THE EQUAL PROTECTION PROBLEM IN SEXUAL HARASSMENT DOCTRINE

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> The city hired J. to cut grass when she was sixteen. From the beginning, male co-workers subjected her to relentless harassment. One man called her "his bitch" and repeatedly said he was going to take her "out to the woods" and "get her up the ass." Other men made similar comments. The verbal abuse turned physical when one man grabbed her genital area "to see if she was a guy or a girl." Fearing the men would rape her, J. quit her job.[1]

Does the law prohibit this sexual harassment? Yes. This conduct creates a hostile work environment. But what if J. were male? Is it still unlawful? If not, does that violate the Constitution's guarantee of equal protection?

INTRODUCTION

For twenty years, women have sued their employers under Title VII for sexual harassment perpetrated by men, asserting that the sexual harassment qualified as sex discrimination.[2] In Oncale v. Sundowner Offshore Services Inc.,[3] the Supreme Court unanimously held that Title VII also recognizes same-sex sexual harassment.[4] Thus, men may also sue their employers when other men sexually harass them at work.[5]

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[1] This hypothetical generally follows the facts of Doe v. City of Belleville, in which the plaintiffs were male. *See* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998) (vacating decision for further reconsideration in light of Oncale v. Sundowner Offshore Serv., 523 U.S. 75 (1998)). The case eventually settled. *See* Brothers Who Fought Harassment Battle Come Forward, St. Louis Post-Dispatch, June 17, 1999, at 1 (reporting that Vincent and Steven Mudd, who sued the City of Belleville under the aliases J. Doe and H. Doe, settled out of court the previous year).

[2] The first reported sexual harassment case under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 (e)(2)(a) (1994), is Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975). However, the first federal case, reported after Corne was published, is Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974). For descriptions of early sexual harassment decisions, *see* Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 59-77 (1979).

[3] 523 U.S. 75 (1998).

[4] *See id.* at 79.

[5] Women, of course, may also sue for same-sex sexual harassment. *See, e.g.*, Brunetti v. Rubin, 999 F. Supp. 1408 (D. Colo. 1998) (female plaintiff alleging that female harasser repeatedly touched or brushed plaintiff's breasts, lips and knee, sent her gifts, and told plaintiff she had "feelings for her that she did not know how to handle"). This Article primarily refers to

Oncale emphasized that plaintiffs in same-sex sexual harassment cases must satisfy Title VII's statutory requirements.[6] In pertinent part, Title VII makes it "an unlawful employment practice . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[7]

The Supreme Court stressed that plaintiffs must prove that the harassment happened "because of such individual's . . . sex" and outlined briefly three evidentiary routes plaintiffs might take to prove this element.[8] The first evidentiary route is sexual desire.[9] In same-sex cases, plaintiffs may satisfy the requirement by proving the harasser is homosexual.[10] Likewise, plaintiffs in male-female cases may rely on the harasser's heterosexuality. The Court reasoned that in such situations, the combination of sexual proposals and the harasser's sexual orientation could lead a factfinder to reasonably assume that the harassment occurred out of sexual desire, and thus "because of sex."[11] The second evidentiary route is general hostility.[12] Oncale explained this evidentiary route with an example, stating that factfinders could find discrimination if a female harasses another female in "such sex-specific and derogatory terms"[13] as to make it apparent that a general hostility toward women motivated the harasser.[14] For this second evidentiary route, factfinders presumably look at the conduct without regard to the harasser's sexual

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men, since the large majority of same-sex sexual harassment cases involve men. For example, a survey of the first 100 opinions to cite Oncale found twenty cases involving claims of same-sex sexual harassment; seventeen cases involved men. *See* Sonya Smallets, Oncale v. Sundowner Offshore Services: A Victory for Gay and Lesbian Rights?, 14 Berkeley Women's L.J. 136, 141-42 (1999).

[6] *See* 523 U.S. at 80-81.

[7] 42 U.S.C. § 2000 (e)(2)(a) (1994).

[8] *See id.* at 80-81.

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *Id.* at 80.

[14] *See id.* at 80-81.

orientation. The third evidentiary route is direct evidence showing that the harasser treated men and women differently in a mixed-sex workplace.[15]

This Article argues that Oncale's first evidentiary route raises an equal protection problem because it classifies plaintiffs by their sex and proceeds to treat them differently. When heterosexual men create sexually hostile work environments, female plaintiffs need only prove the harassment affected the "compensation, terms, conditions, or privileges" of employment, and that the employer is liable, to obtain a remedy. Male plaintiffs in the same position—sexually harassed by heterosexual men—must meet a higher burden by meeting the above requirement and proving additionally that they were harassed "because of their sex." This differential treatment triggers constitutional scrutiny because the government must treat men and women the same unless it can provide an "exceedingly persuasive" justification for the differential treatment.[16] If the government cannot meet this burden, the practice is unconstitutional.[17]

Oncale's first evidentiary route creates an equal protection problem because courts cannot justify treating men's and women's claims differently in all sexual harassment cases. However, this Article also offers a solution that remains consistent with the language of Oncale. Lower courts should rely on a plaintiff's sex and the harasser's sexual orientation to infer a Title VII violation only in *quid pro quo* claims of sexual harassment.

Courts, including the Supreme Court, have recognized two types of sexual harassment: *quid pro quo* and hostile work environment. *Quid pro quo* harassment occurs when a supervisor seeks sexual favors in return for job benefits (e.g., "Sleep with me or you are fired."). In comparison, hostile work environment harassment occurs when a harasser's sexual conduct or comments creates an intimidating, hostile, or offensive work environment. If courts only use Oncale's first evidentiary route in *quid pro quo* claims, they will avoid the equal protection problem and remain faithful to the Supreme Court's opinion.

To identify the equal protection problem more precisely, Part I proposes a framework for understanding when sexual harassment violates Title VII. Part II then uses this framework to analyze Oncale's first evidentiary route under modern equal protection doctrine. This part argues that Oncale's first evidentiary route treats male and female plaintiffs differently, thus triggering heightened scrutiny. To pass constitutional muster, courts must provide an exceedingly persuasive justification for the differential treatment male and

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[15] *See id.*

[16] *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996).

[17] *See id.*

female plaintiffs are given. Part II then explains that courts cannot meet this burden in hostile work environment claims because a number of male and female plaintiffs are similarly situated in such cases. At most, courts may apply Oncale's first evidentiary route in *quid pro quo* claims.

Given that the Constitution strongly presumes that the government must treat men and women the same, Part III argues that courts should continue to utilize a conduct-based approach in hostile work environment claims. Courts should infer the harassment happened "because of such individual's sex" if the conduct is sexual. If such conduct also rises to the level of affecting the "compensation, terms, conditions, or privileges" of employment, plaintiffs should have a Title VII claim regardless of their sex. A conduct-based approach is constitutionally sound since it treats male and female plaintiffs the same. Moreover, it is the best way for courts to adjudicate hostile work environment claims because it lowers litigation costs and reduces the likelihood of arbitrary or biased decisions.

I. AN ANALYTICAL FRAMEWORK FOR UNDERSTANDING SEXUAL HARASSMENT AS A TITLE VII VIOLATION

A. Men Sexually Harassing Men: Exposing the Tension Between Two Approaches to Sexual Harassment

Joseph Oncale was sexually harassed at work.[18] From August to November of 1991, Sundowner Offshore Services employed Oncale on an all-male offshore oilrig.[19] From the start of his employment, Oncale was barraged with verbal harassment from three men, John Lyons, Danny Pippen, and Brandon Johnson.[20] The comments ranged from "[y]ou know you got a cute little ass, boy" to threats of rape.[21] Moreover, on three occasions, they sexually

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[18] This conclusion rests on the premise that the alleged facts of Joseph Oncale's case are true. For the alleged facts of the case, *see* On Petition for Writ of Certiorari, Brief for Petitioner, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96-568). *See also* Catharine A. MacKinnon, Brief of National Organization on Male Sexual Victimization, Inc., Amici Curiae in Support of Petitioner, Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998 (1996) (No. 96-568), 8 UCLA Women's L.J. 9, 13 (1997). No court ever made a finding of fact, however, because the case settled after being remanded. *See* Settlement Reached in Harassment Suit, The Washington Times, Oct. 26, 1998 at A9 (describing settlement).

[19] *See* MacKinnon, *supra* note 18, at 13.

[20] *See id.*

[21] *Id.* at 13-14.

assaulted him.[22] In the most graphic incident, they attacked Oncale as he showered.[23] While Pippen pinned Oncale, Lyons forced a bar of soap into his anus and told him "they're fixing to fuck [him]."[24] The threats continued and Oncale eventually quit because he feared he would be raped.[25]

The Equal Employment Opportunity Commission (EEOC) defines sexual harassment to include, among other things, verbal or physical conduct of a sexual nature that has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[26] The conduct Joseph Oncale alleged meets this

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[22] *See id.* The first assault occurred on October 25, 1991, while Oncale traveled by boat to another oil platform. *See id.* Danny Pippen grabbed and pulled Oncale down and pinned him. *See id.* Lyons then unzipped his pants, "pulled out his penis, and stuck it onto the back of Oncale's head." *Id.* Lyons and Pippen both laughed as Oncale asked them to stop. *See id.* The second assault occurred the next day when Brandon Johnson grabbed and forced Oncale to the ground. *See id.* While Oncale was on the ground, "Lyons pulled his penis out and put it on Oncale's arm." *Id.* The third assault, described immediately below, occurred that same night as Oncale showered. *See id.*

[23] *See id.* at 13-14.

[24] *Id.* at 13.

