as those that "preserve male control and entrench masculine norms in the workplace." \textsuperscript{304} For Schultz, sexual harassment is "conduct that has the \textit{purpose or effect} of undermining the perceived or actual competence of women (and some men) who threaten the idealized masculinity of those who do the work." \textsuperscript{305} There is a common grammatical construction in each of these antisubordination theories that bespeaks vagueness on the causation inquiry: In each case, it is the \textit{conduct}, not the actor, that is the subject of the sentence. Moreover, the verb in each sentence suggests an effect of the conduct, rather than an intention on the part of the defendant. The defining inquiry is whether the conduct contributes to a larger structure of domination. Significantly, it places the focus on the \textit{effect} of the conduct—a point made most explicit in Schultz's definition of sexual harassment in terms of its "purpose or effect," but which underlies all of the definitions. \textsuperscript{306}

These antisubordination theories, while theoretically coherent and complete in themselves, have a limitation that I believe affects most antisubordination arguments. So long as courts tend to adhere to formal equality arguments first and foremost, and antisubordination arguments only secondarily and occasionally, antisubordination advocates are likely to encounter frustration in seeing their theories influence the development of legal doctrine and resolutions of specific cases—\textit{Oncale} standing as a prominent example. There are two

\textsuperscript{302} MACRINNON, supra note 21, at 117 (emphasis added).
\textsuperscript{303} Franke, supra note 13, at 772.
\textsuperscript{304} Abrams, supra note 15, at 1172.
\textsuperscript{305} Schultz, supra note 13, at 1762 (emphasis added).
\textsuperscript{306} There is a subtle but important distinction between "purpose or effect" as Schultz uses it here and the EEOC Guidelines' use of that phrase. I understand Schultz's "purpose or effect" test to tell us when the harassing conduct is because of sex—hence the important qualifier defining harassment in terms of its attack on workers who "threaten the idealized masculinity" of the workplace. \textit{Id.} The EEOC Guidelines state that the various forms of "conduct of a sexual nature" will constitute harassment where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (2001). The Guidelines rely on the sex per se rule to supply the "because of sex" element; whereas the "purpose or effect" language refers not to causation but to severity. The EEOC means to suggest that sexual (and therefore sex-based) conduct is severe enough to constitute harassment either if it did unreasonably interfere with an individual's work performance or even if—in the case of a particularly thick-skinned worker—it was demonstrably \textit{intended} so to interfere.
main reasons for this disconnect between theory and practice, which I
discuss in the following Sections. First, a complex theory of causation,
in the absence of a sex per se rule, is bound to present plaintiffs with
difficulties in proving and arguing their cases. Second, courts have a
marked preference for clearly text-based arguments when it comes to
construing statutory claims. For these reasons, I argue that antisubor-
dination theorists need to frame their arguments in textual terms—
and, specifically in Title VII cases, to engage closely with the phrase
"because of sex."

A. The Causation Problem Exemplified: Plaintiffs’ Proof Problems
Arising from Abandonment of the Sex Per Se Rule

I strongly agree with the fundamental insight that sexually harass-
ing conduct should be judged and identified, in the antisubordina-
tion sense, by its effect. However, antisubordination theorists must, but
typically do not, confront the notion that removing the discrimina-
tor’s intention from the definition of harassment is legally problem-
atic. This is not because basic antidiscrimination law principles
should compel the conclusion that the discriminator’s subjective men-
tal state is the key. Indeed, I agree with antisubordination theory that
any intentional act that has the described effect of contributing to a
race- and sex-based caste system should be deemed violative of Title
VII. The analytical focus should be where antisubordination theory
would place it, on the discriminatory conduct rather than what the
discriminator meant by it. The problem with the antisubordination
theories is that they require sophisticated interpretations of this con-
duct in order to determine causation. A judge or jury must divine the

307 If they address the motivation question at all, antisubordination theorists have
tended to place undue reliance on statements from cases to the effect that benign mo-
tivations are no defense to discrimination. See, e.g., Int’l Union v. Johnson Controls,
Inc., 499 U.S. 187, 199 (1991) (“T]he absence of a malevolent motive does not con-
vert a facially discriminatory policy into a neutral policy with a discriminatory effect.”);
Franke, supra note 13, at 745 (“[C]ontemporary sex discrimination jurisprudence de-
nounces conduct that reflects or ratifies benign, yet nonetheless harmful, actions or
policies . . . .”). It is a mistake to read these cases as a departure from a motivation-
based theory of intentional discrimination. Saying that benign motivations are no de-

See, e.g., Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (acknow-
ledging that society’s “long and unfortunate history of sex discrimination” often
“was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put
women, not on a pedestal, but in a cage”).
“social” or “cultural” meaning of the conduct in order to resolve liability questions. 308 Unless judges and jurors are themselves to become feminists or queer theorists, which seems unlikely, then these broader theories must reach the law through some mediating idiom, one which does not require a sophisticated understanding and acceptance of antisubordination theory.

Schultz, Franke, and Abrams each builds her theory on a sophisticated interpretation of sexual harassment to derive the broader social meaning of harassing conduct. Acts of sexual harassment, whether or not sexual, are to be recognized as “because of sex” if they “police hetero-patriarchal gender norms,”309 “entrench masculine norms,”310 or “undermin[e] the . . . competence of women.”311 The causation inquiries implicit in these theories are necessarily difficult and complex. Are courts and juries to apply these concepts, and, if so, how?

It would be unfair to find fault with these theoretical works, which have significantly contributed to our understanding of sexual harassment, for not going further to consider questions of implementation in great detail—questions that could easily fill another article.312 The conventions of our discipline realistically and mercifully allow us to draw parameters around the scope of an article. It is not my intention to engage in such a fault-finding enterprise. I do, however, wish to draw attention to the need of antisubordination theorists in the overall scheme of things to struggle with the nagging problem of causation in general. In this specific context, my argument is that, were the relevant antisubordination theorists to do so, they might well reconsider their respective positions on the sex per se rule. Franke, for example, expresses some awareness of a need, or at least practical utility, for reconsidering her theoretical disapproval of the sex per se rule. “I believe that the inferences courts now draw in traditional male/female sexual harassment cases make sense,” she writes. “They

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308 Charles R. Lawrence has argued that determining such social or cultural meaning is something that courts do frequently, and therefore argues that a “cultural meaning test” is a viable means for courts to recognize equal protection violations in acts of unconscious racism. Lawrence, supra note 64, at 355-62.
309 Franke, supra note 13, at 772.
310 Abrams, supra note 13, at 1172.
311 Schultz, supra note 13, at 1762.
312 It would be more than unfair; in my case, it would be casting stones from behind the walls of a glass house, since I do not claim to have solved the causation problem from an antisubordination perspective. Other than proposing to restore the sex per se rule, I have only tentative suggestions to make. Infra text accompanying notes 328-29.
represent an appropriately efficient method by which female plaintiffs can prove that they have been discriminated against because of their sex. But this nod to practicality is not consistent with Franke’s theoretical argument. The traditional inferences are the very ones Franke seeks to expose as judicial “laziness.” If, as she argues, sexual conduct per se does not make harassment because of sex, how can the traditional inferences “make sense” under her theory, however efficient it is to draw them? Some judges will have read her article; how does Franke propose to “keep ’em down on the farm after they’ve seen Paree”? Franke’s only theoretical justification for making this concession to practicality is to say that

[i]n more traditional cases, where a woman alleges that she has been sexually harassed by a man, a lower quantum of proof is sufficient to trigger an inference of sex discrimination [read: causation] because larger cultural norms of women as sex objects and men as sex subjects have been reproduced in the offending conduct.

