He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the “Reasonable Heterosexist” Standard

E. Gary Spitko*

Under current sexual harassment law, the trier of fact in a same-sex sexual harassment lawsuit is likely to judge the alleged behavior of a gay sexual harassment defendant more harshly than it would judge the identical behavior in a context where the defendant was not of the same sex as the plaintiff. This bias to a gay sexual harassment defendant arises because the “reasonable person” constructed by the trier of fact in evaluating whether an alleged act of hostile environment sexual harassment should be actionable is, under the author’s theory, a non-gay person with a heterosexist world view. The bias the author identifies exemplifies a common manifestation of such heterosexism: an activity that is condoned or even valued when engaged in by a non-gay person is condemned when engaged in by a gay person.

One means for alleviating this bias is for courts to refuse to recognize a cause of action under Title VII for same-sex sexual harassment. This result would be consistent with the refusal of federal courts to apply the “but-for” or “differences” theory of sex discrimination to recognize that sexual orientation discrimination is sex discrimination. Courts have justified their refusal to recognize a cause of action for sexual orientation discrimination under Title VII’s sex discrimination prohibition by arguing that Congress has not shown an intent to specifically proscribe sexual orientation discrimination. These courts should apply such a “negative inference” principle across the spectrum of sex discrimination cases and also refuse to proscribe same-sex sexual harassment because Congress has not shown any intent to make such behavior actionable under Title VII. An alternate means for alleviating the heterosexual bias that also recognizes the utility of having a remedy under Title VII for same-sex sexual harassment is for courts to instruct the trier of fact in a same-sex sexual harassment lawsuit to evaluate the actions of the defendant in the hypothetical context of a mixed-sex interaction. Thus, the gay supervisor who has commented on his

* Associate, Paul, Hastings, Janofsky & Walker, Atlanta. Georgia (joining the faculty of the Indiana University School of Law at Indianapolis in August 1997). A.B., 1987, Cornell University; J.D., 1991, Duke University School of Law. I wish to thank Ron Krotoszynski, Stephen Miller, Nancy Rafuse, and Betsy Wilborn for their helpful comments on an earlier draft of this article. I also am grateful to Catharine MacKinnon for her having shared with me her critique of my argument, even though she disagrees with much that I say.

male subordinate's physical appearance, in theory, would be judged as
though he had commented on the appearance of a female subordinate.

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"We must conquer AIDS before it affects the heterosexual population."1

I

INTRODUCTION AND OVERVIEW

During the 1970's, sexual harassment by men of working women be-
gan to be understood as an unacceptable barrier to the full and equal partici-
pation of women in the work force.2 Soon after, courts started to recognize
a cause of action under Title VII of the Civil Rights Act of 1964 to redress
injuries arising from sexual harassment.3 This sexual harassment cause of
action is a judicially constructed tort; neither the text nor the legislative

1. Margaret Heckler, U.S. Secretary of Health and Human Services in the Reagan Administra-
history of Title VII expressly proscribes, or even mentions, sexual harassment. 4

To this day, owing to the lack of any specific textual or historical reference, the exact parameters of actionable sexual harassment under Title VII remain undefined. 5 As recently as 1994, a deep split began to develop within the federal courts concerning whether Title VII proscribes sexual harassment when the putative victim and the alleged harasser are both of the same sex. 6 In this unresolved debate, no one has discussed the effect that recognition of a Title VII cause of action for same-sex sexual harassment is likely to have on gay people. This Article speaks to that issue.

State tort law provides an alternate, albeit more difficult, means of redress for injuries arising from same-sex sexual harassment. 7 The availability of these state tort remedies, however, does not make moot the debate over recognition of a cause of action for same-sex sexual harassment under Title VII. The common law tort that plaintiffs most frequently utilize to seek redress for alleged sexual harassment is intentional infliction of emotional distress. 8 A plaintiff alleging intentional infliction of emotional distress, however, must demonstrate that the defendant engaged in extreme tortious behavior in excess of that needed to demonstrate a prima facie case of sexual harassment under Title VII. 9


5. See Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) ("Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.'"); Kenneth L. Pollack, Introduction: Current Issues In Sexual Harassment Law, 48 Vand. L. Rev. 1009, 1014 (1995) (listing splits of court authority relating to the standards for holding an employer liable for the sexually harassing behavior of its manager, for weighing the reasonableness of a putative victim's perception that her environment was hostile to her on the basis of her gender, and for admitting evidence concerning a sexual harassment plaintiff's past sexual conduct).

6. See infra Part II.B.

7. See Epstein, supra note 4, at 352-53 (pointing out that "[t]he common law does not take harassment lightly" and illustrating how assault and battery, insult, offensive battery, intentional infliction of emotional distress by extreme and outrageous conduct, and invasion of privacy can remedy allegedly sexually harassing behavior); MacKinnon, supra note 2, at 159 ("[M]any of the acts that comprise incidents of sexual harassment, if properly construed. . ., arguably fit into the traditional torts of assault and battery, with corollary dignitary harm, or, if sufficiently extreme, the tort of intentional infliction of emotional distress.").


9. McKee v. Ram Prods., No. 92-CV-481, 1993 U.S. Dist. LEXIS 7346 (W.D. Mich. Apr. 23, 1993) (granting summary judgment on claim of intentional infliction of emotional distress because company's use of profane language, including referring to women as "bitches," was not extreme or outrageous; moreover, victim's stress was not sufficiently severe); Bailey v. Unocal Corp., 700 F. Supp. 396, 400 (N.D. Ill. 1988) (holding that employer's "electing not to learn" of supervisor's alleged repeated sexual advances and exposing of himself to plaintiff was not sufficiently extreme or outrageous to state cause of action for intentional infliction of emotional distress); Bowersox v. P.H. Glatfelter Co.,
Moreover, in approximately half of the states, a workers' compensation statute provides the exclusive remedy for state tort claims asserted by alleged victims of sexual harassment. The preemption by workers' compensation laws of state tort remedies is important because an employer's potential liability under the workers' compensation scheme generally is significantly less than its potential liability under state tort law or Title VII. Most importantly, unlike Title VII and state tort laws, workers' compensation laws do not allow for the recovery of either compensatory or punitive damages.

Part II of this Article begins with an examination of the reasoning used by courts to support judicial recognition of a cause of action for mixed-sex sexual harassment. Part II then discusses the two distinct theories of discrimination that Professor Catharine MacKinnon sets forth in her influential argument that sexual harassment is within the purview of Title VII's "sex" discrimination prohibition. Under MacKinnon's "differences theory," which is concerned only with disparate treatment that is based on "arbitrary" or overgeneralized distinctions, sexual harassment is sex discrimination because it "differentially injures one gender—defined group in a sphere—sexuality in employment—in which the treatment of women and men can be compared." Under MacKinnon's "inequality theory," which treats as discriminatory any employment practice that disadvantages any particular social group, sexual harassment is sex discrimination because it

677 F. Supp. 307, 311 (M.D. Pa. 1988) (finding that sexually explicit remarks and display of sexually explicit materials were not sufficiently extreme or outrageous conduct to support a claim of intentional infliction of emotional distress).


11. See Bernstein v. Aetna Life & Cas., 843 F.2d 359, 364-65 (9th Cir. 1988).

12. See Korn, supra note 10 at 1368-69 (noting that employers have sought refuge under workers' compensation statutes from tort claims relating to alleged sexual harassment because their liability is significantly less under the workers' compensation scheme).

13. Id. at 1369.

perpetuates the social inequality of women by degrading and objectifying women *qua* women.\(^\text{15}\)

Part II continues with a discussion of the split within the federal courts over recognition of a cause of action for same-sex sexual harassment. This Part concludes that the split results from courts applying one or the other of MacKinnon's two theories of discrimination. Those courts that have implicitly followed MacKinnon's differences theory have recognized a cause of action for same-sex sexual harassment. On the other hand, courts that have implicitly accepted MacKinnon's inequality theory have refused to recognize such a cause of action. Part II goes on to demonstrate that MacKinnon's inequality theory of sex discrimination does not apply in the context of same-sex sexual harassment because such harassment does not send a message of gender inferiority.

Part II argues that courts should not apply the differences theory to justify recognition of a cause of action for same-sex sexual harassment because courts have refused to apply the differences approach in litigation under Title VII challenging sexual orientation discrimination. An inconsistent application of the differences theory to support a cause of action for same-sex sexual harassment would provide an incentive to the rational employer to employ a non-gay person over a comparable gay candidate. This incentive would be created because an employer's liability for an act of same-sex sexual harassment is likely to exceed an employer's liability for an equivalent act of mixed-sex sexual harassment.

Part III argues that any given alleged act of sexual harassment will be judged more harshly when the actions complained of involve same-sex interactions rather than mixed-sex interactions. This conclusion follows from the heterosexist nature of the facially neutral standard that the trier of fact uses to judge whether allegedly sexually harassing behavior is sufficiently offensive to be actionable.\(^\text{16}\)

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15. *Id.*

16. This Article employs the term "heterosexist" as Gregory Herek has defined it: "a world-view, a value system that prizes heterosexuality, assumes it is the only appropriate manifestation of love and sexuality, and devalues homosexuality and all that is not heterosexual." Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986). This Article gives a broader meaning to the words Herek used, however, than Herek himself seems to have intended. Herek points out that the term "homophobia," which technically means fear of sameness, is an inadequate designation for anti-gay prejudice because "it unjustifiably narrows our understanding of anti-lesbian and anti-gay prejudice to a single dimension of fear, and ... presumes such prejudice to be irrational." *Id.* at 924-25. However, Herek seems to conceive of "heterosexism" as being distinct from "homophobia." "While homophobia involves active fear and loathing of homosexuality, heterosexism wishes away lesbian and gay people or assumes that they never really existed." *Id.* at 925. To the contrary, this Article employs the term "heterosexism" to encompass the active ill will that Herek ascribes to "homophobia." Heterosexism, then, is seen as one manifestation of homophobia. See also Wayne R. Dynes, "Heterosexuality," 1 ENCyclopedia OF HOMOSEXuALITY 532, 534-35 (Wayne R. Dynes ed., 1990) (defining heterosexism as the "excessive prizing or favoring of heterosexual persons and values"); I. Bennett Capers, Note, "Sexual Orientation" and *Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991) (stating that heterosexism "refers to institutional valorization of heterosexual activity").
Finally, Part IV proposes steps that the courts should take to ameliorate the anti-gay effects that result when they recognize a cause of action for same-sex sexual harassment. Most importantly, courts should attempt to eliminate the heterosexual bias inherent in the sexual harassment standard by instructing the finder of fact to evaluate the actions of a gay same-sex sexual harassment defendant in the hypothetical context of a mixed-sex interaction.

II
THEORIES OF ACTIONABLE SEXUAL HARASSMENT APPLIED IN THE SAME-SEX CONTEXT

A. Judicial Construction of a Cause of Action Under Title VII for Sexual Harassment

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII does not, however, expressly proscribe "sexual harassment" or disparate treatment based on sexual attractions, sexual relationships, or receptivity to sexual propositions.

For example, under the majority view, Title VII does not encompass a claim of disparate treatment arising from a manager's hiring of his paramour rather than her more qualified competitor, even if the manager's hiring decision is based entirely on his sexual involvement. According to this view, a male who is denied an employment opportunity that is instead preferentially awarded to the decision maker's paramour is not prejudiced because of his sex. Rather, he is prejudiced only because the decision maker preferred his paramour. As the Court of Appeals for the Second Circuit reasoned in *DeCintio v. Westchester County Medical Center*, the rejected male applicant "faced exactly the same predicament as that faced by any woman applicant for the promotion: [n]o one but [the paramour]..."

19. 807 F.2d at 306-08.
could be considered for the appointment because of [the paramour's] special relationship to [the decision maker]."  

In theory, the rationale of DeCintio should lead courts to conclude that a woman who is denied an employment opportunity because of her refusal to submit to the decision maker's sexual demands is not prejudiced because of her sex. Rather, she is prejudiced because of her "special relationship" to the decision maker. All other female applicants, from whom the decision maker has not demanded sexual favors, stand on equal footing with any male applicant, to whom the decision maker presumably is not even sexually attracted, for the employment opportunity.

