

# Reconsidering Attraction in Sexual Harassment

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## TABLE OF CONTENTS

INTRODUCTION .....	102
I. ATTRACTION THEORY AND CAUSATION IN SEXUAL HARASSMENT CASES.....	105
A. <i>Proving Causation with Attraction Theory</i> .....	107
B. <i>The Rise of Attraction Theory in Sexual Harassment Doctrine</i> .....	112
II. COVERAGE GAPS AND THE FALL OF ATTRACTION THEORY .....	120
A. <i>Same-Sex Cases Based on Attraction by Gays and Lesbians</i> .....	121
B. <i>The Bisexuality Gap</i> .....	125
1. The Existence of the Bisexuality Gap .....	127
a. The “Doubting Bisexuality” Approach .....	127
b. The “If You Don’t Like the Definition Change It” Approach.....	128
c. The “Same Harm” Approach.....	129
d. The “There Might Be Causation” Approach.....	129
e. The “Proving Causation by Other Methods” Approach.....	129
f. The “Secondary Discrimination” Approach .....	130
2. The Size of the Bisexuality Gap.....	131
a. Preferential Bisexuals (Kinsey 1s, 2s, 4s, or 5s): Attraction-Based Conduct Consistent with Preference .....	133
b. Preferential Bisexuals (for Example, Kinsey 1s, 2s, 4s, or 5s): Attraction-Based Conduct Contrary to Preference.....	136
3. The Significance of the Bisexuality Gap.....	137
C. <i>Harassment Based on Motivations Other Than Sexual Attraction</i> .....	139
D. <i>Practical Issues in the Application of Attraction Theory</i> .....	144
1. Proving Attraction.....	144
2. Proving Monosexuality .....	145
a. How Plaintiffs Can Prove Monosexuality .....	145
(1) Self-Reporting by Harassers.....	146
(2) The Harasser’s Sexual History .....	148
(3) The Fact of an Attraction-Based Conduct .....	149
b. Presumptions Regarding Sexual Orientation.....	151
(1) Arguments for a Presumption of Monosexuality.....	151
(2) Arguments Against a Presumption of Monosexuality .....	154
(3) A Bilateral Presumption of Monosexuality .....	155
E. <i>Summary: The Significance of Attraction Theory’s Coverage Gaps</i> .....	157
III. POTENTIAL NORMATIVE CRITIQUES OF ATTRACTION THEORY .....	157
A. <i>Inequalities Resulting from Coverage Gaps</i> .....	157
1. Unequal Treatment of Victims .....	157
2. Unequal Treatment of Harassers .....	159

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a. Rule of Law Issues .....	159
b. Potential for Evasion of Liability .....	160
B. <i>Accounting for Power</i> .....	162
1. The Effect of Attraction Theory on Perceptions of Legal Actors.....	164
2. Public Perceptions: The Narrative Appeal—or Lack of Narrative Appeal— of Attraction Theory.....	167
C. <i>Burdening Sexual and Other Minorities</i> .....	168
D. <i>Privacy and Proof of Monosexuality</i> .....	170
1. Protecting Privacy by Presuming Monosexuality.....	171
2. Discovery and Procedural Protections for Privacy .....	172
IV. THE EFFICACY OF ALTERNATIVE THEORIES OF CAUSATION .....	173
CONCLUSION.....	175

### INTRODUCTION

A battle is being fought over how to conceptualize sexuality in the workplace—a battle with critically high stakes for sexual harassment plaintiffs. One side, which tends to be associated with the feminists of the late 1970s and early 1980s, sees workplace sexuality as a manifestation of sexual desire or attraction.<sup>1</sup> The other side, consisting of the vast majority of modern or “second-generation” feminists,<sup>2</sup> sees workplace sexuality as an expression or manifestation of gender-based power dynamics.

The attraction-based view was highly influential in shaping the early development of sexual harassment law. However, in modern times, at least within the academy, the attraction-based view has fallen into extreme disfavor and the power-based view has achieved ascendance nearly to the point of orthodoxy.<sup>3</sup> Within the academy the attraction-based view is almost universally regarded as problematic at best, or backward and archaic at worst. Modern scholars either attack the attraction-based view, or they ignore it.<sup>4</sup> Among those that attack it, some might deign to keep the

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1. The early feminists actually offered up several theories of workplace sexual conduct, including sophisticated theories based on conceptions of sex- and gender-based dominance and power, as well as theories based on attraction. *See, e.g.*, CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). However, the theory that the early courts adopted from this work—and, hence, the theory that tends to be associated with the early feminists—is one based on sexual attraction.

2. Professor Schwartz lists Kathryn Abrams, Anita Bernstein, Katherine Franke, and Vicki Schultz as examples of second generation feminists. David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1700 (2002).

3. *See Doe v. City of Belleville*, 119 F.3d 563, 588 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998) (“Harassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser.”); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 820 (1991) (indicating that sexual harassment is about men exercising power over women); Schwartz, *supra* note 2, at 1721 (“It has long been broadly acknowledged ‘that men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire.’”) (quoting Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 743 (1997)); *see also* MACKINNON, *supra* note 1, at 1 (“Central to the concept [of sexual harassment] is the use of power derived from one social sphere to lever benefits or impose deprivations in another.”).

4. *E.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998) (attacking attraction-based view); Franke, *supra* note 3, at 740-47 (same); Estrich, *supra* note 3, at 820 (same); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (ignoring attraction-based view).

attraction-based view within the arsenal of weapons available to fight sexual harassment. However, these writers treat this view as an embarrassment—something to be tolerated only for its potential usefulness in persuading unsophisticated judges, juries, and laypersons to support plaintiffs in harassment cases, but certainly not a paradigm to be analyzed seriously.<sup>5</sup> Others advocate discontinuing the use of the attraction-based view altogether.<sup>6</sup>

As a result of this treatment, the attraction-based view seems to have entered a death spiral. Despite the fact that courts have been relying on this view for over twenty years, the attraction-based paradigm has been completely under-analyzed. This under-analysis has resulted in confusion and frustration in trying to apply this paradigm. Confusion and frustration have fueled criticism of the attraction-based view. And this criticism, now to the point of derision, has tainted the attraction-based paradigm to the point where no one will engage in any serious analysis of it.<sup>7</sup> And so it continues.

Outside of the academy, courts and practitioners continue to rely on the attraction-based view.<sup>8</sup> However, as a result of the academy's derision of this view, as well as the confusion and frustration that surround it, courts and practitioners are under increasing pressure to reduce or discontinue their reliance on it. At least one influential judicial opinion has criticized the attraction-based view,<sup>9</sup> highlighting the possibility that the barrage of academic criticism may ultimately bury this view in the courts as it has in the law journals.

The stakes in this battle between the power-based paradigm and the attraction-based paradigm are twofold. At one level, the power-based theorists' attack on the attraction-based paradigm is a struggle to enrich the conceptual understanding of sexual harassment. Supporters of the power-based view fear that an attraction-based view trivializes the personal experience and social significance of sexual harassment, and may fail to provide a compelling narrative as to why we should be concerned about sexual conduct in the workplace.

But this battle is also a practical one. Proponents of the power-based view are largely motivated by fears over doctrinal limits that seem inherent to an attraction-based view of sexual harassment. By tying sexual harassment law to a power-based view, these commentators hope to extend the reach of sexual harassment law to cover

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5. *E.g.*, Franke, *supra* note 3, at 730 (“At best, [the attraction-based view] is an evidentiary short cut that Title VII plaintiffs may use in order to prove sex discrimination.”); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1212 n.125 (1998) (Arguing that if sexual harassment law were to abandon the attraction-based view, this might “result[] in a characterization that may not adequately convey to legal decisionmakers and the public the complex, multifaceted nature of harassment.”).

6. *E.g.*, Lucetta Pope, *Everything You Ever Wanted to Know About Sexual Harassment but Were Too Politically Correct to Ask (Or, the Use and Abuse of “but for” Analysis in Sexual Harassment Law Under Title VII)*, 30 SW. U. L. REV. 253, 293 (2001) (urging courts to “relinquish[]” modes of proof based on attraction).

7. *See, e.g.*, Franke, *supra* note 3, at 734 (referring to the attraction-based view as “a reversion to the primordial ooze of Title VII doctrine” and noting that “[t]he law and our culture have evolved beyond that rather primitive view.”).

8. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Sexual harassment plaintiff can rely on sexual attraction to prove that conduct occurred “because of” sex.).

9. *See Doe v. City of Belleville*, 119 F.3d 563, 586 (7th Cir. 1997) (noting that attraction-based theory “betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok—in other words, that the harasser is attracted to the victim and simply cannot restrain himself”).

cases that might escape its purview if it were based on an attraction-based view. However, this Article will argue that, by marginalizing or abandoning the attraction-based view, sexual harassment law will likely cover *fewer* cases.

This Article challenges the prevailing academic wisdom and defends attraction-based theory against its critics. In so doing, it undertakes two projects. First, this Article will offer, for the first time, a detailed analytical account of the role of the attraction-based view in sexual harassment law. This account will show that the attraction-based paradigm emerged more as a (largely successful) response to the practical needs of sexual harassment plaintiffs than as a response to the conceptual needs of a social movement. However, this Article will argue that, understood in this context, the attraction-based view poses little threat to the compelling conceptual story told by the power-based theorists. Second, this Article criticizes the power-based view, which, in a mirror image to the attraction-based view, is conceptually powerful, but practically limited. Put simply, an abandonment of the attraction-based paradigm in sexual harassment law would leave many litigants without a viable claim for relief and would leave the courts with the difficult job of developing practical doctrines to implement a theory not developed with an eye towards the realities of legal practice.

This Article will proceed in four parts. Part I explains the significance of the attraction-based view to the law of sexual harassment. This Part demonstrates not only how the attraction-based view provides a theoretical basis for treating workplace sexual conduct as a form of sex discrimination,<sup>10</sup> but also how this view works in practice to provide relief for victims of workplace sexual conduct in a streamlined and effective manner. This Part articulates in a comprehensive manner how an attraction-based paradigm can be used to construct a theory by which plaintiffs can show that workplace sexual conduct has occurred “because of” sex (“discriminatory causation” or “causation”), as required by most anti-discrimination laws.<sup>11</sup> It calls the method of proving discriminatory causation “attraction theory.” This Part also explains the powerful influence attraction theory has exerted on the development of sexual harassment law.

Part II explores the limits of attraction theory. First, this Part explains the essential criticisms offered by power-based theorists. In particular, despite its potential usefulness in many cases, power-based theorists have argued that attraction theory will not work to prove causation (1) in cases involving bisexual harassers (the “bisexuality gap”); and (2) in cases where sexual conduct is motivated not by sexual attraction, but rather by something else, such as animosity or a desire to humiliate or exclude the victim (the “nonattraction gap”).<sup>12</sup> This Part then explores a practical gap that may

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10. When anti-discrimination laws use the word “sex,” they are generally understood to refer to the biological state of being either male or female. *See, e.g.*, *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996) (Niemeyer, J., concurring) (prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (same); *Doe*, 119 F.3d at 600 (Manion, J., dissenting) (“Thus, when Congress outlawed discrimination ‘because of such individual’s sex,’ it proscribed differentiating among individuals because of the employee’s status as a man or woman.”). Accordingly, this Article will use the word “sex” in this fashion. Readers should be careful to avoid confusion between “sex” in this sense, and “sexuality”—that is, sexual behavior or conduct.

11. *E.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000). *See* Schwartz, *supra* note 2, at 1697 (discussing problem of causation); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir.) (same), *aff’d* 123 S. Ct. 2148 (2003).

12. For criticisms of an attraction-based view that seem to be based on concerns about the

result in attraction theory from difficulties in proving attraction and sexual orientation (the conditions necessary for the use of attraction theory). This Part argues that even though these theoretical and practical coverage gaps are real, they are not as large as modern scholars have tended to suppose. Moreover, the practical gap from difficulties in proof could be largely eliminated through the use of a presumption regarding sexual orientation in *all* attraction-based cases, as opposed to the presumption currently applied by the courts, which only applies to opposite-sex cases. In any event, this Part concludes, none of these gaps are so large as to render attraction theory useless or to justify the abandonment of the theory altogether.

Part III examines the normative criticisms that might be leveled at attraction theory. It will conclude that, while attraction theory does pose some normative problems, few of these are insurmountable—and none would appear to justify leaving certain plaintiffs in sexual harassment cases without a remedy, which is what will likely occur if we forego the use of attraction theory.

Part IV turns to the power-based theories, concluding that they are riddled with practical limitations and are actually inferior to attraction theory as a vehicle for providing relief. In particular, this Part explains that there are likely to be a set of cases in which attraction theory will work to prove causation but in which a power-based theory will be difficult or will not work. In these cases foregoing the use of attraction theory, as many of the second-generation feminists seem to urge, could easily result in leaving plaintiffs without a remedy.

#### I. ATTRACTION THEORY AND CAUSATION IN SEXUAL HARASSMENT CASES

In the late 1970s, feminist theorists, led largely by Catherine MacKinnon, began to explore the problem of sexual conduct in the workplace. These writers articulated the idea that such conduct was problematic, not merely as a matter of sexual morality or

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non-attraction gap, see Estrich, *supra* note 3, at 840-42 (noting that sexual harassment doctrine based on attraction fails to account for power dynamic between men and women in the workplace); Franke, *supra* note 3, at 740-42 (understanding sexual harassment as being based on desire in terms of sexual desire “is wrong for many of the same reasons that it is a mistake to understand rape as primarily a crime of passion or lust”; that is, because it fails to account for the fact that it involves “power expressed through the idiom of sex”); Schultz, *supra* note 3, at 1689 (focus on attraction tends to blind the observer to gender-based power dynamic).

For criticisms of the attraction-based view that seem to be motivated by concerns about a bisexuality gap, see Franke, *supra* note 3, at 737 (observing that attraction theory will not work where the harasser is not exclusively heterosexual or exclusively gay/lesbian); Estrich, *supra* note 4, at 819 n.18 (criticizing sexual harassment doctrine based on attraction as failing to cover harassment by bisexual harasser); Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals under Title VII*, 27 RUTGERS L.J. 383, 406-08 (1996) (same); Sandra Levitsky, Note, *Footnote 55: Closing the “Bisexual Defense” Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1036 (1996) (same); Steiner v. Showboat Operating Corp., 25 F.3d 1459, 1464 (9th Cir. 1994) (fearing that sexual harasser may avoid liability by claiming to be bisexual); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336-37 (D. Wyo. 1993) (same).

As will be discussed more fully below in Part III.A.2, some writers have (wrongly) used the gaps in attraction theory, particularly the bisexuality gap, as a way to attack the treatment of sexual harassment as a form of sex discrimination. *E.g.*, Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1984) (Bork, J., dissenting); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 357-58 (1992) (claiming that sexual harassment law is bankrupt because it could not be used to hold a bisexual harasser liable).

workplace productivity, but as a matter of sex equality.<sup>13</sup> They understood sexual conduct in the workplace as a manifestation of, and a significant force in maintaining, inequality between the sexes—that is, male dominance. Accordingly, these theorists sought a remedy for such conduct under anti-discrimination laws.<sup>14</sup>

However, a significant conceptual and practical gap needed to be bridged in order to find an anti-discrimination remedy for workplace sexual conduct. Virtually all anti-discrimination laws require a showing of discriminatory causation; that is, such laws require plaintiffs to prove that the conduct in question occurred “because of” a protected characteristic, such as sex.<sup>15</sup> The challenge, then, was to articulate—and be able to prove—how workplace sexual conduct can be understood as occurring “because of” sex.

Feminist theorists and litigators at the time, including Professor MacKinnon, offered up two possible approaches to showing causation: a power-based approach and an attraction-based approach.<sup>16</sup> Professor MacKinnon made clear that she preferred the power-based approach, which argued that workplace sexual conduct reflected and tended to perpetuate sex-based power imbalances at work and in society.<sup>17</sup> However, Professor MacKinnon also offered up an attraction-based approach. She suggested that, in the typical sexual harassment case of the time, in which a man made sexual advances toward a woman, a fact-finder could infer that, had the target not been female, the harasser would not have acted as he did.<sup>18</sup>

Professor MacKinnon did not provide much in the way of explanation for this conclusion. However, it is apparent that her conclusion relies on an attraction-based paradigm. The idea seems to be that males who make sexual advances toward females do so based on sexual attraction, and that, for those (heterosexual) males, such attraction would be reserved for females.<sup>19</sup>

Even though Professor MacKinnon did not elaborate on her attraction-based

13. See MACKINNON, *supra* note 1, at 215-21.

14. As will be discussed more fully in Part I.A, these theorists have been extremely successful. Under modern law, sexual harassment is almost universally treated as a form of sex discrimination. However, the flip side of this development is that, in most jurisdictions, workplace sexual harassment is not actionable in and of itself; it is actionable only as a form of discrimination based on sex. Thus, to obtain a remedy, victims of workplace sexual conduct must generally look to anti-discrimination law.

15. *E.g.*, 42 U.S.C. § 2000e-2(a). Although numerous statutes, ordinances, and other laws prohibit sex discrimination, most sexual harassment claims are brought under Title VII. Additionally, in writing and interpreting anti-discrimination statutes, it is common to look to Title VII for guidance. This Article will therefore focus on Title VII.

16. See MACKINNON, *supra* note 1, at 6. Professor MacKinnon referred to the power-based approach as an “inequality approach” and the attraction-based approach as a “difference approach.” Later writers have referred to MacKinnon’s power-based approach as an “anti-subordination” approach and her attraction-based approach as a “formal equality” or “but for” approach. *E.g.*, Franke, *supra* note 3, at 704 n.50, 705 n.53 (referring to Professor MacKinnon’s “inequality” theory as an “antisubordination” theory).

17. MACKINNON, *supra* note 1, at 6-7.

18. *Id.* at 192-93. Professor MacKinnon appears to have been quite prescient, recognizing some possible shortcomings of the attraction-based approach, and favoring the power-based approach. The fact that she also offered the attraction-based approach, which was palatable to the courts at the time, also suggests a deep understanding of realpolitik and practicality.

19. *Id.* at 199 (discussing sexual attraction); see also *id.* at 203 (referring to bisexual exception, which, as will be discussed below in Part II.B, is a product of attraction-based theory).

theory of causation, and even though she would have preferred a theory of causation grounded in a power-based view of workplace sexuality, the courts latched onto her attraction-based view.<sup>20</sup> Based on this view, the courts adopted a remedy for sexual harassment under anti-discrimination law, and proceeded to develop the law of sexual harassment.

The courts' reliance on an attraction-based view makes sense. Properly theorized, an attraction-based view can support a finding of discriminatory causation in a great many cases, including those most prevalent at the time that sexual harassment law was developed. Unfortunately, however, in nearly twenty-five years of using the attraction-based view, no one has endeavored to provide a comprehensive analysis of the link between attraction and discriminatory causation. As a result, the role of attraction in sexual harassment law has been misunderstood, the attraction-based paradigm has been subjected to unfair (as well as fair) criticism, and the law of sexual harassment has become muddled.

This Part will attempt to fill the theoretical void surrounding the attraction-based view. It will begin by demonstrating how an attraction-based paradigm can be used to show causation in certain types of sexual harassment cases. It will then show the significant power that this theory, despite its under-articulation, had in shaping modern sexual harassment law. It will also explain how the power of this theory derived, not from any compelling conceptual narrative, but as a result of its practical ability to provide a streamlined and effective way of evaluating causation.

#### A. Proving Causation with Attraction Theory

Although there are several concepts of causation in anti-discrimination law, the attraction-based paradigm relies on a concept commonly referred to as "disparate treatment."<sup>21</sup> Disparate treatment is often referred to as "intentional" discrimination, since it focuses on the intent, or motivation, of the perpetrator—that is, his or her state of mind in deciding whether to act or how to act, or in selecting a target upon whom to act.<sup>22</sup> In other words, disparate treatment is concerned with how the perpetrator made the decision in question. If a protected characteristic, such as sex, played a sufficient role in the perpetrator's decisionmaking process, the decision can be seen as having been made "because of" that characteristic.<sup>23</sup>

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20. Professor Franke suggests a reason why courts might have declined to rely on Professor MacKinnon's power-based theory: "Unfortunately, her analysis is either too complicated or too radical for most judges." Franke, *supra* note 3, at 729.

21. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 4 (Paul W. Cane et al. eds., 1996) (listing theories of causation, including disparate treatment and disparate impact); Franke, *supra* note 3, at 746 ("Sexual harassment claims usually are analyzed as disparate treatment cases.").

Because attraction theory—and sexual harassment law generally—is based on the concept of disparate treatment, this Article will focus on that concept. For an interesting discussion about the possibility of treating sexual harassment as a form of disparate impact, see Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185 (2003).

22. 1 LINDEMANN & GROSSMAN, *supra* note 21, at 10-11 ("In an individual disparate treatment case, the central question is always whether the defendant's actions were motivated by discriminatory intent.").