While I agree with that justification for a “lower quantum of proof,” I do not see that it follows from all that Franke has argued. In fact, it sounds like a reversion to MacKinnon’s theory: sexual conduct in male-female cases is “because of sex” because it reproduces sexist cultural norms.

Abrams, who gives due regard to the question of implementation of her theoretical arguments, works to bridge the gap between theory and practice on the causation issue by relying on expert witness testimony. “The entrenchment of masculine norms . . . might require expert testimony both in the cross-sex and same-sex cases.” “This testimony, which might be offered by a social psychologist, would include identification of particular norms as paradigmatically masculine and discussion of how particular workplace conduct served to entrench these norms.” This is a troubling solution for plaintiffs. To begin with, expert witnesses can be extremely expensive, both in terms of their own hourly rates and attorney time to prepare them. The cost of this norms expert would be incurred in every case that reaches the

313 Franke, supra note 13, at 729.
315 Franke, supra note 13, at 769. Again, Franke sometimes uses the term “discrimination” when she appears to mean “causation.”
316 Abrams, supra note 13, at 1223.
317 Id. at 1223 n.272.
summary judgment stage, since (in contrast to economic experts who calculate the monetary amount of damages) the norms testimony would be necessary to prove the prima facie case. Further, I have a real concern that witnesses who have both the necessary expertise and the ability to articulate these complex theories persuasively will not be sufficiently widely available. Jurors and even judges tend to be skeptical of social science experts of this kind.  

On a more fundamental level, each of the above theoretical formulae might require plaintiffs to prove something about the effects or social meaning of harassment beyond the immediate harm to themselves. To date, sexual harassment cases have held consistently that a plaintiff does not have to show that the workplace was hostile and abusive for all women, only for herself.  

Might a showing of entrenchment or policing of “norms” require proof of the effect on the particular workplace for others—the “message” sent by the harassment? If not, could the defendant defeat a harassment claim by showing that, notwithstanding the abusive environment, the particular harassed employee remained resistant to the normative message of the harassment? Although Schultz does not speak in terms of norm reinforcement, her theory is subject to a similar set of questions. If harassing conduct means conduct “designed to undermine a woman’s competence,” are we talking about effects extending beyond a plaintiff or not? From whose vantage point is the undermining of the plaintiff’s competence to be judged—in her own eyes or in those of her coworkers or supervisors?  

Nor is it an answer to take the relatively short step from an effects-based definition of sexually harassing or other discriminatory conduct to disparate impact theory. It is not surprising that antisubordination theorists have long been drawn to disparate impact theory as an ex-

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318 Even an expert with the reputation of the renowned Dr. Susan Fiske was greeted with skepticism by some of the Justices in *Price Waterhouse v. Hopkins*. See 490 U.S. 228, 293 n.5 (1989) (Kennedy, J., dissenting) (“Price Waterhouse chose not to object to Fiske’s testimony . . . but I think the plurality’s enthusiasm for Fiske’s conclusions unwarranted.”).


320 Schultz, *supra* note 13, at 1769.

321 Undermining competence, furthermore, seems to require proof of a level of severity that exceeds the current standard of whether the harassment “made it more difficult to do the job.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).
emplar, and have tended to argue for universal or wider application of a disparate impact theory. Disparate impact theory is an expression of the antisubordination principle within Title VII, and it by definition avoids an inquiry into the harasser's motives.

But antisubordination theorists should avoid the temptation to rely entirely on disparate impact theory for two reasons. First, pragmatically speaking, disparate impact theory is not on the ascendancy in Title VII jurisprudence, nor is there reason to believe that an impetus to overrule Washington v. Davis, which rejected a disparate impact theory of discrimination under the Equal Protection Clause, is on the horizon. Second, and more importantly, disparate impact theory aims at a wrong that is quite simply different from a class of harassing conduct that has the "purpose or effect" of subordinating women. There is a very important difference between facially neutral employment practices that have a disparate impact (such as testing instruments or height-weight requirements) but that might be defensible under some degree of business necessity, and intentional but unconscious discriminatory conduct. The latter reflects more intentional connections to perpetuating a caste system; whether it is conscious sexism/racism or more subtle cognitive bias, intentional discrimination always lacks business justification and deserves greater blame. A harasser in the Doe or Oncale cases who does not understand that his actions "police hetero-patriarchal gender norms" is not discriminating "unintentionally" or "sex-neutrally" within the meaning of disparate impact theory. His is not a facially sex- (or gender-) neutral practice with an arguable business justification. Rather, he is committing intentional acts that discriminate; the difference is, his discrimination is not a conscious "reason" in the sense that Title VII cases traditionally have required. There are sound reasons in policy for maintaining the

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322 E.g., MACKINNON, supra note 21, at 206-08.
323 See, e.g., Case, supra note 27, at 5 (advocating disparate impact analysis for discrimination targeted at gender); Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003, 1034 (1986) ("The disparate impact approach would be more successful in combating . . . barriers to equality . . .").
326 See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 565 (1997) (discussing Washington v. Davis and concluding that "[m]any times the Court has reaffirmed this principle that discriminatory impact is not sufficient to prove a racial classification").
distinction: disparate impact requires proof of the broader effects of a policy beyond the individual case—typically in the form of statistics—whereas intentional discrimination cases typically do not require such proof. It would be burdensome to shift sexual harassment plaintiffs into the disparate impact mode of proof.\cite{327}

A useful exercise for considering how an antisubordination argument could be implemented within legal rules of decision is to submit the theory to a "jury instruction test."\cite{328} That is: take the theory and write it up in the form of a set of jury instructions. Jury instructions, of course, are the mode in which the legal system explains the law to lay jurors in order to guide their analysis of the facts of a case as they try to reach a verdict. For instance:

(1) Workplace harassment must be "because of sex" to violate Title VII. Harassing workplace conduct is "because of sex" if the conduct made it more difficult for the plaintiff to do her job because she is a woman; or

(2) Harassing workplace conduct is "because of sex" if the conduct has any tendency to further the control of (heterosexual) men in the workplace.