Settled case law, however, is to the contrary. "Quid pro quo" sexual harassment—"in which submission to sexual conduct is made a condition of concrete employment benefits"—violates Title VII's proscription of sex discrimination. The seminal quid pro quo sexual harassment case is Barnes v. Costle. The female plaintiff in Barnes alleged that her employer had eliminated her job in retaliation for her refusal to grant sexual favors to her male supervisor and that this adverse action "would not have occurred but for her sex." Granting summary judgment to the employer, the district court reasoned:

The substance of [the plaintiff's] complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. . . . Regardless of how inexcusable the conduct of [the plaintiff's] supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on [the plaintiff's] sex.

The Court of Appeals for the District of Columbia Circuit, however, reversed the district court's grant of summary judgment. The appeals court found that the plaintiff had been subjected to an arbitrary barrier to continued employment "because she was a woman" since "retention of her job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male." The appeals court grounded its Barnes holding on the principal that disparate treatment

20. Id. at 308.
23. 561 F.2d 983 (D.C. Cir. 1977).
24. Id. at 985.
25. Id. at 986.
26. Id. at 984.
27. Id. at 990.
28. Id. at 989.
in employment need not be founded solely on gender to violate Title VII.\textsuperscript{29} 

"[I]t is enough that gender is a factor contributing to the discrimination in a substantial way."\textsuperscript{30}

A second variety of sexual harassment that courts have held actionable under Title VII is "hostile environment" harassment where gender-based harassment "is a persistent condition of work."\textsuperscript{31} Such harassment, in order to be actionable, "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"\textsuperscript{32} Unlike a plaintiff alleging quid pro quo sexual harassment, however, the victim of alleged environmental harassment need not suffer an economic detriment to state a cause of action for sex discrimination under Title VII.\textsuperscript{33} Moreover, properly understood, hostile environment sexual harassment need not even be sexual in nature.\textsuperscript{34}

The theory of environmental harassment first gained judicial acceptance in Rogers v. EEOC,\textsuperscript{35} a case involving a claim of national origin discrimination. The plaintiff in Rogers alleged that her employer discriminated against her on the basis of her Hispanic origin when it discriminated against its Hispanic clients.\textsuperscript{36} The Court of Appeals for the Fifth Circuit rejected the employer's argument that the alleged discrimination was not an unlawful "employment practice" because the alleged discrimination was directed at its clients and not its employees. Instead, the court

\textsuperscript{29} \textit{Id.} at 991.

\textsuperscript{30} \textit{Id.} at 990. The Barnes court cited to Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971), in which the Supreme Court held that an employer's policy of refusing to employ mothers of pre-school-age children was prima facie sex discrimination within the purview of Title VII when the employer did employ fathers of pre-school-age children.

\textsuperscript{31} \textit{MACKINNON}, supra note 2, at 32 (original emphasis). MacKinnon argues that quid pro quo harassment and environmental harassment merge since "tolerate it or leave" is an implicit condition in environmental harassment. \textit{Id.} at 46. See also Merit Sav. Bank v. Vinson, 477 U.S. 57 (1986).

\textsuperscript{32} \textit{Merit}, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

\textsuperscript{33} See Merit, 477 U.S. at 67-68; Henson, 682 F.2d at 901 ("[U]nder certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers a tangible job detriment."); Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981) (arguing that "sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy" violates Title VII even if the victim is not deprived of a "tangible job benefit").

\textsuperscript{34} See Joshua F. Thorpe, Note, \textit{Gender-Based Harassment and the Hostile Work Environment}, 1990 \textit{Duke L.J.} 1361, 1363-64 (arguing that "all forms of gender discrimination that affect an employee's work environment are potentially actionable under Title VII without regard to whether they arise from sexual motives") (original emphasis). See also Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (stating that "the predicate acts underlying a sexual harassment claim need not be sexual in nature"); Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985) (holding that sexual harassment claimant is "under no obligation to adduce proof of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature") (internal quotations omitted); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1173 (D. Nev. 1995) (finding that non-sexual, gender-oriented harassment is actionable as sexual harassment).

\textsuperscript{35} 454 F.2d 234 (5th Cir. 1971), \textit{cert. denied}, 406 U.S. 957 (1972).

\textsuperscript{36} \textit{Id.} at 237.
reasoned that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection" under Title VII.\textsuperscript{37} Fourteen years later, the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment."\textsuperscript{38} The Court adopted the reasoning of Rogers:

The phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with . . . discrimination [based on a protected category]. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .\textsuperscript{39}

It is readily apparent that discrimination against clients according to their national origin is discrimination on the basis of national origin, even if such a practice arguably is not an employment practice. However, it is less apparent how sexual harassment as it is popularly understood —that is, the imposition of unwanted sexual commentary and advances—fits within Title VII's prohibition of discrimination on the basis of "sex." "Unlike sex discrimination in its other forms, sexual harassment involves not just gender, but also the sexual characteristics which the harasser is attracted to (in a quid pro quo case) or is seeking to exploit in some offensive way (in a hostile work environment case)."\textsuperscript{40}

In her 1979 book "Sexual Harassment of Working Women," Professor Catherine MacKinnon sets forth what are perhaps the most influential arguments for bringing sexual harassment within the meaning of the "sex" discrimination prohibition in Title VII.\textsuperscript{41} MacKinnon presents two distinct

\begin{thebibliography}{9}
\bibitem{37} Id. at 237-38.
\bibitem{39} Id. (quoting Rogers, 454 F.2d at 238).
\bibitem{41} MACKINNON, supra note 2. See, e.g., Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861 n.15 (3d Cir. 1990) (citing to MacKinnon's theory that "women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women," as the basis for hostile environment sexual harassment claims); Bundy v. Jackson, 641 F.2d 934, 945-46 (D.C. Cir. 1981) (citing to MacKinnon in holding that a woman need not allege that she has suffered an economic detriment to state a claim for sexual harassment); Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441 (S.D.W. Va. 1985) (adopting MacKinnon's definition of quid pro quo sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power"); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366 (E.D. Pa. 1985) (same), aff'd, 800 F.2d 1136 (3d Cir. 1986). See also Mary Anne C. Case, \textit{Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence}, 105 \textit{YALE L.J.} 1, 83 n.275 (noting that MacKinnon is "one of those responsible for [the] development" of the sexual harassment cause of action); Carolyn Grose, \textit{Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII}, 7 \textit{YALE J.L. & FEMINISM} 375, 379, 398 (1995) (labeling "sexual harassment theory" as "the quintessential feminist legal creation" and lauding MacKinnon's argument that sexual harassment is a form of sex discrimination as "one of the most significant contributions made by feminist jurisprudence to mainstream legal thought").
\end{thebibliography}
theories of how sexual harassment is discrimination on the basis of sex: the
"differences theory" and the "inequality theory."  

Under the differences approach, only disparate treatment that is "arbi-
trary" or based on overgeneralized or inaccurate distinctions between the
sexes is proscribed. Thus, under the differences approach, men and wo-
men must be treated similarly in employment unless a biological difference
between the sexes justifies disparate treatment.

The inequality approach treats as discriminatory any rule or employ-
ment practice that disadvantages a particular social group. "In this view,
the prohibition on sex discrimination aims to eliminate the social inferiority
of one sex to the other [and] to dismantle the social structure that maintains
[that inferiority.]"

Central to MacKinnon's argument that both the differences theory and
the inequality theory support recognition of a cause of action under Title
VII for sexual harassment is her notion that women "occupy a structurally
inferior as well as distinct place" in society and in the work
place. Mac-
Kinnon describes a work force that is segregated by gender both horizon-
tally and vertically, which makes women systematically vulnerable to
sexual harassment. In MacKinnon's view, the work force is segregated
horizontally since a large majority of working women work in jobs that are
"for women"—that is, jobs that relatively few men also perform. The
work force is segregated vertically because, regardless of what job a woman
performs, she is likely to be subordinate to men in the work place.

This structural inferiority of women in the work place is the critical
link between sexual harassment and sex discrimination because it suggests
that men are able to sexually harass women because they are women; it is
the sexual harassment victim's female gender that has placed her in the
position of powerlessness that makes possible the sexual harassment. Thus, "an analysis of the abuse as structural [demonstrates that sexual har-
assment merits] legal attention as sex discrimination, not just as unfairness
between two individuals, which might better be approached through private
law."

Within this framework, both the differences theory and the inequality
theory support an argument that sexual harassment is sex discrimination.

\[42\] MacKinnon, supra note 2, at 4.
\[43\] Id. at 4, 101.
\[44\] Id. at 110.
\[45\] Id. at 116-17.
\[46\] Id. at 103.
\[47\] Id. at 2.
\[48\] Id. at 9-10.
\[49\] Id. at 10-11.
\[50\] Id. at 9, 12.
\[51\] Id. at 27.
\[52\] Id.
"Under the differences approach, sexual harassment is sex discrimination *per se* because the practice differentially injures one gender-defined group in a sphere—sexuality in employment—in which the treatment of women and men can be compared."\(^5\) When a supervisor or co-worker sexually harasses only female employees, women are treated unequally as they must meet sexual demands or endure sexual commentary that similarly situated men do not.\(^5\)

Under the inequality theory, sexual harassment is sex discrimination because it perpetuates the social inequality of women by degrading and objectifying women *qua* women.\(^5\) "Sexual harassment makes of women's sexuality a badge of female servitude."\(^5\) MacKinnon has described three ways in which this is so:

Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality, here, in the employment context. . . . [F]irst, the exchange of sex for survival has historically assured women's economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women, often in vicious and unwanted ways. Third, women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women.\(^5\)

B. The Split over Application of Professor MacKinnon's Theories of Discrimination and the Resulting Split over Recognition of a Cause of Action for Same-Sex Sexual Harassment

Federal courts have split sharply over whether Title VII provides a cause of action for sexual harassment when the claimed victim is of the same sex as the alleged harasser. This split mirrors, and largely results from, a split over which of MacKinnon's theories of discrimination the courts have implicitly accepted.

Those courts that have recognized a cause of action for same-sex sexual harassment have adopted a "but-for" analysis: same-sex sexual harassment is sex discrimination under this view because, but for the victim's sex, he would not have been sexually harassed. Without express acknowledgement, and perhaps unwittingly, these courts have adopted a theory that is comparable to MacKinnon's differences theory. On the other hand, the courts that have refused to recognize a cause of action for same-sex sexual harassment, for the most part, have reasoned that same-sex sexual harassment is not actionable because the practice does not degrade the victim on

\(^{53}\) Id. at 6 (original emphasis).
\(^{54}\) Id.
\(^{55}\) Id. at 7.
\(^{56}\) Id. at 189.
\(^{57}\) Id. at 174.
the basis of his or her sex. This rationale parallels MacKinnon's inequality approach.

The earliest case recognizing a cause of action under Title VII for same-sex sexual harassment is *Wright v. Methodist Youth Services, Inc.*.\(^{58}\) In *Wright*, a male plaintiff alleged that his employment had been terminated because he had rejected the sexual advances of his male supervisor.\(^{59}\) The court held that the plaintiff had stated a cause of action under Title VII.\(^{60}\) The court based its decision on cases upholding a female employee's right to recover under Title VII after her employment had been terminated because she had refused the sexual advances of her male supervisor. "Those holdings are predicated on the notion that making a demand of a female employee that would not be made of a male employee involves sex discrimination."\(^{61}\) The court held that the plaintiff's claim was "the obverse of that coin—an alleged demand of a male employee that would not be directed to a female."\(^{62}\)

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59. Id. at 309-10.
60. Id. at 310.
61. Id.
62. Id. (citing Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981) (stating that "discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination") (original emphasis)). Under the but-for theory of sexual harassment, harassing behavior by a bisexual or "equal opportunity" harasser is not actionable because the plaintiff cannot demonstrate "that but for the fact of her sex, she would not have been the object of harassment." Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982). When the harasser victimizes employees of both sexes, "the sexual harassment would not be based upon sex because men and women are accorded like treatment." Id. See also Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) ("It is of significance to note that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment."), aff'd, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); Bundy, 641 F.2d at 942 n.7 ("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) ("[W]hen a bisexual superior . . . conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair . . . the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."); MacKinnon, supra note 2, at 203 ("By the logic of the differences argument, if a sexual condition of employment were imposed equally upon both women and men by the same employer, the practice would no longer constitute sex discrimination because it would not be properly based on the gender difference.").