23. There is some question as to exactly how much of a role the prohibited characteristic must play in the decisionmaking process in order to be actionable. Is it enough that the prohibited characteristic played *any* role in the decisionmaking process? Or does the prohibited

Thus, a critical question in sexual harassment cases is: How can we see inside the harasser's decisionmaking process? How can a sexual harassment plaintiff prove that the perpetrator considered the target's sex in the decision to harass him or her?

Although perpetrators in anti-discrimination cases may occasionally admit to considering sex in making their decisions,<sup>24</sup> in cases without such admissions (most cases), plaintiffs will need some other way to get into the mind of the perpetrator. In cases involving certain types of sexual conduct, an attraction-based paradigm may be helpful in solving this problem. This paradigm can be used to construct a theory of causation that I will call "attraction theory."

Attraction theory is based on the concept that one may be able to prove what is going on in the mind of a perpetrator by examining his or her decisionmaking habits. When a person has a habit of acting in a particular way, a fact-finder may infer that the person acted in that way in the case in question.<sup>25</sup> This principle applies to proving states of mind, as well as actions.

To understand this concept, suppose that we observe H hit T, a man. From this alone we might not have much insight into H's decisionmaking process. It would be difficult to say, based on this evidence alone, that H considered T's sex in deciding to hit him—that is, that H hit T because T was a man.

However, suppose that we know that H has a habit of considering the sex of the target in deciding whom to hit. For example, in deciding whom to hit, H might tend to use the following rule of decision: If the target is a man, hit him; if the target is a woman, do not hit her. If H tends to use this rule of decision in deciding whom to hit, we could say that H has a habit of considering sex when making such decisions.

Based on such a habit, we might conclude that H considered T's sex on the occasion in question—that is, in deciding to hit a particular target. In other words, based on the knowledge that H generally considers sex in deciding whom to hit, we might infer that H considered T's sex in deciding to hit T. This concept—proving

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characteristic need to have been a "but for" cause of the final decision? Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion) (holding that decision is "because of" sex where sex is "a factor" in the decision) with *id.* at 262-63 (O'Connor, J., concurring) (stating that a decision can only be considered to be "because of" sex where sex is the "but for" cause of the decision). This issue was arguably resolved by the Civil Rights Act of 1991, which amended Title VII to make clear that liability attached whenever a prohibited characteristic, such as sex, was "a motivating factor" in a decision. 42 U.S.C. § 2000e-2(m) (2000). However, even under this standard, the defense can reduce its damages by showing that it "would have taken the same action in the absence of the impermissible motivating factor"—which sounds a lot like "but for" causation. *Id.* § 2000e-5(g)(2)(B). Moreover, there is a question about whether the "a motivating factor" standard applies in all cases, or only in so-called "mixed motive" cases. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (adopting "but for" standard in so-called single-motive cases); *see also Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2150 (2003) (discussing need for direct evidence in "mixed motive" cases). For purposes of this Article, I will not try to resolve these issues. Rather, where one of my conclusions depends on which standard is adopted, I will simply note it.

24. For example, in one case I litigated, I asked a harasser who he targeted, other than the female plaintiff. His response: "Well, [plaintiff] was the only woman—except for [one other worker], who is large and who would hit me if I did that to her." In other words, the deponent admitted he only picked on small, defenseless women. In my experience, such admissions are rare.

25. *See* FED. R. EVID. 406 ("Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . .").

intent in a specific decision by reference to a habit of decisionmaking in a particular way—is well entrenched in the rules of evidence.<sup>26</sup>

Note that the habit does not have to be exclusive to be capable of producing an inference of intent. Suppose, for example, that H usually or often uses—but does not always use—a sex-based rule of decision in deciding whom to hit.<sup>27</sup> In such a case, the fact that H often or usually uses the rule might lead a fact-finder to infer that H used the rule on the occasion in question.<sup>28</sup> Nor does the habit—or the application of the habit on a particular occasion—need to be conscious: most courts and commentators seem to be in agreement that such unconscious intent is actionable.<sup>29</sup>

In anti-discrimination cases outside of the area of sexual harassment, evidence of a

26. *See id.*; *see also* FED. R. EVID. 404(b) (prior bad acts can be used to prove intent).

27. A nonexclusive habit might be the result of a rule that considers sex, but not in a way that is always outcome determinative. For example, suppose that H's rule of decision was: "If the target is a man, favor hitting him; but if the target is a woman, try not to hit her." In such a case, sex is considered, but might not be outcome-determinative. That is, T has a habit of considering sex, but in a way that is not always outcome-determinative.

Alternatively, a nonexclusive habit might be the result of a sex-selective rule of decision that is not uniformly applied. For example, H might apply a sex-selective rule of decision regarding whom to hit in all situations that do not involve self-defense. However, in situations that require self-defense, H might hit any person who is a threat, irrespective of that person's sex. In such a case, H has a habit of engaging in sex-based decisionmaking, although H does not always make decisions in accordance with that habit.

28. *See* FED. R. EVID. 401 (stating that evidence is relevant if it tends to make the existence of a material fact, such as discriminatory intent, more probable than it would be absent the evidence).

Of course, at some point, the habit in question may be applied sufficiently rarely that it might not make sense for a fact-finder to infer that it was applied in any particular instance. This Article will not address that limit.

29. *See* *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468-69 (D.C. Cir. 1987) (rejecting argument by employer that it could not be liable for disparate treatment based on unconscious application of sex-based stereotypes), *aff'd*, 490 U.S. 228, 250-52 (plurality opinion), 259 (White, J., concurring), 276-77 (O'Connor, J., concurring); *see also* *Hopkins v. Price Waterhouse*, 920 F.2d 967, 969 (D.C. Cir. 1990) (noting that this portion of the earlier *Hopkins* decision was upheld by the Supreme Court); *Lenihan v. City of New York*, 636 F. Supp. 998, 1009 (S.D.N.Y. 1985) (holding that a plaintiff "need not demonstrate that her employer bears a conscious animus or malice . . . [because] discrimination often arises out of very subtle stereotyping that may reflect a benign or protectionist view of women and their place in society"); *Sweeney v. Bd. of Trs. of Keene State Coll.*, 604 F.2d 106, 114 (1st Cir. 1979) ("One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts."). *But see* *Costa*, 299 F.3d at 854 ("Disparate treatment claims require the plaintiff to prove that the employer acted with conscious intent to discriminate.") (citing distinction between disparate treatment and disparate impact theories).

A few commentators seem less certain that existing anti-discrimination doctrines adequately account for unconscious aspects of decisionmaking. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) ("While Title VII jurisprudence gives lip service to the notion that actionable intergroup bias can be subtle or unconscious, courts have so far failed to develop doctrinal models capable of addressing such phenomena—especially subtle or unconscious race and national origin discrimination."); *see also* Schwartz, *supra* note 2, at 1697 (suggesting that if courts considered unconscious discrimination as an actionable form of intent under disparate treatment doctrine, sexuality would always be proof of causation—implying that courts do not currently do so).

habit of discriminatory decisionmaking may be difficult to develop. In such cases, plaintiffs may try to gather such evidence by comparing the perpetrator's treatment of members of one sex with his or her treatment of members of the other sex.<sup>30</sup> Such "comparative" evidence can be thought of as evidence of habit.<sup>31</sup> This evidence may show a pattern—a habit—of discriminatory decisionmaking by the perpetrator from which the fact-finder might infer that the perpetrator engaged in discriminatory decisionmaking on the occasion in question.<sup>32</sup> However, proving habit in this way can be difficult. In many cases, there may not be a large enough number of events to discern a pattern.<sup>33</sup> In other cases, the relevant work unit may be single-sex, or nearly single-sex, making it difficult to discern any sex-based patterns.

But in the area of sexual harassment, it may be possible to prove habit in a way that does not require comparative or statistical evidence—at least where the conduct in question involves the selection of potential sexual partners based on sexual attraction. This is because we often tend to think of sexual attraction as involving sex-based habits of selection—that is, sexual orientation.

Attraction theory sees sexual orientation as a habit of sex-based selection applicable to decisions regarding choices of potential sexual partners.<sup>34</sup> That is, heterosexuals are seen as being in the habit of choosing opposite-sex partners, and gays and lesbians are seen as being in the habit of choosing same-sex partners.<sup>35</sup> Thus, monosexuals—persons who are heterosexual or gay/lesbian, as opposed to bisexual—are assumed to be in the habit of engaging in sex-based selection in making decisions

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30. *E.g.*, Schwartz, *supra* note 2, at 1711 ("The stock-in-trade of intentional discrimination cases is comparative evidence; in order to succeed, one needs to show that a similarly situated employee not in the plaintiff's group (a man in a sex discrimination case brought by a woman, or a white employee in a race discrimination case by an African American employee, for instance) was treated more favorably than the plaintiff.").

31. This Part discusses comparative evidence as a way to discern patterns. Sometimes writers speak of using comparative evidence in a different way: as evidence of pretext. *E.g.*, 1 LINDEMANN & GROSSMAN, *supra* note 21, at 27. This is a somewhat different concept. The point in such cases is not to discern a pattern in decisionmaking, but to disprove that a perpetrator uses a particular type of decisionmaking—that is, to show lack of candor. This method of proving discriminatory intent via "pretext" may be relevant outside the area of attraction theory. However, it is not directly relevant to attraction theory.

32. An observed sex-based pattern in a perpetrator's decisionmaking may reflect a negative attitude toward the relevant group (in our hitting hypothetical, men). That is, we may think of the observed pattern as part of a chain of inference in which we (1) infer attitude from pattern, and (2) infer sex-based decisionmaking from attitude. But it is not clear that it is necessary to consider attitude. It may be that one can simply make inferences about the decisionmaking process from the pattern (that is, habit) itself.

33. Statistically, this can be thought of as a problem of small sample size. When the sample size is too small, it becomes difficult to determine whether what is being observed in fact represents a pattern, or whether it is merely a product of chance.

Comparative evidence and statistics are often discussed as two separate ways to prove discriminatory intent. *E.g.*, *id.* at 27. However, as this discussion suggests, statistics may really just be a method of assessing the quality of certain types of comparative evidence.

34. Joannie M. Schrof & Betsy Wagner, *Sex in America*, U.S. NEWS & WORLD REP., Oct. 17, 1994, at 74 (arguing that many people are habitually sex selective in choosing partners for sexual relations—that is, in their sexual orientation).

35. I will try to avoid the use of the word "homosexual," as, unfortunately, this term has tended to be employed as an epithet. Instead, I will use the words "gay," "lesbian," or "gay/lesbian." Because the words "heterosexual" and "bisexual" have not tended to be used as epithets, I will use those words.

regarding potential sexual partners.<sup>36</sup> Accordingly, when a monosexual harasser engages in a particular act of selecting a particular sexual partner, attraction theory suggests that the harasser acted consistently with that habit and therefore considered the target's sex in his or her decisionmaking process.

Thus, attraction theory can serve to show discriminatory causation when two basic conditions are present:

- (1) Sexual Attraction. The harassment must be motivated, at least in part, by sexual attraction; and
- (2) Monosexuality. The harasser must be either heterosexual or gay/lesbian, as opposed to bisexual.<sup>37</sup>

The second condition (monosexuality) provides evidence of a habit of sex-based selection in choosing potential sexual partners. The first condition (attraction) suggests that the habit is relevant—that is, that in the case in question, the harasser was in fact choosing a sexual partner.<sup>38</sup>

Where these two conditions exist, a target of sexual harassment can show discriminatory causation in a simple, straightforward manner. In most cases where workplace sexual conduct is based on sexual attraction, it will not be difficult to prove that fact.<sup>39</sup> Once attraction is shown, if the harasser is monosexual,<sup>40</sup> the plaintiff can rely on sexual orientation to demonstrate a habit of sex-based selection in such decisions—thereby proving discriminatory causation.<sup>41</sup>

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36. This is not to say that monosexuals choose sexual partners based solely on the basis of their sex or that bisexuals are completely indiscriminate in selecting sexual partners. It is only to say that, by definition, monosexuals take sex into account in selecting sexual partners and bisexuals do not. A heterosexual female might not be attracted to all men; but in selecting a sexual partner, she will, by definition, prefer men over women (exclusively, if she is “purely” heterosexual). Or a bisexual male might be attracted only to persons with a particular feature, such as long hair, and thus might not be attracted to all persons of either sex. However, by definition, the sex of the target is irrelevant to his selections. (The possibility of preferential bisexuals—that is, those willing to engage in sexual relations with persons of either sex, but who tend to prefer partners of a particular sex—will be discussed in Part II.B.2).

Transgenderism and transvestitism may play a role in the selection of sexual partners as well. However, these issues are beyond the scope of this Article.

37. Actually, this statement of the second condition necessary for the application of attraction theory (monosexuality) is somewhat oversimplified. As will be discussed in Part II.B.2, there is some question regarding whether monosexuality must be “pure”—or how this theory can deal with the fact that people may not be “purely” heterosexual or “purely” gay/lesbian.

38. As will be discussed below in Part II.C, sexual conduct—including sexual advances—may be motivated by sentiments other than sexual attraction. For example, some sexual advances may be motivated by a desire to demonstrate power or dominance.

39. See, e.g., *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1011 (7th Cir. 1999) (factfinder may find that conduct was based on sexual attraction where conduct consisted of explicit and implicit sexual advances).

40. Part III.D.2 will discuss the potential difficulties of knowing—or proving—sexual orientation.

41. This proposition was rejected in *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990). In *Trautvetter*, the court was concerned that a male harasser's sexual attraction toward a female plaintiff might be based on factors other than the target's sex—that is, on her personal characteristics, as opposed to characteristics peculiar to her sex. *Id.* at 1152. This argument misses the point that if the harasser tends as a general matter to be attracted to personal characteristics of women over those of men—that is, is heterosexual—such a habit might suggest that, in the case in question, the harasser considered the sex of the target in deciding she

In such cases, there is no need to offer comparative evidence or statistical evidence; no need to offer evidence of remarks made or attitudes held by the perpetrator. Causation can be proven without recourse to these types of evidence, which are often difficult to discover, inconclusive, or unpersuasive. Thus, where it is applicable, attraction theory provides a relatively simple, streamlined way of demonstrating causation in sexual harassment cases.

*B. The Rise of Attraction Theory in Sexual Harassment Doctrine*

At the time the courts first began to deal with cases involving sexual conduct in the workplace (and in the roughly twenty-five years since), attraction theory was not articulated in any kind of comprehensive manner. In fact, at the time sexual harassment law began to develop, attraction theory was not articulated at all beyond the simple conclusory assertion that, had the target been a different sex, the harasser would not have engaged in the conduct in question.

Yet, despite this dearth of analysis, attraction theory played an enormous role in early sexual harassment law, as well as in the development of that law over the subsequent twenty-five years. In fact, it would not be an exaggeration to say that this theory was responsible for the courts' initial willingness to adopt a cause of action for sexual harassment under anti-discrimination law, and for the phenomenal growth in plaintiffs' resort to this cause of action.

In early sexual harassment cases, courts struggled with the issue of causation. In traditional sex discrimination cases (outside of the area of sexual harassment), plaintiffs generally put on evidence of the perpetrator's state of mind to show causation. However, in the early sexual harassment cases, the only evidence seemed to be that a male harasser had made sexual advances toward a female target (generally accompanied by an express or implied threat).<sup>42</sup> The question, therefore, was whether this evidence was sufficient to show discriminatory causation—in other words, that the harasser had acted “because of” the target's sex.

Initially, some courts resisted the idea that there could be discriminatory causation in such cases.<sup>43</sup> For example, in *Barnes v. Train*, the court held that the plaintiff had been “discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor.”<sup>44</sup> Similarly, in *Corne v. Bausch & Lomb, Inc.*, the court saw sexual advances by a male supervisor toward a female subordinate as being based on “nothing more than . . . a personal urge.”<sup>45</sup> And in *Tomkins v. Public Service Electric & Gas Co.*, the district court opined that the harasser was “motivated by sexual desire,” as opposed to the sex of the target, and that

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was attractive.

42. *E.g.*, *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd in part, and vacated in part sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, (D. Ariz. 1975), *vacated without op.*, 562 F.2d 55 (9th Cir. 1977).

43. *E.g.*, *Tomkins*, 422 F. Supp. at 556; *Corne*, 390 F. Supp. at 163; *Barnes v. Train*, 13 F.E.P. Cases 123, 123 (D.D.C. 1974); *Costle*, 561 F.2d 983 (D.C. Cir. 1977).

Other early courts rejected Title VII claims for sexual harassment on grounds other than lack of causation. *E.g.*, *Miller*, 418 F. Supp. 233 (lack of responsibility on the part of the employer); *Corne*, 390 F. Supp. 161 (same) (alternate holding).

44. 13 F.E.P. Cases at 124.

45. 390 F. Supp. at 163.

the sex of the target was “incidental” to the harasser’s decision.<sup>46</sup> Thus, these early courts found no causation in sexual harassment cases.<sup>47</sup>

However, at this time, some feminist writers, including Katherine MacKinnon and Kerri Weisel, had articulated the outlines of attraction theory as a method of showing causation in sexual harassment cases. Their point was that in the typical sexual harassment case of the time, which involved males making sexual advances toward females, the perpetrator would not have done the same thing had the sex of the target been different—that is, had the target been male.<sup>48</sup>

Soon, courts began to pick up on this theory to find discriminatory causation in sexual harassment cases, and a cause of action for workplace sexual conduct was born.<sup>49</sup> These courts tended to see male harassers who made sexual advances toward female targets as being (1) motivated by attraction, and (2) heterosexual.<sup>50</sup> Thus, based on attraction theory, these courts were able to find that the harasser took the target’s

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46. 422 F. Supp. at 556. Having focused on sexual attraction, *Tomkins* might have found causation using attraction theory. However, the court’s reasoning seems to suffer from another flaw: It seems to reject the possibility of mixed motives—suggesting that, where a perpetrator acts based on more than one motive, the decision is not actionable, or is not actionable unless the discriminatory motive is somehow primary. The court posited multiple motives for the harasser’s actions (sexual desire and the sex of the target). Because the court seemed to assume that sexual desire was the primary motive, and the sex of the target only a secondary (“incidental”) motive, it held that there was no discrimination. As discussed above, this view appears to have been rejected by *Hopkins* and the Civil Rights Act of 1991, 825 F.2d 458 (D.C. Cir. 1987); Pub. L. No. 102-166, 105 stat. 1071 (codified at 42 U.S.C. §§ 2000e-2000e(16) (2001)), which require only that sex be “a motivating factor” in the perpetrator’s decision. A similar “primary cause” argument was made, and rejected, in *Saxbe*, 413 F. Supp. at 657.

47. Some of the early courts that rejected the possibility of causation in sexual harassment cases appear to have considered attraction theory as a way to find causation, but rejected this theory on the ground that the theory might lead to the strange result that bisexuals could then harass with impunity. For example, in *Corne v. Bausch & Lomb, Inc.*, the court noted that attraction theory “would mean that if the conduct complained of was directed equally to males [that is, if the harasser were bisexual] there would be no basis for suit.” 390 F. Supp. 161, 163 (D. Ariz. 1975); see also *Tomkins*, 422 F. Supp. at 556 (“The gender lines might as easily have been reversed, or even not crossed at all.”). As a result, these courts refused to apply attraction theory. As will be discussed more fully below in Part IV.A.2, this criticism of sexual harassment law is flawed. In any event, this position was held only temporarily by a minority of courts, and quickly gave way to the adoption of attraction theory by virtually all courts.

48. See MACKINNON, *supra* note 1, at 6; Kerri Weisel, Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 126-27 (1977). Ms. Weisel’s comment contained the articulation of the broad parameters of attraction theory; she suggested that it might be possible to infer causation (that is, that a male harasser would not have harassed another man) if it could be presumed or proven that the harasser were heterosexual. Weisel, *supra*, at 133-34. She did not explain how such an inference actually derived from the harasser’s sexual orientation (for example, by seeing sexual orientation as a habit of sex-selective decisionmaking). And because she did not like this theory’s reliance on sexual orientation, she did not analyze it any further. *Id.* Professor MacKinnon’s description of the theory was less detailed.

49. See Kenji Yoshino, *The Empistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 438 (2000) (“The impetus for [finding causation in early cases] came from feminist activists such as Kerri Weisel, who contended that desire-based harassment was sex-based harassment because an individual usually directs desire only at one sex or the other.”).

50. The propriety of these assumptions, which appear to have been based on no evidence other than the fact that a male harasser had made a sexual advance toward a female target, will be discussed below in Part III.D.2.

sex into account in deciding to harass her. Under this theory, sex was not to be seen as “incidental” to the harasser’s decision; it was seen as integral to that decision—a “but for” cause of that decision.