I suggest not that these examples would implement successfully the theories of Schultz, Abrams, or Franke, but rather that the exercise shows the host of difficulties raised in trying to summarize those theories in a way that accurately reflects their gist and at the same time conforms to the idioms and limitations of the jury instruction form. Jury instructions require a complex effort at balancing the subtleties of the law against the need to explain the law to laypeople in a plain, user-friendly way. When it comes to ideas that are unfamiliar or disagreeable to them, judges are not wholly unlike jurors in the degree to which they require the ideas to be broken down into a usable, say-

\cite{327} Thus, I have serious reservations about Mary Anne Case's argument that certain forms of gender discrimination—those intentional discriminatory acts targeting individuals because of their feminine or masculine traits—should be analyzed as disparate impact claims. Case, supra note 27, at 5, 75-80. Case is very persuasive in her fundamental argument that much of what is, or should be, recognized as actionable sex discrimination under Title VII is actually discrimination against the feminine, or discrimination because the gender of the worker does not match the presumed gender of the job. I cannot see, however, how discrimination because of gender is ever sufficiently unconnected to sex to view it as a "sex-neutral" practice and therefore within disparate impact analysis. To make such a concession seems to me to play into the hands of those who now argue that sexual orientation is so unconnected to sex as to fall outside Title VII.

\cite{328} This idea is inspired by Anita Bernstein, who submits her proposed "respectful person" standard for sexual harassment cases to just such a test. Bernstein, supra note 13, at 522-24.
WHEN IS SEX BECAUSE OF SEX?

A. The Utility of a Sex Per Se Rule

Applying the jury instruction test in a more abstract way, a sex per se rule seems like a useful shortcut to proving a prima facie case. Therefore, the jury instruction test is also a useful proxy for testing the judicial utility of a theory.

A complex theoretical argument as to why harassing sexual conduct is because of sex at best takes up time and space for plaintiffs’ lawyers writing their oppositions to motions for summary judgment. Worse, it could require extra, previously unnecessary proof in the form of expensive expert testimony. Worst of all, it could give courts the option of not buying the theory, or the proof, and dismissing cases alleging harassing sexual conduct as not “because of sex.” These potential difficulties also highlight the contrasting advantage, helpful to all participants in the litigation process, of the sex per se rule as an evidentiary shortcut to proof of a prima facie case.

B. The Need to Make Textual Arguments in Title VII Cases

The answer to the causation problem in antisubordination theory is not necessarily to fix them by coming up with more user-friendly formulations of the wrong of sexual harassment that meet the jury instruction test. Perhaps sophisticated accounts of the “social meaning” of discriminatory acts are an inherent feature of antisubordination theory. Even if they are not, there remains the problem that courts generally have not accepted antisubordination theory over formal equality theory in discrimination cases. Moreover, courts have tended to look for textually based arguments in discrimination cases rather than holistic, purposive understandings. This fact requires antisubordination theorists to proceed on two tracks, just as MacKinnon did in Sexual Harassment of Working Women by making two types of arguments together.

The debate between advocates of a formal equality theory of discrimination and an antisubordination theory of discrimination goes back to the legislative history of the 1964 Civil Rights Act itself. Under “formal equality” principles, Title VII is colorblind, and is designed to “prohibit racial discrimination in employment simpliciter...” [Title VII] prohibits a covered employer from considering race when mak-

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329 To be sure, employers might well gain a tactical advantage in litigation where the complex elements of a claim make plaintiff’s proof burden more complicated and onerous. But the “bright line” nature of the sex per se rule simplifies the litigated issues for everyone. Moreover, clear, understandable elements of a cause of action make it easier for employers to comply with the law, and thereby avoid litigation altogether.

590 MACKINNON, supra note 21.
ing an employment decision, whether the race be black or white.\textsuperscript{331} Similarly, under this view, Title VII is sex-blind and prohibits employers from considering sex in employment decisions.\textsuperscript{332} This approach, which MacKinnon calls the "differences" approach, makes little or no reference to the historical or current social realities of subordination and fully embraces "reverse discrimination" claims, treating discrimination against women or minorities as no worse than "discrimination" against white/hetero males. Moreover, as MacKinnon argues, when applied to sex discrimination, the formal equality approach allows some differential treatment of women—even if it works to the disadvantage of women—if it can be shown to be "rationally" based on sex differences.\textsuperscript{333}

The antisubordination theory of discrimination—which I have referred to elsewhere as the "protected class" theory—"derives its meaning from real-world conditions of discrimination, both historical and contemporary, and from the historical contexts of the relevant enactments."\textsuperscript{334} This vision of Title VII holds that the primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially [or sexually] stratified job environments to the disadvantage of minority [or female] citizens."\textsuperscript{335} While the formal equality or "colorblind/sex-blind" approach to discrimination has undoubtedly held sway over the judicial mind in the majority of discrimination cases, the antisubordination or "protected class" vision has been an animating spirit that surfaces from time to time.\textsuperscript{336}

There are several possible explanations why formal equality argu-

\textsuperscript{332} See Johnson v. Transp. Agency, 480 U.S. 616, 658 (1987) (Scalia, J., dissenting) (arguing that Title VII was "a guarantee that race or sex will not be the basis for employment determinations").
\textsuperscript{333} MACKINNON, supra note 21, at 101-02.
\textsuperscript{334} Schwartz, supra note 324, at 664.
\textsuperscript{336} Antisubordination arguments have been adopted by courts in the handful of cases where it has been necessary to see through seemingly benign, but paternalistic differential treatment. Supra note 307. It is important to keep sight of the strong antisubordination roots in Title VII and therefore to avoid the suggestion that antisubordination is somehow a revisionist interpretation of the civil rights laws. See Schwartz, supra note 324, at 671-74 (arguing that "protected class" theory governed the early Title VII cases Griggs and McDonnell Douglas, before giving way to decisions driven by colorblind theory).
WHEN IS SEX BECAUSE OF SEX?

When is sex because of sex? Decisions dominate antidiscrimination caselaw. First, it appeals broadly to an easily stated and basic notion of fairness, that like cases should be treated alike. Moreover, formal equality does produce a just outcome in many clear-cut cases of discrimination. In early sex discrimination cases, "it worked extraordinarily well for [litigator and professor Ruth Bader] Ginsburg and her legions." At the same time, as has often been noted, it limits the potential of antidiscrimination law to accomplish profound change in the present caste system. Formal equality theory fails to address societal discrimination that cannot be blamed on an identifiable discrimination "villain"; it takes a male framework as the objective point of reference, and, when considered alone without input from antisubordination theory, it provides the winning edge for arguments against affirmative action. Formal equality is "elementary fairness" without redistribution. For this reason, a formal equality theory of discrimination appeals to many political and judicial moderates and conservatives. Indeed, it has been suggested that supporters of the Civil Rights Act of 1964 built broad political consensus for the Act by suppressing views more expressive of antisubordination.

Within the judiciary, even the most liberal judges have relied upon formal equality theory in discrimination cases, for example justifying affirmative action not in antisubordination terms, but as a permissible exception to a rule of sex/colorblindness. To be sure, most judges are doubtless not accomplished feminist thinkers, and the language of antisubordination does not come naturally to them. But there is something more: the possibility that formal equality reasoning, despite its oft-noted theoretical incoherence, is easier for judges to apply than antisubordination theory. In the context of discrimination and harassment cases, formal equality theory avoids the necessity for fact-intensive inquiries into motivation. If sex discrimination is de-

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337 Scales, supra note 264, at 1374; see, e.g., Mary Becker, Prince Charming: Abstract Equality, 1987 Sup. Ct. Rev. 201, 201 (noting that women's rights advocates "[t]hroughout the seventies . . . agreed that formal equality was the most appropriate general standard").