But see Steiner v. Showboat Operating Co., 25 F.3d 1459, 1462-64 (9th Cir. 1994), cert. denied, 115 S. Ct. 733 (1995) (finding that the fact that a supervisor was verbally abusive to both men and women was not a defense to a female subordinate's claim of sexual harassment where the supervisor's abuse of women differed from his abuse of men in that the former was of a sexual and gender-specific nature); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) ("[E]qual harassment of both genders does not escape the purview of Title VII[:] Where a harasser violates both men and women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.'") (internal citation omitted).

For a thoughtful proposal to eliminate the "bisexual harasser" defense, see Sandra Levitsky, Note, *Footnote 55: Closing the 'Bisexual Defense' Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1044 (1996) (arguing for a "dominance" theory of sexual harassment that would proscribe any harassment that "reinforce[s] sexual hierarchy by taking advantage of the sex object stereotype").
In accordance with *Wright*, courts that have recognized a cause of action under Title VII for same-sex sexual harassment, and that have provided a rationale for their holding, almost uniformly have reasoned that such harassment is sex discrimination within the purview of Title VII because the alleged victim would not have been harassed “but for” his sex.63


Few published opinions recognizing a cause of action for same-sex sexual harassment have provided a rationale other than the “but-for” rationale in support of that holding. *See Peric* v. *University of Illinois*, No. 96-C-2354, U.S. Dist. LEXIS 13042, at *4-5 (N.D. Ill. Sept. 4, 1996) (“The statute is clearly worded in gender neutral terms, and no legislative history exists to contradict a gender neutral reading.”); *Blizis* v. *Mike Raiser Ford, Inc.*, 896 F. Supp. 805, 806-07 (N.D. Ind. 1995) (holding that male employee may show actionable sexual harassment under Title VII by demonstrating that sexually explicit comments and behavior by his male co-workers created an anti-male atmosphere); *Ton* v. *Infor-
The leading case holding that same-sex sexual harassment is not actionable under Title VII is *Goluszek v. Smith.* In *Goluszek,* the male plaintiff alleged that his male supervisor and male co-workers had subjected him to verbal harassment of a sexual nature and that his male co-workers physically assaulted him by poking him in the buttocks with a stick.

Holding that “the defendant’s conduct was not the type of conduct Congress intended to sanction when it enacted Title VII,” the court reasoned:

The “sexual harassment” that is actionable under Title VII “is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.” . . . Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their sexuality . . . In effect, the offender is saying by words or actions that the victim is inferior because of the victim’s sex.

The court found that the plaintiff “was a male in a male-dominated environment.” Thus, although the plaintiff “may have been harassed ‘because’ he is a male . . . that harassment was not of a kind which created an anti-male environment in the work place.” Courts have widely followed *Goluszek*’s reasoning.

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64. 697 F. Supp. 1452 (N.D. Ill. 1988).
65. The plaintiff alleged that his supervisor told him he needed to “get married and get some of that soft pink smelly stuff that’s between the legs of a woman.” The plaintiff further alleged that his co-workers told him that he should get married and should go out with a certain female employee “because she ‘fucks.’” Id. at 1453. Plaintiff’s co-workers allegedly “periodically asked him if he had gotten any ‘pussy’ or had oral sex, showed him pictures of nude women, told him they would get him ‘fucked,’ accused him of being gay or bisexual, and made other sex-related comments.” Id. at 1454.
66. Id. at 1454.
67. Id. at 1456 (citations omitted).
68. Id.
69. Id.
Although neither Goluszek nor its progeny expressly discusses MacKinnon’s inequality theory of sexual harassment, the rationale of Goluszek demonstrates that MacKinnon’s inequality theory of discrimination does not transfer to sexual harassment in the same-sex context. Central to the rationale of Goluszek is the notion that regardless of how harmful same-sex sexual harassment may be for the victim of that harassment, it does not send a message of gender inferiority; therefore, it is not discrimination on the basis of sex.⁷¹ MacKinnon herself explained that the inequality theory is concerned only with practices that promote or perpetuate social inferiority:

'[t]he inequality conception...is grounded in an analysis of the balance of power between specific groups with particular social histories. Sex discrimination is treated as a logical and necessary outgrowth of a social whole in which the human sex difference has been transformed into a systematic social inequality—for the benefit of some, to the detriment of others.'⁷²

Same-sex sexual harassment does not alter this “balance of power” between the sexes. Although the individual harasser may benefit from his harassing behavior and the individual victim of his harassment may suffer a detriment because of it, the equality or inequality of the sexes remains static.⁷³ This point is well illustrated by the distinction between homosexual and heterosexual pornography:

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⁷¹. See Grose, supra note 41, at 382-83 (noting that the Goluszek court refused to recognize the claim of a male that his male co-workers had created a sexually hostile environment because “the concerns that Title VII seeks to address in prohibiting sexual harassment simply are not present in a same-sex situation”). Cf. Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2523 (1994) (Goluszek seems to be premised on the notion that “when a judgment against a person in group X is made by another person in group X, it is assumed to be ‘because of the [target’s] ‘sex.’”’ alteration and emphasis in the original), cert. denied, 1996 U.S. LEXIS 4780 (U.S. Oct. 7, 1996); Mayo v. Kiwest Corp., 94 F.3d 641 (4th Cir. 1996).

⁷². MacKINNON, supra note 2, at 126-27.

⁷³. See Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1383 (C.D. Cal. 1995) (“The imbalance of power resulting from a dominant gender disadvantaging a subservient gender does not figure into [same-sex communications].”). See also Grose, supra note 41, at 385 (“Sexual harassment is about male subordination of females—a power dynamic unique to that interaction. Suggesting that it simply is about treating people on the job differently ‘because of their sex’ obscures the essence of the offensive behavior: the socially constructed power differential that exists between men and women.”).
In homosexual pornography both participants in a sexual depiction are male. Thus, to the extent any coercion, objectification or violence is depicted, both the perpetrator and the victim are male. There is no distinct and recognizable "other" against whom these degradations are being committed. Conversely in male centered heterosexual pornography, women are traditionally and routinely degraded. There is a distinct and recognizable dominant class (men) and subjugated class (women).  

The inequality theory makes allowance for the reality that context is critical to the meaning given to the message that a would-be harasser sends. Assume for example that a supervisor refers to both a white employee and a black employee as "nigger." Under the but-for or differences theory of discrimination, the supervisor has not discriminated based on race because he has treated the white employee and the black employee identically. Under the inequality theory of discrimination, however, the finder of fact must consider the disparate effects that the supervisor's actions are likely to have on the two employees. The white employee who is called "nigger" is likely to be more confused than offended. For the black employee, the message of racial hostility is unmistakable.

Judge Richard Posner has noted the importance of context in sexual harassment litigation:

We are mindful of the dangers that lurk in trying to assess the impact of words without taking account of gesture, inflection, the physical propinquity of the speaker and hearer, the presence or absence of other persons, and other aspects of context. . . . Even a gross disparity in size between speaker and listener, favoring the former, might ominously magnify the impact of the speaker's words.

Even more so, race, gender, sexual orientation, cultural and historical experiences and numerous other contextual variables are highly relevant to the inequality theory inquiry. For example, a noose hung over a black man's desk by his white co-worker expresses a racist enmity more powerfully than a noose hung over a white man's desk by his black co-worker because of

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74. Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1176 n.9 (D. Nev. 1995) (citing Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Tex. L. Rev. 1097, 1137 & nn.174-75 (1994)). In Fox, the male plaintiffs alleged that they had been subjected to a sexually hostile work environment when their supervisors and other co-employees openly had discussed, drawn, and written about homosexual sex acts. The court acknowledged that the complaint possibly alleged a hostile and abusive work environment, 876 F. Supp. at 1174, but held that the complaint failed to state a cause of action under Title VII because it had not "allege[d] facts indicating the work environment was hostile to the [plaintiffs] on the basis of their gender." See id. at 1172-73. Finally, the Fox court opined that same-sex harassment might be actionable under a "but-for" theory of discrimination: "If [the alleged] conduct were directed only at men, or were directed at plaintiffs because they were men, it might be actionable as gender oriented harassment." Id. at 1173.

75. Cf. Fair v. Guiding Eyes for Blind, Inc., 742 F. Supp. 151, 156 (S.D.N.Y. 1990) ("It is difficult to understand how [a man]'s allegedly calling a man on the golf course a 'bitch' can be considered sexual harassment towards either a woman or a man.").

76. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995).
the history in the United States of lynching black men. Taking that hypothetical a step further, one sees that if both the person who hangs the noose and the person for whom the noose is hung are of the same race, the noose loses much of its message of racial animosity.

Similarly, even if one accepts MacKinnon's notion that a male supervisor's sexual harassment of his female subordinate "makes of women's sexuality a badge of female servitude," a lesbian supervisor's similar harassment of her female subordinate cannot reasonably be seen as sending the message to the victim that she is inferior because of her sex.

C. A Compelling Theory "But-For" Its Inconsistencies

As demonstrated, the inequality theory of sexual harassment cannot support a cause of action for same-sex sexual harassment under Title VII. The argument remains, however, that courts should recognize the cause of action under the "but-for" or differences theory of sexual harassment. The argument is superficially compelling. Assuming that a supervisor sexually harasses only his male employees, men are treated unequally since they must meet sexual demands (or suffer a detriment for refusing to meet such sexual demands) that similarly situated women do not. This disparate treatment is no less arbitrary in the same-sex context than it is in the mixed-sex context.

77. See Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 n.4 (11th Cir. 1989) (commenting in a case presenting a Section 1981 claim based on a racially hostile environment that "[t]he grossness of hanging an object resembling a noose at the work station of a black female is self-evident").

78. MACKINNON, supra note 2, at 189.

79. I sent Professor MacKinnon a draft of this Article shortly before it went to publication. She was kind enough to respond and share with me her critique of my argument. In sum, Professor MacKinnon vehemently disagrees with most of my arguments and she strongly opposes my use of her writings to argue for a result that she abhors. In particular, Professor MacKinnon believes that same-sex sexual harassment is discrimination on the basis of sex. In her view, anyone who is singled out for harassment or abuse, wherever we have sex equality rules, for their place in the gender system should be able to bring a sex equality claim. Under the "differences" theory, lesbians or gay men harassed as such, or anyone harassed for gendered reasons, would have a claim when they would not be so treated "but for sex," meaning but for their own gender. Under her alternate "inequality" theory, the subordination of gay men and lesbians is actionable as a product of male dominance. Gay men and lesbians are harassed for challenging the gender rules of male supremacy, which is not a sex-equal system. Apart from providing a remedy for the many people now violated without relief, whom she feels my approach sacrifices, Professor MacKinnon also believes that judicial recognition of employment rights in the same-sex context would materially advance gay rights as a whole. In her analysis, gay men and all women share an interest in ending male supremacy, and this clearly supported doctrinal step would promote that joint interest. Letter from Catharine A. MacKinnon, Professor of Law, University of Michigan, to Gary Spitko (Oct. 26, 1996) (on file with the Berkeley Journal of Employment and Labor Law).

80. Indeed, several commentators recently have called for judicial recognition of a cause of action under Title VII for same-sex sexual harassment. See Levitsky, supra note 62, at 1014 (arguing that a refusal to recognize same-sex sexual harassment "seems inappropriate given that victims of . . . [such] harassment suffer no less an injury from sexual harassment than victims of opposite-sex sexual harassment"); Trish K. Murphy, Comment, Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII, 70 WASH. L. REV. 1125, 1125 (1995) ("[N]o valid justification exists for distinguishing between same-gender sexual harassment and sexual harassment involving members of
Nevertheless, the but-for theory of discrimination should not be applied in the context of same-sex sexual harassment because courts have refused to apply the theory in the context of claims of sexual orientation discrimination in employment. Courts have failed to provide a remedy under Title VII for sexual orientation discrimination victims even though these victims would not have suffered discrimination “but for” the fact that their preferred erotic or romantic partners were of the same sex. The practical result of this failure is that no federal law proscribes discrimination in employment on the basis of sexual orientation. While the status quo in federal employment discrimination law thus allows employers the freedom to discriminate on the basis of sexual orientation, recognition of a cause of action for same-sex sexual harassment under Title VII would make such discrimination in employment economically rational.