The first case to hold sexual harassment was actionable under Title VII was *Williams v. Saxbe*.<sup>51</sup> In discussing causation in that case, the *Saxbe* court expressly referenced the conditions for—and limits of—attraction theory. The court focused on the sexual orientation of the harasser, noting that causation could be found if the harasser was heterosexual or gay/lesbian, but not if the harasser was bisexual.<sup>52</sup> In other words, the court was focused on the second condition of attraction theory (monosexuality), as well as one of the limits of attraction theory—that is, the fact that the theory will not work to show causation where the harasser is bisexual.<sup>53</sup>

Reliance upon attraction theory is even clearer in *Barnes v. Costle*,<sup>54</sup> which is probably the most significant of the early harassment cases. In that case, the court noted that the plaintiff had made allegations from which a fact-finder could find causation: amorousness and heterosexuality<sup>55</sup>—the two conditions required for the application of attraction theory. The *Costle* court also noted that there would not be causation in the case of a bisexual harasser—a limit of attraction theory.<sup>56</sup>

Neither *Saxbe* nor *Costle* described their theory of causation as “attraction theory.” More notably, neither explained exactly why attraction theory worked to show causation. However, these courts clearly understood—even if not in a self-conscious manner—that causation could be found based on attraction and monosexuality (or, at least, heterosexuality).<sup>57</sup>

After *Costle* was decided, many other circuits simply relied on its reasoning—that is, on attraction theory—to find causation in cases involving male-to-female sexual advances. In *Tomkins v. Public Service Electric & Gas Co.*, for example, the Third Circuit relied on the *Costle* court’s reasoning to find causation (and reverse the district court decision discussed above).<sup>58</sup> In *Miller v. Bank of America*, the Ninth Circuit relied on *Costle* (and the Third Circuit’s opinion in *Tomkins*) to find causation.<sup>59</sup> In *Henson v. City of Dundee*, the Eleventh Circuit relied on *Bundy v. Jackson*, which in turn relied directly on *Costle* for its conclusion regarding causation.<sup>60</sup> And in *Horn v.*

51. 413 F. Supp. at 654.

52. *Id.* at 659 n.6.

53. As will be discussed below, *infra* Part II, this is somewhat of an oversimplification of this limit on attraction theory. The theory will work for bisexual harassers as long as they are “preferential,” as opposed to “purely” bisexual.

54. 561 F.2d 983 (D.C. Cir. 1977).

55. *Id.* at 989 n.49 (describing supervisor as allegedly “amorous” and “heterosexual”); *see also id.* at 990 (describing supervisor as being motivated by “sexual desire[ ]”).

56. *Costle*, 561 F.2d at 990 n.55.

57. As will be discussed more fully in Part III.D.2, another important feature of these cases is that they do not appear to have required any special proof that the conditions for attraction theory were present—that is, that the harassers were motivated by attraction or that they were heterosexual. Rather, these facts seemed to be assumed from the fact that a male had made sexual advances toward a female.

58. *See* 568 F.2d at 1048.

59. 600 F.2d at 212 n.1.

60. 682 F.2d 897, 904 (11th Cir. 1982) (citing *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981)). *Bundy* was a hostile environment case that relied directly on *Costle* for its conclusion regarding causation. *Bundy*, 641 F.2d at 942 n.7 (citing *Costle*, 561 F.2d at 990 n.55). *Henson* also refers to the case of the bisexual harasser which also suggests that the court was relying upon attraction theory to find causation. 682 F.2d at 904.

*Duke Homes*, the Seventh Circuit asserted, “But for [the target’s] womanhood, [the harasser] would not have demanded sex as a condition of employment.”<sup>61</sup> The only reasoning offered for this assertion was a citation to *Costle*.<sup>62</sup>

All of these earliest cases were “quid pro quo” cases.<sup>63</sup> Quid pro quo harassment occurs when a supervisor (or someone else in a position of power) makes an unwelcome request to engage in sexual relations with the target, and where the request is accompanied by an express or implied threat.<sup>64</sup> Because it is, by definition, a request to engage in sexual relations, quid pro quo harassment inevitably involves sexual advances.<sup>65</sup> Moreover, in virtually all of these early cases, the harasser was male and

61. 755 F.2d 599, 604 (7th Cir. 1985).

62. *Id.* at 604.

63. *Miller*, 418 F. Supp. 233 (male supervisor fired female employee who rejected his sexual advances); *Tomkins*, 568 F.2d 1044 (male supervisor made advances toward female subordinate accompanied by economic threats and physical force); *Costle*, 561 F.2d at 983 (female plaintiff’s job abolished after rejecting sexual advances by male supervisor); *Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev’d in part, and vacated in part sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (female plaintiff fired after spurning sexual advances by male supervisor); *see also Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated without op.*, 562 F.2d 55 (9th Cir. 1977) (male supervisor terminated two female employees who rejected his sexual advances). The term “quid pro quo” was apparently coined by Professor MacKinnon. *See Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 n.27 (1984).

64. 1 LINDEMANN & GROSSMAN, *supra* note 21, at 746 (“The essence of a quid pro quo claim is that the individual has been forced to choose between suffering an employment detriment and submitting to sexual demands.”); *see Nichols v. Frank*, 42 F.3d 503, 512 (9th Cir. 1994) (“Implicit quid pro quo harassment is . . . far more likely to take place than is the explicit variety.”).

Quid pro quo cases may involve promises rather than, or in addition to, threats. *E.g.*, *Miller*, 418 F. Supp. 233 (supervisor promised plaintiff a better job if she would be sexually cooperative and fired her when she refused). The causation issue is the same irrespective of whether the advance is coupled with a threat or a promise. Thus, here I will use the more standard definition, involving employment detriment.

Although it might be suggested that, unlike a threat, there is no harm from a promise (as long as there is no accompanying threat), one could certainly find harm in the effect such a proposition would likely have on the target. For example, a great deal of research has shown that sexual propositions in the workplace may lead to feelings of self-doubt or lack of worth, as well feelings of disgust, anger, anxiety, hurt, depression, sadness, or guilt. *See* Barbara A. Gutek, *SEX AND THE WORKPLACE* 71 (1985) (disgust, anger, anxiety, hurt, depression, sadness, or guilt); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1230 n.159 (1998) (intense self-doubt is a major theme among women who speak about their experiences of harassment); Susan Grover, *The First Stone in Retrospect: An Outsider’s Observations on The Book and Its Critics*, 11 WIS. WOMEN’S L.J. 243, 257 n.32 (1996) (book review) (discussing studies suggesting that harassment victims feel lack of self-worth); Sharyn Lenhart, M.D., *Physical and Mental Health Aspects of Sexual Harassment*, in *SEXUAL HARASSMENT IN THE WORKPLACE AND ACADEMIA—PSYCHIATRIC ISSUES* 21, 24-25 (Diane K. Shrier, M.D. ed., 1996) (discussing a 1992 study showing that sexual violation, especially harassment, causes self-doubt). Moreover, harm to the target’s dignity can be found in the fact that a request for sexual relations coupled with a promise of gain from engaging in such relations is akin to a request to engage in prostitution—and a suggestion that the target might be willing to do so. *See Insignia Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. 2000) (quid pro quo harassment violates public policy against solicitation for prostitution).

65. *See* 1 LINDEMANN & GROSSMAN, *supra* note 21, at 746 (“[A] claim of quid pro quo harassment necessarily involves unwelcome sexual advances.”).

the target was female.<sup>66</sup> Based on the fact of the advance (from which the courts were willing to infer attraction) and the male-to-female configuration (from which the courts were willing to infer heterosexuality), the courts came to routinely find causation in quid pro quo cases based on attraction theory.<sup>67</sup>

Soon, though, courts were confronted with another type of case, called a “hostile work environment” case. In such a case, there is sexual conduct, but no threat. Hostile environment harassment has come to be broadly defined, essentially as any sexual conduct in the workplace that is not quid pro quo harassment.<sup>68</sup> Hostile environment harassment may, but need not, involve sexual advances.<sup>69</sup> However, virtually all early hostile environment cases involved sexual advances—again by males against females.<sup>70</sup> Thus the courts could—and did—deal with causation in these cases in the same way that they did in the early quid pro quo cases: They applied attraction theory (and assumed that its conditions were present based on the fact of male-to-female sexual advances).<sup>71</sup>

The leading hostile environment case was *Bundy v. Jackson*.<sup>72</sup> In that case, the court concluded, “[The target] was invited [to engage in sexual relations with the harasser] only because she was a woman.”<sup>73</sup> The only explanation offered for this assertion is a citation to *Costle*<sup>74</sup>—which, as discussed above, was based on attraction theory. After *Bundy*, many courts in hostile environment cases simply cited *Bundy* to

66. *E.g.*, *Tomkins*, 568 F.2d at 1047 n.4, 1048-49; *see also* *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Miller*, 600 F.2d 211; *Costle*, 561 F.2d at 990; *Garber v. Saxon Bus. Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977); *Saxbe*, 413 F. Supp. at 654.

67. In quid pro quo cases, there are often two causation issues. The first, addressed by this Article, is whether the harasser selected the target for sexual advances based on the target’s sex. The second causation issue arises where the target rejects the sexual advance and is subjected to adverse employment action, such as termination or demotion. *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002). In such cases, it is also necessary to show that the adverse employment action occurred “because of” the rejection. If this latter type of causation is proven, the adverse employment action is seen as being “because of sex” based on a causal chain—that is, the adverse action occurred because of rejection of the sexual advance; the rejection occurred because of the advance; and the advance occurred because of the target’s sex.

68. *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2003) (“[Hostile environment harassment includes] conduct of a sexual nature . . . [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”); 1 LINDEMANN & GROSSMAN, *supra* note 21, at 781 (hostile environment harassment may be by a co-worker and does not require any threat).

69. *See* 1 LINDEMANN & GROSSMAN, *supra* note 21, at 781 (Hostile environment harassment “is not limited to sexual advances or even to sexual behavior targeted at the complainant.”).

70. *E.g.*, *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (female employee repeatedly propositioned by male co-worker; held to violate Title VII); *Henson*, 682 F.2d 897 (same); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986) (same); *B.T. Jones v. Flagship Int’l*, 793 F.2d 714 (5th Cir. 1986) (same).

71. The only difference between these early hostile environment cases and the quid pro quo cases that the courts dealt with before was that the advances in the hostile environment cases were by co-workers instead of supervisors, or were not seen as involving any threats or promises. In these cases, the courts seemed to be concerned primarily with the question of whether there was harm—not whether there was discriminatory causation.

72. 641 F.2d 934 (D.C. Cir. 1981).

73. *Id.* at 942.

74. *Id.*

find causation in hostile environment cases.<sup>75</sup>

At approximately the time that *Bundy* was decided, there occurred another important development in sexual harassment law: The EEOC, the agency charged with enforcing Title VII,<sup>76</sup> promulgated a set of guidelines regarding sexual harassment (the “Guidelines”).<sup>77</sup> These Guidelines asserted that Title VII was violated by unwelcome “conduct of a sexual nature,” where such conduct was accompanied by work-related threats (*quid pro quo*) or adversely affected the target’s work environment (hostile environment).<sup>78</sup>

There is no mention of discriminatory causation in the Guidelines. But the Guidelines seem to assume causation based largely on attraction theory. In promulgating those Guidelines, the EEOC relied on *Costle* and other cases that found causation based on attraction theory.<sup>79</sup> Moreover, at the time that the EEOC Guidelines were promulgated, almost all of the sexual harassment cases that had been litigated had involved the male-to-female-advance paradigm. As noted above, in such cases, the courts—and quite possibly the EEOC—tended to presume causation based on attraction theory.

Almost immediately, courts began to adopt and approve the EEOC guidelines. Where there was any question as to the correctness of the Guidelines, this question was generally resolved by the application of attraction theory.

*Bundy* appears to have been the first case to cite the Guidelines with approval.<sup>80</sup> And, as noted above, that case was based on attraction theory. And in *Katz v. Dole*, the Fourth Circuit accepted the EEOC Guidelines with little comment.<sup>81</sup> However, the court there remarked, “In cases involving claims of sexual harassment, on the other hand [as opposed to standard sex discrimination cases], the sexual advance or insult will almost always” be because of sex.<sup>82</sup>

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75. *E.g.*, *Moylan*, 792 F.2d at 749; *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Ferguson v. E.I. DuPont de Nemours & Co.*, 560 F. Supp. 1172, 1197 (D. Del. 1983).

76. 42 U.S.C. § 2000e (2000).

77. EEOC Guidelines, 45 Fed. Reg. 74,676 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11). As explained in *Meritor Sav. Bank v. Vinson*, “these Guidelines, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” 477 U.S. 57, 65 (1986) (quotations omitted).

78. *Id.*

79. *Id.* In addition to *Costle*, the EEOC cited *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978), *Garber v. Saxon Bus. Prods.*, 552 F.2d 1032 (4th Cir. 1977), and *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978). In *Heelan*, the court simply relies on *Costle*, and on another case that in turn relied on *Costle* and *Saxbe*. *Heelan*, 451 F. Supp. at 1388 (citing *Costle* and *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 465-66 (E.D. Mich. 1977), which in turn cites *Costle* and *Saxbe*). *Garber* is a *per curiam* case that does not discuss its reasoning in finding causation, but appears to assume causation based on the male-to-female advance paradigm. 552 F.2d at 1032.

Interestingly, *Kyriazi*, upon which the EEOC relies for its definition of hostile environment harassment, is not really a sexual harassment case. Rather, it is primarily a sex discrimination case that uses evidence of certain sexual conduct to support its conclusion that the plaintiff class had been denied promotions and other benefits because of their sex. That case does not appear to be based on attraction theory. However, it also does not appear to rely upon the sexual nature of conduct to find that the conduct was motivated by sex, and thus does not necessarily support the EEOC’s position.

80. 641 F.2d at 947.

81. 709 F.2d 251, 254-55 (4th Cir. 1983).

82. *Id.* at 255.

Perhaps the most significant early citation to the EEOC Guidelines was by the Eleventh Circuit in *Henson v. City of Dundee*.<sup>83</sup> In that case, the court cited the Guidelines, arguably with approval, for the proposition that sexual harassment could violate Title VII.<sup>84</sup> In discussing why sexual harassment could violate Title VII, *Henson* expressly relied on attraction theory:

In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment.<sup>85</sup>

Moreover, the court notes that, “there may be cases in which a supervisor makes sexual overtures to workers of both sexes” in which the conduct “would not be based upon sex because men and women are accorded like treatment.”<sup>86</sup> Thus, *Henson* was clearly based on attraction theory.

By this time, most commentators seemed to accept attraction theory as well—though still largely without any significant analysis of how it worked or what its limits might be. For example, in an influential note in the *Harvard Law Review*, the editors simply assumed causation, noting, “Unless a bisexual employer sexually harasses male and female employees alike—a situation that has yet to appear in any reported case—the sex of an employee is an implicit factor in the harasser’s choice of a victim.”<sup>87</sup>

The final development in the rise of attraction theory occurred when the Supreme Court held in *Meritor Savings Bank v. Vinson*<sup>88</sup> that sexual harassment could constitute sex discrimination. In so doing, the Court was a little cagey regarding causation. Instead of saying outright that there was causation in the case at bar, or how one could prove causation in sexual harassment cases generally, the Court said simply that, “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex”—a tautology.<sup>89</sup>

Even though the *Meritor* Court did not discuss how a plaintiff could prove causation, it clearly assumed that a plaintiff could in fact do so—and may even have assumed that the plaintiff in that case had done so. And this assumption seems to have been based on attraction theory. *Meritor*, like virtually all of the other sexual

83. 682 F.2d 897, 903 (11th Cir. 1982).

84. *Id.* Although *Henson* uses the EEOC Guidelines (as well as *Costle*) to bolster its conclusion that sexual harassment can violate Title VII, the court conspicuously adds several elements to the EEOC’s definition—including a causation requirement. *Id.* However, in *Meritor*, the Supreme Court characterizes *Henson* as being supportive of the Guidelines. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

85. *Henson*, 682 F.2d at 904 (citing *Bundy*).

86. *Id.* (citing *Costle*).

87. Note, *supra* note 63, at 1454 n.28.

88. *Meritor*, 477 U.S. at 57.

89. *Id.* at 64 (quoting *Vinson v. Taylor*, 753 F.2d 141 (1985), *aff’d sub nom. Meritor*, 477 U.S. 57 (alteration in original)). See also *id.* at 65 (“Title VII affords employees the right to work in an environment free from *discriminatory* intimidation, ridicule, and insult.”) (emphasis added); *id.* at 66 (“Nothing in Title VII suggests that a hostile environment based on *discriminatory* sexual harassment should not be likewise prohibited.”) (emphasis added); *id.* (“[C]ourts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that *discrimination* based on sex has created a hostile or abusive work environment.”) (emphasis added).

harassment cases up to that point, involved sexual advances by a male toward a female.<sup>90</sup> Below, the D.C. Circuit had held that hostile environment harassment could be discriminatory based largely on *Bundy*—that is, based on assumptions of attraction and monosexuality from the male-to-female-advance paradigm.<sup>91</sup> The Supreme Court affirmed, appearing to endorse this reasoning.<sup>92</sup> Moreover, the Supreme Court appeared to endorse the EEOC Guidelines, which, as discussed above, seemed to be based largely on attraction theory.<sup>93</sup> And the Court cited both *Henson* and *Bundy* with approval,<sup>94</sup> cases that, as discussed above, were solidly based on attraction theory. Thus, *Meritor* could be understood as a strong endorsement of the use of attraction theory—at least in the context of male-to-female sexual advances.<sup>95</sup> And, *Meritor* has been widely understood this way.<sup>96</sup>

Thus, as of 1986, when *Meritor* was decided, the courts appear to have adopted attraction theory as a method, if not *the* method, of proving causation in both quid pro quo and hostile environment sexual harassment cases. And numerous commentators, including feminists, seemed satisfied with this result.<sup>97</sup>

However, there were two problems lurking for attraction theory. First, the theory appears to have been adopted almost entirely for its practical virtues—that is, for its ability to demonstrate discriminatory causation, and therefore to provide victims of workplace sexual conduct with a remedy, in a streamlined and effective manner. This theory did not offer any compelling conceptual reason why sexual conduct in the workplace implicated anti-discrimination values. Thus, attraction theory was conceptually unsatisfying, though practically useful.

Commentators seemed willing to forgive the theory its conceptual weakness as long as it could fulfill its promise of practicality. However, the second problem lurking for attraction theory was that it contained certain practical limitations. These limitations were not apparent in most of the early sexual harassment cases involving

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90. *See id.* at 60. Actually, this is a serious understatement; the male supervisor in that case raped the plaintiff repeatedly.

91. *Vinson*, 753 F.2d at 145. The D.C. Circuit also relied on the EEOC's guidelines, which, as discussed above, appear to be based largely on attraction theory.

92. *Meritor*, 477 U.S. at 73. I say "appearing" because, as noted in the text, the Supreme Court actually sidestepped the question of causation, stating only that sexual harassment would be considered discriminatory where it was based on sex—a tautology. *Id.* at 64. However, the Court did affirm the D.C. Circuit's ruling—which included a holding on causation that assumed that the conditions for attraction theory were present based on the male-to-female-advance paradigm.

93. Schwartz, *supra* note 2, at 1723 ("[T]he *Meritor* Court broadly endorsed the EEOC Guidelines, which the Court understood in sex per se terms"—that is, as allowing causation to be assumed based solely on the existence of sexual conduct.).

94. *Meritor*, 477 U.S. at 67.

95. Additionally, *Meritor* can be (or, at least, has been) understood as endorsing the concept that the conditions required for the application of attraction theory (attraction and monosexuality)—and thus causation—can be assumed, at least in cases involving male-to-female advances, and quite possibly in all cases involving sexuality. That is, this case has been largely understood as endorsing a sexuality proxy. *See* Schwartz, *supra* note 2, at 1723 (*Meritor* "could well have been seen by lower courts as a suggestion that they might take the causation element for granted and focus their attention on the other elements of the harassment claim.").

96. *See* Schwartz, *supra* note 2, at 1723.

97. *See* Note, *supra* note 63, at 1452-54, 1454 n.28 (expressing concern with plight of women in sexualized workplaces and approval of court's adoption of anti-discrimination cause of action—which, as discussed in the text, was premised largely on attraction theory).

sexual advances by males toward females. However, they would soon become apparent as the courts began to address new types of sexual harassment cases. These limitations, or gaps, would form the primary basis for a torrent of virulent criticism of attraction theory.

## II. COVERAGE GAPS AND THE FALL OF ATTRACTION THEORY

The fall of attraction theory began when a significant number of courts and commentators came to realize that attraction theory would not work in all cases—including cases that arguably involved core types of discrimination.

Most early sexual harassment cases had involved sexual advances, or actions that courts interpreted as sexual advances, by men toward women. In such cases, courts seemed willing to presume (1) that the harassers were motivated by sexual attraction, and (2) that the harassers were monosexual (specifically, heterosexual).<sup>98</sup> Thus, the courts could apply attraction theory to find causation. However, in the next wave of sexual harassment cases, courts began to encounter fact patterns in which the conditions required for the application of attraction theory were questionable or non-existent. For example, in cases involving harassers and targets of the same sex, courts often hesitated to find attraction or monosexuality. Courts also faced cases involving bisexual harassers (that is, where the condition of monosexuality was absent), and cases in which harassers' actions did not appear to be motivated by sexual attraction.