338 See, e.g., Scales, supra note 264, at 1376-80 (detailing the "[t]yranny of [o]bjectivity").

339 See, e.g., Schwartz, supra note 324, at 684 ("Once they let colorblindness in the door at all, racial balancers necessarily acknowledge that affirmative action . . . is discrimination.").

340 See William N. Eskridge, Jr., Dynamic Statutory Interpretation 303 (1994) ("Once the civil rights bill became law, the suppressed points of view came to the surface.").

341 Schwartz, supra note 324, at 680-82.
fined as "expos[ing members of one sex] to disadvantageous terms or conditions to which members of the other sex are not exposed," then some thorny proof problems are obviated. Once there is an intentional act that disadvantages one employee, proof of discrimination becomes a question of inferring that the act was motivated in whole or in part by impermissible consideration of race, sex, etc. Such a motive can be proved without a direct window into the sexist mind of the discriminator, and possibly without any proof at all beyond the differential treatment itself.

Formal equality theory has a further advantage over antisubordination theory that appeals to the judicial mind, aside from its apparently neutral and countercritical substance. A formal equality interpretation of Title VII lends itself to a straightforward textual argument. A mechanical, linguistic parsing of the pertinent statutory language: "discrimination . . . because of" can readily be translated into "differential treatment motivated (consciously) by." Taking a dictionary to each term seems in itself a kind of value-neutral, "judicial" act of statutory interpretation that conforms itself to the will of Congress. That is a controversial point, of course, but it seems more palatable to most judges than adopting the posture of a critical theorist, deconstructionist, or even a cutting edge theorist of statutory interpretation. The words "discrimination because of sex" sound, to the ears of most judges, as though they mean, quite simply, "expos[ing members of one sex] to disadvantageous terms or conditions to which members of the other sex are not exposed."

In contrast, antisubordination theories take a holistic approach to the statutory prohibition "discrimination because of sex." Such theories understand the phrase as a statutory expression of an overall purpose of outlawing practices that create a sex-defined hierarchy of men over women. This purposivist antisubordination approach is captured in MacKinnon's contention that in sex discrimination cases, "[t]he only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status." As reflected in their respective formulations of causation, the theories articulated by Franke, Schultz, and Abrams are likewise all purposivist antisubordination theories.  

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343 Id.
344 MacKINNON, supra note 21, at 117.
345 "Purposivism" interprets statutes "by identifying the purpose or objective of the
Understanding the difference between a purposivist antisubordination theory and a textual formal equality theory is crucial to understanding what went wrong in *Oncale*. Franke is sharply critical of the failure of courts to articulate a theory of why sexual harassment is sex discrimination. Abrams, commenting on *Oncale* specifically, expressed frustration that Justice Scalia "offered no theory of the wrong [of sexual harassment] that purports to explain why same-sex cases should be included in Title VII's ambit." But the *Oncale* Court does articulate a theory of sexual harassment. It happens to be a mechanical, but clear-cut textual approach arguing that the wrong of harassment is its violation of formal equality principles. In my view, what Franke and Abrams actually want to criticize is the failure of courts, like the Supreme Court in *Oncale*, to articulate a purposivist antisubordination theory of why sexual harassment violates Title VII. This raises a problem. Courts are not likely to move en masse toward adoption of purposivist antisubordination arguments. There has never been a controlling consensus in favor of antisubordination as the underlying theory of employment discrimination law. At the same time, in sexual harassment cases, courts have seemed more comfortable relying on textual arguments. Moreover, there is a critical communication gap here: when an antisubordination theorist making a purposivist argument says "let's take a fresh look at causation in Title VII cases," a textual, formal-equality-oriented court will understand "causation" in a very different way than what the antisubordination theorists intended.

Antisubordination theory supplies a vital theoretical test for arguments. Decisions based on this theory poke through the surface of the case reports from time to time, but one has to acknowledge that most of the time courts remain mesmerized by formal equality. Antisubordination arguments are the conscience of Title VII. Theorists must continue to develop these arguments in order to wage the moral battle for proper understanding of antidiscrimination law. But as a practical matter, antisubordination theorists have to apply themselves to the task of translating their arguments pragmatically into textual arguments.

In *Sexual Harassment of Working Women*, MacKinnon asserts that the statute, and then by determining which interpretation is most consistent with that purpose or goal" even where the interpretation causes the statute to "evolve to meet new problems." ESKRIDGE, supra note 340, at 25-26.

Abrams, supra note 126, at 1258.

formal equality and antisubordination approaches "can be mutually supporting, each reaching the same result." By offering both a formal equality and an antisubordination argument, and showing how they work together, MacKinnon was not simply touching all the bases, but also illustrating the importance of proceeding on two tracks in a legal system that has been—and may be fundamentally—relatively inhospitable to purposivist antisubordination arguments. I do not agree that the other track has to be a formal equality approach; MacKinnon may have wrongly assumed that a textual argument is always a formal equality argument. For feminists, any theory of sexual harassment should meet both a "textual" and a "purposivist" test: is it consistent with the statutory language "discrimination because of sex," and is it grounded in Title VII's antisubordination purpose?

C. "Because of Sex" as the Next Theoretical Challenge for Textual Antisubordination Arguments

If, as I argue, the general challenge for antisubordination theorists is to proceed on a textual track, the specific challenge is to develop a theory of causation—a definition of "because of"—that, as far as possible, maps antisubordination principles onto the text of "discrimination because of sex." This would allow judges and juries to identify sex-discriminatory harassing conduct without requiring them first to become cutting-edge "second generation" theorists of sexual harassment. The best bet, in my view, is to persuade courts to take a more expansive view of the phrase "because of" that moves away from a subjective motivation theory of intentional discrimination. The justification for a lower causation threshold has already been suggested: because harassing conduct inherently lacks legitimate business justification, there is less demand on the causation inquiry to serve its gate-

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348 MACKINNON, supra note 21, at 105. MacKinnon uses the term "differences" to mean what I have called "formal equality," and "inequality" to mean what I have called "antisubordination." Id. at 101-02.