[25] *See id.* Lyons made repeated threats to rape Oncale including: "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 . . . ." and "You told your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway." *Id.* When asked during a deposition why he left Sundowner, Oncale stated "I felt that if I didn't leave my job, that I would be raped or forced to have sex." *See* Oncale, 523 U.S. at 77. Oncale's pink slip stated he "voluntarily left due to sexual harassment and verbal abuse." *Id.*

[26] 29 C.F.R. § 1604.11(a) (1999). The EEOC is the administrative agency charged by Congress to enforce Title VII and advance its policies. *See* 42 U.S.C. § 2000e-4 (1994). The EEOC's guidelines on sexual harassment state in full:

> 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.*

29 C.F.R. § 1604.11(a) (1999) (emphasis added).The first two subsections encompass "*quid pro quo*" harassment, while the third one refers to "hostile work environment" harassment. *See infra* note 49 discussing the distinction.

definition.

Indeed, if Oncale had involved male-female harassment, the paradigm case of sexual harassment, it would not have perplexed anyone. Courts would have just assumed that it was "discrimination because of such individual's sex," and thus unlawful under Title VII because it created a hostile work environment.[27] Yet, Oncale and other same-sex cases that qualify as sexual harassment[28] have caused scholars and courts to re-examine why sexual harassment is unlawful under a statute that prohibits sex discrimination.[29]

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[27] *See* Steven L. Willborn, Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law, 7 Wm. & Mary Bill Rts. J. 677, 681 (1999) ("[I]f the harassment involves a person of one sex harassing someone of the opposite sex, discrimination is assumed. Although this assumption covers the vast majority of the cases, it is what caused the problem in Oncale. The problem in Oncale, which had split the circuits, was what to do with the assumption of sex discrimination when the harassment involved people of the same sex."). *See also* Katherine M. Franke, What's Wrong with Sexual Harassment?, 49 Stan. L. Rev. 691, 694 (1997) (arguing that courts have just assumed conduct of a sexual nature is "based on sex").

[28] For examples of behavior perpetrated by men involving "unwelcome sexual conduct" that has the "purpose or effect of creating an intimidating, hostile, or offensive working environment," (but not necessarily qualifying as sex discrimination), *see* Johnson v. Hondo, Inc., 125 F.3d 408, 410 n.1 (7th Cir. 1997) (sexual harasser frequently told employee "I am going to make you suck my dick," while gesturing as if masturbating inches in front of the plaintiff's face); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1192-93 (4th Cir. 1996) (among many other acts of sexual harassment, co-workers tied McWilliam's hands together, blindfolded him, forced him to his knees, and placed a broomstick to plaintiff's anus while another co-worker exposed his genitals); Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1374 (8th Cir. 1996) (harassers repeatedly grabbed and squeezed the plaintiff's testicles); Torres v. National Precision Blanking, 943 F. Supp. 952 (N.D. Ill. 1996) (harasser inserted finger into plaintiff's rectum); Ashworth v. Roundup Co., 897 F. Supp. 489, 492-94 (W.D. Wash. 1995) (harasser threatened to "butt fuck" the plaintiff and jabbed a steel object between his buttocks).

[29] *See, e.g.*, Franke, *supra* note 27, at 694-95 (arguing that same-sex sexual harassment cases require a re-evaluation of why sexual harassment is sex discrimination); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1774 (1998) (arguing for "a coherent framework for addressing claims of same-sex harassment"); Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169, 1172 (1998) (arguing for a new theory of sexual harassment "that avoids essentialism and encompasses cases of same-sex sexual harassment").

Before Oncale, the Supreme Court had heard two sexual harassment cases under Title VII, but never addressed the issue of why (or when) sexual harassment qualifies as sex discrimination. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that sexual harassment creating a hostile environment may be actionable without seriously affecting the victim physically or psychologically); Meritor Savings Bank v. Vinson 477 U.S. 57, 64 (1986) (holding that when sexual harassment is "severe or pervasive" enough to create a hostile work environment it affects the "compensation, terms, conditions, or privileges" of employment). The

Legal scholars generally take two approaches in explaining why sexual harassment is unlawful. First, many scholars argue that Title VII prohibits sexual harassment because sexual harassment is "a form of sex discrimination."[30] Those that make this argument first focus on defining discrimination and then explain why sexual harassment qualifies as a form of it.[31] The argument then becomes a syllogism. Title VII prohibits sex discrimination; sexual harassment is sex discrimination; thus, Title VII prohibits sexual harassment. Notably, if sexual harassment is a form of sex discrimination, the crucial inquiry is always whether a plaintiff was sexually harassed.

Other scholars argue that sex discrimination means "treating men and women differently."[32] From this approach, the key question is whether the

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issue of sex discrimination was salient in Oncale because it involved men sexually harassing men instead of women.

[30] This approach to the problem of sexual harassment first began twenty years ago with Catharine MacKinnon. MacKinnon argued that sex discrimination should be viewed as a practice that reinforces the social inequality of women to men, rather than simply "treating men and women differently." Under this definition, MacKinnon argued, all sexual harassment qualifies as sex discrimination. *See* MacKinnon, *supra* note 2, at 174. For more recent scholarly work discussing why sexual harassment is a form of sex discrimination, *see supra* note 29.

[31] *See, e.g.*, MacKinnon, Sexual Harassment, *supra* note 2, at 116-18 (arguing sexual harassment is sex discrimination because it reinforces the social inequality of women to men); Franke, *supra* note 27, at 772 (1997) (arguing sexual harassment "is a practice, grounded and undertaken in the service of hetero-patriarchal norms. These norms, regulatory, constitutive, and punitive in nature, produce gendered subjects: feminine women as sex objects and masculine men as sex subjects. On this account, *sexual harassment is sex discrimination* precisely because its use and effect police hetero-patriarchal gender norms in the workplace.") (emphasis added); Schultz, *supra* note 29, at 1755, 1803 (arguing that "*harassment 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" and that courts should adopt a "competence centered" paradigm, because it understands harassment as a means to reclaim favored lines of work and work competence as masculine-identified turf . . . . [as case law shows] "hostile work environment harassment is *simply a form of gender discrimination*") (emphasis added); Abrams, *supra* note 29, at 1172 (arguing for a new theory of sexual harassment that characterizes sexual harassment as "a phenomenon to preserve male control and entrench masculine norms"); Linda B. Epstein, Note, What is a Gender Norm and Why Should We Care? Implementing a New Theory in Sexual Harassment Law, 51 Stan. L. Rev. 161, 180-81 (1998) (arguing that courts should apply a "unified theory of gender norm harassment that encompasses sexual and non-sexual but sex-based conduct...." and that "[i]f sexualizing women was recast as enforcing upon women the gender norm of "sexual object," that enforcement is *inherently a discriminatory one*") (emphasis added).

[32] *See, e.g.*, Willborn, *supra* note 27, at 723 (arguing courts should treat Title VII's discrimination element "seriously" and find that discrimination exists only when men and

harasser treated members of one sex differently from members of the other sex. That is, Title VII only prohibits sexual harassment that happens because an employee is biologically male or female rather than for some other reason. The question is one of causation: "but for" the plaintiff's sex would he or she still have been sexually harassed?[33] For example, if an employer sexually harasses employees when they advocate feminist beliefs, the employer has arguably not treated them poorly because of their "sex" but "because of" their political views, and Title VII does not prohibit such behavior.

Depending on the context, the language of courts' opinions has vacillated between these two approaches. In cases involving men sexually harassing women, many courts have stated the conclusion that sexual harassment *is* sex discrimination.[34] But when deciding cases involving men sexually harassing men, courts have reverted to claiming that the critical inquiry is whether the harasser treated members of one sex differently than another.[35] Cases involving

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women are treated differently); Rebecca Hanner White, There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment, 7 Wm. & Mary Bill Rts. J. 725, 735 (1999) (arguing that the Supreme Court merged sexual harassment with other forms of disparate treatment claims).

[33] *See, e.g.*, Willborn, *supra* note 27, at 705. This view is consistent with early sexual harassment cases explicitly adopting a "but for" causation. *See also infra* note 37 (citing cases using "but for" analysis).

[34] *See, e.g.*, Provencher v. CVS Pharmacy, 145 F.3d 5, 13 (1st Cir. 1998) (stating "[s]exual harassment is a form of gender discrimination prohibited by Title VII."); Mattern v. Eastman Kodak Co., 104 F.3d 702, 715 (5th Cir. 1997) ("A claim of 'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII § 703 (a)(1)), *cert. denied*, 118 S. Ct. 336 (1997); Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1365 (10th Cir. 1997) ("It is beyond contention that Title VII prohibits sexual harassment in the workplace."); Fleming v. Boeing Co., 120 F.3d 242, 244 (11th Cir. 1997) ("Sexual harassment is a form of sexual discrimination within the meaning of Title VII."); Bator v. Hawaii, 39 F.3d 1021, 1028-29 (9th Cir. 1994) ("Courts have recognized that sexual harassment is sex discrimination in violation of Title VII at least since 1977."); Poe v. Haydon, 853 F.2d 418, 428 (6th Cir. 1988) ("the Supreme Court ruled [in Meritor] that 'hostile environment' sexual harassment is a form of sex discrimination").