This conclusion follows from the premise that a finder of fact would be likely to penalize much allegedly sexually harassing behavior in the same-sex context that it would not penalize if the putative victim and the alleged harasser were of different sexes. Part III of this Article sets forth the argument that this increased likelihood of liability results from the heterosexist nature of the “reasonable person” standard that the fact finder uses to judge whether allegedly sexually harassing behavior is sufficiently abusive to be actionable.

In sum, the incongruence that arises from application of the but-for theory to same-sex sexual harassment, in conjunction with the heterosexist nature of the sexual harassment standard, provides a powerful financial incentive to employers to discriminate against gay men and lesbians. Although federal law would not protect gay men and lesbians from such employment discrimination based on their sexual orientation, their potential

different genders.”); Lisa Wehren, Note, Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction, 32 Cal. W.L. Rev. 87, 91 (1995) (“If the harassing conduct amounts to actionable sexual harassment in the cross-gender context, the same exact conduct cannot be said to be outside the purview of Title VII merely because it is directed at a person of the same gender.”).

81. With respect to this asymmetry, Kathryn Abrams has observed: “To the extent that discrimination against gay men is actually a form of policing of their departures from traditional gender roles . . . such harassment may actually embody more of the gender discrimination at which [Title VII] was aimed than the advances of gay supervisors would.” Kathryn Abrams, supra note 71, at n.127.


employers would face an increased likelihood of liability for alleged same-sex sexual harassment, relative to the likelihood of liability for an allegation of comparable mixed-sex sexual harassment. Thus, the employer would be prudent, all other factors being equal, to refuse to employ gay people—an option that remains legal under federal law.  

A broader understanding of how the differences approach has been selectively applied under Title VII to disadvantage gay people will facilitate an understanding of this argument. Courts have failed or refused to apply the but-for theory of sex discrimination across the board in Title VII litigation; thus, they have retained the discretion to apply this theory of discrimination in a discriminatory fashion. For example, courts of appeals have uniformly held that an employer does not violate Title VII's proscription of sex discrimination when it applies different grooming standards to men than it does to women.  

Willingham v. Macon Telegraph Publishing Co. is a typical case. In Willingham, the court held that an employer's grooming code, which excluded employment of men with long hair but allowed employment of women with long hair, was not sex discrimination within the purview of Title VII.

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84. One could extrapolate from the argument I set forth in Part III on the heterosexist nature of the reasonable person standard and argue that the reasonable person standard also disadvantages women and racial and religious minorities. The impunity with which an employer may discriminate against gay people qua gay people, however, distinguishes the plight of those with a minority sexual orientation from those other minorities. Title VII expressly forbids discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). Therefore, even assuming a generalized majoritarian bias inherent in the reasonable person standard, such bias would not support an argument against recognition of claims for "reverse" discrimination relating to an environment hostile on the basis of gender, race, or religion. But see King v. M.R. Brown, Inc., 911 F. Supp. 161, 167 (E.D. Pa. 1995) ("[T]he cognizability of reverse discrimination claims under Title VII belies the conclusion" that same-sex sexual harassment is not actionable under Title VII); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) ("It would be untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII."); Sardinia v. Dellwood Foods, Inc., No. 94-5458, 1995 U.S. Dist. LEXIS 16073, at *16 (S.D.N.Y. Oct. 30, 1995) (same); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1993) (pointing to the Supreme Court's recognition of "reverse [race] discrimination" claims by white plaintiffs as support for the recognition of a cause of action for same-sex sexual harassment).


86. 507 F.2d 1084 (5th Cir. 1975) (en banc).
The plaintiff's argument was straightforward: the employer had discriminated against him on the basis of his sex when it had denied him employment because of his long hair, for the employer would not have denied employment to a woman with similarly long hair.87 The Court of Appeals for the Fifth Circuit rejected this "but-for" argument:

Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.88

The refusal of courts to apply the but-for principle in adjudicating Title VII challenges to gender-disparate grooming codes can be explained by reference to (1) the courts' judgment that the impact of such codes on employees is de minimis, and (2) the inference drawn by courts that Congress, therefore, must not have intended to proscribe such gender disparate codes.89

A similar judicial negative inference drawn from congressional silence underlies the failure of courts to apply the but-for theory of sex discrimination when adjudicating claims of sexual orientation discrimination under Title VII. Courts that have addressed the issue have universally held that sexual orientation discrimination is not actionable under Title VII.90 Be-

87. Id. at 1088.
88. Id. at 1091 (original emphasis). But see EEOC v. Sage Realty Corp., 87 F.R.D. 365, 369 (S.D.N.Y. 1980) (finding that plaintiff alleging that employer made female employees but not male employees wear sexually provocative and revealing uniform had stated a cause of action under Title VII).
89. Id. at 1090. See also Barker, 549 F.2d at 401 ("Employer grooming codes requiring different hair length for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude that they were a target of the Act."); Knott, 527 F.2d at 1252 ([S]light differences in the appearance requirements for males and females have only a negligible effect on employment opportunities."). But see Barker, 549 F.2d at 404 (McCree, J., dissenting) ("[T]here appears to be no justification for limiting an employee's statutory rights against a private employer to the circumstances in which a person enjoys constitutional protection against government action.") (original emphasis); Earwood, 539 F.2d at 1352 (Winter, J., dissenting) ("Grooming standards are clearly 'terms, conditions, or privileges of employment.'").
90. See Dillon v. Frank, 952 F.2d 403, No. 90-2290, 1992 U.S. App. LEXIS 766, at *22 (6th Cir. Jan 15, 1992) (unpublished opinion) (holding that Title VII does not make illegal comments and assaults directed at plaintiff because of his alleged homosexuality); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding, without discussion, that "Title VII does not prohibit discrimination against homosexuals"), cert. denied, 493 U.S. 1089 (1990); Pritchett v. Sizeler Real Estate Management Co., 67 Fair Empl. Prac. Cas. (BNA) 1377, 1378 (E.D. La. 1995) ("It is abundantly clear that Title VII does not protect against discrimination on any basis relating to sexual orientation."); Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) ("Title VII applies only to 'discrimination on the basis of gender and should not be judicially extended to include sexual preferences such as homosexuality.'") (citation omitted); The EEOC also has taken the position that sexual orientation discrimination is not actionable under Title VII. EEOC Decision 76-75, 19 Fair Empl. Prac. Cas. (BNA) 1823, 1824 (1975) (explaining that there is no evidence that Congress, when enacting Title VII, intended to
sides demonstrating the courts’ inconsistent application of the but-for-theory, an examination of this case law also will help to illuminate the discussion in Part III on the “reasonable heterosexual” standard. This case law exemplifies a heterosexual judiciary subjectively and discriminatorily applying the law in a manner that disadvantages gay people.

The most important case involving a challenge to sexual orientation discrimination under Title VII is DeSantis v. Pacific Telephone & Telegraph Co. In DeSantis, the court reasoned by negative inference that Title VII did not proscribe discrimination on the basis of sexual orientation: “Congress has not shown any intent other than to restrict the term "sex" to its natural meaning. Therefore this court will not expand Title VII’s application in the absence of Congressional mandate.”

The DeSantis court expressly rejected the but-for argument that “if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners.” The court found that the but-for theory was inapposite because “whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus, this policy does not involve different decisional criteria for the sexes.”

The DeSantis court also carved out a “homosexual exception” to the disparate impact standard announced in Griggs v. Duke Power Co. The appellants in DeSantis argued that an employer’s ban on gay employees disproportionately impacted men because more men than women are gay

include “sexual practices” within the meaning of the term “sex”); EEOC Compliance Manual (BNA) §§ 615.2(b)(3) (1988).

91. 608 F.2d 327 (9th Cir. 1979).

92. Id. at 329 (quoting Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977)). See also Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (rejecting a transsexual’s claim that her employer violated Title VII by discriminating against her because she was a woman with male anatomy: “the word ‘sex’ in Title VII is to be given its traditional definition. . . . Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one’s transsexualism does not fall within the protective purview of the Act.”). But see James v. Ranch Mart Hardware, Inc., 66 Fair Empl. Prac. Cas. (BNA) 1338, 1339 (D. Kan. 1994) (ruling that a plaintiff, who alleged that his employer terminated his employment because he was a man living as a woman and that his employer would not have terminated a woman living as a man, had stated a claim for sex discrimination under Title VII).

93. 608 F.2d at 331.

94. Id. See also Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that Title VII does not proscribe discrimination on the basis of effeminacy, reasoning that “[h]ere the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females . . .”); Davis v. Sheraton Soc’y Hill Hotel, 907 F. Supp. 896, 902 (E.D. Pa. 1995) (finding that harassment of a male employee because he wore an earring and carried a red satchel was discrimination based on “sexual identity” but not because of “sex”); Carreno v. Local Union No. 226, Int’l Bhd. of Elec. Workers, 54 Fair Empl. Prac. Cas. (BNA) 81, 82-83 (D. Kan. 1990) (“The test enunciated for sexual harassment should be ‘but for’ the fact of [his] sex, [he] would not have been the object of harassment. . . . In this case, the harassment suffered by the plaintiff was not encountered because of his sex; rather this harassment was encountered because of his sexual preference.”) (citations omitted).

and because an employer can more easily identify a gay man than it can a lesbian. Thus, the appellants argued, under *Griggs* such an employment practice violated Title VII. The *DeSantis* court accepted for the sake of argument that the appellants could satisfy the *Griggs* standard, but held that *Griggs* could not be applied to extend Title VII to gay people.

In finding that the disproportionate impact of educational tests on blacks violated Title VII, the Supreme Court in *Griggs* sought to effectuate a major congressional purpose in enacting Title VII: protection of blacks from employment discrimination. Congress did not intend, however, to protect sexual orientation and has repeatedly refused to extend such protection. [Allowing appellants' disparate impact claim] would achieve by judicial "construction" what Congress did not do and has consistently refused to do on many occasions. It would violate the rule that our duty in construing a statute is to "ascertain . . . and give effect to the legislative will."  

The same Court of Appeals for the Ninth Circuit, in *Davis v. County of Los Angeles*, had found that a five-foot seven-inch height requirement for county firefighters had a disparate impact on Mexican-American applicants. The court held the height restriction, therefore, violated Title VII because the employer had not shown that the height requirement was job-related.