349 There is not a strict logical correlation between a particular approach to statutory interpretation and antisubordination or formal equality theory. In the Title VII context, both formal equality and antisubordination theorists can advance purposivist arguments. (Then-) Justice Rehnquist's dissent in United Steelworkers of America v. Weber is in part a purposivist articulation of a colorblind theory of discrimination: "We have never wavered in our understanding that Title VII 'prohibits all racial discrimination in employment, without exception for any group of particular employees.'" 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting) (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 (1976)).
keeping function in harassment cases.550

One approach would be to lower the threshold of intentionality to establish causation.551 As Linda Krieger has suggested, one could reasonably interpret the language of Title VII as requiring a plaintiff to establish only that “his or her protected status ‘made a difference’ or ‘played a role’ in a challenged employment decision.”552 Indeed, the plurality opinion in Price Waterhouse states that “because of sex” means “that gender must be irrelevant to employment decisions.”553 This may boil down to little more than a looser version of the “but for cause” test that the Supreme Court has sometimes said is required in discrimination cases.554 The notion that sex was “relevant” to sexually harassing behavior seems like an inviting concept for implementing antisubordination theories of causation until one asks what evidence would prove such “relevance.” Any proposed legal standard of causation will be met with a skeptical question from courts: How could they apply this standard in a way that would allow trial courts to grant summary judgment in appropriate cases on the ground that causation is not present? Perhaps a workable doctrine would provide for certain kinds of facts raising a presumption of causation (because of sex) that would shift the burden of production to the defendant to show that sex was irrelevant to the harassing conduct. One example would be a showing that a female plaintiff was in a workforce in which women have been traditionally underrepresented.

Another approach would be to view the sex-basis of a claim from the vantage point of the plaintiff rather than the defendant. Linguistically, “because of” does not necessarily mean “motivated by.” If one views “discrimination” as an injurious act or course of conduct, sex can be a “cause” of that injury not only if the actor’s motivation was the plaintiff’s sex, under the traditional view, but also if the plaintiff experienced injurious conduct “because of her sex.” The court in Doe expressed something like this concept when it spoke of a hypothetical plaintiff for whom “the work environment would be rendered hostile . . . as a woman.”555 Similarly, in Brown v. Henderson, the court sug-

550 Supra Part I.B.3.
551 See Lawrence, supra note 64, at 323 (arguing that equal protection law should redress unconscious race discrimination); Oppenheimer, supra note 64, at 917-19 (examining the potential for negligence liability in discrimination cases).
552 Krieger, supra note 60, at 1168.
554 Supra Parts I.B.1-2.
555 Doe v. City of Belleville, 119 F.3d 563, 578 (7th Cir. 1997).
gested a victim-focused notion of causation in stating that "a woman might be abused in ways that cannot be explained without reference to her sex, notwithstanding the fact that a man received treatment at least as harsh, though for other—non-sexual—reasons." This broader understanding of the meaning of "because of" may be implicit in the commonly used substitute in judicial decisions, "based on," as in "discrimination based on sex." Oncale itself refers to discrimination and harassment "on the basis of sex." To be sure, one can object to the foregoing suggestions, but the particular flaws of the suggestions do not detract from the argument that some work is necessary in order to expand the notion of causation in sexual harassment cases.

V. REVIVING THE SEX PER SE RULE

The sex per se rule is not in itself an articulate antisubordination theory. It is instead a stand-in doctrine that furthers the aims of antisubordination theory while solving certain practical problems. Specifically, it allows courts and juries to determine, without difficult factual or theoretical inquiry, that a particular category of conduct is "because of sex" and to move on quickly to the issues of severity. The foregoing Section suggests that the sex per se rule should be justified, not only as consistent with antisubordination theory, as argued above, but also based on a textual argument. After the critiques of the sex per se rule in the Franke and Schultz articles, and more pointedly, after the disapproval of that rule in Oncale, it is no longer enough to say, "of course sexual harassment is based on sex; what else can it be based on?" A textual argument, if it was not needed previously, is certainly needed now.

A. Theoretical and Textual Justifications for Reviving the Sex Per Se Rule

Franke has observed that the statement of the sex per se rule in

556 257 F.3d 246, 254 (2d Cir. 2001).
557 See, e.g., Pollard v. E.I. Du Pont de Nemours & Co., 523 U.S. 843, 846 (2001) (noting in Title VII case that the "Court of Appeals affirmed, concluding that the record demonstrated that DuPont employees engaged in flagrant discrimination based on sex"); Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (finding that "sexual harassment is ordinarily based on sex"). A LEXIS search for "discrimination based on sex" in the federal caselaw database as of April 29, 2002, would yield more than 1000 cases.
558 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); see Valdes, supra note 27, at 12, 16-17 (arguing that sexual orientation and gender are fundamentally "sex-based").
the lower courts has been "a mere conclusion posing as an argument," and a sign of judicial laziness.\textsuperscript{359} Lazy or not, were the courts onto something in finding it plain that sexual conduct in the workplace is "because of sex"? Schultz and Franke both appear to have assumed that the MacKinnonist "sex equals sexism" theory provides the only theoretical argument for the proposition that sexual conduct is inherently "because of sex"; neither attempted to look beyond MacKinnon for other arguments. A starting point for considering other arguments would be to ask the question in reverse: is it theoretically sound to assert that there is some sexual conduct that is \textit{not} "because of sex"? I think not.

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

\textsuperscript{359} Franke, \textit{supra} note 13, at 720. The \textit{Doe} opinion is a unique exception: there, the court struggled mightily to place the sex per se rule on firmer theoretical footing. Judge Rovner's opinion seemed to work outward from the common sense insight that "[f]rankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender." \textit{Doe}, 119 F.3d at 580. The court questioned "why such proof [of differential treatment or express sex animus] is needed when the harassment has explicit sexual overtones." \textit{Id.} at 576. The court seemed aware of the notion that sexual conduct derives its meaning from a context in which sex and gender make a difference; it noted that "in each case [involving sexual conduct,] the victim's gender . . . affects how he or she will experience that harassment; and in anything short of a truly unisex society, men's and women's experiences will be different. In that sense, each arguably is the victim of sex discrimination." \textit{Id.} at 578. The court went on to observe that a harassment victim becomes a "sexual object" whose job is conditioned on her "willingness to endure harassment that is inseparable from her gender." \textit{Id.} at 579 (citations omitted). Harassing sexual conduct, the court observed, is "humiliating in a deeply personal way, as only sexual acts can be," and is "a grave intrusion upon [the plaintiff's] sexual privacy." \textit{Id.} at 580.

Unfortunately, these articulate intuitions in the opinion never really coalesced into a theory of why sexual conduct is per se "because of sex." In many parts of the opinion, the \textit{Doe} court seemed to strive for a broader understanding of causation, in which "because of sex" means "a nexus between the harassment and the plaintiff's gender" and extends to any "harassment that is \textit{in some way linked} to the plaintiff's sex." \textit{Id.} at 570 (emphasis added) (citations omitted). However, the court circulated around the issue and ultimately fell back on a particularly strong fact pattern that was rife with explicit language showing that the harassers targeted H. Doe because he was not sufficiently masculine. Thus, "when one's genitals are grabbed, \textit{when one is demeasured in gender-specific language}, and when one is threatened with sexual assault, it would seem to us impossible to de-link the harassment from the gender of the individual harassed." \textit{Id.} at 580 (emphasis added). At the end of the day, the court was able to fall back on the harassers' gender-specific language—a clear indicator of a sex-based intent—and concluded that it "need not so decide" that sexual conduct is per se because of sex. \textit{Id.}
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. It is one thing to say, as Franke does, that maleness and femaleness are not opposites but rather are "two locations on a spectrum of sexual and gendered identity," it is quite another thing to say that maleness and femaleness are irrelevant or invisible to sexual actors. This point is even stronger if one conceives "sex" under Title VII as something more than mere biological sex, as Franke and others have argued it should be. I would venture to say that we are more acutely aware of the sex and gender identities of others (regardless of whether they are actual or perceived) when we act sexually toward them than at most other times, whether the sexual act is an expression of desire or power.