[35] For example, the Supreme Court's decision in Oncale was the first time the Court emphasized that sexual harassment plaintiffs must prove they were discriminated against "because of such individual's sex," even though it had previously heard two other Title VII sexual harassment cases. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). In Meritor, the Supreme Court glossed over the question of sex discrimination by simply stating, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64.

same-sex sexual harassment have exposed the tension between the two approaches. Moreover, such cases have shown that one may either conclude that "sexual harassment is a form of sex discrimination" or adopt a definition of sex discrimination that means treating men and women differently, but one cannot logically do both.[36]

B. Understanding Title VII's Scope If Discrimination Means Treating Men and Women Differently

This Article assumes discrimination "because of such individual's sex" means treating men and women differently for two reasons. First, this approach has strong roots in the first cases to recognize sexual harassment as a violation of Title VII. Those cases explicitly linked sexual harassment to Title VII's prohibition of sex discrimination by explaining that if the female plaintiff were a man, the employer would not have harassed her.[37] Second, courts have shown

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The switch from sexual harassment as "a form of sex discrimination" to sexual harassment as only sex discrimination if it happens "because of such individual's sex" is exemplified by Justice Thomas's opinions in two 1998 sexual harassment cases. In Burlington Indus., Inc. v. Ellerth, a case involving male-female harassment, Justice Thomas stated, "Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but *a form of employment discrimination*." 524 U.S. 742, 774 (1998) (Thomas, J., dissenting) (emphasis added). In contrast, in Oncale Justice Thomas wrote a one sentence concurrence that stated, "I concur 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.'" Oncale, 523 U.S. at 82 (Thomas, J., concurring). In Justice Thomas's favor, in Burlington he was emphasizing that liability for sexual harassment should be treated like other Title VII cases. But it is nonetheless revealing that Justice Thomas, who four months earlier in Oncale had emphasized that the "because of sex" requirement must be shown in every case, did not write, "Sexual harassment *may be* a form of employment discrimination" in the context of male-female harassment.

[36] Although one cannot logically hold both true, the EEOC has combined the two approaches in its compliance manual. It states, "Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex." EEOC Comp. Man. (CCH), ¶ 3101, § 615.2(b)(3) (1999) (discussing same-sex sexual harassment). The plain meaning of this sentence contradicts itself. It is akin to saying, "Since a bicycle is a form of transportation, the crucial inquiry is whether one can move around on it."

[37] *See* Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?") (first appellate case to establish a hostile environment claim of sexual harassment); Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) ("But for her womanhood, from aught that appears, her participation in sexual activity would

reluctance to define sex discrimination as anything besides "treating men and women differently." Indeed, the Supreme Court voiced continued support for this definition in Oncale when it stated, "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms of conditions of employment to which members of the other sex are not exposed."[38]

Under this approach, Title VII focuses on both the employer's behavior and the reasons motivating it. The employer's behavior must affect the "compensation, terms, conditions, or privileges of employment." The motive must be "because of such individual's . . . sex."

To illustrate, consider that no federal law prohibits an employer from hiring, assigning, promoting, or terminating employees because they are politically liberal or feminist. However, Title VII does prohibit the same behavior if it happens because the employee is a woman or a man. A key to understanding this approach to Title VII is separating an employer's behavior from an employer's motives.

The text of Title VII does not prohibit sexual harassment. Rather, it prohibits sexual harassment that affects the "compensation, terms, conditions, or privileges of employment" and happens "because of such individual's sex."[39] As mentioned above, this approach to sex discrimination seeks to answer a question of but-for causation: would the plaintiff have suffered the harassment

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never have been solicited.") (first appellate case to establish a *quid pro quo* claim of sexual harassment); *see also* Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986) (stating "[t]he harassment complained of was based upon sex, i.e., that but for the fact of her sex, the plaintiff would not have been the object of harassment"); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) ("we hold that any 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."); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) ("In proving a claim for a hostile work environment due to sexual harassment, therefore, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.").

[38] 523 U.S. 75, 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

[39] The Supreme Court has held that if the sexual harassment is a hostile work environment claim, the victim must show that the abuse is so "severe or pervasive" as to alter the "terms or conditions" of employment as specified in 42 U.S.C. § 2000(a)(1) (1994). *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (stating that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview").

"but for" his or her sex.[40] Since sexual harassment does not necessarily happen "because of such individual's sex," one must determine *when* it (or any other behavior) is motivated by the fact that the plaintiff is a woman or man—in the sense that it would not have happened to a similar person of the opposite sex.

In both case law and academic scholarship, one can identify three motives that meet the "but for" definition and which distinguish acts that happen "because of such individual's sex" from acts that happen for other reasons.[41] An employer's behavior qualifies as sex discrimination if motivated in part by (1) sexual attraction; (2) gender animus; or (3) gender stereotypes.[42] An employer motivated by these reasons, at least in part, treats the employee differently because of that person's sex—in each case, "but for" the employee's sex, the employer would not treat him or her in such a fashion. Notably, though, Title VII does not prohibit all behavior that falls into one of these categories, since the conduct must still rise to the level of affecting the "compensation, terms, conditions, or privileges of employment." Briefly

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[40] *See supra* note 33 and accompanying text. *See also* note 37 (listing cases using "but for" analysis).

[41] Other motives might also meet this definition of sex discrimination. However, such motives are not discussed because the goal in this section is to describe current case law and scholarship, rather than critique it.

[42] This Article does not attempt to identify these themes comprehensively throughout case law and scholarship. However, one can easily find each of these themes in recent scholarship that has discussed the history of sexual harassment theory and jurisprudence. On the role of sexual desire in sexual harassment doctrine, *see* Franke, *supra* note 27, at 714-25 (1997); Schultz, *supra* note 29, at 1696-1705 (1998). On the role of gender animus in sexual harassment doctrine, see for example, Schultz, *supra* note 29, at 1736 (discussing courts' use of "gender animus" to find sex discrimination).

In Burlington Indus., Inc. v. Ellerth, the Supreme Court explicitly mentioned both gender animus and sexual attraction as motives for a supervisor's sexual harassment. *See* 524 U.S. 742, 756-57 (1998) ("As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer.").

The role of gender stereotyping as sex discrimination has recently received the most attention by scholars attempting to explain why same-sex sexual harassment qualifies as sex discrimination. *See* Franke, *supra* note 27, at 693; Shultz, *supra* note 29, at 1774-89; Abrams, *supra* note 29, at 1172; Epstein, *supra* note 31, at 161.

The most significant difference between this Article's framework and other scholarship on sexual harassment and sex discrimination is that this framework does not claim that all sexual harassment falls under one of these categories. Rather, this Article makes the claim that *if* sexual harassment, or other behavior, is motivated by one of these three motives, *then* it is sex discrimination.

consider why each of these motivations meets the "but for" test for sex discrimination.

Sexual attraction: If a person is sexually attracted to one sex, and acts on that desire, then the conduct is discriminatory.[43] For example, if a heterosexual[44] female employer assigns a male employee to a specific job because she is sexually attracted to him, her motive is discriminatory. "But for" his sex, he would not have been assigned to the job.

Gender animus: If a person hates one sex, and acts on that hate, then the conduct is discriminatory. An employer violates Title VII when he does not hire a qualified woman for a job because he hates women. "But for" the woman's sex, she would have been hired.

Gender stereotyping: If a person acts on gender stereotypes, then the conduct is discriminatory. Gender stereotypes consist of a set of beliefs about the characteristics men and women possess and the societal roles they occupy.[45] A person can discriminate by relying on gender stereotypes in two ways. First, the stereotypes can serve as descriptive generalizations about men and women.

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[43] Thus, the "bisexual harasser" is not liable under Title VII since the behavior does not turn on the sex of the employee. *See* Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike."); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In 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."). *See generally* Sandra Levitsky, Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases, 80 Minn. L. Rev. 1013 (1996) (explaining the establishment of the "bisexual defense" loophole).

[44] For the most part, courts have assumed a rather strict heterosexual/homosexual divide. *See, e.g.*, Oncale, 523 U.S. 75, 80. Since courts have used these categories as if they were binary and almost exclusive descriptions of sexuality, this Article leaves them unchallenged to show how current sexual harassment doctrine, *on its own terms*, has an equal protection problem.

However, there are good reasons to think this binary description of human sexuality is wrong. This assumption about human sexuality has been challenged for over 50 years. *See* Alfred C. Kinsey et al., Sexual Behavior in the Human Male 639 (1948) ("The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex."). For a discussion on the erasure of bisexuality in contemporary legal discourse, *see* Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 Stan. L. Rev. 353 (2000). For a discussion of the major sexuality studies and their findings on the incidents of homosexuality and bisexuality in the population, *see id.* at 370-88.

[45] *See* Kay Deaux & Marianne LaFrance, Gender, *in* 1 The Handbook of Social Psychology 788, 793 (Daniel T. Gilbert et al. eds., 1998).

For example, employers may assign women and men to different jobs because "men are more assertive and independent than women" or because "women make better secretaries."

Second, gender stereotypes can also reflect beliefs about how men and women *should* act or behave.[46] Thus, an employer may react adversely to women and men who do not conform to specific gender stereotypes. For instance, an employer may not promote a woman because she is "too aggressive" and lacks "interpersonal skills."[47] No particular animus towards women, as such, motivates the employer. Rather, the employer believes that men and women should act or behave in different ways. Nonetheless, "but for" her sex, the employee would not be thought too aggressive or lacking in interpersonal skills.

It is important to note that behavior motivated by gender stereotypes is discriminatory only when it treats men and women differently. Thus, an employer does not violate Title VII if he only hires independent and aggressive employees (male and female) even though such characteristics are typically viewed as "masculine."[48] In comparison, employers do violate Title VII if they base employment decisions on the expectations that women will not or should not act aggressively.

C. Explaining Male-Female Sexual Harassment as Sex Discrimination Under This Framework

One can apply this framework to identify when male-female sexual harassment qualifies as sex discrimination. Over the last twenty years, courts have recognized two types of claims under the rubric of "sexual harassment": *quid pro quo* and hostile work environment claims.[49] *Quid pro quo* harassment

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[46] *See id.*

[47] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

[48] *See* Deaux & LaFrance, *supra* note 45, at 795.