Moreover, the *DeSantis* reasoning is diametrically at odds with the reasoning supporting the majority view that an allegation of antimiscegenation discrimination by an employer states a claim under Title VII. The but-

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96. 608 F.2d at 330.
97. Id. at 330-31.
98. Id. (quoting Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)).
99. 566 F.2d 1334 (9th Cir. 1977).
100. Id. at 1341.
101. Id. at 1341-43. See also Dothard v. Rawlinson, 433 U.S. 321, 328-332 (1977) (holding that height requirements that have a discriminatory effect on women violate Title VII unless the employer demonstrates "a manifest relationship to the employment in question") (quoting *Griggs*, 401 U.S. at 432). Compare with *DeSantis*, 608 F.2d at 333 (Sneed, J., dissenting) (arguing that use of "homosexuality as a disqualification for employment" disproportionately impacts males states a Title VII claim under *Griggs*).
102. Indeed, in *Griggs* the Supreme Court did not hold that Congress, in enacting Title VII, intended to protect those without a high school education. The Court's holding was straightforward: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.
103. See Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 891-92 (11th Cir. 1986); Erwin v. Mister Omelet of Am., 54 Fair Empl. Prac. Cas. (BNA) 1456, 1459 (M.D.N.C. 1991) (involving a "romantic involvement," rather than a marriage); Reiter v. Center Consol. Sch. Dist., 618 F. Supp. 1458, 1460 (D. Colo. 1985) ("Discriminatory employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII."); Whitney v. Greater N.Y. Corp. of Seventh Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (involving a "casual social relationship" rather than a marriage). The EEOC also takes the position that an employer violates Title VII by discriminating against an employee because of his association with people of a different race. See EEOC decision 71-1902, 3 Fair
for theory of discrimination is applied in these miscegenation/interracial association cases even though "whether dealing with [blacks] or [whites] the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the [other race]." 104. "The underlying rationale in these cases is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with." 105

By parallel reasoning, a plaintiff should possess a cause of action for discrimination when he 'alleges that he has been discriminated against on the basis of a homosexual relationship, desire, or sex act that would not have been sanctioned had the focus of his relationship, desire, or act been a person of the sex different from his own. 106 Thus, sexual orientation discrimination fits easily within the but-for theory of sex discrimination: but for his sex, a gay man would not be discriminated against for having an erotic or romantic attraction toward a man. 107 The inconsistency of the courts' reasoning from sexual orientation to miscegenation/association is illustrated by the hypothetical employer that has discriminated in employment against a white man who has a black lover. If the employer discriminated against the employee because his lover is of a different race, the employee may maintain a cause of action under Title VII. However, if the employer discriminated against the employee because his lover is of the same sex, Title VII does not apply.

Empl. Prac. Cas. (BNA) 1244, 1244 (1971) ("[E]mployer violated Title VII by discharging Caucasian female employee because of her race, it appearing that employee's dating a Negro was at least a factor in her discharge."); EEOC decision 71-909, 3 Fair Empl. Prac. Cas. (BNA) 269, 269 (1970) ("[E]mployer violated Title VII by discharging Caucasian employee because of his friendly association with Negro employees").

104. DeSantis, 608 F.2d at 331.

105. Reiter, 618 F. Supp. at 1460. See also Parr, 791 F.2d at 891-92 ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."); Gresham, 586 F. Supp. at 1445 (expressly applying a "but-for" analysis); Whitney, 401 F. Supp. at 1366 ("Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was 'discharge[d] . . . because of [her] race.'").

106. See Baehr v. Lewin, 852 P.2d 44, 48-49 (Haw. 1993) (holding that statute allowing mixed-sex marriages but not same-sex marriages discriminates on the basis of sex and, thus, violates equal protection clause of Hawaii constitution, unless the state can demonstrate that the statute is narrowly drawn to further a compelling interest). See also Loving v. Virginia, 388 U.S. 1, 7-8 (1967) (holding that statute criminalizing miscegenation discriminates on the basis of race and violates Equal Protection Clause of the Fourteenth Amendment); Marcosson, supra note 40, at 4-6 & n.24 (arguing that "[b]ecause discrimination based on interracial marriage states a Title VII claim it cannot be argued that the method of constitutional interpretation used in Loving distinguishes it from the statutory construction appropriate for Title VII").

107. See Marcosson, supra note 40, at 9-10 ("If we agree that sexual orientation discrimination treats men and women differently in the same way that antimiscegenation laws treat blacks and whites differently, then such policies employ gender classifications, and they are barred by Title VII even if in 1964 Congress did not foresee that anti-gay discrimination was included.").
The language of Title VII proscribes on its face all sex discrimination; therefore, courts may not legitimately exempt from Title VII's coverage sex discrimination relating to romantic or physical attractions unless "there is 'clearly expressed legislative intention' contrary to that language, which would require [the court] to question the strong presumption that Congress expresses its intent through the language it chooses."\(^{108}\) There is no such limiting language relating to sexual orientation in the relevant legislative history of Title VII.

The prohibition against employment discrimination based on "sex" was offered as a floor amendment to Title VII in the House of Representatives one day before the House approved Title VII.\(^{109}\) The House debate on the amendment fills a mere eight pages of the Congressional Record.\(^{110}\) The Senate did not debate the provision at all.\(^{111}\) Thus, the courts "are left with little legislative history to guide [them] in interpreting the Act's prohibition against discrimination based on 'sex'."\(^{112}\)

Courts have gazed into this void, however, and they have seen a reflection of their own heterosexism and homophobia: because a presumptively heterosexist and homophobic Congress did not expressly address employment discrimination against gay people *qua* gay people, it must not have intended to protect gay people from such discrimination. In this way, the courts have illustrated the danger to gay people in judicial exercise of a power of questionable legitimacy "to narrow statutory texts, insofar as to make them more precisely tailored to the purpose that the Court per-

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109. See 110 Cong. Rec. 2577-84 (1964) (remarks of Representatives Smith, Tuten, Andrews, and Rivers). The amendment was offered in the hope that its adoption ultimately would defeat passage of Title VII in its entirety. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986); Francis J. Vaas, *Title VII: Legislative History*, 7 BOSTON C. INDUS. & COM. L. REV. 431, 441-42 (1966). Indeed, Representative Howard Smith, who successfully proposed the amendment to Title VII that added the prohibition of "sex" discrimination, voted against Title VII in its entirety the next day. See 110 Cong. Rec. 2804 (1964).

110. See 110 Cong. Rec. 2577-84 (1964).

111. Claypoole, *supra* note 4, at 1165 (concluding that "[t]he small amount of legislative history that does exist shows that Congress did not intend to create a remedy for most of the situations that now fall under the definition of sexual harassment").

112. *Meritor*, 477 U.S. at 63-64; *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991). There is in fact no support in the legislative history for inclusion of sexual harassment as a form of sex discrimination. See Epstein, *supra* note 4, at 357.
ceives."¹¹³ Such an exercise enables courts to project their own heterosexism and homophobia onto Congress and the laws that Congress enacts.¹¹⁴

Having so projected a heterosexist and homophobic intent onto Congress, courts should at least consistently refuse to apply the differences approach to employment discrimination across the spectrum of same-sex contexts. Courts should find that the same (heterosexist) Congress that must not have intended (as demonstrated by its silence) to protect gay people from discrimination in employment also must not have been concerned with same-sex sexual harassment. The failure of courts to rule consistently in this area will result in the imposition of relatively greater liability for the employer of a gay sexual harasser. This increased exposure to liability, coupled with de jure immunity for the employer who refuses to employ a gay person, provides a powerful incentive to the employer, all other factors being equal, to prefer to employ the non-gay candidate over the gay candidate.¹¹⁵

The conclusion that recognition of a cause of action for same-sex sexual harassment will disadvantage gay people in this way is necessarily based on the premise that an employer’s actual liability for an act of same-sex sexual harassment would exceed the employer’s actual liability for a comparable act of mixed-sex sexual harassment. The following Part sets forth an argument that supports this premise.

¹¹³. See Rose v. Rose, 481 U.S. 619, 640 (1987) (Scalia, J., concurring). See also I.N.S. v. Cardoza-Fonesca, 480 U.S. 421, 452-54 (1987) (Scalia, J., concurring in the judgment) ("Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); Union Bank v. Wolas, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."); Marcosson, supra note 40, at 9 (citing Justice Scalia’s theory of statutory interpretation in support of the proposition that congressional intent in enacting Title VII is “somewhat irrelevant” in deciding whether sexual orientation discrimination is actionable under Title VII).

¹¹⁴. There is Supreme Court precedent for the proposition that Congress did not mean what it said in enacting Title VII and for the proposition that courts are free to disregard the explicit language of the statute in order to give effect to the “true intention” of Congress. In United Steelworkers v. Weber, 443 U.S. 193 (1979), which presented a challenge by white workers to an employer and union plan that reserved 50 percent of the openings in a craft-training program for black employees, the Court rejected a “literal construction” of Title VII citing to the “familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” Id. at 201 (quoting United States v. Church of the Holy Trinity, 143 U.S. 457, 459 (1892)). In upholding the challenged set-aside program, the Court examined the legislative history of Title VII and found that an interpretation of Title VII that forbade “affirmative action” would be contrary to the purpose of the statute. Id. at 201-02.

In his dissent, Justice Rehnquist pointed out that the plain language of Title VII “flatly prohibited” racial discrimination in favor of blacks, id. at 228, and presented ample evidence from the legislative history that congressional supporters of the legislation intended to outlaw all race discrimination by covered employers. Id. at 230-239.

III

The Reasonable Heterosexist Standard

A. The Reasonable Person as a Community Norm

In 1992, Gonzalo Herrera filed suit under California law against The Advocate, a gay-oriented magazine, alleging that his male supervisor had subjected him to unwanted sexual advances, lewd physical contact and sexually explicit language. At first, The Advocate’s publishers defended against the lawsuit by arguing that same-sex sexual harassment was not actionable under California law. The publishers later ordered their attorneys to withdraw that defense after gay activists criticized the magazine for adopting a litigation strategy adverse to the best interests of the gay community.116

The premise of those activists who criticized The Advocate should be rejected; recognition of a cause of action for same-sex sexual harassment would not be a civil rights gain for gay people. Instead, recognition of such a cause of action would serve as an additional means for non-gay people to regulate the sexual behavior of gay people.117

This outcome is rooted in the supposedly objective nature of one of the elements of the prima facie claim for hostile environment sexual harassment. Harris v. Forklift Systems, Inc.118 established that there is both an objective prong and a subjective prong to the hostile environment sexual harassment claim:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.119

In his concurrence in Harris, Justice Scalia warned of the danger posed by this “reasonable person” standard in sexual harassment litigation:

As a practical matter, today’s holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. One might say that

116. See Garry Abrams, Rough Water Ahead for The Advocate?, L.A. TIMES, Jan. 28, 1993, § E, at 1 (noting that The Advocate was withdrawing its controversial defense “[t]o avert its potentially biggest embarrassment”); LPI Changes Stance In Same-Sex Harassment Case, FOLIO, Mar. 15, 1993, at 16 (stating that The Advocate “incurred the wrath of many homosexual activists because of the initial stance”).

117. See Grose, supra note 41, at 377, 397 (arguing against “the natural reaction of feminist, lesbian, queer theory, and progressive legal scholars and advocates . . . to attempt to force same-sex sexual harassment cases into the ambit of Title VII’s protection against workplace discrimination” because “[a]llowing the state to regulate same-sex sexual harassment would strengthen the state’s power to ‘define acceptable sex’”).


119. Id. at 21-22.
what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.\textsuperscript{120}

The danger that Justice Scalia recognized is compounded for the gay civil defendant accused of same-sex sexual harassment because the reasonable person is, in theory and in practice, a non-gay person with a heterosexist world view.\textsuperscript{121} After all, the reasonable person standard is nothing more than a means for comparing the collective norm of the jury with the defendant's behavior in question:

The traditional concept of the neutral reasonable person standard . . . reflects a kind of social consensus, 'a personification of a community ideal of reasonable behavior, as determined by the fact finder's social judgment.' As a practical matter, this means that when the trier of fact is a judge, the 'community ideal of reasonable behavior' will be what the judge's own experience reflects, and when the trier of fact is a jury of citizens, reasonableness will reflect a consensus based on the jurors' collective experience and common wisdom. Thus, the reasonable person is the trier of fact, who can only be expected to rely upon his or her own perspective as a participant and representative of the community at large in deciding what is reasonable.\textsuperscript{122}

As such, the reasonable person standard is ideally suited for subordinating sexual minorities who do not conform to the majority's norms.\textsuperscript{123}

Feminist scholars have long argued that the reasonable person standard devalues or ignores altogether the experiences of women, thereby exacerbating gender inequality.\textsuperscript{124} MacKinnon, for example, has theorized that "ordinary" women and "ordinary" men differ with respect to the sexual attitudes and behaviors that they find offensive. The ordinary man might be stimulated by a comment coming from a woman that the ordinary woman

\textsuperscript{120} Id. at 24 (Scalia, J., concurring).

\textsuperscript{121} See Robert B. Mison, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 CALIF. L. REV. 133, 160 (1992) ("[W]hen the reasonableness standard is blind to sexual orientation, the presumption of sexual identity is almost invariably heterosexual.").