Indeed, the notion that all sexual conduct is "because of sex" flows in some ways from Franke's own arguments. Franke argues persuasively that gender identity is constructed in a dialectical fashion; a sexual act creates and reinforces the gender of the person acting and the person acted upon. This argument has two further implications. First, sexual conduct cannot be understood independently of the gender of the persons involved. Second, the relationship between gender and any instance of sexual conduct is one of both cause and effect; sexual conduct is necessarily "because of" the gender of all persons involved. Again, since "gendered" beings are located in "sexed" bodies, "because of gender" also necessarily implies "because of sex."

These principles apply whether or not the act is one of sexual desire. Franke cites research of the psychologist John Pryor, who concluded "that men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire." Viewed through the lens of Franke's theory of sexual harassment as a "technology" for regulating gender and promoting heteropatriarchy, it would appear that most, if not all, sexual conduct in the workplace not

560 Franke, supra note 13, at 758.
561 Franke, supra note 26, at 8, 95-98; see also supra note 207 (explaining how the sex-gender distinction was blurred in the dictionary definitions of those terms in the early 1960s, when Title VII was first enacted).
562 See Franke, supra note 13, at 763 (arguing that sexual harassment is sexist because "it solidifies what 'real men' and 'real women' should be").
563 See Valdes, supra note 27, at 12 ("[E]very person's sex is also that person's gender.").
564 Franke, supra note 13, at 743 (citations omitted).
expressing desire is nevertheless because of sex. Take the example of
telling sexual jokes or posting pornographic pictures in an all-male oil
rig or fire station. This type of sexual conduct functions as a sort of
waving of a flag of heteropatriarchy, calling upon the audience to sa-
lute. Those who do not salute can be identified as gender traitors and
treated accordingly. This conduct is “because of sex” irrespective of
whether anyone is offended by it, let alone severely abused or op-
pressed, although the latter reaction is necessary to make a federal
case.

Although, as I see it, a sex per se rule is not only consistent with,
but actually follows from Franke’s argument, she herself seems to re-
treat from this implication of her own theory in drawing lines among
the same-sex harassment cases. Franke identifies three categories: (1)
a gay male supervisor makes sexual advances toward a male subordi-
nate; (2) a non-gay (either heterosexual or not alleged to be gay) har-
asser engages in sexual conduct that humiliates “or otherwise victim-
ize[s]” the plaintiff, “[r]ather than sexually objectifying” him; (3) the
plaintiff (like category two) was not the harasser’s sex object, but was
victimized because of his gender identity, for failing to conform to the
hetero-masculine gender expectations of the defendant or the work-
place.\textsuperscript{365} The first category, a same-sex harassment version of a reverse
discrimination claim, has had the most consistent success in the
courts, because it satisfies the “sexual desire” interpretation of “be-
cause of sex,” but Franke persuasively argues that under her antisub-
ordination theory, it is not sex discrimination.\textsuperscript{366} The third category of
cases are the core of Franke’s revision of the antisubordination theory,
and she argues that these should be seen as clear-cut violations of Ti-
tle VII.\textsuperscript{367} The second category—the “straight-on” same-sex harass-
ment case, as it were—for Franke represents “the most difficult chal-
lenge to my, or any, theory of sex discrimination.”\textsuperscript{368} Franke
reluctantly concludes that these plaintiffs, although they have suffered
harm, have no cause of action under Title VII: even though “there is
a gendered orthodoxy” at work in such harassment, they are not inju-

\begin{itemize}
\item \textsuperscript{365} Id. at 696-98.
\item \textsuperscript{366} Id. at 766-67. Franke suggests as “a middle ground between grand and meager
theory” that these cases be actionable as “Title VII disparate treatment” cases, but not
as sexual harassment cases. \textit{Id}. I frankly do not understand either what she means by a
“disparate treatment” case in this context or why such doctrinal treatment represents a
“middle ground.”
\item \textsuperscript{367} Id. at 770-71.
\item \textsuperscript{368} Id. at 768.
\end{itemize}
rianely "gendered" by it.\textsuperscript{369}

Interestingly, Franke classified the Fifth Circuit's decision in \textit{Oncale} in this nonactionable category; her initial interpretation of \textit{Oncale} as a nonactionable "type two" case illustrates the problematic quality of her rejection of a sex per se rule.\textsuperscript{370} Why banish a claim like Joseph \textit{Oncale}'s from Title VII law? Franke elsewhere states that masculinity and femininity are not two opposite poles, but ends of a continuum of gender. Why then does \textit{Oncale} get lumped together with "the guys"—the same guys who are threatening to rape him? If gender is a question of degree, the sexual hazing directed at \textit{Oncale} by non-gay harassers should be powerful prima facie evidence that he is not at the point of the gender spectrum where his harassers demand that he be. Plaintiffs in type-two cases are not different from type-three plaintiffs: they suffer what Franke should recognize as a gender injury. The gender-policing purpose or effect of sexualized harassment by other heterosexual males may be less obvious when the victim is heterosexual than if he were an openly gay man or transgendered or transsexual, but in view of Franke's notion of a spectrum of gender, this should be a difference of degree and not of kind. While sexual conduct, certainly, is far from the only harassing conduct that may be because of sex, a showing that the conduct is sexual should be enough to cross the causation threshold.

One final point: Schultz has asserted that sexual conduct should not be a "bright line" test for causation because courts have experienced difficulty in determining what conduct is sexual. In a similar vein, Susan Estrich has argued that courts tend to err in favor of defendants by finding conduct to be nonsexual.\textsuperscript{371} However, these ar-

\textsuperscript{369} \textit{Id.} Franke does allow that such plaintiffs could bootstrap their harassment claim into a Title VII claim if they first object to the harassment as perpetuating gender orthodoxy, and the harassment continues as "some form of penalty for making that unwelcomeness known." \textit{Id.} at 768-69.

\textsuperscript{370} Franke, \textit{supra} note 13, at 697 n.17. I should not be understood as suggesting that there is anything inconsistent between Franke's characterization of the Fifth Circuit decision in \textit{Oncale} in her law review article and her commendable and well-argued amicus brief to the Supreme Court in \textit{Oncale}. To begin with, her classification of \textit{Oncale} in the article did not involve explicit discussion of the case, but only its inclusion in a string cite of "type two" cases. She might not have considered it a type-two case on further scrutiny or as it was framed in the Supreme Court. Moreover, advocates and amici have to take advantage of issues that arise in the Supreme Court as and when they arise; the facts of the cases on which the Supreme Court grants certiorari are not always ideal.

arguments do not provide a valid objection to a sex per se rule. Holding that sexual conduct is per se “because of sex” is not to hold non-sexual conduct as falling outside of Title VII’s prohibition of harassment. It simply recognizes that in a subcategory of cases, the plaintiff will be relieved of having to produce separate evidence of causation. The fact that some individual cases will create problems of categorization—is the conduct sexual or not?—is no objection either, but is rather a problem endemic to all rules and standards in the law. Neither of these objections provides a persuasive reason why proof should be made more difficult for those plaintiffs who, like Lois Robinson, have been harassed by conduct that is indisputably sexual.