[49] Catharine MacKinnon first divided sexual harassment into two categories. *See* MacKinnon, *supra* note 2, at 32-42. MacKinnon labeled the first type "*quid pro quo*," meaning sexual harassment "in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity." *Id.* at 32. According to MacKinnon, the second form "arises when sexual harassment is a persistent *condition of work*." *Id.* at 40. In 1980 the Equal Employment Opportunity Commission followed MacKinnon's framework in adopting guidelines prohibiting sexual harassment. Building on MacKinnon's work, the EEOC guidelines recognized both forms of harassment as a Title VII violation even though courts had previously only recognized *quid pro quo* claims. *See* David Schultz, From Reasonable Man to Unreasonable Victim?:

occurs when a supervisor seeks sexual favors in return for job benefits. A common example of this harassment is the statement "sleep with me or you are fired." In comparison, hostile work environment harassment occurs when a harasser's sexual conduct creates an intimidating, hostile, or offensive work environment.

The discriminatory element behind *quid pro quo* claims is a sexual attraction only aimed at one sex.[50] If a heterosexual male supervisor terminates a female employee's employment because she rejects his sexual advances, he has violated Title VII. The conduct is discriminatory because he would not have made sexual advances to a male employee.

In contrast, hostile work environment claims may be motivated not only by sexual attraction but also by gender animus and gender stereotypes.[51] A hostile work claim might involve a co-worker's repetitive and unwelcome sexual advances that create a hostile work environment. This would qualify as discriminatory for the same reasons *quid pro quo* claims violate Title VII: such behavior is not aimed at male employees. A man motivated by gender animus may sexually harass a woman because "[w]omen are only fit company for

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Assessing Harris v. Forklift Systems and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law, 27 Suffolk U. L. Rev. 717, 723 (1993) (stating "MacKinnon's arguments quickly influenced the EEOC's 1980 guidelines and interpretation of Title VII."). Although the EEOC guidelines were not binding, courts considered them persuasive authority in interpreting the statute. The Supreme Court recognized the distinction when it heard its first sexual harassment case. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986).

The Supreme Court recently weakened the distinction between *quid pro quo* and hostile work environment harassment in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). Burlington rejected the distinction between *quid pro quo* and hostile environment harassment as a basis for determining whether to apply strict or negligence-based employer liability, respectively, for employees' behavior. *See id.* at 751-53. In rejecting that distinction, the Court stated, "The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Id.* at 751. Thus, the principle difference between hostile work environment and *quid pro quo* is currently whether the harasser made a threat of adverse employment action and then carried it out (*e.g.*, denied overtime or promotional opportunities).

However, as this Article argues below, the distinction may serve another purpose. Specifically, it may help lower courts remain consistent with the Supreme Court's opinion in Oncale and avoid violating the Constitution's mandate of equal protection. *See infra* Part II.D.

[50] *See supra* note 43 and accompanying text *infra* (discussing bisexual harasser who is not liable under Title VII because his sexual desire is aimed at both men and women).

[51] *See* Oncale, 523 U.S. 75, 80 (stating "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

something that howls . . . There's nothing worse than having to work around women."[52] Finally, gender stereotypes might also motivate a man to sexually harass a woman. He may feel she is attempting to do a "man's job" or she needs to act "like a woman." Such a harasser may be trying to put the woman "in her place."

In each of these examples, the sexual harassment qualifies as an act of discrimination because "but for" the victim's sex, the harassment would not have happened. However, this framework does not claim all sexual harassment happens for one of these reasons. A person might sexually harass an employee in a way that does not meet the "but for" test. For example, a supervisor may constantly say "sleep with me or you're fired" in jest.[53] Or, a co-worker may harass a male or female employee with sexual conduct for other reasons, precisely because sexual harassment is an intimidating, offensive, degrading way to treat someone. One can imagine an employer sexually harassing male and female employees for a myriad of reasons other than the employee's sex (e.g., because the employee is shy, a "tattletale," advocates feminist beliefs, etc.). Regardless of the sex or sexual orientation of either party, a harasser motivated by such reasons has not sexually harassed the employee "because of such individual's sex."

D. Explaining Same-Sex Sexual Harassment As Sex Discrimination Under This Framework

This framework also allows one to describe when same-sex sexual harassment involving men happens "because of such individual's sex." Although possible, most men do not have an animus towards men as a group.[54] Instead, one expects that sexual desire and gender stereotypes motivate most men to sexually harass other men. For example, sexual attraction may motivate a homosexual man to sexually harass another man with behavior that qualifies as either *quid pro quo* or a hostile work environment. In comparison, a heterosexual man might sexually harass another man because of a gender stereotype—for example, sexually harassing a male secretary because that job "is not for men." In such a case, the harasser would have targeted the secretary

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[52] Robinson v. Jacksonville Shipyards, Inc, 760 F. Supp. 1486, 1498 (M.D. Fla. 1991).

[53] *See* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 567-69 (Wood, J. concurring and dissenting) (stating a supervisor may make constant demands for sex in exchange for job benefits "maybe in jest, maybe not").

[54] *See* Craig R. Waldo et al., Are Men Sexually Harassed? If So, by Whom?, 22 Law & Hum. Beh. 59, 72 (1998) (stating "men are not likely to disparage their own gender").

because he occupied a traditionally female job. Finally, just as with male-female sexual harassment, a man—heterosexual or not—might sexually harass another man for another reason (i.e., one that is not "because of sex").

It is worth emphasizing that under the "but for" framework above, nothing about the sexual harassment inherently makes it different from other Title VII cases. If instead of sexually harassing the male secretary, an employer did not hire the man for the same reason, the employer would still violate Title VII. More importantly, in either case, the employer's heterosexual orientation does not allow one to determine conclusively whether "but for" the man's sex the adverse employment action would not have happened. Under this framework, it is the employer's motive that makes it sex discrimination, rather than the employer's behavior that affects the "compensation, terms, conditions, or privileges of employment."

II. EQUAL PROTECTION ANALYSIS OF ONCALE'S FIRST EVIDENTIARY ROUTE

This section identifies and solves Oncale's equal protection problem in four steps. First, it discusses the preliminary issue of government action, arguing that this requirement is satisfied because the official conduct of judicial officers and their decisions qualify as government action. Second, it argues that if factfinders rely on the sexual orientation of harassers to prove a Title VII complaint, they will treat male and female plaintiffs differently. This differential treatment triggers heightened scrutiny. Third, it argues that the evidentiary route cannot survive constitutional scrutiny if applied to hostile work environment claims because a substantial number of male and female victims of sexual harassment are similarly situated in such cases.

Finally, this section resolves the dilemma lower courts face in attempting to remain faithful to the Constitution's mandate of equal protection without acting contrary to the Supreme Court's opinion in Oncale. It concludes that factfinders may avoid the equal protection problem by only relying on Oncale's first evidentiary route when examining *quid pro quo* claims.

A. Adjudication of a Statutory Right by Judges and Juries Satisfies the Government Action Requirement

The Constitution's requirement of equal protection applies to a court's adjudication of Title VII.[55] This is an important point since the Constitution's

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[55] *See* Palmore v. Sidoti, 466 U.S. 429, 432 n.1 (1984); Shelly v. Kraemer, 334 U.S. 1, 14 (1948) ("That the action of state courts and judicial officers in their official capacities is to be

requirement of equal protection only limits government action, and does not apply to private parties.[56] Judges are government officials, and their actions qualify as government action when performed in their official capacity.[57] For example, judges may not base their decisions on the litigants' race when deciding a civil case such as child custody, because their decisions are governed by the Fourteenth Amendment.[58]

Fact finding remains a state action even when that task is performed by the jurors. Although private citizens serve as jurors, it is fair to say that juries qualify as a government entity since they are created and controlled by the government. Moreover, deciding the facts of a legal case falls within the core meaning of a "traditional government function."[59] Thus, like judges or the government in general, jury decisions may not rest on unconstitutional grounds. In short, if judges and juries rely on Oncale's first evidentiary route, the evidentiary route is subject to constitutional scrutiny.

B. Relying on the Harasser's Sexual Orientation Classifies Plaintiffs by Their Sex

In Oncale, the Supreme Court explained that a factfinder could rely on the harasser's sexual orientation to find that sexual harassment happened "because

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regarded as action of the State . . . is a proposition which has long been established by decisions of this Court."); *see also* J. Nowak & R. Rotunda, Constitutional Law 452 (1991) ("When a legislature, executive officer, or a court takes some official action against an individual, that action is subjected to review under the Constitution, for the official act of any government agency is direct government action and is therefore subject to the restraints of the Constitution.").

[56] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-73 (1972) (holding the Fourteenth Amendment was not applicable because there was no state action at a private club).

[57] Indeed, their conduct remains state action even if the judge acts *ultra vires* (i.e., contrary to the law). *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 929 (1982) ("The actions of a state officer who exceeds the limits of his authority constitute state action.").

[58] *See* Palmore, 466 U.S. at 429 (child custody order based, in part, on the race of mother triggers heightened scrutiny). Likewise, a judge's instructions to a jury about how to determine the facts of a case would also qualify as government action.

[59] *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (discussing government action test based on whether the action is a traditional government function). As a state action, fact finding surely falls within the meaning of a traditional government function and should consequently be subject to the requirements of the Constitution.

of such individual's sex."[60] If factfinders rely on this evidentiary route, they will treat male and female plaintiffs differently. Whether a plaintiff automatically fulfills Title VII's "because of such individual's sex" requirement always depends on his or her sex. Consider, for example, a heterosexual male employer who repeatedly calls an employee "his bitch" and grabs the employee's genitals.[61] Under Oncale's first evidentiary route, all female employees in this situation have a claim that the harassment happened "because of such individual's sex." In contrast, male employees in the same situation bear the burden of proving this element by other means.