Because attraction theory had never been comprehensively articulated and its boundaries had never been systematically explored, courts and commentators were ill-equipped to deal with these issues. When attraction theory is articulated and its boundaries explored, it becomes apparent that the first issue (same-sex harassment) is not problematic under attraction theory, and that the second and third issues (bisexual harassers and harassment not motivated by attraction) simply represent limits on the ability of attraction theory to show causation—coverage gaps.

Yet power-based theorists have seized on these issues as grounds for attacking attraction theory. The thrust of this attack is that these three issues render attraction theory ineffective as a method of showing causation.<sup>99</sup>

This Part will address these claims. Part A will argue that attraction theory is perfectly viable in same-sex cases, and that the criticisms of the power-based theorists in this area are not properly seen as criticisms of attraction theory. Parts B and C will explore the bisexuality and non-attraction gaps respectively. And Part D will address gaps that might result from the practical application of attraction theory, including difficulties that might arise from trying to prove sexual orientation. This Part will conclude that though these theoretical and practical gaps are real, and thus represent limits of attraction theory, they are not nearly so large as to render attraction theory useless as a practical matter.

### A. Same-Sex Cases Based on Attraction by Gays and Lesbians

One of the first areas in which courts and commentators experienced difficulty in applying attraction theory involved so-called same-sex harassment cases—that is,

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98. Whether these presumptions make sense will be addressed *infra* in Part III.D.2.b.

99. Power-theorist's alternative, normative critique, based on these gaps, is that these gaps result in inequities among litigants. This critique will be explored *infra* in Part III.A.

cases in which the harasser and the target were of the same sex.<sup>100</sup> Same-sex cases, like opposite-sex cases, can be broken down into two categories: those based on sexual attraction and those not based on sexual attraction. This Section will deal with attraction-based same-sex cases.<sup>101</sup> It will demonstrate that attraction theory is perfectly capable of dealing with same-sex attraction-based cases. The only real issue that arises in this area is with presumptions that the courts have applied regarding the sexual orientation of harassers—presumptions that are not mandated by attraction theory.

Critics of attraction theory have found fault in its supposedly limited ability to deal with same-sex harassment cases, even where those cases involved attraction. These criticisms have tended to point to the hesitancy of several courts to adopt a cause of action in same-sex cases. However, it is important to understand that this hesitancy arose from two distinct sources—neither of which suggests a limit on the usefulness of attraction theory.

One group of courts hesitated to provide a cause of action in same-sex cases irrespective of causation (and thus, irrespective of attraction theory). Some of these courts believed that Congress did not intend Title VII to apply to such cases.<sup>102</sup> Others feared that providing a cause of action in such cases would effectively render sexual orientation a protected characteristic under Title VII, a result they saw either as undesirable or contrary to Congress's wishes.<sup>103</sup> Both views were ultimately repudiated

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100. See Michael R. Triplett, *Sexual Orientation: Same-Sex Harassment and Gender Identity Are Hot Litigation Issues*, ABA Panelists Say, 56 Daily Labor Report (Bureau of Nat'l Affairs, Wash. D.C.) Mar. 22, 2002, at C2 (same-sex harassment is significant area of litigation).

101. Same-sex non-attraction-based cases will be addressed along with opposite-sex non-attraction cases *infra* in Part II.C.

102. *E.g.*, *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (Congress only intended to protect persons from an environment that was anti-male or anti-female.); *Garcia v. Elf Atochem*, 28 F.3d 446, 451-52 (5th Cir. 1994) (citing *Goluszek*, 697 F. Supp. 1452); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994) (agreeing with *Goluszek* "that Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender"); *Hopkins*, 871 F. Supp. 822, 834 (D. Md. 1994) (adopting reasoning from *Garcia*, *Vandeventer*, and *Goluszek*); see also *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 144-45 (4th Cir. 1996) (Murnaghan, J., dissenting) (Congress was concerned with equality between men and women; same-sex harassment not within ambit of Title VII). *But see Sardinia v. Dellwood Foods, Inc.*, No. 94 Civ. 5458 (LAP), 1995 WL 640502, at \*4 (S.D.N.Y. Nov. 1, 1995) (criticizing view of Congressional intent espoused in *Goluszek* and its progeny).

103. See, *e.g.*, *Carreno v. Local 226, Int'l Bhd. of Elec. Workers*, Civ. A. No. 89-4083-S, 1990 WL 159199, at \*3 (D. Kan. Sept. 27, 1990) ("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."); see also *Doe v. City of Belleville*, 119 F.3d 563, 567 (7th Cir. 1997) (citing district court Order at 3-4) (same), *vacated by City of Belleville v. Doe*, 523 U.S. 1001 (1998); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (Defendant argued that, to hold for same-sex plaintiff, was "in effect, to protect against discrimination on the basis of sexual orientation.").

As most courts realized, the fact that Title VII might protect a plaintiff who happened to be gay/lesbian or perceived as gay/lesbian was irrelevant. As long as the target was harassed because of his or her sex, Title VII would be violated. *E.g.*, *Rene v. MGM Grand*, 243 F.3d 1206, 1209 (9th Cir. 2002) (en banc); *Fredette*, 112 F.3d at 1510; *Johnson v. Cmty. Nursing Servs.*, 932 F. Supp. 269, 273 (D. Utah 1996) ("The fact that sexual preference may influence the sexual harassment should not be reason to diminish, let alone invalidate, the fact that a supervisor discriminated against an employee because of the employee's sex."); *Tanner v. Prima*

by the Supreme Court.<sup>104</sup> But even while these views were still viable, disagreement with them could not properly take the form of an attack on attraction theory—as attraction theory had nothing to do with the courts’ refusal to provide a cause of action in same-sex cases.

A second group of courts (including the Supreme Court) have held that same-sex cases can be actionable and that attraction theory may be used to show causation in such cases.<sup>105</sup> The problem for these courts—and the focus of critics’ attack on attraction theory—is not the applicability of attraction theory in same-sex cases. Rather, the problem concerns how a plaintiff can prove that the conditions for attraction theory (particularly monosexuality) exist.

There is no doubt that attraction theory works in same-sex cases. Where the conditions for the application of attraction theory exist, same-sex harassment is just like opposite-sex harassment. Monosexuality (in same-sex cases, homosexuality)<sup>106</sup> can be used to show a habit of sex-based selection in the choice of sexual partners, and attraction can be used to infer that the habit was germane to the case at hand. Thus, a fact-finder can infer that the harasser selected the target based on sex—that is, causation.<sup>107</sup>

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Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (“Although Title VII does not include a prohibition on discrimination based on sexual orientation, homosexuals are just as protected by Title VII’s existing protections as anyone else.”).

104. *Oncale*, 523 U.S. at 80.

105. *E.g.*, *id.*

106. As noted *supra* note 35, this Article uses the terms “gay” and “lesbian,” rather than “homosexual,” as the latter term has come to carry certain negative connotations. However, in discussing the state of being gay or lesbian, this Article will use the term “homosexuality.” This usage reflects the fact that the word “homosexuality,” which is used as a clinical term in much of the literature I address, does not seem to carry with it all of the negative connotations of the word “homosexual”—and has not tended to be used as an epithet, as has the word “homosexual.” This usage also avoids the awkwardness of the extended phrase “state of being gay or lesbian.”

107. Early opposite-sex cases apparently recognized this, stating in dicta that their reasoning (attraction theory) would apply—and causation would exist—in cases in which a gay or lesbian harasser had made sexual advances toward a person of his or her own sex. *E.g.*, *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.3-4 and accompanying text (3rd Cir. 1977). Most early commentators adopted a similar view. *E.g.*, Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 1987 COLUM. L. REV. 1258, 1259 n.13 (Title VII covers both opposite-sex and same-sex harassment).

And most courts, when faced with actual same-sex cases, had no problem applying attraction theory when they believed or were willing to assume that the harasser was gay or lesbian. *E.g.*, *Yeary v. Goodwill Indus.*, 107 F.3d 443, 447-48 (6th Cir. 1997) (“[T]his case [involving male-on-male harassment] is as traditional as they come, albeit with a twist. It is about an employee making sexual propositions to and physically assaulting a co-worker because, it appears, he finds that co-worker sexually attractive. This is a scenario that has been found actionable countless times over, when the aggressor is a male and the victim is a female. Likewise, there is no serious question that the same scenario would be actionable in the less typical case where the aggressor is a female and the victim is a male. Consequently, we find no substantive difference between either of those situations and that present here.”); *see also McCoy v. Macon Water Auth.*, 966 F. Supp. 1209 (M.D. Ga. 1997); *Fredette*, 112 F.3d at 1510; *Hopkins*, 77 F.3d at 752; *Parrish v. Washington Nat’l. Ins. Co.*, No. 89 C4515, 1990 WL 165611, at \*6 (N.D. Ill. Oct. 16, 1990); *Prescott v. Indep. Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995).

The issue in these cases has not been whether attraction theory works when its conditions (monosexuality and attraction) are shown to be present; rather, the issue has been how a plaintiff can show that these conditions are present. In opposite-sex cases, courts often simply assumed (or maybe presumed) that sexual conduct was based on sexual attraction and that the harasser was monosexual (heterosexual). Often, these assumptions were made silently.<sup>108</sup> Other courts were more candid regarding these assumptions, justifying them based on the judges' (unsupported) assumptions about "reality" or what "usually" occurs. For example, in *Hopkins v. Baltimore Gas & Electric*, Judge Neimeyer wrote:

When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is "because of" the victim's gender. This presumption is grounded on *the reality* that sexual conduct directed by a man, for example, toward a woman is *usually* undertaken because the target is female and the same conduct would not have been directed toward another male.<sup>109</sup>

However, in same-sex cases, courts have been much more hesitant to assume attraction and particularly monosexuality (homosexuality).<sup>110</sup> As Judge Ellis put it in *Tietgen v. Brown's Westminster Motors*:

In the more typical cases noted above—where a male employer subjects a woman to sexual touching, or to more harsh treatment than similarly situated males—the element of causation is self-evidently present and hence rarely disputed by the defendant. In same-sex harassment cases, by contrast, causation is much less evident and may be difficult to prove.<sup>111</sup>

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Eventually, the Supreme Court endorsed this view in *Oncale*, which held that a same-sex plaintiff could show causation where he or she could show that the harasser is gay or lesbian (and, presumably, that the harassment was motivated by attraction). 523 U.S. at 80.

108. *See, e.g.*, *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (asserting existence of attraction and monosexuality with no discussion of evidence that would prove these facts); *Tomkins*, 568 F.2d at 1047 n.4, 1048-49 (same); *Costle*, 561 F.2d at 990 (same); *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976), *rev'd in part, and vacated in part sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978) (same).

109. *Hopkins*, 77 F.3d at 752 (Neimeyer, J. concurring) (emphasis added); *see also* *Tietgen v. Brown's Westminster Motors*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (in opposite sex case, "the element of causation is self-evidently present"); *id.* at 1500-01 ("It is the essence of sexual conduct between two individuals that the one initiating or inviting the conduct normally does so because of the other's sex."). This reasoning appears to have been picked up by the Supreme Court in *Oncale*. 523 U.S. at 80 ("Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex."). *See infra* Part II.D.2.b for a discussion of whether such a "presumption of heterosexuality" makes sense.

110. Most courts in same-sex cases have focused on homosexuality, as opposed to attraction, apparently willing to assume that sexual conduct by a gay or lesbian toward a same-sex target must be motivated by attraction. Conversely, in same-sex cases where courts seemed convinced harassment was based on sexual attraction, they have been willing to infer homosexuality. Whether such inferences make sense will be addressed in Part II.D. *infra*.

111. *Tietgen*, 921 F. Supp. at 1501.

Several courts have declined to find causation where they have doubted that the harasser was gay or lesbian.<sup>112</sup> And most courts that have found causation in same-sex cases have done so only when presented with sufficient allegations (at the pleading stage) or proof (at the summary judgment or directed verdict stage) that the harasser was gay or lesbian.<sup>113</sup>

Effectively, these courts have adopted a presumption of heterosexuality. In opposite-sex cases, this works in favor of the plaintiffs. Not only is monosexuality (heterosexuality) presumed; attraction tends to be presumed as well in cases involving sexual conduct by heterosexuals toward opposite-sex targets. However, in same-sex cases, the presumption of heterosexuality serves as a significant barrier to plaintiffs. Not only is homosexuality doubted; so is attraction. As Judge Niemeyer wrote:

[W]hen the harasser and the victim are the same [sex], the presumption [regarding attraction] is just the opposite because such sexually suggestive conduct is usually motivated by entirely different reasons.

Thus, when a male employee seeks to prove that he has been sexually harassed by a person of the same sex, he carries the burden of proving that the harassment was directed against him “because of” his sex.<sup>114</sup>

Judge Ellis similarly suggested that different presumptions are warranted in same-sex cases “because the allegedly harassing conduct is often capable of being construed not only as actionable harassment, but also, and perhaps more familiarly, as mere locker room antics, joking, or horseplay.”<sup>115</sup> Thus, he noted that, unlike opposite-sex cases, where attraction would be presumed, plaintiffs in same-sex cases “must plead and prove that the alleged harasser was sexually attracted to his victim or homosexual.”<sup>116</sup>

The Supreme Court appears to have adopted a similar presumption in *Oncale v. Sundowner Offshore Services*, in which the Court stated: “The same chain of inference [that is, attraction theory] would be available to a plaintiff alleging same-sex

112. *E.g.*, *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1297 n.7 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996) (finding no evidence of causation where there was no evidence that the same-sex harassers were gay); *Parrish v. Wash. Nat'l Ins. Co.*, No. 89-C4515, 1990 WL 165611, at \*3, \*7 n.2 (N.D. Ill. Oct. 16, 1990) (finding no causation where the plaintiff did not allege that the same-sex harasser was gay).

Some courts went a step farther, holding that same-sex harassment could *only* be actionable where the harasser was gay or lesbian. *Compare* *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996), *with* *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5 (4th Cir. 1996). Such a position was tantamount to holding that the *only* way to prove causation—at least in a same-sex case—is via attraction theory. The Supreme Court (correctly) rejected this position. *Oncale*, 523 U.S. at 80.

113. *E.g.*, *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 444, 448 (6th Cir. 1997) (emphasizing that the harasser was a “well known . . . homosexual”) (alteration added); *Hopkins*, 77 F.3d at 752 (Niemeyer, J., concurring); *Sardinia v. Dellwood Foods, Inc.*, No. 94 Civ. 5458 (LAP), 1995 WL 640502, at \*6 (S.D.N.Y. Nov. 1, 1995); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 542 (M.D. Ala. 1983) (“since the evidence established the terminal manager’s homosexual proclivities, the harassment to which plaintiff complained was based upon sex”); *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981); *see also Quick*, 895 F. Supp. at 1297 n.7 (distinguishing cases where there was evidence that the harasser was gay or lesbian).

114. *Hopkins*, 77 F.3d at 752 (Niemeyer, J., concurring).

115. *Tietgen*, 921 F. Supp. at 1501.

116. *Id.* at 1502.

harassment, *if* there were credible evidence that the harasser was homosexual.”<sup>117</sup> The implication is that a same-sex plaintiff needs to present credible evidence of the harasser’s sexual orientation, while an opposite-sex plaintiff need not present any such evidence.

This presumption of heterosexuality is potentially problematic. And critics of attraction theory have spent a great deal of time attacking this presumption.<sup>118</sup> Part II.D will address the issues that arise from this presumption. However, whatever problems may be inherent in courts’ presumption of heterosexuality, these problems are not the product of attraction theory. Attraction theory merely requires either a showing or an assumption regarding sexual orientation. The theory does not suggest that sexual orientation should be assumed in some cases and not others, or that one sexual orientation should be assumed and others accepted only with proof. In terms of attraction theory, there is no reason that courts could not presume homosexuality, heterosexuality, neither, or even both. Thus, it does not make sense to attack attraction theory on the ground that, in applying that theory, courts have adopted a set of presumptions and nonpresumptions that may be problematic.<sup>119</sup>

### B. The Bisexuality Gap

Another category of cases in which courts and commentators have had trouble with attraction theory involves harassers who are—or claim to be—bisexual. This Part will demonstrate that these cases (unlike those involving same-sex harassment) represent a true gap in the ability of attraction theory to demonstrate discriminatory causation. This gap will be referred to as the bisexuality gap.<sup>120</sup>

The possibility of a bisexual harasser has long occupied both courts and theorists.<sup>121</sup> However, as long as this possibility appeared to be purely theoretical, it

117. *Oncale*, 523 U.S. at 80 (emphasis added).

118. See, e.g., Franke, *supra* note 3, at 735; Jane Gallop, *The Lecherous Professor: A Reading*, DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES, Summer 1995, at 1, 11.

119. In Part II.D.2.b, I will address the question of whether it makes sense to adopt some kind of presumption regarding sexual orientation, either as an evidentiary matter or a policy matter.

120. I use the word “gap” or “exception” to refer to a set of circumstances in which attraction theory will not work. However, as we will see, many of the writers who discuss the topic treat it as an *exemption* from liability under anti-discrimination laws. See, e.g., Charles R. Calleros, *Same-Sex Harassment, Textualism, Free Speech, and Oncale: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability*, 7 GEO. MASON L. REV. 1, 39 (1988) (talking about “[I]mmunity under Title VII for the truly indiscriminate harasser”); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 352 (1990). As I will discuss in the text, this is a mischaracterization.

121. In early cases, several courts explained in dicta that, if they were to encounter a case by a bisexual harasser, they would find no causation. The point, presumably, was to illustrate (though not articulate) attraction theory—that is, the discriminatory nature of sexual conduct (specifically, the sex-based selection of sexual partners) by monosexuals. See, e.g., *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (“Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex.”); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (“These situations, like that at bar [where a man, who was presumed to be heterosexual, made sexual advances toward a woman], are to be distinguished from a bisexual

did not seem to cause much concern for feminists. Rather, the possibility of a bisexuality gap was primarily the concern of a small group of conservatives who opposed any treatment of sexual harassment as a form of sex discrimination.<sup>122</sup> At that time, most feminists belittled the possibility of a bisexuality gap, arguing that the issue was a “straw person” argument or “law professor’s construct,” with no practical significance.<sup>123</sup>

However, in modern times it has become apparent that there really do exist bisexual harassers, or at least harassers who claim to be bisexual.<sup>124</sup> Moreover, some of the problems inherent in the issue of the bisexual harasser have appeared in the related area of the so-called “equal opportunity” harasser.<sup>125</sup>

Perhaps as a result of this newfound practical significance, or perhaps as a result of a broader normative agenda, modern feminist writers have joined the chorus of those concerned with the possibility of a bisexuality gap, using such a gap as a primary basis for their attack on attraction theory. The thrust of their argument is that this gap significantly diminishes the practical utility of attraction theory.<sup>126</sup>

Despite the fact that numerous writers have discussed the possibility of a bisexuality gap—and despite the fact that such a gap has been at the core of an ongoing debate about the viability of attraction theory, and even the viability of sexual harassment law itself—the bisexuality gap has been vastly undertheorized and largely

superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.”).

122. *See, e.g.*, *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (“It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act [Title VII], because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit.”). As will be discussed *infra* in Part IV.A.2, the existence of a bisexuality gap is not a persuasive argument against an anti-discrimination approach to sexual harassment (or against the use of attraction theory).

123. *See, e.g.*, *Henson*, 682 F.2d at 905 n.11 (referring to the case of a bisexual harasser as “exceedingly atypical”); Charles R. Calleros, *The Meaning of “Sex”: Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 77 (1995) (“purely bisexual harassment seems to be exceedingly rare”); *id.* at 78 (referring to the case of a purely bisexual harasser as “theoretical”); John J. Donahue, Review Essay, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1611 (1992) (“The case of the bisexual harasser is a law professor’s construct, not a serious basis for making policy.”); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 n.28 (1984) (describing bisexual harassment as “a situation that has yet to appear in any reported case”); *see also* MACKINNON, *supra* note 1, at 203 (suggesting the possibility of a bisexual harasser should not be a matter of concern).

124. *See, e.g.*, *Holman v. Indiana*, 211 F.3d 399, 405 (7th Cir. 2000); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1011 (7th Cir. 1999); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (defendant claiming the harasser was bisexual); *see also* *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 835 (D. Md. 1994) (plaintiff alleging that the harasser was bisexual, presumably to be able to claim attraction despite the fact that the harasser was married and had also harassed females).

125. *See, e.g.*, *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) (defendant alleging that the harasser abused both men and women). The bisexual harasser cases may be thought of as a subset of “equal opportunity” harasser cases—that is, equal opportunity harassment cases that involve sexual attraction.

126. *See infra* Part II.B.2.

misunderstood. This Part will attempt to fill this void, addressing the existence, size, and significance of the bisexuality gap in attraction theory. First, this Part will show that the gap is real—contrary to the arguments of many theorists who have attempted to resist the notion that there is such a gap. It will then address the size of the gap, concluding that the gap, while significant in some cases, is not nearly so large as to diminish the practical utility of attraction theory.

### 1. The Existence of the Bisexuality Gap

A cottage industry has arisen in debating the existence of the bisexuality gap. Let the debate end here: There *is* a bisexuality gap within attraction theory—though not within sexual harassment law itself.