B. Applications

The sex per se rule could take the form of a conclusive presumption that sexual conduct is “because of sex” as a matter of law, which is how courts seemed to treat the issue prior to Oncale. Alternatively, the rule could raise a rebuttable presumption, shifting to the defendant the burden of producing evidence that the sexual conduct was not because of sex—however the latter concept is defined in harassment cases. In this Section, I discuss three other issues relating to the application of a sex per se rule. First, I will attempt to distinguish Oncale, which seems to reject such a rule. Second, I will examine how a sex per se rule would help resolve cases of discrimination on account of “sexual orientation.” Finally, I will examine how a sex per se rule would help resolve cases involving an “equal opportunity harasser.”

1. Distinguishing Oncale

Oncale’s rejection of a sex per se rule is sufficiently unclear that courts can, with a straight face, revive it in response to a sufficiently persuasive argument. Oncale makes three references to a sex per se rule. It is first mentioned as the third in a “bewildering variety of stances” lower courts have taken in same-sex harassment cases: “Still other[ decisions] suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.” The court declined to adopt any of the “stances” mentioned, but Doe, to which the Court cited, is significant.

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because it was summarily vacated and remanded by the Court for reconsideration in light of *Oncale* even though, like *Oncale*, it allowed a same-sex claim to go forward.\textsuperscript{373}

Adding to the implication of disapproval are two subsequent statements. "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."\textsuperscript{374} And, in discussing the "evidentiary routes" for proving causation, the Court mentions "explicit or implicit proposals of sexual activity" presumably "motivated by sexual desire."\textsuperscript{375}

Arguably these statements are ambiguous in their posture toward the sex per se rule. Clearly, the Court does not adopt such a rule, but does *Oncale* preclude it? To say that conduct that is sexual in content is not "always actionable" may only refer to the principle that harassing conduct must be severe or pervasive. This statement thus leaves open the possibility that sexual conduct is presumptively "because of sex," insofar as actionable sexual harassment must be not only "because of sex" but also severe or pervasive. Similarly, to say that words with sexual connotation are not "discrimination because of sex" follows the same logic: Sexual language is arguably "because of sex" but not automatically "discrimination because of sex," since the latter, again, requires a showing of severe or pervasive harassment. To be sure, an argument can be made that the Court's pronouncements, although themselves ambiguous, tend in context to show an intent to reject the sex per se rule. However, as Justice Scalia himself, the opinion's author, has said elsewhere, "we think it generally undesirable, where holdings of the Court are not at issue, to dissect sentences of the United States Reports as though they were the United States Code."\textsuperscript{376}

2. Discrimination on Account of "Sexual Orientation"

A sex per se rule would recognize many of the same-sex claims where harassment was aimed at gender nonconformists. Typically, these cases involve explicitly sexual taunts and sexualized physical abuse. For those (myself included) who believe that reverse discrimination cases should be disfavored under antidiscrimination laws, a sex

\textsuperscript{373} City of Belleville v. Doe, 523 U.S. 1001 (1998).
\textsuperscript{374} Oncale, 523 U.S. at 80.
\textsuperscript{375} Id.
\textsuperscript{376} St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).
per se rule has one problematic feature: it will do nothing to prevent claims targeting gay harassers. Nevertheless, it will not recognize more such claims than are already recognized by Oncale, which embraces a sexual desire theory of causation under which proof of the harasser’s homosexuality will establish “because of sex.”

Significantly, there is a growing recognition that harassment of gender nonconformists violates Title VII even in the absence of a sex per se rule. Franke and others have persuasively argued that the law of sex discrimination has conflated such concepts as biological sex, gender, and sexual behavior.\(^\text{377}\) Paradoxically, when pressed to reason beyond the logical and cultural limits of the “sex system” (the law’s limited conceptions of sex and gender)—for example, as Taylor Flynn has argued, in transgender litigation—courts tend to fall back on a crabbed definition of “sex” as referring to biological sex or, more specifically, sex as defined by external genitalia.\(^\text{378}\) Franke is rightfully critical of such a crabbed view of sex discrimination. Among other reasons to reject a biologically deterministic conception of “sex” in construing Title VII, is that this very conflation of sex and gender was undoubtedly at work when Title VII was enacted—there was no notion that the two were different. Thus, employment discrimination against a class of persons on account of a “mismatch” between their sex and their gender is discrimination because of sex.

The Oncale court, in my view, bent over backwards to avoid stating legal standards that would lead to protection of lesbians and gays from discrimination on account of sexual orientation discrimination. But I believe that regressive effort must fail in the foreseeable future. Oncale’s very emphasis on “because of sex” as the touchstone of sex discrimination works against the exclusion of lesbians and gays. Simply put: “When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex. . . . If their own gender, or that of their loved ones, were different, they would not be so treated.”\(^\text{379}\) Discrimination on the basis of sexual orientation is thus, in the plainest of language, discrimination on the basis of sex within the terms of Title VII.

Some courts have begun to apply such a theory, under a sex-stereotyping rubric, in cases that could be characterized as discrimination on account of sexual orientation. For instance, in Higgins v. New

\(^{377}\) E.g., Franke, supra note 26, at 9-14; Valdes, supra note 27.

\(^{378}\) Flynn, supra note 27, at 394-96.

\(^{379}\) MacKinnon Brief, supra note 127, at 27.
Balance Athletic Shoe, Inc., the court considered the Title VII claim of a gay employee alleging sex discrimination on account of his sexual orientation. The court of appeals "regard[ed] it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation." Nevertheless, the court stated in dicta:

Oncale confirms that the standards of liability under Title VII, as they have been refined and explicated over time, apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs. In other words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.

In Schwenk v. Hartford, the court applied Price Waterhouse to determine that a male-to-female transsexual inmate raped by a prison guard could state a claim under the Gender Motivated Violence Act. Applying Title VII principles, the court found that "the evidence offered by [plaintiff] Schwenk tends to show that [the guard] Mitchell's actions were motivated, at least in part, by Schwenk's gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor." According to the court,

under Price Waterhouse, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII. . . . [B]oth statutes [GMVA and Title VII] prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms "sex" and "gender" have become interchangeable.