In cases like this, male plaintiffs can object that if they were female, they would have a claim—and, as a matter of doctrine, they would be correct. Simply put, "but for" the male plaintiff's sex, the factfinder would assume that Title VII's discrimination element had been satisfied. Once this equal protection claim is made, the burden shifts to the court to provide an exceedingly persuasive justification for the differential treatment of male and female plaintiffs.

The objection to this argument is that Oncale's evidentiary route simply draws a distinction based on the harasser's sexual orientation. Thus, one might argue, courts treat men and women the same, since courts grant both sexes an inference of proof when the harasser's orientation is "attracted" to their particular sex.

Courts should reject this argument and hold that the evidentiary route in fact classifies plaintiffs by their sex and then treats them differently depending on whether they are male or female. The first and most fundamental reason is that the Constitution grants individuals, not groups, equal protection rights.[62] A proper first step in an equal protection analysis focuses on the individual plaintiff and asks whether the government is relying on that individual's sex to make its decision; it does not ask whether groups are treated

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[60] 523 U.S. 75, 80 (1998).

[61] *See* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).

[62] The Fourteenth Amendment states, "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224-25 (1995) (recognizing the basic principle that the Fourteenth Amendment protects personal rights); J.E.B. v. Alabama ex rel. T.B, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) ("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (holding that equal protection is an individual, personal right); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.").

"equally."[63] Of course, it is worth keeping in mind that such a classification is not *per se* unconstitutional. Rather, it triggers heightened scrutiny. Under Oncale's first evidentiary route, every time a court looks to the harasser's sexual orientation, it must also look at the individual *plaintiff's sex*.[64] In fact, for the evidentiary route to work, the court must classify the plaintiff as a man or woman. It is this classification that triggers a heightened constitutional scrutiny.[65]

The Supreme Court's doctrinal treatment of racial classifications reflects this understanding. In the context of race, the Court has rejected arguments that racial classifications apply "equally." By analogy, this supports the argument that relying on a harasser's orientation classifies plaintiffs by their sex. In Palmore v. Sidoti,[66] for example, the Supreme Court held unconstitutional a state court's decision to award custody of a child to the father because the child's mother, who was white, remarried a black man.[67] The Court saw the state court's decision as a clear classification based on race, and thus subject to strict scrutiny.[68] One could frame the state court's decision as favoring "same

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[63] For example, the segregation in Brown v. Board of Educ., 347 U.S. 483 (1954), counted as race discrimination even though a law was applied equally—namely, children could only go to school with someone of the same race. One might argue that it should not count as "discrimination" because the same law, and indeed segregation in general, was applied "equally." The flaw in this argument, from a legal viewpoint, is that in determining whether there is a racial classification, the Constitution begins with the individual and asks whether the child would be able to go to the other school except for that child's race. It then asks whether the racial classification can survive constitutional scrutiny. Likewise, the first question one must ask about Oncale's first evidentiary route is whether the plaintiff would have a claim except for his or her sex.

[64] In his classic defense of "the antidiscrimination principle," Professor Paul Brest described it as "the general principle disfavoring classifications and other decisions and practices that *depend* on the race (or ethnic origin) of the parties affected." Paul Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 1 (1976) (emphasis added). This Article argues that Oncale's first evidentiary route *depends* on the plaintiff's gender to function.

[65] In *every* case where a court grants a presumption based on the sexual orientation of the harasser, the success of plaintiff's (male or female) claim will depend on his or her sex. For example, a woman harassed by a homosexual man will carry a higher burden of proof than a man. Similarly, a man harassed by a heterosexual man will carry a higher burden of proof than a woman.

[66] 466 U.S. 429 (1984).

[67] *See id.* at 430-31.

[68] *See id.* at 432.

race" custody, and argue that the court's test treats blacks and whites equally. The court favors everyone—both black and white—if they have "same race" relationships, and equally disfavors them when they do not. Thus, the law does not qualify as a racial classification because it treats everyone "equally."

However, as the Supreme Court recognized in Palmore, a court using such a test would still classify individuals by their race.[69] In every case, courts would classify plaintiffs as "white" or "colored." Whether a parent received custody of his or her child would partially depend on his or her race. The real issue in Palmore, and in the current doctrine of sexual harassment, is not whether the government was classifying people with a suspect criteria, but whether that classification can survive constitutional scrutiny.

One also sees this same approach in recent state court cases involving same-sex marriage. These cases support this Article's analysis because they have approached the issue of same-sex marriage in an analytically similar way: deciding that such laws classify people by their sex, and then subjecting the laws to heightened scrutiny. Moreover, the same-sex marriage cases have focused on the rights of individual plaintiffs and whether the state would have treated them differently except for their sex. Since the courts decided these cases under state constitutions, they have less value as precedent in interpreting the U.S. Constitution. Nonetheless, the states' guarantees of equal protection remain comparable to the protection afforded by the Fourteenth Amendment. Thus, the cases provide a useful example of courts subjecting a similar problem to an equal protection analysis.

The first widely-known same-sex marriage case was decided by the Hawaii Supreme Court in Baehr v. Lewin in 1993.[70] In Baehr, the court held that by denying same-sex couples access to marriage licenses the state had regulated them "on the basis of the applicant's sex."[71] The state created a "sex-

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[69] *See id.*; *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that law prohibiting interracial marriage violated the Equal Protection Clause and stating "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"). While Loving also applies here, this Article uses Palmore as an example for two reasons. First, a court might interpret Loving's holding as also resting on substantive due process grounds because it restricted the fundamental right to marriage. *See* 388 U.S. at 12. Second, while Loving involved a complete ban, Palmore simply involved the court taking a "same race" relationship into account as a factor for custody. Palmore is thus more similar to Oncale's first evidentiary route which grants an assumption of proof, yet still allows plaintiffs to prove their claims in other ways.

[70] 852 P.2d 44 (Haw. 1993) (plurality opinion).

[71] *Id.* at 60.

based classification" by only giving license to couples comprised of a male and a female.[72] The state was relying on the plaintiffs' sex and would have allowed the plaintiffs to marry "but for" the biological sex of one partner. Since sex classifications triggered strict scrutiny under the Hawaiian Constitution, the court remanded the case for a factual determination of whether the state could prove that its classification was narrowly tailored to further a compelling state interest.[73]

Similarly, in 1998 a same-sex couple challenged the constitutionality of Alaska's marriage statute after being denied marriage licenses.[74] In Brause, two men claimed that the state's prohibition of same-sex marriage implicated the privacy and equal protection provisions of the Alaskan Constitution and thus required a showing of a compelling state interest.[75] Although ruling on privacy grounds, the court also stated that the prohibition was "based on sex or gender" and thus would require the state's arguments to survive heightened scrutiny. "That this is a sex-based classification can readily be demonstrated," the court explained. "[I]f twins, one male and one female, both wished to marry a woman and otherwise met all of the [state's] requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious."[76]

Likewise, one can imagine two twins, one male and one female who are both sexually harassed by their heterosexual employers in a way that affects the terms and conditions of employment. If both bring a Title VII suit, only the twin brother's sex prevents him from obtaining a remedy like his twin sister.

However, one should note the differences in the equal protection analysis of an evidentiary route that relies on the harasser's sexual orientation and same-

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[72] *Id.* at 60 (stating "by its plain language, [the regulation] restricts the marital relation to a male and a female").

[73] On remand, the trial court found that the state did not demonstrate a compelling interest. This decision was stayed pending a second appeal to the Hawaii Supreme Court, which has not yet ruled on the issue. *See* Baehr v. Miike, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). A referendum then challenged the court's action. On November 3, 1998, voters in Hawaii approved a legislative act to prohibit same-sex marriages in the state. *See* Arlene Levinson, Some Ballot Decisions Must Wait, Associated Press, Nov. 5, 1998, *available in* 1998 WL 21783273.

[74] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

[75] *See id.* at *1.

[76] *Id.* at *6.

sex marriages. While the government classifies individual plaintiffs by their sex in both instances, that does not make either classification unconstitutional *per se*.[77] (Indeed, this Article argues below that in certain circumstances Oncale's first evidentiary route may be constitutional.)[78] A classification that treats men and women differently simply triggers heightened scrutiny; a court must still determine if the government can provide "an exceedingly persuasive" justification that the sex classification is "substantially related" to achieving an "actual important interest."[79]

Under this second prong, the government's arguments will naturally differ.[80] For example, to justify its ban on same-sex marriage, the state might assert an interest in child-rearing and procreation—interests that would not be asserted to justify a presumption that Title VII was violated. The main point is that determining the constitutionality of same-sex marriage does not help determine the constitutionality of Oncale's first evidentiary route. While both actions trigger heightened scrutiny, it would be consistent with current equal protection doctrine for a court to find one constitutional but not the other.[81]

A final pragmatic argument demonstrates why relying on a harasser's sexual orientation in sexual harassment cases classifies plaintiffs by their sex. If courts hold otherwise, they set a precedent capable of disabling sex discrimination law. Assume, for argument's sake, that relying on the harasser's sexual orientation and the plaintiff's sex does not qualify as sex discrimination. Then it follows that it is not sex discrimination for employers to rely on a supervisor's sexual orientation and an employee's sex when, for example, assigning jobs.[82] A company policy could only assign men to a certain job,

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[77] *See* United States v. Virginia, 518 U.S. 515, 532 n.6 (emphasizing that even strict scrutiny "is not inevitably 'fatal in fact'").

[78] *See supra* Section II.D.

[79] *See* United States v. Virginia, 518 U.S. at 532.

[80] *Cf.* Baehr v. Miike, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (listing state's asserted compelling interests in prohibiting same-sex marriage).

[81] Moreover, the analogy between same-sex marriage and same-sex sexual harassment only goes so far. Through Title VII, the government has given everyone a right to workplaces free from sex discrimination. The government has not given everyone a right to marry whomever they want. A more precise analogy would be if a state did grant everyone a right to marriage, and courts then made it more difficult for same-sex couples to get married. In such a case, the court would also have to justify the gender classification.