This gap is a result of the conditions required for attraction theory to demonstrate discriminatory causation. One of the conditions required for the application of attraction theory is monosexuality. That is, the harasser must be either heterosexual or gay/lesbian, as opposed to bisexual. Where the harasser is bisexual, there is no habit of sex-based selection in choosing sexual partners from which a factfinder might infer causation.<sup>127</sup> Thus, in such cases, attraction theory will not be available to demonstrate causation. This is not to say that a bisexual cannot engage in sex discrimination. It is only to say that attraction theory will not work to show causation in such cases; where the harasser is bisexual, some other theory will be necessary to show causation.

Several writers have resisted the idea that there is a bisexuality gap. Some appear motivated by a desire to find causation in specific cases. Others seem motivated to defend attraction theory or even sexual harassment law itself, believing (erroneously) that such a gap would be a serious or fatal blow to the enterprise. Six basic approaches have emerged in this enterprise. This Part will briefly address each of these approaches. Although some of these approaches are more promising than others, none of these approaches seriously call into question the fact that there is a bisexuality gap in attraction theory.

#### a. The “Doubting Bisexuality” Approach

Many courts and commentators, faced with the possibility of a bisexual harasser, have simply expressed doubt that a particular harasser is in fact bisexual.<sup>128</sup> This approach does not call into question the existence of the bisexuality gap. If anything, this approach acknowledges the gap and simply tries to avoid the gap as a factual matter.

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127. It is possible, maybe likely, that bisexuals are not a monolithic group. Many social scientists believe that some bisexuals are not “purely” bisexual in the sense that they generally prefer either same-sex or opposite-sex partners. This issue will be dealt with *infra* in Part II.B.2.

128. *See, e.g., Shepherd*, 168 F.3d at 1010 (doubting the defendant’s characterization of the harasser as bisexual); *Steiner*, 25 F.3d at 1463-64 (same); *Chiapuzio*, 826 F. Supp. at 1337 (“This Court would not so much characterize Bell as a bisexual harasser, but simply as an ‘equal-opportunity’ harasser whose remarks were gender-driven.”); *see also* *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 479-80 (5th Cir. 2002) (finding that evidence of sexual advances is sufficient to give rise to an inference of monosexuality—that is, to rebut a claim of bisexuality); *Holman*, 211 F.3d at 406 (Equal Opportunity Employment Commission arguing that “the facts could show that Urich harassed Karen out of spite because he was jealous of her relationship with her husband (with whom Urich really wanted to have sexual relations) and thus was not really an ‘equal opportunity’ [that is, bisexual] harasser”).

A variation of the doubting bisexuality approach is the adoption of a presumption of monosexuality—that is, to require defendants to prove bisexuality as an affirmative defense. As discussed above, the courts have expressly adopted such a presumption in opposite-sex cases.<sup>129</sup> And, though not explicit, such a general presumption of monosexuality may explain the “doubting bisexuality” approach taken by some courts in same-sex cases.<sup>130</sup> However, this approach, like the basic doubting bisexuality approach, does not call into question the existence of the bisexuality gap. Rather, it assumes that the gap exists and tries to reduce its practical significance by shifting the burden to the defendant to prove that the case falls within the gap.<sup>131</sup>

#### b. The “If You Don’t Like the Definition Change It” Approach

A second approach that writers have taken to resist the bisexuality gap is to broaden the meaning of the phrase “because of sex” to include sexuality. Professor Donahue, for example, asserts:

Sex is both a gender and a function or activity. A bisexual individual who singles out employees for bad treatment because of their sexual attributes is concerned with sex as a function or activity. Even if the bisexual harasser violates equal numbers of men and women, it is not unthinkable to argue that each individual who is harassed is being treated badly because of their sex.<sup>132</sup>

The problem with this argument is that the courts have made it quite clear that “sex” in anti-discrimination statutes refers to biological sex—not sexual activity.<sup>133</sup> Thus, this argument does not refute the existence of a bisexuality gap in attraction theory.

#### c. The “Same Harm” Approach

A third approach that writers have taken to resist the bisexuality gap is to focus on the harm suffered by targets. These authors argue that the harm suffered by targets of sexual harassment is the same whether the harasser is monosexual or bisexual. Thus, the argument goes, targets of bisexual harassment should be treated the same as targets of monosexual harassment.<sup>134</sup>

129. *See supra* Part II.A.

130. *See* Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 822 (2002) (suggesting that courts have adopted this approach). Part II.D, *infra*, will argue that such a general presumption of monosexuality is a good idea.

131. Whether such a presumption makes sense will be addressed *infra* in Part II.D.2.b.

132. Donahue, *supra* note 123, at 1611 n.134.

133. *See, e.g., Hopkins*, 77 F.3d at 751 (holding that Title VII prohibits sex discrimination solely on the basis of whether the employee is a man or a woman); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (same); *Doe v. City of Belleville*, 119 F.3d 563, 600 (7th Cir. 1997) (Manion, J., dissenting) (“Thus, when Congress outlawed discrimination ‘because of such individual’s sex,’ it proscribed differentiating among individuals because of the employee’s status as a man or woman.”).

134. *E.g., Sandra Levitsky, Note, Footnote 55: Closing the “Bisexual Defense” Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1014-15 (1996).

The problem with this argument is that it fails to account for the causation requirement in anti-discrimination law. To make a claim of sex discrimination, a plaintiff needs to show more than just harm; the plaintiff needs to show that the harm in question occurred “because of” sex. The fact that the harm in question may have been quantitatively or qualitatively similar to harm suffered by someone else who can show causation does not itself suggest causation—it only suggests harm. Thus, this approach does not refute the existence of a bisexuality gap in attraction theory.

#### d. The “There Might Be Causation” Approach

A fourth approach that some writers have taken to resist the bisexuality gap is merely to speculate that there *might* be causation in such cases. For example, one court has suggested that “it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender,” that is, sex.<sup>135</sup> Another writer has suggested that it is possible that “a bisexual harasser harasses men because they are men, and women because they are women.”<sup>136</sup> The problem with these statements is that the authors do not explain themselves; they do not analyze the decisionmaking process. To prove causation, it is necessary to understand the decisionmaking process—that is, to show how sex is used in that process. Merely speculating that sex *might* be used in the process is not helpful. Such speculation does not seriously call into question the bisexuality gap.

The four approaches discussed above do not seriously attempt to understand the decisionmaking process of a harasser, and thus cannot effectively argue about causation in disparate treatment—which focuses on the decisionmaking process. Two additional, more promising approaches do attempt to analyze the harasser’s decisionmaking process. However, neither of these approaches relies on attraction theory to do so. Thus, neither casts doubt on the bisexuality gap in attraction theory.

#### e. The “Proving Causation by Other Methods” Approach

One promising approach to dealing with the bisexuality exception has been to argue for causation using theories other than attraction theory. For example, in an early (and prescient) piece on sexual harassment, Kerri Weisel argued that “although a bisexual supervisor may not have a sexual preference for women, he might still harass only women in response to the prevailing stereotype.”<sup>137</sup> In other words, Ms. Weisel went beyond merely speculating that a bisexual harasser might engage in sex-based selection; she suggests a mindset—stereotyping—that would represent sex-selective decisionmaking, and thus disparate treatment.<sup>138</sup> Recently, this type of mindset has received a great deal of attention as a way of demonstrating disparate treatment.<sup>139</sup> Thus, this might be a promising theory.

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135. *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (quoting *Donahue*, *supra* note 123, at 1610-11).

136. Cathleen Marie Mogan, Note, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants from Having Their Cake and Eating It Too*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 543, 574 (1992).

137. Weisel, *supra* note 48, at 137 n.63.

138. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion) (holding that stereotyping based on gender is discrimination under Title VII).

139. *See, e.g., Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001), *rev’d en banc*, 305 F.3d 1061 (9th Cir. 2002).

Other writers have suggested that causation might be proven if a bisexual harasser can be shown to have engaged in quantitatively different conduct toward men and women—that is, targeted men and women disproportionately.<sup>140</sup> Such an approach may simply be a way of showing that the harasser is not in fact bisexual—that is, a variation of the doubting bisexuality approach discussed above.<sup>141</sup> But it may also be seen as an argument that the target of a bisexual harasser may be able to show causation by reference to comparative or statistical evidence.

However, these arguments are not about attraction theory. To the contrary, these writers are suggesting ways to prove causation without using attraction theory in order to avoid the bisexuality gap in attraction theory. Thus, these arguments do not refute the bisexuality gap in attraction theory.

#### f. The “Secondary Discrimination” Approach

The last approach that writers have taken to resisting the bisexuality gap involves suggestions that the harasser has engaged in qualitatively different conduct toward men and women.<sup>142</sup> This might simply amount to an argument that the harasser is not in fact bisexual—that is, yet another variation of the doubting bisexuality approach addressed above.<sup>143</sup> Alternatively, this approach might be based on the (more promising) argument that a bisexual harasser could engage in what I call “secondary discrimination.”

Secondary discrimination is the idea that, while a perpetrator may not select targets for mistreatment based on a protected characteristic, once the targets have been selected, the perpetrator may decide how to mistreat them based on protected characteristics. For example, consider a perpetrator, H, who decides to harm all persons who stand in the way of his professional ambitions. In such a case, H has not selected targets to inflict harm upon based on race or sex, or any other characteristic that would be prohibited by anti-discrimination law; he has selected targets based solely by reference to a non-protected characteristic (the fact that the targets stand in the way of H’s career progression).

Suppose, however, that in deciding *how* to harm his targets, H chooses a *method* of harm for each target that is based on protected characteristics of the already-selected targets. For example, suppose that H decides to display lynching pictures to an African American who stands in his way, or swastikas to a Jew who stands in his way. In such a situation, the latter decision—that is, the selection of a method of harm—is based on the protected characteristic. That is, the perpetrator considers the protected characteristic to determine the method of harm to inflict on his or her already-selected targets.<sup>144</sup> In such a case, even if the harasser cannot be seen as engaging in disparate

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140. See Calleros, *supra* note 120, at 39 (suggesting bisexual harassers may harass men and women “with different frequency”).

141. See *supra* Part II.B.1.a. Alternatively, this argument may be meant to suggest that the harasser is not “purely” bisexual, as Professor Calleros argues in a later article that the bisexuality exception will only apply to “pure” bisexuals. See Calleros, *supra* note 123, at 72. This argument is addressed in Part II.B.2 *infra*.

142. See, e.g., Calleros, *supra* note 123, at 72 (suggesting a bisexual harasser might harass men and women “in such different ways or to such different degrees” as to prove causation); see also Calleros, *supra* note 120, at 39 (suggesting a bisexual harasser may “harass men and women in different ways”).

143. See *supra* Part II.B.1.a.

144. See, e.g., *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996) (holding that

treatment in choosing targets, the harasser may be shown to have engaged in disparate treatment in deciding how to treat targets once they have been chosen.

This concept might be applied to sexual harassment by a bisexual harasser. The bisexual harasser may choose targets without reference to their sex; but once a target has been chosen, the harasser may engage in qualitatively different conduct toward the target depending on whether the target is male or female. For example, a bisexual harasser may “wine and dine” men, but take a more direct approach with women. Or the harasser may engage in more demeaning conduct toward one sex than the other.<sup>145</sup>

This approach, while potentially promising in terms of suggesting a method for proving discriminatory causation in cases involving bisexual harassers,<sup>146</sup> does not involve attraction theory. Rather, like the proving-causation-by-other-methods approach, this approach suggests a method of proving causation other than attraction theory. It does not contradict the fact that attraction theory will not work in cases involving bisexual harassers.

In summary, despite numerous attempts to resist this conclusion, there exists in attraction theory a bisexuality gap.

## 2. The Size of the Bisexuality Gap

Another group of writers has acknowledged that there is, in fact, a bisexuality gap in attraction theory, but have debated the size—and thus the significance—of the gap. This debate starts from the premise that attraction theory will not work when the harasser is bisexual, and proceeds to argue over who counts as bisexual for this purpose. If the definition of bisexual were expansive, the bisexual gap would be significant, limiting the usefulness of attraction theory. But if the definition were narrow, the bisexual gap would be small, increasing the utility of attraction theory.

The debate over who counts as bisexual arises from the suggestion by social scientists that sexual orientation is not a set of three discrete categories (heterosexual, bisexual, gay/lesbian), but rather is a continuum.<sup>147</sup> More specifically, these scientists

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a dispute begun over a commission resulted in discriminatory sexual harassment).

145. This may be what Professor Calleros is suggesting when he talks about proving causation in cases involving bisexual harassers by showing that they harass men and women in “different ways” or to “different degrees.” See Calleros, *supra* note 123, at 72 (“Even a bisexual harasser can run afoul of Title VII if he or she harasses in such different ways or to such different degrees that an employee is subjected to different terms or conditions of employment based on the employee’s gender.”); see also Calleros, *supra* note 120, at 39 (“[T]he [bisexual] harasser is much more likely to harass men and women in different ways, with different frequency, or to different degrees. In any such case, the plaintiff would have the opportunity to show that the differential treatment exposed him or her to conditions of work to which members of the other sex were not subjected.”).

146. Of course, a plaintiff would presumably need to come up with some proof that the harasser engaged in secondary discrimination.

147. See, e.g., ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-55 (W.B. Saunders Co. 1948) [hereinafter KINSEY ET AL., HUMAN MALE]; Schrof & Wagner, *supra* note 34, at 74 (discussing a recent sex survey) (“[J]ust 2.8 percent of men and 1.4 percent of women say they are gay. When the question is broader, 10.1 percent of men and 8.6 percent of women either identify themselves as gay, say they have had a sexual experience with someone of the same gender or claim to have some physical attraction to members of the same sex.”). See also *Doe v. City of Belleville*, 119 F.3d 563, 589 (7th Cir. 1997) (“Few people are either entirely heterosexual or homosexual in orientation, for example—zeros or sixes on the Kinsey scale. . . . Many people who are heterosexual have had one or more homosexual experiences in

suggest, bisexuality is not monolithic. Some bisexuals might be truly indifferent to the sex of potential sexual partners. These individuals can be thought of as “pure” bisexuals. But other bisexuals, though willing to engage in sexual relations with both men and women, might have a preference for partners of one sex. These individuals can be thought of as “preferential” bisexuals.

Perhaps the best known of these social science researchers, Alfred Kinsey, has derived a seven-point scale (from 0 to 6) to describe sexual orientation.<sup>148</sup> Those who are purely heterosexual are at the 0 end of the scale, those who are purely gay/lesbian are at the 6 end of the scale. The points on the scale from 1 to 5 represent bisexuals with varying degrees of sex-based preference for sexual partners. A person who is a 1 would strongly prefer opposite-sex partners, but be attracted in some cases to same-sex partners; a 2 would have a slight preference for opposite-sex partners; a 3 would be completely indifferent; a 4 would have a slight preference for same-sex partners; and a 5 would have a strong, though not exclusive, preference for same-sex partners.<sup>149</sup> Based on the Kinsey scale, we can refer to 0s as “pure heterosexuals,” 6s as “pure gay/lesbians,” 3s as “pure bisexuals,” and 1s, 2s, 4s, and 5s as “preferential bisexuals.”

The issue for attraction theory is whether the bisexuality gap applies to preferential bisexuals (that is, Kinsey 1s, 2s, 4s, and 5s), or only to pure bisexuals (Kinsey 3s). As discussed above, attraction theory clearly works where the harasser is purely monosexual (Kinsey 0s or 6s).<sup>150</sup> It is also clear that attraction theory will not work—that is, there is a gap in attraction theory—where the harasser is purely bisexual (Kinsey 3s).<sup>151</sup> Thus, the issue is whether attraction theory works—or whether the bisexuality gap extends to—preferential bisexuals (Kinsey 1s, 2s, 4s, and 5s). Legal writers have debated—or, at least, made assertions regarding—this issue for some time now.

Some writers, including Charles Calleros, have asserted that attraction theory will work anytime the harasser is not “purely bisexual” (Kinsey 3s)—that is, that it will work where the harasser is preferentially bisexual.<sup>152</sup> Professor Calleros’s point is that the bisexuality gap is small; that because the gap only applies in cases of “purely bisexual” harassers, which he claims are “exceedingly rare,” it does not significantly reduce the utility of attraction theory.<sup>153</sup>

Other writers, however, have taken the opposite position. Professor Franke, for example, asserts that attraction theory will not work in cases involving preferential bisexuals—that the theory will only work in cases involving harassers that are “pure” heterosexuals (Kinsey 0s) or “pure” gays/lesbians (Kinsey 6s).<sup>154</sup> Similarly, Judge

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their lives, although that does not make them gay, and likewise many gay and lesbian individuals have had heterosexual experiences.”)

148. KINSEY ET AL., *HUMAN MALE*, *supra* note 147, at 638-55.

149. *Id.*

150. *See supra* Part I.A.

151. *See supra* Part II.B.1.

152. *See Calleros, supra* note 123, at 77 (arguing that attraction theory will not work where the harasser is “purely bisexual”); *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (same). Actually, these writers are not self-consciously describing a limit of attraction theory; rather, they are talking about the limits of sexual harassment law itself. However, they seem to assume that sexual harassment law is co-extensive with attraction theory.

153. Calleros, *supra* note 123, at 77-78.

154. *E.g.*, Franke, *supra* note 3, at 737 (“As a logical matter, this reasoning [attraction theory] works only in a world populated exclusively by Kinsey Ones and Kinsey Sixes, that is, people who are exclusively heterosexual or exclusively homosexual.”). Though Professor Franke refers to “Kinsey Ones and Kinsey Sixes” as being “pure” heterosexuals and

Rovner suggests that attraction theory will only apply to harassers who are exclusively heterosexual or exclusively gay/lesbian.<sup>155</sup>

The point of writers such as Professor Franke or Judge Rovner is to criticize attraction theory. As Judge Rovner put it, “Few people are either entirely heterosexual or homosexual in orientation, for example—zeros or sixes on the Kinsey scale.”<sup>156</sup> These writers assume that a small percentage of the population falls within these groups and that the utility of attraction theory is therefore extremely limited. They therefore argue that attraction theory needs to be either supplemented or discarded.<sup>157</sup>

Neither side in this debate has engaged in significant analysis. The following two Subparts will provide this analysis. They will conclude that, though neither side in this debate is completely correct, attraction theory is not as limited as its opponents have suggested. Attraction theory will sometimes work where the harasser is preferentially bisexual.

a. Preferential Bisexuals (Kinsey 1s, 2s, 4s, or 5s): Attraction-Based Conduct Consistent with Preference

Whether attraction theory will work for preferential bisexuals (or whether the bisexuality gap extends to this population) depends in large part on the degree-of-causation that is required under the anti-discrimination doctrine of disparate treatment—an issue currently debated among the lower federal courts and undecided by the Supreme Court.<sup>158</sup> There are at least four possible positions on this issue.

One position would hold that disparate treatment doctrine requires no particular degree-of-causation. That is, a plaintiff need only demonstrate that the perpetrator considered sex—that is, took sex into account—in his or her decision.<sup>159</sup>

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homosexuals respectively, she apparently means Kinsey 0s and 6s.

155. *See Doe v. City of Belleville*, 119 F.3d 563, 585, 589 (7th Cir. 1997).

156. *Id.* at 589.

157. There might appear to be a certain irony in feminists making arguments that there are large coverage gaps in attraction theory. After all, if courts were to accept these arguments, more victims of sexual harassment would fall within these gaps. Thus, victims who might otherwise prove causation through attraction theory would need to find some other way to prove causation. Second-generation feminists seem unconcerned about this possibility, presumably based on the fact that they have proposed alternative theories of causation that they hope will provide universal coverage. However, as discussed in Part IV *infra*, it is not clear how confident we should be that any theory offered so far would provide such universal coverage.

158. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848-49 (9th Cir. 2002), *cert. granted*, 537 U.S. 1099 (2003), *aff'd*, 123 S. Ct. 2148 (2003) (describing a circuit split on issues of the degree-of-causation required to prevail in a disparate treatment case and the level of proof required to shift the burden to the defendant to prove an absence of this level of causation); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 658 (2000). The Supreme Court in *Costa* addressed the type of proof necessary to obtain a “mixed motive” instruction, which seems to provide for liability based on a low level of causation, but permit defendants to avoid some damages by showing a lack of “but for” causation. *Costa*, 123 S. Ct. at 2153-55. However, the Court did not address the precise level of causation necessary under either the “mixed-motive” or “single-motive” approach, or how to determine which approach is appropriate in a particular case. This Article will not take a position on these issues; rather, it will describe the effect of the various possible outcomes of the debate on the applicability of attraction theory to preferential bisexuals.

159. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion) (observing that “gender may not be considered”); *id.* (noting that the decisionmaker may not

If such a low degree-of-causation is sufficient, then attraction theory will work for all preferential bisexual harassers. Preferential bisexuals may be seen as having a non-exclusive habit of selecting sexual partners based on their sex. That is, the habit either does not apply in all cases or does not control all cases in which it applies. But it is nonetheless a habit of sex-based selection. Accordingly, we can infer in any particular case that the harasser did consider sex. That is, we can prove a low degree-of-causation in cases involving preferential bisexuals using attraction theory.<sup>160</sup> The bisexuality gap would apply only to pure bisexuals (Kinsey 3s).