\textsuperscript{123} See Naomi R. Cahn, Symposium, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 CORNELL L. REV. 1398, 1431, 1435 (1992) (arguing that while the reasonable person appears to provide a neutral standard, in actuality it incorporates subjective beliefs that subordinate non-dominant groups). See also Johnson, supra note 122, at 639 ("[R]easonableness' aids the legal system in its attempt to reconcile the tension between individual autonomy and community harmony by providing an objective means of superimposing community standards upon individual behavior.") (citing Robert Unikel, Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 N.W.U.L. REV. 326, 329-30 (1992)).

\textsuperscript{124} See MACKINNON, supra note 2, at 144.
would find offensive coming from a man.\textsuperscript{125} For this reason, some commentators have called for the adoption of a corrective "reasonable woman" standard in sexual harassment litigation.\textsuperscript{126}

In the sexual harassment context, the argument for the adoption of a "reasonable woman" standard lost much of whatever force it had when Congress amended Title VII in 1991 to provide for a right to a jury trial when the plaintiff seeks compensatory or punitive damages.\textsuperscript{127} The finder of fact who applies the reasonable person standard in Title VII litigation is no longer a federal judge who, given the composition of the federal judiciary, is far more likely to be male than female. Now, a jury consisting of both men and women will apply the standard.\textsuperscript{128} Thus, to the extent that men and women differ in their perception of what behavior is offensive to the reasonable person, the female perspective will be represented on the jury and will be incorporated into the construction of the reasonable person standard.

In contrast, a gay defendant's fate in a same-sex sexual harassment lawsuit is likely to rest in the hands of a wholly non-gay jury.\textsuperscript{129} Even worse, it is probable that those non-gay jurors will have had little or no exposure to openly gay people. Consequently, those jurors will have a difficult time incorporating the perspective of the gay defendant into their construction of the reasonable person standard, even if they were inclined to consider the gay defendant's perspective. The social and cultural segregation of gay America from non-gay America, even more than the statistical probability that gay people will be excluded entirely from the jury, makes the plight of the gay sexual harassment defendant qualitatively different from, and more precarious than, that of the female (but non-gay) sexual harassment litigant.

\textsuperscript{125} Id. at 171.

\textsuperscript{126} See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the "reasonable woman" standard in hostile environment sexual harassment litigation).


\textsuperscript{128} Johnson, supra note 122, at 622 (rejecting adoption of a "reasonable woman" standard and arguing, inter alia, that most Title VII sexual harassment cases will be tried to a jury consisting of both women and men "and there is no compelling reason to presume that such juries will be incapable of fairly deciding such cases using an objective and gender-neutral standard of reasonableness); Saba Ashraf, Note, The Reasonableness of The 'Reasonable Woman' Standard: An Evaluation of Its Use In Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act, 21 Hofstra L. Rev. 483, 501 (1992).

\textsuperscript{129} See generally Edward O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States (1994) (analyzing a survey of a representative sample of American adults between the ages of 18 and 60, conducted by the National Opinion Research Center at the University of Chicago, finding that only 2.8% of men and 1.4% of women identify themselves as gay or lesbian).
Rejecting the assertion, by advocates of a "reasonable woman" standard in sexual harassment litigation, that men "systematically ignore the experiences of women," one commentator has argued:

Most men spend much of their lives in the company of women, whether mothers, mates, daughters, sisters, friends, teachers, co-workers, or colleagues, and the idea that such relationships are built essentially on dominance, sexual enmity, and the absence of any understanding or appreciation for the experiences of women is patent nonsense.

Most non-gay Americans, however, spend little or no time in the company of openly gay people. Moreover, this social and cultural segregation exists precisely because it is desired by much of non-gay America. Indeed, much of non-gay America views the existence of openly gay people in the mainstream of society as a grave threat to the welfare of their (presumably heterosexual) children and to the maintenance of the values and culture they cherish. Most of what little contact exists between gay and non-gay America, therefore, is based on enmity and misunderstanding. Thus, the reasonable person standard is likely to reflect only the mores of the heterosexual community and to ignore the perspective of the gay same-sex sexual harassment defendant.

B. A Kiss Is Just a Kiss?

While the reasonable person standard ignores the perspective of alleged harassers who are gay, the standard is not indifferent to the homosexual nature of their alleged acts. Indeed, recognition of a cause of action for same-sex sexual harassment will not, as some suggest, merely apply to gay people the rules by which non-gay people must live. The non-gay/heterosexual majority is not so willing to allow gay people to live by the rules it

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130. See Ellison, 924 F.2d at 879.
131. Johnson, supra note 122, at 630; Ashraf, supra note 128, at 503 ("It bears emphasis that the community which determines the conduct expected of the reasonable person is a community made up of women and men, not just of men.").
133. See Mison, supra note 121, at 162-63, 205-06 (arguing that because anti-gay bias is so widespread, selection of a jury even from a cross-section of the community is likely to result in a "homophobic jury").
134. See Pritchett v. Sizeler Real Estate Management Co., 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) ("To conclude that same gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws that govern the work place conduct of heterosexuals.").
writes for itself, and it is not so willing to live by the rules it imposes on gay people. Because contemporary America is profoundly, unapologetically heterosexist,\textsuperscript{135} recognition of a cause of action for same-sex sexual harassment will result in gays being held to a higher standard of behavior than non-gays.\textsuperscript{136}

This argument is not premised on the notion that cultural differences between gay people and non-gay people give rise to divergent conceptions of which sexual comments or behaviors are out of bounds in the work place and, thus, actionable as sexual harassment.\textsuperscript{137} Rather, any given sexual comment or behavior will be judged more harshly by the finder of fact when the claimed victim of alleged harassment is of the same sex as the alleged harasser than when he is of the other sex. This result reflects a common manifestation of heterosexism—an activity that is condoned or even valued when engaged in by a non-gay person is condemned when engaged in by a gay person.\textsuperscript{138} The refusal by non-gay people to recognize same-sex marriage exemplifies this phenomenon.\textsuperscript{139}

To appreciate this point, it is helpful to consider the types of behavior that courts have held not to be actionable sexual harassment in the mixed-sex context. In \textit{Weiss v. Coca-Cola Bottling Co. of Chicago},\textsuperscript{140} the plaintiff alleged that her male supervisor "asked her for dates, called her a 'dumb
blonde,’ put his hand on her shoulder several times, placed signs stating ‘I love you’ in her work area, and attempted to kiss her in a bar.”

“Taking all of [her] allegations as true, [the Court of Appeals for the Seventh Circuit held that] her claim does not meet the standard for actionable sexual harassment.” In general, isolated or infrequent unwelcomed kissing, touching or propositioning will not alone give rise to a cause of action for sexual harassment in the mixed-sex context because such behavior would not interfere with the reasonable person’s work performance.

Yet, one should expect that identical behavior in a same-sex context would give rise to liability under Title VII for sexual harassment. This expectation arises from repeated experiences with heterosexist intolerance of homosexual displays of affection or sexuality.

A recent example of such heterosexist intolerance of homosexuality gained national and international attention last year. On March 6, 1995, Jonathan Schmitz appeared on an episode of “The Jenny Jones Show” that focused on secret admirers. The television show’s producers had invited Schmitz to appear on the show to meet his own secret admirer. The secret admirer turned out to be Schmitz’s gay neighbor, Scott Amedure. After Amedure revealed his attraction to Schmitz and the viewing audience, Schmitz expressed disinterest and stated that he was “completely heterosexual.” Three days later, Schmitz went to Amedure’s home and shot him twice with a 12-gauge shotgun, killing him instantly. He then dialed “911” and told the rescue operator that he had just killed a man “because he [expletive]d me on national television.”

Mr. Schmitz’s actions appear to betray his own homophobia.

The reactions to the murder by the police and the prosecutor in the county where

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141. Id. at 337.
142. Id.
145. For a fuller recitation of the facts surrounding this incident, see Megan Garvey, The Aftershock of Shock TV, Wash. Post, Mar. 25, 1995, § D, at 1. Mr. Schmitz has pleaded not guilty to the murder. Id.
146. Mr. Schmitz has admitted that he murdered Amedure but has made clear through his attorney that he holds dear certain moral values: “My client is not a homosexual and takes great offense to
the murder occurred, as well as by the national media, betray systemic heterosexism. The police, the prosecutor, and the media all placed partial blame for the murder at the feet of “The Jenny Jones Show.”

The local sheriff remarked that “[i]t’s a sad commentary on how individual’s lives can be altered by the quest for Nielsen ratings.”147 The prosecutor assigned to the case blamed the murder in part on the television show’s humiliation of Mr. Schmitz: “In my view, ‘The Jenny Jones Show’ ambushed this defendant with humiliation. And in retaliation, this defendant ambushed the victim with a shotgun.”148

Media commentators throughout the nation widely condemned “The Jenny Jones Show” for “humiliating” Schmitz by providing Amedure with a platform from which he could inform Schmitz of his attraction to him.149 These commentators took for granted that a non-gay man would feel humiliated by another man’s attraction to him; unfortunately, the commentators failed to explore the sources or implications of that “natural” humiliation.150

The media director of the National Gay and Lesbian Task Force was left to theorize:
The sole reason that everyone is discussing Schmitz’s “humiliation” with such ease is that homophobia is so common in this country as to be considered normal. It does not need to be directly stated; it is just a given that Schmitz would feel humiliated. While the media focus their attention on the excesses of talk shows and the discomfort their guests feel, very little is being said about how Scott Amedure felt as he lay dying.\footnote{151}

The direct relevance of Scott Amedure’s murder to a discussion of the reasonable person standard in same-sex sexual harassment litigation is demonstrated by the cases in which a murder defendant asserts the “homosexual advance defense.”\footnote{152} A killing that otherwise would be murder may be reduced to manslaughter if the defendant can demonstrate that he killed in the heat of passion stoked by an adequate provocation.\footnote{153} An asserted provocation may be found adequate only if it would be sufficient to cause the “reasonable person” to lose his self-control and kill in the heat of passion.\footnote{154}

Tellingly, triers of fact have found that a reasonable person might have been provoked to kill in response to a homosexual advance.\footnote{155} \textit{Schick v. State}\footnote{156} is a typical case. In \textit{Schick}, the defendant, Timothy Schick, was charged with murdering Stephen Lamie. Schick confessed to police that he was hitchhiking when Lamie stopped his car to give him a ride. According to the confession, after Schick asked Lamie where he could get a “blow job,” Lamie offered to accommodate him personally. Lamie then drove

\footnotesize{\textsuperscript{151} Robin Kane, \textit{Perspective On Homophobia: Hate, Not Humiliation}, Is at Fault, L.A. TIMES, Mar. 16, 1995, § B, at 7. See also David W. Dunlap, \textit{Shameless Homophobia And The ‘Jenny Jones’ Murder}, N.Y. TIMES, Mar. 19, 1995, § 4, at 16 (While “hands were being wrung about the state of television talk shows . . . the circumstances of the killing seemed almost to be taken for granted, as if there was nothing all that mysterious or confounding about so violent a response to an expression of unrequited affection—man to man.”); Jennifer Loven, \textit{Talk Show Debate Misses Point}, ROCKY MOUNTAIN NEWS, Apr. 9, 1995, § A, at 3 (reporting that gay activists argue that “fear and revulsion toward gays . . . got Scott Amedure killed,” not “The Jenny Jones Show”); Deb Schwartz, \textit{Who Really Killed Scott Amedure, And Why Are Journalists Protecting Him?}, VILLAGE VOICE, Mar. 28, 1995, at 21 (“By concentrating on the power of the press and the machinations of Schmitz’s hetero male psyche, the media managed to skip around the contextual messiness of the murder—homophobia, the prevalence of anti-gay and -lesbian violence, and the easy availability of guns.”).}

\footnotesize{\textsuperscript{152} See Mison, \textit{supra} note 121, at 147 (“When [a murder victim’s] behavior is alleged to be homosexual in character, prevailing cultural climate more than normative and objective elements on which manslaughter theory is dependent affects the ultimate verdict.”).}