[82] Courts use a similar analysis of sex discrimination under Title VII and the Equal Protection clause. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976) (stating that the Fourteenth Amendment standard of discrimination is the same concept embodied in Title VII).

because the supervisor was a heterosexual man. Indeed, if courts did hold that relying on the harasser's orientation does not classify plaintiffs by their gender, companies might want to establish such policies to avoid liability for sexual harassment. Under such policies, employers could segregate much of the workforce into groups of men and women without violating federal laws against sex discrimination.[83] Such a bizarre result supports the conclusion that courts recognize that Oncale's first evidentiary route, in fact, classifies individual plaintiffs by their sex.

C. Oncale's First Evidentiary Route Is Unconstitutional in Hostile Work Environment Claims

Government classifications based on sex trigger a heightened means-ends scrutiny. In this case, Oncale's first evidentiary route must be measured against Title VII's actual purpose,[84] the elimination of sex discrimination in the workplace.[85] Thus, the evidentiary route's constitutionality turns on whether it is a legitimate means to achieve this end. A court seeking to justify Oncale's evidentiary route must meet its burden and provide "an exceedingly persuasive" justification that holding men and women to different standards of proof in a sexual harassment case substantially advances the elimination of sex

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Thus, if relying on one person's sexual orientation and another's sex does not trigger heightened scrutiny in an Equal Protection claim, it does not qualify as sex discrimination under Title VII either.

[83] For example, if relying on one party's sexual orientation and another's sex does not qualify as a sex classification, then a company could hire only men for an entire division of its company because the president of that division was a heterosexual man (or even heterosexual woman), and it would not facially qualify as "sex discrimination." In response, an employee might bring claim of "disparate impact" under 42 U.S.C. §§ 2000e-2(k)(1)(A)(i) (1994). However, the employer would seemingly be able to defeat this by claiming that it is a business necessity for employees to cooperate, and a policy of segregation based on the sexual orientation of one employee and the sex of another facilitates this purpose. All of this simply goes to show that it would be absurd not to recognize that Oncale's first evidentiary route classifies plaintiffs by their sex.

[84] *See, e.g.*, United States v. Virginia, 518 U.S. at 536 (stating that the purpose justifying the differential treatment must be the actual one, not an alleged objective stated post hoc).

[85] Eliminating sex discrimination qualifies as a "compelling government interest," a requirement under heightened scrutiny. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623-24 (1984) (holding that a state government had a compelling interest in eradicating sex discrimination).

discrimination in the workplace.[86]

Although no formula exists for determining when the state has provided an exceedingly persuasive justification, one can draw a general conclusion from the Supreme Court case law of the last three decades. Differences between men and women as groups, even if quite substantial, do not justify treating *all* men and *all* women differently. The Court has consistently held government action unconstitutional if it treats men and women differently while some men and some women are "similarly situated" with respect to the state's purpose.[87]

Using this general proposition, one can locate the equal protection problem in Oncale's first evidentiary route if courts use it in every sexual harassment case. In claims of a hostile work environment, male and female plaintiffs may be similarly situated. If a heterosexual male harasses a woman with sexual conduct that creates a hostile work environment, she has a Title VII claim of sex discrimination—regardless of the motive behind the sexual harassment. If a heterosexual male harasses a man, the male victim carries the burden of proving through other means that it happened "because of such individual's sex."

Yet, the female and male plaintiffs may be similarly situated in two ways. First, both may be sexually harassed because of a gender stereotype. Second, both the man and the woman may be sexually harassed for reasons other than "because of such individual's sex." Under Oncale's first evidentiary route, courts give remedies to female plaintiffs but not male plaintiffs, even though they are in the same position.

Moreover, while the burden rests with the court to prove that men and women are not sufficiently similarly situated to survive heightened scrutiny, empirical research supports the conclusion that a substantial number of men are

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[86] *See* United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

[87] The touchstone of the "exceedingly persuasive" test appears to be whether some men and some women, even if very few, are similarly situated. If some men and women are similarly situated, then the government may not classify individuals by their sex. For example, in United States v. Virginia, the Court emphasized there was nothing about VMI inherently unsuitable to *all* women and that some women could perform well under the school's "adversarial" system. *See* 518 U.S. at 520. Justice Scalia, in his dissent, accused the majority of applying a higher level of scrutiny than precedent acknowledged. Under the majority's test, Scalia argued, one would have to find VMI's admissions policy unconstitutional if there existed "a single woman" willing and able to undertake VMI's program. *See id.* at 573 (Scalia, J. dissenting).

Thus, one can generalize that for the government to treat men and women differently, it is necessary that a relevant categorical difference exist between them. This generalization is consistent with those cases where the Supreme Court has upheld a sex classification. *See infra* note 98.

sexually harassed because of gender stereotypes. Recent research indicates that between 6.7 percent and 11.1 percent of men in the workforce have been harassed for reasons related to gender stereotypes, most often by other men.[88] For example, men sexually harassed other men if they did traditionally female activities such as doing housework or leaving work for childcare.[89] Unfortunately, the research was not conducted from a legal perspective, so one cannot say that Title VII prohibited the behavior (e.g., the harassment might not have legally created a "hostile or offensive" work environment). But if the sexual harassment, or in fact any other behavior, was based on gender stereotypes and it affected the "compensation, terms, conditions, or privileges of employment," it would violate Title VII.

This does not deny that heterosexual men may sexually harass women much more often than men "because of such individual's sex." But the fact that women and men are on average different does not allow the government to treat all women and all men differently. Since 1971, the Supreme Court has consistently struck down sex classifications even when they were based on accurate generalizations. For example, in Craig v. Boren[90] the Court held that although young men may be ten times more likely than women to drive drunk, the government must have the same drinking age for everyone. Similarly, in Wengler v. Druggists Mutual Insurance Co.,[91] the Court held that states cannot award spousal-death benefits to women automatically, while requiring men *to prove* they were financially dependent on their deceased spouses,[92] even though women were substantially more likely to depend financially on their spouses.[93] Even though significant differences may exist between men and women as groups, the government must treat every individual the same regardless of that person's sex absent an exceedingly persuasive justification.

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[88] *See* Waldo et al., *supra* note 54, at 72; *see also* U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges, 14, 18 (1995) (fourteen percent of men reported experiencing "unwanted sexual behavior" in the previous two years; thirty-five percent of the harassers were men).

[89] *See* Waldo et al., *supra* note 54, at 66.

[90] 429 U.S. 190, 200-04 (1976).

[91] 446 U.S. 142 (1980).

[92] *See id.* at 152.

[93] *See id.* at 151 (stating that the state asserted that "most women are dependent on male wage earners," but only a few cases involve dependent men).

In short, Oncale's first evidentiary route is unconstitutional if applied to every case of sexual harassment, because in hostile work environment claims male and female plaintiffs may be similarly situated. Certainly, as the research currently stands, courts cannot meet their burden and produce an "exceedingly persuasive" justification that the evidentiary route is "substantially related" to Title VII's goal of eliminating sex discrimination in hostile work environment claims.

A final argument underscores why courts should not apply this evidentiary route to hostile work environment claims: the familiar idea that courts should not interpret statutes in a way that raises a serious constitutional question.[94] If this Article fails to demonstrate that the broad application of this route is clearly unconstitutional, the issue is nevertheless a serious constitutional question that courts should seek to avoid. For this reason, courts should not interpret Oncale's first evidentiary route as applying to all sexual harassment claims.

D. The Solution: Oncale's First Evidentiary Route May Survive Heightened Scrutiny in *Quid Pro Quo* Claims

This Article's argument puts lower courts in a difficult position, as it questions the legitimacy of the Supreme Court's opinion in Oncale when measured against the Equal Protection Clause's doctrinal requirements. Both warrant respect from lower courts, although the Constitution's requirement of equal protection of the laws undoubtedly trumps dicta about an issue not raised on appeal.[95]

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[94] *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 128-30 (1958) (construing statute so as to avoid constitutional questions); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-01, 504-07 (1979) (same); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575–78 (1988) (same).

[95] Thus, if there is no other way to resolve it, Oncale's dicta should not be followed. The issue on appeal was whether Joseph Oncale was barred, as a matter of law, from bringing a Title VII suit for sexual harassment because his harassers were also men, not how he would prove it. *See* 523 U.S. 75, 76 (1998).

Oncale's dicta on proof of discrimination should still be considered important. The Supreme Court was both aware and concerned about how plaintiffs in same-sex cases would prove their claim. That much is obvious from the opinion as well as Oncale's oral argument, during which the Court spent a substantial amount of time discussing the issue of proof. *See* Transcript of Oral Argument, Oncale, 523 U.S. 75 (1998) (No. 96-568), available in 1997 WL 751912, at *18-27 (Dec. 3, 1997) [hereinafter Oral Argument]. In fact, the Supreme Court's questioning of Deputy Solicitor General Kneedler focused entirely on how Oncale would prove his claim, rather than if he could bring a claim. *See id.* Nonetheless, the Court's opinions on

The solution to this dilemma is to give a new life to the old distinction between *quid pro quo* and hostile work environment claims and only apply Oncale's first evidentiary route to *quid pro quo* claims.[96] As explained above, *quid pro quo* harassment, such as "sleep with me or you're fired," qualifies as sex discrimination when motivated by sexual attraction towards one sex. If this is correct, then Oncale's first evidentiary route may survive scrutiny if applied only to *quid pro quo* claims, because in those cases men and women are not similarly situated.

Imagine a heterosexual male supervisor who threatens a female employee by saying, "Have sex with me or you're fired." If sexual desire motivates the threat, then the employee has a claim of sex discrimination. However, reasons unrelated to a desire to have sexual relations may also motivate the threat. For example, the employer may be seeking to humiliate and degrade the woman with the threat because she questioned his competence in front of others.