A second, intermediate position on degree-of-causation would hold that disparate treatment doctrine requires some heightened degree-of-causation (but not an outcome-determinative level of causation). That is, a plaintiff must show not only that the perpetrator considered sex in his or her decision, but also that sex played some threshold level of significance in the decisionmaking process. For example, it might be necessary for the plaintiff to show that sex played an “important” or “significant” role in the perpetrator’s decision.<sup>161</sup> However, under such an intermediate degree-of-causation requirement, it would not be necessary to show that sex played an outcome-determinative (for example, “but for”) role in the decision.

Under such an intermediate degree-of-causation requirement, an argument can be made that attraction theory would work for some, but not all, preferential bisexuals. Some bisexuals’ preference for partners of a particular sex might be so low that sex could not be thought of as sufficiently “important” or “significant” to their decisionmaking process to satisfy an intermediate degree-of-causation requirement. Such persons might be referred to as being “weakly preferential” bisexuals (perhaps roughly analogous to Kinsey 2s or 4s).<sup>162</sup> Other bisexuals, in contrast, might have a sufficiently strong preference for partners of a particular sex that sex could be seen as being sufficiently causal in the decisionmaking process. Such persons might be referred to as “strongly preferential” bisexuals (perhaps roughly analogous to Kinsey 1s or 5s). Thus, under an intermediate degree-of-causation requirement, attraction theory would work for strongly preferential bisexuals, but not weakly preferential bisexuals. That is, the bisexuality gap would apply only to pure bisexuals (Kinsey 3s) and weakly preferential bisexuals (roughly, Kinsey 2s and 4s), but not to strongly

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“take [sex] into account”); *id.* at 241 (noting that a plaintiff must show that sex was “a factor” in the decision); *see also* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2000) (stating that a plaintiff must show that sex was “a motivating factor” in the decision—a phrase used by the *Hopkins* plurality).

160. One might argue that, at some point, the harasser’s preference could become too weak to serve as evidence of habit. For example, one might suggest that attraction theory might prove a low degree-of-causation in cases involving Kinsey 1s and 5s, but not Kinsey 2s and 4s. However, this argument misses the point that a sexual orientation of Kinsey 2 or 4 is, by definition, a habit of engaging in sex-based selection. Where the habit is weak, a factfinder might conclude that it was not applied in a particular instance—that is, that the person did not act according to his or her habit. *See* FED. R. EVID. 406 (a jury *may* conclude, from evidence of habit, that a person acted in conformity with that habit on the occasion in question—suggesting that a jury might also decline to reach such a conclusion). However, that would seem to be a jury question. As long as only a low degree-of-causation is required, a jury could reasonably find causation in cases involving all types of preferential bisexuals.

161. *See, e.g., Hopkins*, 490 U.S. at 251 (plurality opinion) (noting that stereotyping played “an important part of the Policy Board’s decision”); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (stating that sex was a “significant factor”).

162. Dr. Kinsey does not appear to have tried to calibrate his categories to any particular degree-of-causation. I do so only for purposes of drawing a rough analogy.

preferential bisexuals (roughly, Kinsey 1s and 5s).

A third position on degree-of-causation would hold that a decision can only be disparate treatment where sex plays an outcome determinative role in the decision—for example, where sex can be said to be a “but for” cause of the decision.<sup>163</sup> (Such position will be referred to as a high, or “but for,” degree-of-causation requirement.) Under a “but for” standard, attraction theory would not apply to preferential bisexuals. Because, by definition, preferential bisexuals are willing to engage in sexual relations with males or females, it would appear impossible to say that, but for being of a particular sex, the target would not have been selected. Thus, under such a standard, attraction theory would work only for purely monosexual harassers (Kinsey 0s and 6s)—and the bisexuality gap would apply to all bisexuals, pure or preferential (Kinsey 1s, 2s, 3s, 4s, or 5s).

A fourth position on degree-of-causation is a variation of the third (“but for”) position. This position would hold that “but for” causation is ultimately required, but would also hold that a plaintiff need not show “but for” causation. Rather, by showing some lower degree-of-causation (e.g., low-level causation), the plaintiff can shift the burden to the defendant to show a *lack* of “but for” causation.<sup>164</sup> Such a burden-shifting position would, like a “but for” requirement, preclude the use of attraction theory for preferential bisexual harassers. However, if a plaintiff could produce proof that a harasser was either exclusively monosexual or preferentially bisexual (that is, anything other than purely bisexual), the burden would shift to the defendant to show that the harasser was not exclusively monosexual.

b. Preferential Bisexuals (for Example, Kinsey 1s, 2s, 4s, or 5s): Attraction-Based Conduct Contrary to Preference

The previous Subpart demonstrated that, depending on the degree-of-causation required by disparate treatment doctrine, attraction theory may demonstrate causation in all, some, or no cases involving preferential bisexual harassers. However, even under degree-of-causation regimes that would permit the use of attraction theory for some or all preferential bisexuals, an additional qualification is necessary. This is because most anti-discrimination laws require two basic elements: harm and causation.<sup>165</sup>

Whether there is harm will depend, at least in part, on whether the harasser’s conduct is consistent with, or contrary to, the harasser’s sexual preference. For Kinsey 1s or 2s, who would prefer opposite-sex partners, selection of an opposite-sex target

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163. *See, e.g., Hopkins*, 490 U.S. at 262-63 (O’Connor, J., concurring) (“I disagree with the plurality’s dictum that the words ‘because of’ do not mean ‘but-for’ causation; manifestly they do.”); *see also Franke, supra* note 3, at 731-32 (suggesting that disparate treatment requires showing of “but for” causation—and, interestingly, referring to attraction theory as “but for” doctrine).

164. *See, e.g., 42 U.S.C. § 2000e-2(m)* (stating that liability attaches upon a showing by a plaintiff that sex was “a motivating factor,” but a defendant can avoid some damages by showing that it would have reached the same decision without considering sex); *see also Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2154-55 (2003) (holding that there is no need to introduce heightened quantity or quality of evidence to shift the burden).

Note that such a burden-shifting scheme might either allow the defendant to avoid all liability, *see Hopkins*, 490 U.S. at 242, or attach liability upon a showing of at least low-level causation, and merely limit damages where the defendant demonstrates less than “but for” causation, *see 42 U.S.C. § 2000e-5(g)(2)(B)* (2001).

165. *E.g., 42 U.S.C. § 2000e-2(a)(1)* (a plaintiff must show both harm (e.g., termination or failure to hire) and causation (“because of” a protected characteristic)).

would be consistent with that preference, while selection of a same-sex target would be contrary to that preference. For Kinsey 4s and 5s, who prefer same-sex partners, selection of a same-sex target would be consistent with that preference, while selection of an opposite-sex target would be contrary to that preference.

Where a preferential bisexual harasses consistent with preference, there will be harm, as well as causation (depending on the degree-of-causation required). However, where a preferential bisexual harasses *contrary* to his or her preference, there will be no harm caused by the selection process.

To illustrate this point, suppose that a male harasser who is a Kinsey 5 (that is, has a strong preference for same-sex partners) makes unwelcome, attraction-based sexual advances toward a same-sex (male) target. The harasser might have considered making advances toward a female target, but, by definition, he will prefer a male target. Thus, if the harasser selects a male target, we can say that the harasser's sexual preference contributed to the fact that the advance—and thus, the harm—occurred.<sup>166</sup>

However, suppose that a male Kinsey 5 has made an unwelcome, attraction-based advance toward a woman.<sup>167</sup> Because the harasser prefers partners of one sex over the other, we may conclude that he took sex into account when he made his decision (which should be sufficient to show causation under a low or intermediate degree-of-causation regime). However, the way in which the harasser took sex into account *avored* the female target. That is, the harasser's habitual selection process would *reduce* the likelihood that a woman would be selected for an unwelcome attraction-based advance (that is, harmed), even though, as it turned out, a woman was selected.

This is analogous to a white job applicant who fails to obtain a job at an employer that discriminates against minority applicants in favor of whites. The white applicant was favored by the employer's discrimination—albeit not enough to avoid the harm in

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166. I am assuming that there is harm from unwanted requests for sexual activity—at least where they are unwelcome and severe or pervasive. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (holding that conduct must be unwelcome and severe or pervasive to be sexual harassment); 1 LINDEMANN & GROSSMAN, *supra* note 21, at 785-805 (same). This requirement is apparently a way of assuring that there is some minimal level of harm.

There has been some excellent research on the harms caused by various forms of sexual harassment. See BARBARA A. GUTEK, *SEX AND THE WORKPLACE* 71 (1985) (victims of sexual harassment often experience disgust, anger, anxiety, hurt, depression, sadness, or guilt); Abrams, *supra* note 5, at 1197 n.159 (intense self-doubt is a major theme among women who speak about their experiences of harassment); Grover, *supra* note 64, at 249 n.32 (book review) (discussing studies suggesting that harassment victims feel a lack of self-worth); Lenhart, M.D., *supra* note 64, at 24-25 (discussing a 1992 study showing that sexual violation, especially harassment, causes self-doubt).

In quid pro quo cases, where requests for sexual relations are accompanied by a threat, there is additional harm. The target is placed in the position of having to choose between unwanted sex and adverse consequences—analogueous to rape. And even if the request is accompanied by a promise of some benefit for compliance, with no express or implied threat of adverse consequences, we may still say that there is harm above and beyond hostile environment harassment: Such an advance insultingly suggests that the target would trade sexual favors for job benefits—that is, that she is a prostitute. See *Insignia Residential Corp. v. Ashton*, 755 A.2d 1080, 1086-87 (Md. 2000) (holding that quid pro quo harassment violates public policy against solicitation for prostitution).

167. See Memorandum in Support of Defendant's Motion for Summary Judgment at 9-10, *Talbot v. Sears, Roebuck & Co.*, (D.C. Idaho 1997) (No. CIV 96-0406-S-EJL) (on file with author) (female coworker claiming that sexual conduct by gay male coworker might have been sexual advance toward her).

question (in this case, failure to obtain the job). Similarly, the woman harassed by the male Kinsey 5 was favored by his discrimination in selecting sexual targets, albeit not enough to avoid the harm in question (here, the unwelcome advance). In this sense, while there may have been discriminatory causation (for example, the protected characteristic was considered), there was no harm.

It might be argued that there is harm based upon the simple fact that the target experienced the advance as unwelcome. However, such an argument fails to account for the fact that there needs to be a relationship between the decisionmaking process that is being challenged and the harm.<sup>168</sup> If the process increases the probability of ultimate harm, the process can be said to cause harm. However, if the process decreases the probability of ultimate harm, the process cannot be said to cause harm—even though the ultimate harm may well occur notwithstanding that the process had decreased the risk.

The same is true in the case of the white job applicant rejected despite the application of an anti-minority hiring process. The white applicant was hurt, not by the decisionmaking process, but by the fact that the process did not favor him enough. Similarly, a person who is targeted for attraction-based conduct contrary to preference by a preferential bisexual is hurt, not by the fact that the harasser considered sex in the decisionmaking process, but by the fact that the harasser did not consider sex enough to avoid selecting the target. In such a case, the target cannot be considered to have been harmed by the decisionmaking process, and thus, cannot maintain an action under disparate treatment law.

### 3. The Significance of the Bisexuality Gap

In summary, there is a bisexuality gap. Attraction theory will not work to show causation where the harasser is purely bisexual under any circumstances. If disparate treatment doctrine requires a low degree-of-causation, the bisexuality gap will only extend to purely bisexual harassers (Kinsey 3s). If disparate treatment requires an intermediate degree-of-causation, the bisexuality gap will also extend to weakly preferential bisexual harassers (roughly, Kinsey 2s through 4s). And if “but for” causation is required, the bisexuality gap will extend to all bisexuals—pure, weakly preferential, and strongly preferential (Kinsey 1s through 5s).

The question remains: Under any of these degree-of-causation regimes, does the bisexuality gap limit the utility of attraction theory to the point where it is no longer worth considering? The answer is no. While it is difficult to know exactly what percentage of the population—much less what percentage of harassers—falls within any particular Kinsey category, it appears that, under any degree-of-causation requirement, a substantial portion of the population will fall within categories covered by attraction theory.

Under the most stringent degree-of-causation requirement, attraction will work for Kinsey 0s and 6s. Social scientists estimate that between 89% and 90% of adults are exclusively monosexual (Kinsey 0s or 6s).<sup>169</sup> Thus, even under a “but for” standard,

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168. See, e.g., 42 U.S.C. § 2000e-2(a)(2) (suggesting that an adverse decision—that is, harm—must be because of sex in cases of disparate treatment).

169. See KINSEY ET AL., HUMAN MALE, *supra* note 147, at 653 (85.0% of males 16-55 are Kinsey 0s; 5.0% are Kinsey 6s; total 90.0%); ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 499 (1953) [hereinafter KINSEY ET AL., HUMAN FEMALE] (roughly 87.6% of females 20 and over reporting sexual contacts or responses are Kinsey 0s; 1.1% are Kinsey 6s; total 88.7%); see also Schrof & Wagner, *supra* note 34, at 74 (discussing a recent sex survey)

the bisexuality gap should only affect between 10% and 11% of cases.<sup>170</sup>

If an intermediate degree-of-causation were required, the bisexuality gap would shrink further. Social scientists estimate that between 92% and 96% of adults are exclusively or predominantly monosexual (Kinsey 0s, 1s, 5s, and 6s).<sup>171</sup> Thus, under an intermediate degree-of-causation requirement, the bisexuality gap should only affect between 4% and 8% of cases.

Moreover, if only a low degree-of-causation were required, the bisexuality gap would shrink even further. Social scientists estimate that between 98% and 99% of

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“10.1 percent of men and 8.6 percent of women either identify themselves as gay, say they have had a sexual experience with someone of the same gender or claim to have some physical attraction to members of the same sex”—suggesting that 89.9% of men and 91.4% of women describe themselves as exclusively heterosexual, and thus monosexual).

It may be noted that this research is based almost entirely on self-reporting. From a scientific perspective, self-reporting is problematic and may well lead to systematic under-reporting of certain sexual orientations. However, under-reporting seems to be less of an issue in terms of determining the significance of the bisexuality gap in attraction theory. If harassers self-report as (that is, admit) being within a category of sexual orientation for which attraction theory works—even if they do so erroneously—then the gap in attraction theory will be small. *See* FED. R. EVID. 801(d)(2) (admissions by party opponents do not constitute hearsay). And while there might be different incentives to self-report in a lawsuit than in a scientific study, two facts suggest that these differences will be small. First, the incentives to change self-reporting to avoid liability in a lawsuit are relatively weak, since employers, rather than employees are liable in such lawsuits. *See* Falbaum v. Pomerantz, Nos. 00-9039, 00-9049, 2001 WL 1019616, at \*4 (2d Cir. Sept. 6, 2001) (holding that no personal liability exists under Title VII); Wathen v. Gen. Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997) (same); Tomka v. Seiler Corp., 66 F.3d 1295, 1313-14 (2d Cir. 1995) (same). Second, the incentives to report as monosexual remain strong in this context. *See* Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice*, 9 HASTINGS WOMEN’S L.J. 1, 18-20 (1998) (discussing “the social stigma and marginalization arising from homophobia”); *see also* Linda M. Laarman, *Employer Health Coverage for Domestic Partners—Identifying the Issues*, 18 EMPLOYEE REL. L.J. 567, 569 (1993) (acknowledging that the social stigma attached to homosexuality makes the abuse of domestic partner benefits unlikely). In fact, such incentives might be even stronger in the context of a lawsuit, where anonymity is not as likely as it would be in a scientific survey.

170. The analysis in this Subpart assumes that the orientation of the population of harassers mirrors that of the general population. It also does not take into account harassment contrary to preference.

171. *See* KINSEY ET AL., HUMAN MALE, *supra* note 147, at 653 (85.0% of males 16-55 are Kinsey 0s; 1.4% are Kinsey 1s; 0.7% are Kinsey 5s; 5.0% are Kinsey 6s; total 92.1%); KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499 (87.6% of females 20 and over reporting sexual contacts or responses are Kinsey 0s; 6.1% are Kinsey 1s; 0.9% are Kinsey 5s; and 1.1% are Kinsey 6s; total 95.7%); *see also* Schrof & Wagner, *supra* note 34, at 74 (discussing recent sex survey) (“10.1 percent of men and 8.6 percent of women either identify themselves as gay, say they have had a sexual experience with someone of the same gender or claim to have some physical attraction to members of the same sex.”); San Francisco Public Library Gay & Lesbian Center, *GLBT Demographics: How Many Lesbians and Gay Men Are There?* (June 1999), at <http://sfpl.lib.ca.us/librarylocations/main/glc/glbtdemo.htm> (surveying literature; noting that Kinsey estimated that roughly 10% of men were Kinsey 5s or 6s and 2-6% of women were more or less exclusively gay/lesbian) (last visited Jan. 12, 2004); Pierre J. Tremblay, *The Homosexuality Factor in the Youth Suicide Problem* app. A, 6th Annual Conference of the Canadian Association for Suicide Prevention, Banff, Alberta, Canada, October 11-14, 1995, at <http://www.qrd.org/qrd/www/youth/tremblay/main.html> (surveying literature; concluding that the best estimate of those who are gay/lesbian or predominantly gay/lesbian is in the 5% range) (last visited Jan 12, 2004).

adults are exclusively or preferentially monosexual (Kinsey 0s, 1s, 2s, 4s, 5s, and 6s).<sup>172</sup> Thus, under a low-level degree-of-causation requirement, the bisexuality gap should only affect between 1% and 2% of cases.

In addition, it is arguable that the figures used here underestimate the utility of attraction theory. These figures address the percentage of the general population that fall within a particular Kinsey category or categories. However, in many sexual harassment cases, it may often be possible to limit the relevant population. For example, in an opposite-sex attraction case, we can eliminate the possibility that the harasser is purely gay/lesbian (Kinsey 6). Thus, to determine the likelihood that attraction theory would work in such a case, we would need to look only at the percentage of the remaining population (Kinsey 0s through 5s) that fall into the particular Kinsey category or categories required for attraction theory. This percentage will tend to be even higher than the percentages discussed above.<sup>173</sup>

Thus, under any degree-of-causation requirement, the bisexuality gap should not sufficiently diminish the utility of attraction theory—much less provide an argument for marginalizing or scrapping that theory.<sup>174</sup>

### C. Harassment Based on Motivations Other Than Sexual Attraction

A final area in which courts and commentators have run into the limits of attraction theory—and, as a result, have come to question the theory—are cases in which the courts have been unsure that sexual conduct was based on sexual attraction.

Recall that one of the conditions necessary for the application of attraction theory is sexual attraction. If the conduct in question is not based on sexual attraction, there is no basis for inferring that the perpetrator's habit of sex-based selection in choosing sexual partners (that is, his or her sexual orientation) was applicable to the decision in question. Thus, where there is no evidence that the conduct in question was based on sexual attraction, attraction theory will not work to show causation. That is, just as there is a bisexuality exception to attraction theory, there is also a "non-attraction exception" to that theory.

As with the bisexuality exception, this is not to say that there can be no discriminatory causation in cases that do not involve sexual attraction. It is only to say that, in such cases, some other theory of causation will be required.<sup>175</sup>

Early feminists understood this limit of attraction theory. Catherine MacKinnon, for example, in urging the adoption of a power-based theory instead of an attraction-

172. See KINSEY ET AL., HUMAN MALE, *supra* note 147, at 653 (85.0% of males 16-55 are Kinsey 0s; 1.4% are Kinsey 1s; 4.9% are Kinsey 2s; 0.8% are Kinsey 4s; 0.7% are Kinsey 5s; 5.0% are Kinsey 6s; total 97.8%); KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499 (roughly 87.6% of females 20 and over reporting sexual contacts or responses are Kinsey 0s; 6.1% are Kinsey 1s; 2.4% are Kinsey 2s; 1.1% are Kinsey 4s; 0.9% are Kinsey 5s; and 1.1% are Kinsey 6s; total 99.2%); see also BUSINESS WOMEN'S NETWORK, WOW! FACTS 2002, at 618 (3d ed. 2002), available at <http://www.ewowfacts.com/pdfs/chapters/62.pdf> (study among gay, lesbian, and transgendered population indicating that 91% self-report as gay, lesbian, or homosexual, while only 6% self-report as bisexual).

173. This project will be undertaken in Part II.D.2.b.(1).

174. A separate issue is how a plaintiff could prove—or a factfinder could infer—that a particular harasser is within a particular category of sexual orientation. This issue is addressed *infra* in Part II.D.2.

175. See e.g., MACKINNON, *supra* note 1, at 106-18 (suggesting a theory of causation that is not dependent on sexual attraction); Abrams, *supra* note 5, at 1188-1220 (same); Franke, *supra* note 3, at 771-72 (same); Schultz, *supra* note 4, at 1755-69 (same).

based theory, pointed out that, “male sexual advances may often derive as much from fear and hatred of women and a desire to keep them in an inferior place as from a genuine positive attraction or affection.”<sup>176</sup> In other words, Professor MacKinnon seemed to understand that, if attraction theory were the only theory of causation in sexual harassment cases, many critical cases of discrimination might be left uncovered.