\footnotesize{\textsuperscript{153} See Rollin M. Perkins & Ronald N. Boyce, \textit{Criminal Law} 85 (3d ed. 1982). See also State v. Flowers, 574 So. 2d 448, 453 (La. Ct. App. 1991), \textit{cert. denied}, 580 So. 2d 666 (La. 1991) (“Manslaughter is defined in part as a homicide which would be first or second degree murder but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection.”).}

\footnotesize{\textsuperscript{154} Perkins & Boyce, \textit{supra} note 153, at 98-99.}

\footnotesize{\textsuperscript{155} The “homosexual advance” defense is distinct from the “homosexual panic” defense. The latter is an insanity or diminished capacity defense which asserts that the criminal defendant should be absolved of liability because an alleged homosexual advance by the victim purportedly caused the criminal defendant to lose his capacity to distinguish between right and wrong. Mison, \textit{supra} note 121, at 135 n.6.}

\footnotesize{\textsuperscript{156} 570 N.E.2d 918 (Ind. Ct. App. 1991).}
Schick to a baseball field. After the pair exited the car, Lamie attempted to grab Schick’s penis. Schick then beat and kicked Lamie to death and stole his wallet. The jury found Schick not guilty of murder but guilty only of voluntary manslaughter.157

It is inconceivable that a jury would excuse a man for murdering a woman because the woman offered to perform oral sex on the man and attempted to grab his penis. Indeed, there has never been a case where a heterosexual advance has been used to mitigate murder to manslaughter.158 One reasonably can infer that the finder of fact in Schick found provocation sufficient to cause a reasonable person to lose his self-control and commit homicide, not in the victim’s offer to perform oral sex on the defendant or in the victim’s attempt to touch the defendant’s genitals, but rather in the homosexual nature of those acts. Thus, it should be expected that the finder of fact in a same-sex sexual harassment suit will find “objectively hostile” acts that the reasonable person would not find abusive if performed in the mixed-sex context.159 Recognition of a cause of action for same-sex sexual harassment under Title VII, therefore, should be understood to be an effective means for the non-gay majority to penalize all types of homosexual erotic or romantic behaviors that would not be penalized in a mixed-sex context.160

157. Id. at 921-22. See also Mills v. Shepherd, 445 F. Supp. 1231, 1233-34 (W.D.N.C. 1978) (defendant convicted of manslaughter where defendant pushed the victim out of the victim’s car, chased him, knocked him down, kicked him to death and stole his car, ring, watch and bracelet; the jury accepted the defense’s contention that the defendant had killed in the heat of passion after being provoked by the victim’s grabbing at the defendant’s “privates” and “making a ‘pass’ at him”); Flowers, 574 So. 2d at 449-51 (defendant convicted of manslaughter where the victim was stabbed seventeen times and the defendant claimed that the victim had undressed and tried to physically force himself on the defendant); Wills v. State, 636 P.2d 372, 373-74 (Okla. Crim. App. 1981) (defendant convicted of manslaughter in the second degree where he kicked to death a man who had made a homosexual advance towards a third party).

158. See Mison, supra note 121, at 134 n. 4.

159. Cf. Kathryn Abrams, supra note 71, at 2515 (attributing the receptivity of courts to claims of gay sexual harassment, “in part to the straight male fear of the spectral homosexual predator”).

160. For reasons quite apart from the heterosexist Harris reasonable person standard and the economic incentive it would provide to employers to discriminate against gay people, Carolyn Grose has also concluded that recognition of same-sex sexual harassment under Title VII will disadvantage gay people. See Grose, supra note 41. Grose’s analysis is obverse to my own as it focuses not on the distinction between same-sex and mixed-sex sexual harassment, but rather on the distinction between same-sex harassment that relates to a gay sexual orientation—perhaps better labeled “anti-gay harassment”—and same-sex harassment that does not:

[I]f courts decide to extend Title VII’s protection to victims of same-sex sexual harassment, courts will have to ask which kind has occurred: harassment based on sexual orientation or harassment based on gender. Plaintiffs who are gay or appear to be gay will lose because the court will view their harassment as “based on sexual orientation” and therefore not covered by Title VII. Plaintiffs who are straight or appear to be straight will win because the court will view their harassment as “based on gender” and therefore covered by Title VII.

Id. at 388. Thus, Grose concludes:

[A]ny attempt to use Title VII to regulate some same-sex interaction in the workplace will send a dangerous mixed message: it is okay to make a workplace miserable for a dyke or a
IV
A PROPOSAL TO AMELIORATE "REASONABLE HETEROSEXISM,"
GIVEN RECOGNITION OF A CAUSE OF ACTION FOR
SAME-SEX SEXUAL HARASSMENT UNDER
TITLE VII

I have argued that recognition of a cause of action under Title VII for
same-sex sexual harassment will unfairly disadvantage gay people because
the reasonable person standard, by which allegedly harassing behavior is
measured, is heterosexist. As noted in Part II, however, a number of courts
already have recognized such a cause of action. Those jurisdictions which
allow a claim for same-sex sexual harassment to be brought under Title VII
should take steps to minimize the anti-gay effects of the "reasonable heter-
osexist" standard.

A. The Futility of Eliminating the Jury

Until passage of the Civil Rights Act of 1991, which expressly pro-
vides that either the plaintiff or the defendant in a Title VII lawsuit may
demand a jury trial whenever the plaintiff seeks compensatory or punitive
damages,161 a jury trial was not available under Title VII.162 Title VII it-
self, as originally enacted, was silent on the issue. However, courts inter-
preting the Civil Rights Act of 1964 reasoned that there was no right to a
jury trial under Title VII because the remedies available to a successful
plaintiff—principally back pay and injunctive relief—were equitable in na-
ture, and historically a jury was not available in suits in equity.163 A

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faggot, or for someone who looks like a dyke or a faggot, but it is not okay to make a work-
place miserable for a straight man or woman. That message is unacceptable.

Id. See also id. at 385-86 ("Reading [Title VII] to encompass [a cause of action for same-sex sexual
harassment] would perpetuate an atmosphere of homophobia in the workplace, while providing no pro-
tection for the victims of such an atmosphere.").

Moreover, Grose argues that where the alleged same-sex harasser is gay, courts will presume that
the alleged harassment would not have occurred "but for" the sex of the putative victim. Thus, such
harassment will be found actionable under Title VII. Id. at 391-92, & notes 83-84. Where the alleged
same-sex harasser is heterosexual, however, courts will presume that the alleged harassment had nothing
to do with the gender of the putative victim. Thus, Title VII will be found not to apply. Id. Cf.
McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (finding no cause
of action for same-sex hostile environment harassment exists under Title VII where both the alleged
victims and the accused harassers are heterosexual), cert. denied, 117 S. Ct. 72 (1996). Grose sums up
her fear as follows: 

"[W]hile a group of straight men who create a sexual environment in the workplace
targeting another man are merely boys being boys, gay men who do that would be seen as expressing
their sexuality towards that other man, and would therefore be liable for 'but for gender' discrimina-
tion." Grose, supra note 41, at n.84. Grose concludes that "applying Title VII to cases of same-sex
sexual harassment continues to privilege one form of sexuality—heterosexuality—over another—homo-
sexuality." Id. at 392.

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162. See Harmon v. May Broad. Co., 583 F.2d 410, 410 (8th Cir. 1978); Slack v. Havens, 522 F.2d
1091, 1094 (9th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301, 308-09 (6th Cir. 1975).
number of commentators have theorized that the courts interpreting Title VII in this fashion were influenced by the fear that the prejudices of jurors would nullify the Civil Rights Act.\textsuperscript{164}

Removing the objective prong of the \textit{Harris} hostile environment test—whether a reasonable person would find the work environment hostile or abusive—from the jury in same-sex sexual harassment litigation, however, should not be expected to significantly lessen the danger to gay defendants posed by the “reasonable heterosexist” standard. The danger remains because the judiciary is itself a profoundly heterosexist institution.\textsuperscript{165}

One prominent federal jurist, Judge Posner, has observed “that judges know next to nothing about the subject of sex beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened

\begin{itemize}
  \item \textsuperscript{164} See, e.g., Richard L. Neumeir, \textit{Civil Rights Act of 1991: What Does It Do? Is It Retroactive?}, 59 DEF. COUNS. J. 500, 504 (1992); Karen W. Kramer, Note, \textit{Overcoming Higher Hurdles: Shifting the Burden of Proof After Hicks and Ezold}, 63 GEO. WASH. L. REV. 404, 440 n.254 (1995) (asserting that most courts held that there was no right to a jury trial under Title VII partly because the courts believed that all-white juries could confound the purposes of the Title); Note, \textit{Practice and Potential of the Advisory Jury}, 100 HARV. L. REV. 1363, 1374-75 (1987) (“The danger of local community power has explicitly guided interpretation of jury rights under Title VII. . . . Th[e] refusal by federal judges to use jury procedure in Title VII actions has allowed them to insulate the national policy of nondiscrimination from possible nullification by the same local majorities whose discriminatory conduct the Act was designed to prevent.”).
  \item \textsuperscript{165} See Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (finding “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand”), reh’g denied, 478 U.S. 1039 (1986); People v. Saldivar, 497 N.E.2d 1138, 1139 (Ill. 1986) (involving a defendant who contended that he fatally stabbed his gay victim twice in the chest after the victim lured him to his apartment by representing that a party was going on and then made a homosexual advance; the judge, in a bench trial on stipulated facts, handed down a conviction of voluntary manslaughter and a sentence of only seven years of imprisonment); Mison, supra note 121, at 162-64 (supporting his argument that judges provide an inadequate safeguard against heterosexist juries precisely because judges also are “susceptible to bias, including homophobia” by citing to several egregiously anti-gay remarks made by judges presiding over anti-gay hate crime murder trials).
  \item See also Chicoine v. Chicoine, 479 N.W.2d 891, 896-97 (S.D. 1992). In \textit{Chicoine}, the circuit court had granted visitation rights to a lesbian mother with the restriction that no unrelated female and no gay man could be present during her children’s visits. \textit{Id.} at 892. The children’s father appealed the order to the extent that it allowed unsupervised overnight visits, arguing that his children would be harmed by exposure to the mother’s “homosexual lifestyle.” \textit{Id.} The Supreme Court of South Dakota reversed and remanded with instructions that the trial court order a home study to ensure that the children would not be “placed in an unsafe or unstable environment.” \textit{Id.} at 894.

  Justice Henderson wrote a concurrence: “For years, [the lesbian mother at hand] has followed a life of perversion . . . . [She] has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see Leviticus 18:22), she should be totally estopped from contaminating these children. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan ‘Egyptian Book of the Dead’ bespoke against it.” \textit{Id.} at 896-97 (Henderson, J., concurring and dissenting in part (footnotes omitted)).
\end{itemize}
out of the judiciary." Openly gay people have been excluded from the judiciary because of their sexual orientation. The first and still only openly gay person ever appointed to the federal bench was appointed by President Clinton in 1994. Thus, gay defendants in bench trials of same-sex sexual harassment claims still would be likely to have their fate in the hands of finders of fact with little or no exposure to openly gay people and little or no ability or inclination to incorporate the perspective of the gay defendant into their construction of the reasonable person standard.

B. The Limited Usefulness of a "Reasonable Homosexual" Standard

In response to concerns that the facially neutral reasonable person standard in sexual harassment litigation is male-biased, some courts have directed that finders of fact should focus their attention on the perspective of the alleged sexual harassment victim. The leading case advocating this approach is *Ellison v. Brady*. The *Ellison* court instructed that a focus on the victim requires an appreciation of the fact that men and women have different perspectives on arguably objectionable conduct.

For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault,

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166. Posner, *supra* note 135, at 1. Judge Posner concludes that the benefits to society that might be derived from anti-gay discrimination would be exceeded by the costs of such discrimination. *Id.* at 307-08. Judge Posner's analysis, however, epitomizes a heterosexist conception of homosexuality. *See*, e.g., *id.* at 295 (stating that if homosexuality is chosen "it ought to be repressed as firmly as possible"); 303-09 (explicating his theory of why even absent discrimination "the homosexual lifestyle" will remain "an unhappy one"); 311 (confusing homosexuality and sodomy); 412-13 (proposing, as a safeguard against pedophilia, that any man "not living as part of a heteroerosexual couple" be forbidden from adopting); 419 (implicitly accepting the premise that preventing children from becoming gay is a worthwhile goal).


168. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (acknowledging "that men and women are vulnerable in different ways and offended by different behavior"); therefore, a "reasonable person" should be of the same sex as the sexual harassment plaintiff); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 665 (D. Minn. 1991) (common question of law for Rule 23 class certification purposes is "whether a reasonable woman would find the work environment hostile"); Spencer v. General Elec. Co., 697 F. Supp. 204, 218 (E.D. Va. 1988), *aff’d*, 894 F.2d 651 (4th Cir. 1990); Radtke v. Everett, 471 N.W.2d 660, 666 (Mich. Ct. App. 1991) ("a standard which views harassing conduct from the 'reasonable person' perspective has the tendency to be male-biased and runs the risk of reinforcing the prevailing level of discrimination which the [Michigan] Civil Rights Act and title VII were designed to eliminate. [Thus, the court] adopt[ed] the 'reasonable woman' perspective [in cases with a female plaintiff to] ensure[ ] a gender-conscious review of sexual harassment").

169. 924 F.2d 872 (9th Cir. 1991).

170. *Id.* at 878.
may view sexual conduct in a vacuum without a full appreciation of the social setting of the underlying threat of violence that a woman may perceive.\(^{171}\)

Conversely, courts could attempt to overcome the heterosexist bias inherent in the reasonable person standard by directing the trier of fact to focus on the perspective of the gay defendant rather than the putative victim. An approach that focuses on the state of mind of the sexual harassment defendant rather than that of the victim would follow the more traditional use of the reasonable person standard in tort law.\(^{172}\) For example, the standard in negligence litigation focuses on the perspective of the defendant as the law demands that one who possesses skills or knowledge superior to those of the ordinary person conduct himself in consonance with such skills or knowledge.\(^{173}\)

Unfortunately, the typical trier of fact would have a difficult time adopting the perspective of the gay defendant in same-sex sexual harassment litigation. The same social and cultural segregation of gay America from non-gay America that originally gives rise, in part, to the heterosexist bias in the reasonable person standard also would make it more difficult for a non-gay fact-finder to understand the perspective of the gay defendant. A similar criticism, stated more strongly, has been made of one rationale for the reasonable woman standard: "if the true nature of sexual harassment can be seen only through the eyes and mind of a reasonable woman, how can a male trier of fact possibly be expected to reach the correct decision through the exercise of his own faculties?"\(^{174}\)

These critics overstate their argument with respect to the reasonable woman standard. Neither the Ellison court nor the courts that have followed its lead have ever endorsed the premise that men are incapable of

\(^{171}\) Id. at 879.

\(^{172}\) See Johnson, supra note 122, at 666-67 ("[T]he question of liability should depend on whether the defendant's conduct was lawful and reasonable. In this respect, the reasonable woman standard is an aberration in the law, for the question of reasonableness has traditionally served as a measure of the defendant's conduct, not the plaintiff's state of mind."). See also Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (judging reasonableness from the perspectives of both the putative sexual harassment victim and the accused harasser).


\(^{174}\) Johnson, supra note 122, at 642, 654 n.139. Johnson himself rejects what he sees as a premise of the reasonable woman standard—that men cannot understand the perspective of a female sexual harassment litigant. See id. at 654 n.139. See also Ellison, 924 F.2d at 884 (Stephens, J., dissenting) (taking issue with the premise, which was never stated by the majority, that men do not have the capacity to understand women's situation with respect to sexual harassment); Cahn, supra note 123, at 1433 (citing Rabidue v. Osceola Ref. Co., 584 F. Supp. 419 (E.D. Mich. 1984)) (relying upon a sexual harassment case where the court found egregiously anti-female alleged harassment not to be actionable as an example of a court's use of the reasonable woman standard in a manner that subordinates woman), aff'd, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); Ashraf, supra note 128, at 500 ("If male judges are now forced to apply a reasonable woman standard, how can we be so sure that they are now applying a reasonable woman's perception rather than a male-biased view of what the reasonable woman's perception is?").
understanding a female plaintiff’s perspective. Their point has been that the legal standard previously did not ask triers of fact, male or female, to try to adopt the perspective of the female sexual harassment victim, and that it would be helpful if they did try. Under the reasonable woman standard, the fact that the plaintiff is a woman is made a relevant part of the total context. Ellison merely teaches that the alleged harassing conduct should be considered in light of the characteristics of the recipient of that conduct. The reasonable victim standard merely orient the trier of fact’s thinking.

In the context of same-sex sexual harassment litigation, however, the argument that the fact finder may be incapable of empathizing with the gay defendant’s perspective has more force. As noted above, many non-gay Americans have little exposure to openly gay people. The same cannot be said of men vis-a-vis women. Therefore, the typical (non-gay/heterosexist) fact-finder will be relatively less capable of adopting the perspective of the gay sexual harassment defendant. Nevertheless, to the extent that the “reasonable homosexual defendant” standard can orient the fact-finder’s thinking closer towards the gay defendant’s perspective, it is better than the status quo.

C. The Value of a Mixed-Sex Substitution

Even if a trier of fact was able and willing to focus on the perspective of the gay same-sex sexual harassment defendant, the “reasonable homosexual defendant” standard itself would still have a heterosexist bias to the extent that the conduct of the reasonable gay defendant is measured against the sexual mores of contemporary society. Current sexual harassment law would ensure the survival of this additional heterosexist bias because the law presently directs finders of fact to factor into their reasonable person calculus the heterosexist mores of contemporary American popular culture. For example, in Baskerville v. Culligan Int’l. Co., the Court of Appeals for the Seventh Circuit found that the plaintiff’s allegations did not establish a case of actionable hostile environment sexual harassment. The court reviewed nine instances of sexual vulgarity that the plaintiff had alleged her male manager had directed toward her over a seven month period and concluded:

175. See, e.g., Ellison, 924 F.2d at 879; Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).
176. See Jolynn Childers, Note, Is There A Place for A Reasonable Woman In The Law? A Discussion of Recent Developments In Hostile Environment Sexual Harassment, 42 DUKE L.J. 854, 902 (1993) (arguing for a “reasonable victim” standard that would evaluate the offensiveness of the defendant’s alleged conduct from the perspective of the putative “reasonable victim”).
177. See Cahn, supra note 123, at 1434-35 (conceding that the reasonable woman standard “encourages judges and juries to recognize the impact of different gender ideologies on the actions of women”).
178. See supra notes 129-33 and accompanying text.
179. 50 F.3d 428 (7th Cir. 1995).
It is no doubt distasteful to a sensitive woman to have such a silly man as one’s boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the supervisor’s] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.180

Contemporary American popular culture, however, is “sex-saturated” only with heterosexual vulgarity. Although homosexual vulgarity also flourishes, it does so only in the subculture of gay ghettos. Arguably, part of the reason why homosexual expressions of sexuality do not flourish in popular culture is because there is no mass market for them. Although “sex sells,” homosexual sex does not sell as well to the heterosexual masses who prefer vulgarity of the heterosexual variety. Nevertheless, homosexual expressions of sexuality are largely absent from the popular culture because of heterosexual hostility toward any expression of gay sexuality.181 Therefore, by itself, an instruction to the finder of fact to consider the perspective of the gay same-sex sexual harassment defendant is at best only of limited utility. The fact-finder might easily conclude that no matter how timid the gay defendant’s sexual advance, he should have known better: a reasonable gay person would know that homosexuality is not tolerated outside of the gay ghetto.

To help eliminate the heterosexual bias inherent in the Harris standard, it would be far more useful to instruct the finder of fact to evaluate the actions of the gay same-sex sexual harassment defendant in the hypothetical context of a mixed-sex interaction. For example, the gay manager who comments on his male subordinate’s physical appearance would be judged as though he had commented on the appearance of a female subordinate.

180. Id. at 431. See also Waltman v. International Paper Co., 875 F.2d 468, 486 (5th Cir. 1989) (Jones, J., dissenting) (“Depictions [of sex] that were only recently regarded as taboo in movies and television are now de rigueur for programs that even children will watch. . . . Against such trends, it is quaint but also naive to rule that employers are legally required to eradicate all sexual graffiti from their establishments.”); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (“The sexually oriented poster displays had a de minimis effect on the plaintiff’s work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.”), aff’d, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).

181. See Steve Coe, ‘Home Improvement’ vs. ‘Frazier’ Possible, BROADCASTING & CABLE, July 25, 1994, at 19 (reporting that Ted Harbert, president of ABC Entertainment, estimated that the ABC television network suffered “a low six-figure loss” because advertisers withdrew their sponsorship of an episode of the television series “Roseanne” that contained a lesbian kiss); Steve Hochman, Peppers’ Peck Stirs Bushel of Controversy, L.A. TIMES, Sept. 7, 1995, § F, at 1 (reporting that nearly 100 music stores and media outlets had refused to display the October 1995 issue of “Guitar” magazine because the magazine’s cover contained a photo of two male members of the popular band “Red Hot Chili Peppers” kissing each other, and noting that in a recent Gallop poll, 60% of people surveyed stated “that they would be offended by a TV show featuring two people of the same sex kissing romantically”); John Martin, Being Gay on TV Okay, But Sexuality Isn’t, PROVIDENCE JOURNAL-BULLETIN, Jan. 16, 1996, § F, at 1 (“The pervading message of [network television] is that being homosexual is perfectly acceptable[,] however[,] there’s something inappropriate about showing homosexuals being physical or sexual.”).
Thus, the finder of fact could find a lesbian kiss, a gay caress, or a homosexual expression of attraction to be actionable under Title VII only if their mixed-sex counterparts also would "create an objectively hostile or abusive work environment."\footnote{182} Although one can imagine a scenario, such as a restroom encounter, that could not be translated into a heterosexual context without distorting the severity of the harasser's actions, reasonable parallels could be drawn.\footnote{183} With a "mixed sex substitution" instruction, the gay defendant would be judged, at least in theory, under the same rules that the heterosexual majority formulates for itself. Such equal protection under Title VII should give pause to non-gay jurors whose instincts are to proscribe expressions of homosexuality in the workplace, especially because, through stare decisis, the non-gay jurors would risk limiting their own social expression.

\section*{Conclusion}

Courts should not presently recognize a cause of action under Title VII for same-sex sexual harassment. The language of Title VII does not expressly proscribe such harassment. Nor does the legislative history of the Act indicate that Congress intended to proscribe such conduct.

Sexual harassment of a woman by another woman or of a man by another man does not involve the subjugation of one gender class by a distinct dominant gender class. Thus, same-sex sexual harassment cannot be brought within Title VII's "sex" discrimination prohibition under the inequality theory of discrimination. Moreover, recognition of a cause of action for same-sex sexual harassment under the differences approach would itself perpetuate the social inequality between the dominant heterosexual majority and the subordinate homosexual minority. The reasonable person standard in sexual harassment litigation results in greater liability for alleged sexual harassment in a same-sex context than in a mixed-sex context. This unequal treatment of gay sexuality under sexual harassment law would suppress expressions of gay sexuality directly and indirectly, both inside and outside the work place, by providing a financial incentive to employers to discriminate against gay people on the basis of their sexual orientation.

Therefore, proscription of same-sex sexual harassment should come only after Congress expressly prohibits employment discrimination on the basis of sexual orientation, removing an employer's financial incentive to discriminate on the basis of sexual orientation. In the meantime, the anti-gay effects of the reasonable person standard should be minimized by in-

\footnote{182. See 
\footnote{183. A problem less easily overcome is presented by the homophobic finder of fact who is unwilling or unable to draw a heterosexual analogy to homosexual behavior. See Mison, supra note 121, at 167 (stating that homophobia may cause juries to disregard instructions from the court).}
structing triers of fact that they may find same-sex conduct to be actionable as sexual harassment only if they find that the identical conduct in a mixed-sex context would violate the Harris standard.