Now imagine that the victim is instead male, and the court accepts *as fact* that the harasser is a heterosexual. In such a case, the court can determine that sexual desire does not motivate the threat because the harasser is heterosexual. And if sexual desire does not motivate the threat, then it does not qualify as sex discrimination in the *quid pro quo* sense. Certainly other reasons motivate the sexual harassment, but the court can determine that the desire to have sexual relations with that employee is not one of them. Thus, when the harasser is a heterosexual man in *quid pro quo* claims, men—categorically—remain differently situated from women. The difference is that inasmuch as the harasser is heterosexual, the court can reason that the underlying motive for the behavior aimed at the man is not sexual attraction.

The Supreme Court has pointed to categorical differences in upholding

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proof remain dicta because the issue was not raised on appeal nor subjected to litigation before being decided.

[96] Some scholars have recently argued that courts should abandon the distinction between *quid pro quo* and hostile work environment claims. *See, e.g.*, Eugene Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J.L. & Pub. Pol'y 307 (1998) (arguing that courts should eliminate the notion of *quid pro quo* harassment and instead deal with it not as "harassment," but as an adverse job action claim).

The Supreme Court also recently called into question the distinction in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). *See supra* note 49. In deciding that employer liability did not turn on whether the claim was *quid pro quo* or a hostile work environment claim, the Court expressed doubt over the utility of such a distinction. This Article argues that the distinction helps courts avoid violating plaintiffs' rights to equal protection. Notably, if there is no distinction, then Oncale's first evidentiary route is unconstitutional since some men and women are similarly situated but differently treated when they bring claims of sexual harassment. *See infra* Part II.C.

the different treatment of men and women in the past. For example, in Rostker v. Goldberg,[97] the Supreme Court held constitutional a law requiring only men to register for the military draft. The Court reasoned that this was justified because only men could fight in military combat. Thus, men and women were not similarly situated. Other cases upholding the differential treatment of men and women have pointed to categorical differences as well.[98]

In sum, an inference based on the sexual orientation of the harasser in *quid pro quo* cases may not be unconstitutional. In those cases, one can make the argument that there exists a categorical difference between male and female victims depending on the sexual orientation of the harasser. If this argument succeeds, Oncale's first evidentiary route can survive heightened scrutiny even though it treats plaintiffs differently depending on their sex.

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[97] 453 U.S. 57 (1981).

[98] Modern equal protection analysis of sex classifications began in 1971 when the Supreme Court first held a sex classification unconstitutional. *See* Reed v. Reed, 404 U.S. 71 (1971) (holding unconstitutional a statute mandating that courts administering estates prefer males to female as executors when the parties were equally qualified). From Reed to May 1998, the Supreme Court heard twenty-nine sex-discrimination claims under the Equal Protection clause. *See* Mary Becker, The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics, 40 Wm. & Mary L. Rev. 209, app. at 273-75 (1998) (listing the cases).

The Court has upheld the differential treatment of men and women in seven of the twenty-nine cases. The Court explicitly reviewed five of these under "heightened scrutiny," which formally began in Craig v. Boren, 429 U.S. 190 (1976). In all five, the Court predicated its decision in part on a categorical difference between men and women as groups. *See* Heckler v. Mathews, 465 U.S. 728, 732-33 (1984) (upholding Social Security provision temporarily exempting women who qualified for benefits before 1977 from a benefit reduction because only women would have detrimentally relied on receiving benefits automatically before 1977 when part of the benefit structure was held unconstitutional); Rostker v. Goldberg, 453 U.S. 57, 78 (1981) (upholding law requiring only men to register for military draft, because only men could fight in combat); Michael M. v. Superior Court, 450 U.S. 464, 471 (1981) (upholding statutory rape law only applying to males because only females can become pregnant); Parham v. Hughes, 441 U.S. 347, 355-56 (1979) (upholding statute precluding father from suing for the wrongful death of his illegitimate child because only fathers could by voluntary unilateral action make the child legitimate and, moreover, the state would almost always know the mother's identity, but frequently might not know the father's identity); Califano v. Webster, 430 U.S. 313, 318 (1977) (upholding temporary provision giving women an advantage in calculating Social Security benefits upon retirement because all women, "as such," had suffered economic discrimination in the market).

III. HOSTILE WORK ENVIRONMENT CLAIMS AFTER ONCALE

For the last two decades, courts have only looked to alleged conduct when women have sued under a claim of sexual harassment that created a hostile work environment. If a female plaintiff proved that she was sexually harassed, courts have categorically assumed that Title VII was violated.[99] In contrast, when men have sued for sexual harassment perpetrated by other men, courts have engaged in a more exacting case-by-case approach, requiring the male plaintiffs to prove both that they were sexually harassed and that it happened "because of the victim's sex."[100]

An Equal Protection analysis coupled with Oncale's holding—that same-sex sexual harassment is actionable—brings the doctrine of sexual harassment to the crossroads. Courts must either assume that all sexual harassment violates Title VII or they must require all plaintiffs to prove the sexual harassment also happened "because of such individual's sex." But the Constitution does not allow courts to categorically assume that certain types of harassment happened "because of such individual's sex" when the plaintiff is a woman, while requiring men in the same situation to prove it.[101]

This section argues that courts should continue to utilize a conduct-based approach, because it represents the best way for courts to adjudicate claims of harassment under Title VII. In essence, courts should hold that certain types of behavior satisfy Title VII's requirement of sex discrimination. For example, courts should continue to assume that harassment involving "unwelcome sexual conduct" satisfies Title VII's "because of such individual's sex" requirement.

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[99] Some courts, like the Ninth Circuit, merely required female plaintiffs to show "(1) that [they] were subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *See* Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991). Under this test, plaintiffs only have to prove they were sexually harassed to have a Title VII claim.

Other courts required additional proof that the harassment was "based on sex." However, the requirement has been a mere formality. If the harassment was male-female, and the conduct was of a sexual nature, courts have always held Title VII had been violated. *See* Willborn, *supra* note 27, at 684-85. Some commentators have dubbed this the "heterosexual presumption," meaning that the conduct was presumed to be discriminatory. *See, e.g.*, Carolyn Grose, Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII, 7 Yale J.L. & Feminism 375 (1995).

[100] *See, e.g.*, McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996).

[101] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152-53 (1980) (holding that state must either grant assumption of proof to males or eliminate it for females).

Likewise, as the Oncale court stated when *explaining* its second evidentiary route, factfinders might assume that certain "sex-specific" harassment is discriminatory. If such conduct also rises to the level of affecting the terms or conditions of employment, then the plaintiff should prevail.

To be clear, the goal of this section is not to put forth a definition of conduct that should qualify as sexual or even "sex-specific."[102] The goal is to defend the currently contested claim that courts may use conduct alone to satisfy Title VII's "because of such individual's sex" requirement. Commentators have objected that such an approach is overinclusive, because not all harassment involving sexual or "sex-based" conduct qualifies as sex discrimination.

This section argues that although using conduct to prove discrimination may be overinclusive, it does not follow that such an approach is illegitimate. Overinclusive approaches are a staple of judicial interpretation.[103] If this is correct, then courts may legitimately focus on defining certain types of conduct as prohibited *per se* under Title VII, including sexual harassment even though it is overinclusive.[104]

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[102] Courts frequently use terms such as "sexual in nature" and "sex-specific" in making conclusions, but do not provide definitions for those words. *See, e.g.*, Spain v. Gallegos, 26 F.3d 439, 449 (3d Cir. 1994) ("In reaching our conclusion . . . we have paid particular attention to the distinction . . . between sexual misconduct in which the intent to discriminate 'is implicit, and thus should be recognized as a matter of course' and 'actions [which] are not sexual by their very nature.'") (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (1990)); Oncale, 523 U.S. at 80 (stating factfinders may use "sex-specific" conduct to infer discrimination). Of course, the way one defines "sexual" or "sex-specific" will have a substantive impact on what the law prohibits. This point, however, does not go to the issue of whether courts may legitimately look to conduct in the first place. This Article argues courts may, and should, look to conduct, while leaving the precise boundaries of such conduct open.

[103] *See* Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178-80 (1989) (defending judicial interpretation of statutes with bright-line rules even though they are overinclusive).

[104] For an extension of this argument, with a focus on the sexual harassment of gay men and lesbians, *see* Brian Lehman, Why Title VII Should Prohibit All Workplace Sexual Harassment, 12 Yale J. of L. & Feminism (forthcoming 2000) (arguing that courts should prohibit all harassment that is sexual or sex-specific in content regardless of the sex, sexual orientation, or any other personal characteristic of the plaintiff because this approach serves as a good adjudicative rule). Copies of the article may be found on <http://www.ssrn.com> or may be requested by e-mailing brian.lehman@aya.yale.edu.

A. Sexual Harassment: Conduct Should Prove Causation

The major objection to prohibiting all sexual harassment under Title VII is that "verbal or physical conduct of a sexual nature" serves as an imperfect proxy for determining whether the harassment happened because of the plaintiff's sex.[105] As explained above, sexual harassment (like any behavior) can happen for some reason other than "because of such individual's sex." To borrow an example from Oncale's oral argument, one can imagine an employer sexually harassing an employee because he or she was "a fat slob" or had "crooked eyes."[106] In such cases, the employee has not been treated differently "because of" his or her sex.