In most early sexual harassment cases, this distinction was not an issue. These cases generally involved sexual advances by males toward females. And the courts seemed quite willing to presume attraction in those cases.<sup>177</sup> But occasionally, the courts faced cases in which attraction was less clear. Perhaps the most important cases of this type, and the cases that seem to have started the second-generation movement, were the cases of *Rabidue v. Osceola Refining Co.*<sup>178</sup> and *Robinson v. Jacksonville Shipyards*.<sup>179</sup>

In *Rabidue*, “male employees from time to time displayed pictures of nude or scantily clad women in their offices and/or work areas.”<sup>180</sup> There was no indication that these pictures were directed toward the plaintiff, Ms. Rabidue. Nor was it clear that these pictures were directed to women in general. Because this conduct had not been directed toward Ms. Rabidue, the court assumed that it was not based on attraction toward her.<sup>181</sup> And while some sexual conduct was directed toward Ms. Rabidue, that conduct primarily involved profane sexual language and epithets, as opposed to sexual advances. Thus, the court assumed that this conduct too was not based on attraction. In fact, it seemed quite unlikely that any of the conduct in question was based on sexual attraction, given that the primary protagonist appeared to intensely dislike Rabidue.<sup>182</sup>

Similarly, in *Robinson*, there was a staggering array of misogynist conduct, including the posting of a “Men Only” sign.<sup>183</sup> Much of this conduct was highly sexualized, including the posting of a vast amount of pornographic material.<sup>184</sup> However, it was not clear that any of this conduct was based on sexual attraction toward the plaintiff, Ms. Robinson. As in *Rabidue*, this conduct seemed to have more to do with hatred or debasement of women than with attraction toward a particular woman.

The outcomes in these cases were quite different. In *Rabidue*, neither the district court nor the majority on appeal seemed to focus on causation. Rather, they focused on the question of whether the conduct was sufficiently severe to be actionable.<sup>185</sup> However, both the lower court and majority appellate opinion made a point of noting that there were no allegations of sexual advances or attraction<sup>186</sup>—suggesting that the

176. MACKINNON, *supra* note 1, at 199.

177. *See supra* Parts I.B, II.A.

178. 805 F.2d 611 (6th Cir. 1986).

179. 760 F. Supp. 1486 (M.D. Fla. 1991).

180. *Rabidue*, 805 F.2d at 615.

181. *Id.*; *see also* Fox v. Sierra Dev. Corp., 876 F. Supp. 1169, 1173 (D. Nev. 1995) (questioning causation where conduct was directed to a general workplace population).

182. *Rabidue*, 805 F.2d at 615 (“[T]he plaintiff and Henry, on the occasions when their duties exposed them to each other, were constantly in a confrontation posture.”).

183. *Robinson*, 760 F. Supp. at 1498.

184. *Id.* at 1495-98.

185. *Rabidue*, 805 F.2d at 622; *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 433 (E.D. Mich. 1984).

186. *Rabidue*, 805 F.2d at 622 (“[T]he plaintiff neither asserted nor proved a claim of ‘sexual advances,’ ‘sexual favors,’ or ‘physical conduct.’”); *Rabidue*, 584 F. Supp. at 431 (noting a lack of physical conduct).

outcome might have been different in an attraction-based case. In contrast, *Robinson* and the dissent in *Rabidue* did focus on causation, apparently realizing that attraction theory would not work and looking at other theories of causation.<sup>187</sup>

Irrespective of the outcomes of these cases, second-generation feminists focused on them as a basis for attacking attraction theory.<sup>188</sup> These writers seemed to understand that attraction theory would not work in such cases. Accordingly, they started looking for other ways to show causation. Yet, as with the bisexuality exception, some used this gap in coverage as an indictment of attraction theory.<sup>189</sup>

Another wave of cases seemed to provide further ammunition: cases of same-sex (generally male-on-male) sexual conduct that did not seem to involve sexual attraction.<sup>190</sup> Moreover, unlike cases such as *Rabidue* or *Robinson*, there was no evidence of antipathy toward a particular sex—for example, misogyny. Thus, not only was attraction theory unavailable; another major theory of causation (evidence of a negative attitude or antipathy toward one sex) seemed to be unavailable. As a result, the courts struggled mightily with causation.

Important cases of this type include *Quick v. Donaldson Co.*,<sup>191</sup> *Doe v. City of Belleville*,<sup>192</sup> and *Oncale v. Sundowner Offshore Services*.<sup>193</sup> In each of these cases, a group of men engaged in extreme sexual conduct toward male plaintiffs, including, in some cases, physical touching or grabbing of genitals and even threats of rape.<sup>194</sup> Yet, despite the sexual nature of this conduct, there was no suggestion that this conduct was based on the harassers' sexual attraction toward the plaintiffs. Rather, the harassers, who claimed to be heterosexuals, seemed to pick on their targets based on the fact that the harassers either perceived the targets to be gay or lesbian, or perceived them as not measuring up to the harasser's male stereotype.<sup>195</sup> Because there was no evidence of attraction, attraction theory was unavailable to show causation in these cases. As a result, the courts struggled with causation—often without any satisfactory conclusion.<sup>196</sup>

187. *Rabidue*, 805 F.2d at 823-28 (Keith, J., concurring in part, dissenting in part); *Robinson*, 760 F. Supp. at 1522-23.

188. See, e.g., Franke, *supra* note 3, at 696.

189. See, e.g., *id.*

190. See Triplett, *supra* note 100.

191. 895 F. Supp. 1288 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996).

192. 119 F.3d 563 (7th Cir. 1997).

193. 523 U.S. 75 (1998).

194. *Doe*, 119 F.3d at 567 (harassers threatened to rape target and grabbed his genitals, ostensibly to see if he was male); *Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118, 118-19 (5th Cir. 1996) (harassers pushed a bar of soap into target's anus, placed their penises on target's neck and arm, and threatened to rape him); *Quick*, 895 F. Supp. at 1292 (harassers engaged in practice called "bagging," which involved grabbing and squeezing the target's testicles).

195. See, e.g., Calleros, *supra* note 120, at 40-41 (suggesting that the "bagging" in *Quick* might have been motivated by the perpetrator's "position of authority in the male hierarchy").

Several courts and theorists have developed some promising theories of causation based on stereotyping that might apply in these situations. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001).

196. In *Doe*, for example, the majority of the panel and a concurring/dissenting judge spent the better part of 43 double-column pages debating the issue. See *generally Doe*, 119 F.3d 563. At the end of this effort, the court determined little. Essentially, the majority seemed to base its holding on a stereotyping theory (for example, that the plaintiffs had been harassed because they failed to meet a sex-based stereotype, and thus because of their sex), but spent most of its

The primary response to this “non-attraction gap” in attraction theory has been to point out (correctly) that attraction is not the only way to prove causation<sup>197</sup> and to try to develop alternative theories for proving causation in cases that do not involve attraction.<sup>198</sup> That is, these writers have not contested the notion of a non-attraction gap. Rather, they are developing theories that could fill this gap.

However, the second-generation feminists have gone beyond trying to find alternative theories of causation to fill the non-attraction gap. As with the bisexuality gap, second-generation feminists have used the non-attraction gap as an indictment of attraction theory.<sup>199</sup> They have argued that the gap is large; that most, if not all, of sexual harassment is based on power, not attraction, and is thus not amenable to proof of causation by attraction theory.<sup>200</sup> On this basis, second-generation feminists have attacked attraction theory.

To understand how significant the non-attraction gap might be, it is helpful to divide harassers into three categories: (1) Those who are motivated solely by sexual attraction, (2) those who are motivated by some combination of sexual attraction and factors other than sexual attraction, and (3) those who are motivated solely by factors other than sexual attraction.

In the first category (harassers motivated solely by sexual attraction), there is no attraction gap. Attraction theory will work.

And there seems to be little reason to doubt that attraction theory will work in the second category (harassers motivated by a mixture of attraction and other factors). This category seems like a simple case of mixed motives. The harasser acts from multiple motives, some of which are discriminatory (e.g., attraction, if the harasser is monosexual) and some of which are arguably not discriminatory (e.g., power, as long

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efforts attempting to defend a sexuality proxy under which any sexuality would suffice as proof of causation. Judge Manion, in partial concurrence and partial dissent, argued that a sexuality proxy was flawed; that in cases outside the male-to-female-advance paradigm, some other evidence of causation, beyond the mere fact that the conduct in question was sexual, would be necessary. *Id.* at 604-06 (Manion, J., concurring in part, dissenting in part). Similarly, in *Quick*, there was a significant—and largely unresolved—dispute regarding causation. *Quick*, 895 F. Supp. at 1293-97.

197. See, e.g., *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 n.9 (4th Cir. 2001) (quoting *Oncale*, 523 U.S. at 80) (“[A] harasser need not be motivated by sexual desire to satisfy the ‘because of sex’ element. It is simply one evidentiary route available to a plaintiff seeking to establish same-sex [or any] harassment.”); *Doe*, 119 F.3d at 590-92; *Abrams*, *supra* note 5, at 1227-28; *Estrich*, *supra* note 3, at 858-60; *Franke*, *supra* note 3, at 762-63; *Schultz*, *supra* note 4, at 1755.

198. See, e.g., *Abrams*, *supra* note 5, at 1227-28; *Franke*, *supra* note 3, at 762-63.

199. *Abrams*, *supra* note 5, at 1188-91; *Franke*, *supra* note 3, at 743-44; *Schultz*, *supra* note 4, at 1773-74.

200. See *Franke*, *supra* note 3, at 743 (“[M]en engage in sexual conduct in the workplace primarily as a way to exercise or express power, not desire.”), *quoted in* *Schwartz*, *supra* note 2, at 1721; see also *Doe*, 119 F.3d at 588 (quoting *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996) (“[H]arassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser.”)); *MACKINNON*, *supra* note 1, at 1 (“Central to the concept [of sexual harassment] is the use of power derived from one social sphere to lever benefits or impose deprivations in another.”); *Estrich*, *supra* note 3, at 820 (sexual harassment is about men exercising power over women). Alternatively, it has been suggested that sexual harassment may be caused by a feeling of *disempowerment* by men. See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1227-28 (1990).

as it is not sex-based).<sup>201</sup> Current anti-discrimination doctrines are fairly clear that such mixed motivations are sufficient for liability.<sup>202</sup>

Thus, attraction theory will work in the first two categories—that is, anytime sexual attraction plays a role in the harasser’s decision. The non-attraction gap is limited to the third category—cases in which attraction plays no role in the harasser’s decision. Although there may well be cases in this category, the body of reported sexual harassment cases, as well as my experience litigating these cases, would seem to suggest that sexual attraction—perhaps along with other motivations, such as power—plays a role in a significant portion of sexual harassment cases.<sup>203</sup> That is, the non-attraction gap does not appear to pose a significant danger of rendering attraction theory useless.<sup>204</sup>

#### *D. Practical Issues in the Application of Attraction Theory*

The previous Subparts have demonstrated that, as a theoretical matter, the coverage gaps in attraction theory should not be significant. As a theoretical matter, attraction theory appears to provide a streamlined, effective method of proving causation in a broad range of cases. Thus, it does not make sense to criticize attraction theory based on its theoretical utility.

But how practical is attraction theory? How can plaintiffs demonstrate attraction and monosexuality, as necessary to prove causation using attraction theory? And to what extent should courts presume attraction, monosexuality, or both? If attraction theory were unworkable as a practical matter, this might suggest that the theory should be scrapped. This Part will demonstrate that attraction theory is useful as a practical, as well as a theoretical, matter.

##### 1. Proving Attraction

How can a plaintiff prove that particular conduct is based on sexual attraction? Attraction may arguably be inferred from the fact of a sexual advance. A sexual

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201. Second-generation feminists have argued persuasively that many exercises of power in the workplace are sex-based. *See, e.g.*, Estrich, *supra* note 3, at 820. If this is the case—and can be proven—then there is no mixed motives problem; all of the motives (i.e., attraction by a monosexual or a sex-based desire to exercise power) would be discriminatory. In such a case, causation could be shown either through attraction theory or through proof that the exercise of power was sex-based.

202. *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2000) (liability attaches any time sex is “a motivating factor,” even where other factors may have also gone into the decision in question).

Damages might be limited in cases where a defendant can prove that the motive in question (attraction, which indicates reliance on sex under attraction theory) played only a small role in the outcome of the decision. 42 U.S.C. § 2000e-5(g)(2)(B). However, the point here is that liability will attach in these cases.

203. I do not purport to know—and do not take any position on—what portion of sexual harassment is motivated by sexual attraction, power, or some combination of these (or other) factors. My only point is that it seems likely that attraction plays at least some role in a significant proportion of sexual harassment cases.

204. This part does not address the issues that might arise in trying to prove that a particular harasser was motivated, at least in part, by sexual attraction. That issue will be addressed immediately *infra* in Part II.D.1.

advance, by definition, is a request to engage in sexual relations. Such a request may suggest that the person making the request (in a sexual harassment case, the harasser) is sexually attracted to the target. Thus, from the fact of a sexual advance, a factfinder may find sexual attraction.

This is not to say that sexual attraction is the only reason a harasser might make sexual advances toward a target. Such advances may be based not on sexual desire, but on a desire to exercise or demonstrate power.<sup>205</sup> Moreover, power and sexual desire may become merged—that is, power may provide a “turn on” for a harasser who was not otherwise sexually attracted toward the target.<sup>206</sup> These possibilities would seem to prevent a conclusion that sexual advances are *always* motivated by sexual attraction. The point here, however, is that sexual attraction is a *possible*—and maybe even a *likely*—motivation for sexual advances. Put differently, a sexual advance may be seen as making the existence of attraction more likely than it would otherwise be, thus providing relevant evidence of attraction.<sup>207</sup> Accordingly, where a factfinder believes that conduct is part of a sexual advance, it would seem to be permissible for the factfinder to conclude that it was motivated, at least in part, by sexual attraction.

Of course, this may simply beg the question of when particular conduct by a harasser is part of a sexual advance. Some sexual advances may be express. Others may be more subtle. However, this question would seem to be a simple question of fact.

On this point, a word of warning may be in order. Some courts seem to infer that sexual conduct is a sexual advance (and, hence, based on attraction) where the harasser is sexually oriented toward persons of the target’s sex—for example, where a heterosexual harasser engages in sexual conduct toward a person of the opposite sex, or a gay or lesbian harasser engages in sexual conduct toward a person of the same sex.<sup>208</sup> However, there are two potential problems with this reasoning. First, as will be seen below, sexual orientation is likely to be harder to prove than attraction. Thus, the idea of proving attraction based on sexual orientation may not make much practical sense. Second, as evident in cases like *Robinson* and *Rabidue*, sexual conduct—even by those who might be sexually oriented toward persons of the target’s sex—does not necessarily indicate sexual advances or attraction.

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205. See sources cited *supra* note 200.

206. I am indebted for this insight to my colleague Nancy Ehrenreich. Support for this proposition may be found in instances of rape of males by other males who are ostensibly heterosexual, particularly in prison settings. In such cases, even though there might be manifestations of attraction, such as sexual arousal, one might have a difficult time suggesting that the perpetrator was motivated by sexual attraction.

207. See FED. R. EVID. 401 (defining “relevant evidence”).

208. See, e.g., *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478-80 (5th Cir. 2002) (inferring homosexuality from indications of attraction toward a same-sex target); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010 (7th Cir. 1999) (suggesting a jury might infer homosexuality from sexual attraction); see also *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 (4th Cir. 2001) (“[T]here is some authority indicating that an earnest sexual solicitation by a harasser will support an inference that the harassment was because of the plaintiff’s sex.”) (citing *Tietgen v. Brown’s Westminster Motors, Inc.*, 921 F. Supp. 1495, 1502 (E.D. Va. 1996)).

This seems to be what courts are talking about when they say they talk about the “obvious” nature of causation in male-to-female-advance cases, or that they would find causation in cases involving same-sex sexual conduct by a gay or lesbian harasser. E.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

## 2. Proving Monosexuality

Several writers have questioned the efficacy of any theory that requires proof of sexual orientation.<sup>209</sup> Though early sexual harassment cases simply assumed monosexuality (heterosexuality) in cases involving male-to-female sexual advances, we have seen reluctance by courts to make such assumptions in same-sex cases. These assumptions have been challenged in cases involving harassers who are or claim to be bisexual.

These issues raise two questions, which will be addressed in the following Subparts: First, if the courts are not willing to assume monosexuality, how might plaintiffs establish this requirement of attraction theory?<sup>210</sup> And second, does it make sense—as an evidentiary matter or as a policy matter—to adopt some kind of presumption regarding sexual orientation?

### a. How Plaintiffs Can Prove Monosexuality

It should be noted at the outset that the very act of trying to prove (or even assume) a litigant's sexual orientation raises extremely serious privacy issues. These issues will be addressed in Part III.D. The present Subpart will focus only on issues of efficacy—that is, whether there are effective ways by which plaintiffs can establish monosexuality, and thereby show causation through attraction theory. It will conclude that there are viable ways in which plaintiffs are likely to be able to demonstrate monosexuality in a large number—possibly a large majority—of cases.

#### (1) Self-Reporting by Harassers

Perhaps the most effective way for plaintiffs to prove monosexuality would be to rely on self-reporting by harassers. Plaintiffs might simply ask their harassers to disclose their sexual orientation—that is, request self-identification, or an admission of monosexuality. Alternatively, some harassers might have made extra-judicial statements regarding their sexual orientation, upon which a plaintiff might rely.<sup>211</sup> If the harasser self-identifies as monosexual toward the target's sex, there would generally be no need to litigate the issue any further. In such cases, the harasser has admitted monosexuality. As a statement against interest in the litigation, such an admission carries with it indicia of accuracy.<sup>212</sup> And the plaintiff has no incentive to

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209. See, e.g., Daniel C. Sanpietro, "Gradually Triumphant Over Ignorance": *Rhode Island's Treatment of Sexual Orientation Discrimination in the Workplace*, 30 SUFFOLK U. L. REV. 439, 478 (1997) (arguing that sexual harassment law should not rely on sexual orientation due to difficulty of proving sexual orientation); Karen L. Steinbach, *Employment Law. The Maryland Survey of the United States Court of Appeals for the Fourth Circuit for the 1995-1996 Term*, 56 MD. L. REV. 1103, 1121 (1997) (same) (construing *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996)).

210. This Subpart will not distinguish gradations of bisexuality. Unless otherwise noted, it will use the term "monosexuality" to describe whatever categories of sexual orientation are sufficient to show causation under the relevant degree-of-causation standard. See *supra* Part II.B.2.

211. See FED. R. EVID. 801(d)(2) (admissions by party opponents do not constitute hearsay).

212. See FED. R. EVID. 804(b)(3) (a statement against interest is admissible over a hearsay

contest it.

There are reasons to believe that self-reporting of monosexuality will be high. As noted in Part II.B.3, a high percentage of the population tends to self-report as monosexual. Depending on the degree-of-causation required by disparate treatment doctrine—and thus the proper definition of monosexuality for purposes of attraction theory—the percentage of the population that self-reports as monosexual appears to be somewhere between 89% (assuming a narrow definition of monosexuality, including only Kinsey 0s and 6s) and 99% (assuming a broad definition of monosexuality that covers all categories other than Kinsey 3s).<sup>213</sup>

We might expect a particularly high level of self-reporting as monosexual in opposite-sex cases. A high proportion of the population tends to self-report as heterosexual generally—estimates seem to cluster around the 90% range.<sup>214</sup> The unfortunate social stigma that remains associated with homosexuality and bisexuality might provide a strong incentive to self-report as heterosexual.<sup>215</sup> Moreover, while a harasser who self-reports as heterosexual may help a plaintiff prove causation, and thus, ultimately, liability, the harasser is not likely to be held individually liable.<sup>216</sup> So the legal consequences of admitting heterosexuality are likely to be relatively small, while the social benefits may be large. Thus, it seems likely that many harassers will self-report as monosexual in opposite-sex cases.<sup>217</sup>

Although some of these incentives might initially suggest that many harassers would *not* admit monosexuality (that is, homosexuality) in the same-sex context, this may not be the case. In such cases, where there is strong evidence that the conduct in question was a same-sex advance based on attraction, the harasser will not credibly be able to self-report as purely heterosexual. Thus, he or she would be likely to report either as gay/lesbian (which would support a finding of causation) or bisexual (which would not). And there are reasons to believe that a significant number of persons in this position would self-report as gay/lesbian. There is evidence that, in the gay, lesbian, and bisexual community, there is a stigma associated with bisexuality.<sup>218</sup> In

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objection).