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580 194 F.3d 252 (1st Cir. 1999).
581 Id. at 259.
582 Id. at 261 n.4 (citation omitted). The statement is dictum insofar as the court rejected these arguments, not on the merits, but on the procedural ground that they were not raised or factually developed in the district court and could not be raised for the first time on appeal.
583 204 F.3d 1187 (9th Cir. 2000).
584 The GMVA was enacted as subtitle C of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994). This section was ruled unconstitutional in United States v. Morrison, 529 U.S. 598 (2000).
585 204 F.3d at 1202. Although this cause of action under the GMVA was ruled unconstitutional by the Supreme Court in Morrison, 529 U.S. at 598, nothing in Morrison undermines the Ninth Circuit's reasoning about the relationship between sex and gender in discrimination cases generally or Title VII in particular.
586 Schwenk, 204 F.3d at 1202.
Courts that continue to reject harassment and discrimination claims by gays, lesbians, and transgendered persons necessarily reason—some quite explicitly—in one of two ways. Either they decide that "sexual orientation," is the "only" motivation for the discrimination or harassment, or they reason in effect that discrimination against someone on account of their sexual orientation is a kind of loophole or "safe harbor" that can legalize conduct that would otherwise be unlawful sex discrimination. Here the reasoning seems to be that because Congress rejected inclusion of sexual orientation as a prohibited ground of discrimination in Title VII, the statute must be construed to make such discrimination legal.

The first argument has been refuted by Francisco Valdes, who has shown how it makes no sense to argue that sexual orientation is ever the "only" basis for discrimination. For one thing, sexual orientation is always fundamentally based on either sex or gender: it can only be defined with reference to the sex or gender of a person vis-a-vis the sex or gender of those with whom he or she is sexual. For another, sexual orientation is only one of several facets of gendered behavior; harassers who target gender nonconformists often themselves conflate sexual orientation and other aspects of gendered behavior. Such harassers may indeed know or even assume nothing about the sexuality of the person they harass, instead focusing on other gender-coded aspects of the victim's personal appearance or demeanor.

387 Again, I use the term advisedly. As Valdes shows, as courts use it, sexual orientation is a conflation of beliefs about an individual's sexual intimacies and that person's gender identity. Valdes, supra note 27, at 135-36.

388 Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000). There, the court, analogizing a claim under the Equal Credit Opportunity Act to Title VII, held that the male plaintiff, a cross-dressing loan applicant, could establish that the bank's refusal to give him a loan application was discriminatory if it was based on his cross-dressing (and assuming that women dressing like men were not refused loan applications). However, the court reasoned, if the refusal was because the loan officer believed the plaintiff was gay, there would be no claim.

389 See, e.g., Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (explaining that Congress, on many occasions, has rejected "bills that would have extended Title VII's protection to people based on their sexual preferences"); Wrightson v. Pizza Hut of Am., Inc. 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation."); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.").

390 Valdes, supra note 27, at 15.

391 Id.
Moreover, whether justifying a Title VII loophole for sexual orientation discrimination on the grounds that it excludes other motivations or as a "safe harbor," the effect is to exclude gays and lesbians from the protection of a law of general application, to which they are presumptively entitled. Romer v. Evans held that equal protection was violated by a law that excluded lesbians and gays from "the protection of generally applicable laws and policies." Therefore, equal protection is violated if gays and lesbians are excluded from a law already on the books that would protect them but for their sexual orientation. In light of Romer, the current interpretation of Title VII purporting to exclude sexual orientation discrimination from its prohibition cannot stand for long.

3. The Equal Opportunity or "Bisexual" Harasser

The problem of the equal opportunity harasser portended by Oncale has emerged as something more than a law school hypothetical. Some recent cases have dismissed claims where the harasser allegedly targeted both male and female employees. But the equal opportunity harasser problem also may extend to such core sexual harassment cases as Robinson v. Jacksonville Shipyards. Few would contest the notion that the wrong of sexual harassment, however it is defined, should include what was done to Lois Robinson. The harassment she endured, summarized at the outset of this Article, was particularly egregious. Yet without a sex per se rule, Oncale's formal equality approach would have given the employer Jacksonville Shipyards an equal opportunity harasser defense. The sexualized hazing was so pervasive at the shipyard that one easily could imagine the employer putting up two or three male employees to testify that they, too, felt offended and harassed. Some courts have begun to recognize, however, that it is possible for a single harasser to discriminate against both men and women. An important advance will occur if and

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Id. at 630-35.
See Valdes, supra note 27, at 192 ("Title VII formally forbids discrimination based on sex and gender stereotyping, but on the statute’s face this protection is not limited to members of the sexual majority."); Cf. MacKinnon Brief, supra note 127, at 28-30 (arguing that excluding same-sex claims from Title VII coverage would violate equal protection).
Supra Part II.B.3; see also Hébert, supra note 154, at 476-79 (discussing harassment that targeted men and women in the same case).
See Brown v. Henderson, 257 F.3d 246, 253 (2d Cir. 2001) (explaining that "the
when courts accept the notion argued in various antisubordination theories, including those discussed here, that employees can be discriminated against on account of their gender. This would broaden the comparative treatment inquiry beyond treatment of "men" and "women" to comparative treatment of hetero-masculine men and others.

The sex per se rule would eliminate the "bisexual harasser" problem for claims involving sexual conduct, since all sexual conduct is "because of sex." The plaintiffs in Holman, for instance, would have established causation under a sex per se rule and would have prevailed if they could have established the severity elements. Assuming a "bisexual harasser" is someone who is "impartial" to the sexual or gender identity of the target, the harassment is nevertheless because of sex: "Impartial" is not the same as "oblivious."

CONCLUSION

Both the Supreme Court and the second generation theorists of sexual harassment have discredited the sex per se rule, not out of any conscious intent to make proof more difficult for Lois Robinson, but rather to address other issues. For feminist theorists, the challenge was to find a unifying antisubordination theory that could at the same time bring both H. Doe and Lois Robinson under the same protective Title VII umbrella. For the Supreme Court, however, the agenda seems to have been to make proof more difficult for H. Doe in order to prevent Title VII from drifting toward prohibition of harassment because of sexual orientation. But abandonment of the sex per se rule would seem to leave the Lois Robinsons standing out in the rain—a result intended by neither feminist theorists nor indeed the Court.

Oncale clearly shows us that courts will continue to look to the words of the statute for doctrinal guidance in understanding Title VII's prohibition of discrimination "because of" sex. The resulting focus on the words "because of" means that courts will continue to take the question of causation seriously. Causation, which in antidiscrimination law means the intent to discriminate, is after all one of the application of discriminatory policies to individuals cannot be justified by their even-handed effects on women and men as classes or in the aggregate"); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) ("[E]ven if [the supervisor] used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women.").
gatekeeping mechanisms that separates employer actions that are lawful from those that may violate Title VII. The sex per se rule has helped combat the subordination of women in the workplace by easing otherwise potentially difficult problems in proving causation, particularly in cases like Robinson, and it could function in the same way to combat subordination based on gender more broadly conceived. After Oncale, the first order of business for theorists of sexual harassment law should be to rehabilitate the sex per se rule by showing courts that it has a theoretical and textual basis. If courts are taking causation seriously, then those of us who believe that the antidiscrimination laws are fundamentally laws against subordination of traditionally disadvantaged groups must take the causation issue seriously as well. We ignore it at our peril, and, more pointedly, at the peril of those whom we hope the antidiscrimination laws will protect.