However, categorically holding that all sexual harassment violates Title VII can be defended as a general rule for courts to apply when adjudicating individual cases. All rules and generalizations that courts adopt are overinclusive because there will always be individual cases that should not be swept into their scope if measured against the law's own terms.[107] Yet, generalized approaches remain legitimate because they serve other values that the law seeks to uphold such as equal treatment, lowering litigation costs, and reducing arbitrariness in decisions. Even if rules never achieve perfect results, they are often the best way for courts to make a decision.[108]

Consider briefly the common law, which holds people liable for accidents that happen "because of" their negligence. In general, courts do not automatically hold defendants liable for accidents or injuries because accidents

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[105] *See* Willborn, *supra* note 27, at 682-83.

[106] *See* Oral Argument, *supra* note 95, at *13 (asking Oncale's counsel whether it would still be sex discrimination if Oncale "had been hazed in some other fashion. I mean, just as obnoxious, but just not—you know, nothing to do with genitals or anything else. They just said, you know, you're a fat slob. Your eyes are crooked. And, you know, they just made life miserable. The same, but—just as obnoxious.").

[107] *See* Cass R. Sunstein, Legal Reasoning and Political Conflict 106-18, 130-31 (1996) (arguing that although rules are always over- and under-inclusive "if assessed by reference to the reasons that justify them," they have other virtues that justify their use).

[108] *See* Scalia, *supra* note 103, at 1183 (arguing that judges should elaborate general rules from statutes "as far as [they] can go" because rules, which never have a "perfect fit," serve other values such as the equal treatment of cases). *See also* Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions, 110 Ethics 5 (1999) (arguing that rules are often the best way to make decisions because they lower decision costs even though they make errors).

happen even when one is not negligent.[109] Instead, courts have often said, "negligence must be proved, and never will be presumed."[110] Despite such emphatic statements, a doctrinal exception exists. Under the doctrine of *res ipsa loquitur*, courts find defendants liable solely because it was a certain type of accident (e.g., the explosion of a water heater, the falling of an elevator, etc.) and ignore whether in that individual case it happened "because of" negligence.[111] This approach rests on the acknowledgement that *res ipsa loquitur* sweeps too broadly because it holds all defendants liable even though in many cases they have not been negligent. At the same time, it remains in use because it is the best way for courts to adjudicate such cases. Holding defendants liable for sexual harassment can be seen in the same light as *res ipsa loquitur*; it is a way to determine causation by making a rule based on conduct.

B. Prohibiting Sexual Harassment as a Rule of Law

Categorically assuming that all sexual harassment happens "because of such individual's sex" is legitimate for three reasons. First, it treats male and female plaintiffs the same, as the Constitution requires. Second, it substantially reduces the costs of adjudicating the claims because courts only have to determine the facts of a case rather than the defendant's motives. Third, it reduces the likelihood of arbitrariness and bias in factfinders' decisions. To illustrate how a categorical approach to sexual harassment serves these last two values particularly well, consider the following hypothetical of a male-female sexual harassment case:

> James River Corporation hired Ann Goluszek as a mechanic. She had never married, nor lived anywhere but her mother's home. According to Goluszek's psychiatrist, she had an "unsophisticated background" and led an "isolated existence" with "little or no sexual experience." She also "blushed easily" and was sensitive to comments pertaining to sex.
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> Shortly after Goluszek started working, a number of machine operators asked her why she was not married, and joked that employees had to be married to work there. They also told her to go out with certain coworkers, because they would "fuck" her. When she

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[109] *See* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 39, at 242 (5th ed. 1984 & Supp. 1995).

[110] *Id.*

[111] *See id.* at 244-45.

> had trouble fixing a machine, the same operators said they would call her "daddy" to help, referring to the supervisor. On a number of occasions, while Goluszek worked on a ladder, employees driving forklifts threatened to knock her off. When a supervisor reprimanded Goluszek for poor performance, she requested a meeting with the plant manager. She complained about both the manager and the danger the forklift drivers presented to her.
>
> When the company transferred Goluzsek to the night shift, her co-workers repeatedly asked her if she had gotten any "pussy" or had oral sex, showed her pictures of nude women, told her they would get her "fucked," and accused her of being gay or bisexual. The employers also poked her in the buttocks with a stick and talked to her about "butt fucking" in the ass. The behavior continued, and Goluzsek eventually filed a complaint.[112]

Based on these facts, one could reasonably argue that the harassment was motivated by gender animus, sexual attraction, or even a gender stereotype. However, one could also reasonably argue that the harassment happened because the victim was unusually shy, sexually inexperienced, lived with her mother, came from an unsophisticated background, or complained about the manager.

For over twenty years, judges have not attempted to answer "why" sexual harassment happens in cases such as this hypothetical for good reason. Attempting to determine the answer to such a question would increase decision costs significantly. Once in court, the threat of losing the lawsuit gives defendants an incentive to argue that the harassment took place for any reason other than the plaintiff's sex. One can imagine defendants raising innumerable defenses in the hypothetical above (i.e., she was harassed not "because of" her sex, but because she was unusually shy, sexually inexperienced, etc.). Even in the most meritorious claims, litigating the issue would take a tremendous amount of time and energy.

Even if one puts the decision costs to one side, it would still remain difficult, if not impossible, for a court to separate out case-by-case claims of sexual harassment that happen "because of such individual's sex" from those which are motivated by other reasons. While one can draw sharp lines in theory, the facts of any given case will be complex and the motives obscure. In the hypothetical above, it would be unreasonable to expect a court to accurately

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[112] This hypothetical generally follows the facts of Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988), in which the plaintiff was male.

determine why Goluzsek was sexually harassed or whether she still would have been harassed "had she been a man." At best, individual decisions would be arbitrary in the sense that plaintiffs with very similar cases of sexual harassment may, or may not, have a claim. At worst, such decisions would be systematically biased against people who were not "average" (e.g., the abnormally shy or those who come from an "unsophisticated background").

For the last two decades courts have focused on the facts before them in male-female cases of sexual harassment. When deciding hostile work environment claims, they have held an employer liable if the plaintiff has proven she was subjected to (1) unwelcome sexual conduct that (2) has the purpose or effect of unreasonably interfering with her work performance or creating an intimidating, hostile, or offensive working environment. Although this approach is overinclusive, it is nonetheless legitimate because it substantially lowers the costs of adjudicating the claims and reduces arbitrary or biased decisions. Moreover, it is grounded on the uncontroversial claim that a great deal of sexual harassment qualifies as sex discrimination under any definition.[113] The same reasoning can be used in prohibiting same-sex sexual harassment. Moreover, the fundamental point remains that if female plaintiffs have a sex discrimination claim when they prove they were sexually harassed, the Constitution demands the same for men.

This does not mean courts should transform Title VII into a "civility code" regulating all harassing and offensive behavior without proof of discrimination. The difference between all behavior that affects the "compensation, terms, conditions, or privileges of employment" and a hostile work environment claim of sexual harassment is the difference between holding people liable for accidents in general and accidents that "speak for themselves." In the former, we require individual proof that negligence caused the accident, while in the latter we assume it. While courts cannot reasonably assert that accidents generally happen because of negligence, they may assume so with certain types of accidents. Likewise, courts may reasonably infer that a substantial amount of harassment, if not most, involving sexual conduct occurs "because of such individual's sex." If the behavior is *also* severe enough to create a hostile work environment, then courts may legitimately find the defendant liable.

A final point deserves emphasis: sexual harassment is not the only type of gender-based harassment that courts should recognize under Title VII. Just as

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[113] Even those who argue that courts should not prohibit all sexual harassment under Title VII agree that most sexual harassment qualifies as sex discrimination. *See, e.g.*, Willborn, *supra* note 27, at 723.

more than one act meets the *res ipsa loquitur* standard, courts should look beyond sexual conduct to determine whether harassment was discriminatory. This argument encourages courts to use other conduct as proxies for determining whether an employer has violated Title VII. Building on Oncale, repeated non-sexual harassment of an employee (male or female) that is "sex-specific," but perhaps not sexual in nature, should be illegal. For instance, courts might categorically find sex discrimination if the harasser, among other things, repeatedly told an employee (male or female) "you're dumb like a woman."[114] However, whatever conduct courts use to satisfy this element, it must be made equally available to male and female plaintiffs.

CONCLUSION

Oncale outlined three evidentiary routes plaintiffs can take in sexual harassment cases to satisfy Title VII's "because of sex" requirement. The first relies on the harasser's sexual orientation; the second relies on the harasser's conduct; the third relies on comparative evidence. The first evidentiary route raises an equal protection problem because it classifies plaintiffs by their sex. To avoid this problem, lower courts should rely on the harasser's sexual orientation only in *quid pro quo* claims.

In sexual harassment claims alleging hostile work environment, courts must give men and women the same protection. Thus, courts should infer that all conduct that is sexual satisfies Title VII's "because of sex" requirement. If this sexual conduct also rises to the level of affecting the "compensation, terms, conditions, or privileges of employment," courts should find the employer liable.

In fact, courts have taken this approach for almost two decades in male-female cases. Such an approach is legitimate, but not because all sexual harassment happens "because of such individual's sex." Rather, it is proper because, regardless of one's approach to Title VII, sex discrimination in the workplace cannot be eliminated without prohibiting sexual harassment.[115]

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[114] Courts should also allow plaintiffs to prove a Title VII claim if the behavior is not sexual or "sex-specific." *See* Schultz, *supra* note 29, at 1762-69 (providing examples of harassment that is not sexual or sex-specific). Such sex discrimination cases would be analogous to general negligence claims where plaintiffs must prove that the accident was caused by negligence, rather than relying on the fact that it was a certain type of accident.

[115] *See* Sunstein *supra* note 107, at 4 (arguing that in a "well-functioning legal system" participants often agree on particular outcomes while disagreeing on the underlying reasons supporting such outcomes); *see also* Lehman, *supra* note 104 (arguing that legal participants with competing interpretations of Title VII can nonetheless agree that the statute should prohibit all workplace sexual harassment).