213. See *supra* notes 165, 167, and 168.

214. See KINSEY ET AL., HUMAN MALE, *supra* note 147, at 653 (85.0% of males 16-55 are Kinsey 0s; 86.4% are Kinsey 0s or 1s; 91.3% are Kinsey 0s, 1s, or 2s); KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499 (roughly 87.6% of females 20 and over reporting sexual contacts or responses are Kinsey 0s; 93.7% are Kinsey 0s or 1s; 96.2% are Kinsey 0s, 1s, or 2s); see also BUSINESS WOMEN'S NETWORK, *supra* note 172, at 624 ("Gay lesbian and bisexual employees make up anywhere from four to 10% of the workforce."); San Francisco Public Library Gay & Lesbian Center, *supra* note 171 (surveying literature); Tremblay, *supra* note 171 (surveying literature; concluding that best estimate of those reporting homosexuality or bisexuality is in the 10% range).

215. See Schaffner, *supra* note 169, at 18-20 (discussing "the social stigma and marginalization arising from homophobia"); see also Laarman, *supra* note 169, at 569 (acknowledging the social stigma attached to homosexuality makes the abuse of domestic partner benefits unlikely).

216. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 2000e (2000) (prohibiting discrimination by "employers"); Falbaum v. Pomerantz, Nos. 00-9039, 00-9049, 2001 WL 1019616, at \*4 (2d Cir. Sept. 6, 2001) (holding that no personal liability exists under Title VII); Wathen v. Gen. Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997) (same); Tomka v. Seiler Corp., 66 F.3d 1295, 1313-14 (2d Cir. 1995) (same).

217. This reasoning would seem to be confirmed by the fact that, in the vast majority of opposite-sex cases, the harasser does not claim to be bisexual.

218. See Rover, *Bisexual All of 'Em*, at <http://www.geocities.com/rovi51us/bisex.html> (last

any event, within these communities, a far greater percentage of persons self-report as gay or lesbian than bisexual.<sup>219</sup> Thus, in same-sex cases, as well as opposite-sex cases, it would seem likely that many, if not most, plaintiffs would be able to rely on perpetrators' self-reporting to establish monosexuality.

Of course, self-reporting on matters of sexual orientation is notoriously inaccurate. In many cases, people cannot even engage in accurate self-assessment in this area.<sup>220</sup> And even where a person has accurately assessed his or her own orientation, there are numerous reasons why he or she might report that orientation inaccurately.<sup>221</sup> However, in this context, where plaintiffs are seeking party admissions, self-reporting—not self-awareness—is relevant. And many of the incentives to self-report falsely as monosexual in the social science context (e.g., social stigma)<sup>222</sup> are also likely to be present in the litigation context.<sup>223</sup> In fact, these incentives may even be heightened in the litigation context, in which anonymity may be lacking.

## (2) The Harasser's Sexual History

If the harasser does not admit to being monosexual, a plaintiff might conceivably try to prove monosexuality by looking for a pattern in the harasser's selection of sexual targets, either within the workplace or more generally. The idea would presumably be that if most or all of the targets are the same sex as the plaintiff, a factfinder might infer monosexuality.

Such an approach would be highly problematic as a normative matter, as it would involve a dramatic invasion of privacy (even more so than simply asking about, or relying on past extra-judicial statements about sexual orientation). And it would also be subject to attack on at least three evidentiary grounds.

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visited Sept. 27, 2003) (In many gay communities, more stigma is attached to bisexuality than to pure homosexuality.).

219. See BUSINESS WOMEN'S NETWORK, *supra* note 172, at 618 (study among gay, lesbian, and transgendered population indicates that 91% self-report as gay, lesbian, or homosexual, while only 6% self-report as bisexual).

220. See Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 364 (1999) (noting the distinction between the "status" of same-sex sexual orientation and the "conduct" of engaging in same-sex sexual behavior is likely to be important in analyzing issues regarding sexual orientation); Tremblay, *supra* note 171, app. A (explaining that many subjects "are not ready to even admit their homosexual desires/identity to themselves, much less to anyone else").

221. San Francisco Public Library Gay & Lesbian Center, *supra* note 171 ("[T]he actual number of gay men and lesbians living in the United States has been significantly and consistently underreported . . . due to social taboo, religious censure, legal statutes, real or perceived risk of jeopardizing jobs, housing, reputations, and family situations.").

222. See Laarman, *supra* note 169, at 569 (acknowledging that the social stigma attached to homosexuality makes the abuse of domestic partner benefits unlikely); Schaffner, *supra* note 169, at 18-20 (discussing "the social stigma and marginalization arising from homophobia"). Such stigma not only tends to encourage self-reporting as exclusively heterosexual, it also may encourage non-heterosexuals to self-report as exclusively gay/lesbian. See Rover, *supra* note 218.

223. I do not mean to endorse false self-reporting or lying under oath, even about such a sensitive topic as sexual orientation. The ethics of this issue are beyond the scope of this Article. My point is only that, in litigation, many plaintiffs may reasonably expect to obtain the evidence they need to show causation using attraction theory—that is, proof of monosexuality—in the form of an admission.

First, there is not likely to be enough data to draw any meaningful conclusions from a statistical point of view. Suppose, for instance, that there were evidence that a male harasser had relationships with three men and no women.<sup>224</sup> This distribution might or might not be representative of the entire universe of the harasser's sexual relationships. In general, in order to show that an observed sample is representative of the universe we are trying to measure, we use statistical analysis to demonstrate the reliability of the sample.<sup>225</sup> Second, aside from lack of sufficient sample size, there are reasons to doubt that a harasser's observed/discoverable sexual conduct will be representative of the universe of his or her sexual conduct. Since most sexual conduct occurs in private, and since there are incentives to conceal certain types of sexual conduct (or to report them inaccurately),<sup>226</sup> we should be particularly circumspect about assuming that the harasser's observable or discoverable sexual conduct would be representative of the entire body of his or her sexual conduct. In other words, in this area, we should be particularly wary of reporting and observation bias.

Finally, even if we could assume that the sample of observed conduct was representative of the universe of actual conduct, conduct is not the issue; the issue is the harasser's decisionmaking process—specifically, whether the harasser has a habit of engaging in sex-based selection. The problem is that patterns in the harasser's conduct may not be representative of patterns in the harasser's thinking. Put differently, an individual's conduct may have little to do with his or her actual sexual orientation—that is, with his or her feelings of sexual attraction.<sup>227</sup> The harasser might have feelings of attraction that he or she would simply not act upon (or would not act upon in any way that would be discoverable).

Thus, a plaintiff who relied solely on inquiries into a harasser's sexual history in order to prove monosexuality would likely face high hurdles to discovering and presenting persuasive evidence. And whether such evidence would ultimately be admissible might be an open question.

Despite its analytical flaws, evidence of sexual history might still be seen as making the fact at issue (monosexuality) more likely to exist than would be the case without the evidence, and thus relevant from an evidentiary point of view.<sup>228</sup> And if it were seen as relevant, it might also be seen as sufficient evidence from which a reasonable jury could conclude that the harasser was monosexual, and thus sufficient to resist summary judgment for the defense on this issue.<sup>229</sup> Some courts appear not only to allow this type of evidence, despite (or without considering) its flaws, but to hold that it precludes summary judgment on the issue of causation—at least when the evidence suggests sexual interest toward targets exclusively of one sex.<sup>230</sup>

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224. *See, e.g.,* La Day v. Catalyst Tech., Inc., 302 F.3d 474, 478-80 (5th Cir. 2002).

225. *See* 1 LINDEMANN & GROSSMAN, *supra* note 21, at 90 (“tests of statistical significance determine the probability” that the observed distribution was the product of chance).

226. *See supra* note 218.

227. San Francisco Public Library Gay and Lesbian Center, *supra* note 171 (“The distinction between behavior and identity can be wide . . .”).

228. FED. R. EVID. 401 (Evidence is relevant if it tends to make the existence of a relevant fact, such as monosexuality, more probable than it would be absent the evidence.).

229. FED. R. CIV. P. 56(c).

230. *See, e.g.,* La Day v. Catalyst Tech., Inc., 302 F.3d 474, 480 (5th Cir. 2002) (holding that homosexuality can be inferred from proof that male harasser made advances toward three men). This willingness of courts to make conclusions based on statistics that are of questionable value may stem from the powerful perceptive effect of “the inexorable zero.” *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977).

On the other hand, many courts might consider excluding such evidence on the ground that it is substantially more prejudicial than probative.<sup>231</sup> Moreover, if the harasser's sexual history is mixed—that is, shows attraction toward both male and female targets—plaintiffs will be in the position of trying to argue, based on sexual history evidence, that the harasser is predominantly, though not exclusively, monosexual. In such cases, courts may be particularly likely to focus on the analytical weaknesses of such evidence.<sup>232</sup>

Thus, it would seem to be risky (as well as normatively problematic) for plaintiffs to attempt to prove monosexuality by attempting to discover harassers' sexual histories.<sup>233</sup>

### (3) The Fact of an Attraction-Based Conduct

What can a plaintiff do where the harasser does not admit monosexuality and the plaintiff cannot prove monosexuality based on the harasser's sexual history? Does the mere fact of an attraction-based sexual advance, or other attraction-based conduct, give rise to an inference of monosexuality? Several courts seem willing to draw such an inference—both in opposite- and same-sex cases.<sup>234</sup> However, the validity of such an inference may be open to question.

Even if we assume that a sexual advance was based on sexual attraction,<sup>235</sup> it is not entirely clear why this would suggest monosexuality. Attraction suggests only that the harasser's sexual orientation includes attraction toward persons of the target's sex. But this would not seem to help a factfinder determine whether the harasser is monosexual or bisexual. For example, suppose that a man made an attraction-based sexual advance toward a woman. A factfinder might be able to eliminate the possibility that the harasser was purely gay. But five other possibilities would remain: The harasser could be (1) purely heterosexual, (2) strongly preferentially heterosexual, (3) weakly preferentially heterosexual, (4) purely bisexual, or (5) preferentially gay (weakly or strongly). The first one, two, or three possibilities would permit the

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231. See FED. R. EVID. 403 (providing that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

232. See *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 (4th Cir. 2001) (stating male plaintiff "fails to come to grips with the fact that female employees (including his original co-plaintiff Susan Willis) also lodged similar complaints regarding [the male harasser's] behavior. This fact undercuts [plaintiff's] claim [that the harasser is gay] to a substantial extent.").

233. If the courts adopt a presumption of monosexuality, such that it falls on defendants to prove bisexuality, these problems would then fall on defendants. See, e.g., *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1011 (7th Cir. 1999) (holding pure bisexuality not conclusively proven by fact that harasser made sexual advances toward both women and men).

234. As discussed above, courts have expressly inferred heterosexuality from opposite-sex advances. See *supra* Part I.B, II.A. And several courts seem to have approved an inference of homosexuality from same-sex advances. See, e.g., *La Day*, 302 F.3d at 479 (stating that homosexuality can be inferred from indication of attraction toward same-sex target); *Shepherd*, 168 F.3d at 1010 (holding that jury might infer homosexuality from sexual attraction); see also *Lack*, 240 F.3d at 261 ("[T]here is some authority indicating that an earnest sexual solicitation by a harasser will support an inference that the harassment was because of the plaintiff's sex.") (citing *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1502 (E.D. Va. 1996)).

235. As discussed above, sexual advances are not necessarily based on sexual attraction. See *supra* Part II.C. Yet, as also discussed above, it does seem possible to infer attraction from sexual advances. See *supra* Part II.D.1.

application of attraction theory (depending on the degree-of-causation requirement); the others would not.

Similarly, consider a same-sex case in which a female harasser made an attraction based advance toward a woman. In such a case, a fact-finder might be able to eliminate the possibility that the harasser was exclusively heterosexual. But again, five other possibilities would remain: The harasser could be (1) purely lesbian, (2) strongly preferentially lesbian, (3) weakly preferentially lesbian, (4) purely bisexual, or (5) preferentially heterosexual (weakly or strongly). Again, the first one, two, or three possibilities would permit the application of attraction theory (depending on the degree-of-causation requirement); the others would not. Yet, if the only available evidence were attraction toward the target, there would seem to be no way to determine which of these possibilities was the correct one. Thus, attraction seems to shed little light on whether monosexuality is present, as necessary for the application of attraction theory.<sup>236</sup>

This is not to say that evidence of attraction-based conduct is meaningless. In both opposite-sex and same-sex cases, such evidence limits the possible sexual orientations of the harasser. The problem in each case is how to choose between the remaining possible sexual orientations. And, at least without some sort of presumption, it does not seem possible to do so based solely on evidence of attraction-based conduct.

#### b. Presumptions Regarding Sexual Orientation

We have seen that, in a large number of attraction-based cases, plaintiffs will likely be able to rely on self-reporting by harassers to prove monosexuality. And, though problematic from both an evidentiary and a privacy point of view, plaintiffs in other cases may be able to prove monosexuality by inquiring into harasser's sexual history. However, the practical utility of attraction theory might be maximized—and the privacy concerns generated by this theory minimized—by adopting some kind of presumption of monosexuality.

As discussed above, courts have tended to presume heterosexuality in cases involving opposite-sex advances.<sup>237</sup> It might also be possible either to reverse the presumption (for example, to presume homosexuality), or adopt a broader presumption of monosexuality. This Subpart will recommend that the courts should adopt such a broad presumption of monosexuality.<sup>238</sup>

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236. Courts seem to have missed this point, in the same-sex context as well as the opposite-sex context. *See, e.g., La Day*, 302 F.3d at 479 (holding that homosexuality can be inferred from indication of attraction toward same-sex target); *Shepherd*, 168 F.3d at 1010 (holding that jury might infer homosexuality from sexual attraction); *see also Lack*, 240 F.3d at 261 (“[T]here is some authority indicating that an earnest sexual solicitation by a harasser will support an inference that the harassment was because of the plaintiff's sex.”) (citing *Tietgen*, 921 F. Supp. at 1502).

237. *See supra* Parts I.B, II.A.

238. Catherine MacKinnon has suggested (approvingly) that courts have effectively adopted such a bilateral presumption of monosexuality. *See MacKinnon, supra* note 130, at 822. However, in light of *Oncale*, such a description seems doubtful. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (requiring plaintiffs seeking to use attraction theory in same-sex cases to introduce “credible evidence that the harasser was homosexual”).

## (1) Arguments for a Presumption of Monosexuality

A presumption of monosexuality would have several benefits. First, such a presumption would make it easier for plaintiffs to prove sexual orientation, and thereby increase the practical utility of attraction theory.

Granted, such a presumption will also make it more difficult for defendants to resist a showing of causation based on attraction theory, as they would have to disprove monosexuality (or attraction). However, shifting this burden makes sense as a matter of discovery policy, given that most of the information that bears on the fact in question—that is, the harasser’s sexual orientation—lies within the control of the harasser, who is generally more closely aligned with the defendant than the plaintiff.

Such a presumption would also provide at least some protection for the privacy of accused harassers. This is because the presumption gives the accused harasser at least some control over whether or not there will be an inquiry into his or her sexual orientation. The accused harasser can choose to contest the presumption of monosexuality, in which case sexual orientation will be at issue; or choose to accept the presumption, in which case sexual orientation will not be at issue.

This is not to say that choice is not invasive or coercive. Such a presumption presents bisexual harassers with a Hobson’s choice: if they accept the presumption of monosexuality, they may feel that they are being dishonest—or that they are forced to deny their self-identity, which can be damaging.<sup>239</sup> Moreover, by accepting the presumption of monosexuality, they are giving up a valid defense to causation, and thus to liability. And while liability will likely fall on the harasser’s employer, many employers might be less than understanding of an employee who subjects them to liability needlessly (at least from the employer’s point of view). On the other hand, if the harasser seeks to rebut the presumption, he or she will be subjected to highly invasive discovery. And whatever choice the harasser makes—and whether the harasser is bisexual or monosexual—he or she is essentially forced to make a public statement concerning his or her sexual orientation. Accepting the presumption will feel much like a self-report of monosexuality; rejecting it involves self-reporting as bisexual.

However, even though such a presumption may present alleged harassers with a Hobson’s choice, at least it presents them with a choice. Thus, it gives the alleged harasser at least some degree of control over the privacy issues that are likely to arise from litigating over sexual orientation.

A final argument that might support a presumption of monosexuality—at least in opposite-sex cases—might be based on empirical research that has been performed on the distribution of sexual orientation within the population. To understand this argument, first consider a case involving opposite-sex, attraction-based conduct.

In an opposite-sex attraction case, we can eliminate the possibility that the harasser is exclusively gay or lesbian (Kinsey 6). Then, based on population statistics, we may be able to assess the likelihood that the harasser falls into any one or more of

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239. See Heidi Joy Schmid, *Decriminalization of Sodomy Under South Africa’s 1996 Constitution: Implications for South African and U.S. Law*, 8 CARDOZO J. INT’L & COMP. L. 163, 189 n. 150 (2000) (The criminalization of sodomy in private between consenting males is a “severe limitation . . . of the gay man’s” rights to privacy, dignity, and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfillment.). See generally Nat’l Coalition for Gay & Lesbian Equality v. Minister of Justice, 1998 (6) BCLR 726 (W).

the remaining possible sexual orientations (Kinsey 0 through 5).<sup>240</sup> Among the population of Kinsey 0 through 5's, social scientists estimate that:

- (1) roughly 89% to 90% self-report as exclusively heterosexual (Kinsey 0),<sup>241</sup> as would be required to show causation under the stringent "but for" degree-of-causation requirement;
- (2) roughly 92% to 95% self-report as exclusively or predominantly heterosexual (Kinsey 0 or 1),<sup>242</sup> as would likely be required to show causation under an intermediate degree-of-causation requirement; and
- (3) roughly 97% self-report as exclusively or preferentially heterosexual (Kinsey 0, 1, or 2),<sup>243</sup> which would be sufficient to show causation under a low degree-of-causation regime.

These statistics would seem to support a presumption of monosexuality in opposite-sex cases.

Another way to look at the statistical case for a presumption of monosexuality is to consider how these statistics would affect the state of the evidence in such a case. If all we know is that a harasser engaged in attraction-based conduct toward a person of the opposite sex, we can place the probability that the harasser is monosexual at 89% or higher. In this sense, we might be able to say that it is more probable than not that the harasser is monosexual—or at least that the plaintiff has introduced relevant evidence of monosexuality.<sup>244</sup> And if the defendant wants to contest this evidence, he or she would need to adduce contrary evidence. That is, the defendant would have the burden of coming forward with evidence of bisexuality—the burden shifts.

Though courts have provided no analysis when adopting their presumption of heterosexuality in opposite-sex cases,<sup>245</sup> reasoning from such population statistics

240. This analysis is slightly different than the analysis above regarding the likelihood of obtaining a self-report of monosexuality in any given harassment case. *See supra* Part II.D.2.a.(1). That analysis looked at the whole population, asking what percentage of that population fell into various categories of orientation. The instant analysis, by contrast, looks only at the population of non-6's, since the facts eliminate the possibility that the harasser is a Kinsey 6, and asks what percentage of that more-limited population falls into various categories of orientation.

241. KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499; KINSEY ET AL., HUMAN MALE, *supra* note 147, at 635; *see also* Tremblay, *supra* note 171 (surveying literature; concluding that best estimate of those reporting homosexuality or bisexuality is in 10% range); BUSINESS WOMEN'S NETWORK, *supra* note 172, at 624 ("Gay, lesbian and bisexual employees make up anywhere from four to 10% of the workforce."); San Francisco Public Library Gay & Lesbian Center, *supra* note 171 (surveying literature). Of course, it is possible that the population of harassers has a different distribution.

242. KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499; KINSEY ET AL., HUMAN MALE, *supra* note 147, at 635.

243. KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499; KINSEY ET AL., HUMAN MALE, *supra* note 147, at 635.

244. *See* FED. R. EVID. 401 (stating that evidence is relevant if it tends to make the existence of a material more probable than it would be absent the evidence).

245. Rather, such courts have usually based such a presumption on their view of "reality" or what "usually" happens—with no further analysis. *E.g.*, *Hopkins*, 77 F.3d at 752 (Neimeyer, J., concurring); *see also* *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) ("Courts and juries have found the inference of discrimination easy to draw in most male-female sexual

might support such a presumption. That is, it might make sense to treat a plaintiff who has presented evidence of opposite-sex attraction-based conduct as having provided some evidence of monosexuality—and thus to grant judgment for the plaintiff absent sufficient evidence to the contrary.<sup>246</sup>

However, an empirical argument for a presumption of monosexuality becomes more difficult to make in same-sex attraction-based cases. In such cases, we can eliminate the possibility that the harasser is exclusively heterosexual (Kinsey 0). Statistics on the distribution of the population among non-heterosexual categories are sparse. Some arguably suggest that a majority of those persons who are not exclusively heterosexual are either exclusively or predominantly gay or lesbian.<sup>247</sup> However, other evidence points to a contrary conclusion. For example, Dr. Kinsey's research shows that, among the population of those who are not exclusively heterosexual, only

- (1) roughly 3% to 8% self-report as exclusively gay or lesbian (Kinsey 6),<sup>248</sup> as would be required to show causation under the stringent “but for” degree-of-causation requirement;
- (2) roughly 4% to 15% self-report as exclusively or predominantly gay or lesbian (Kinsey 5 or 6),<sup>249</sup> as would likely be required to show causation under an intermediate degree-of-causation requirement; and
- (3) roughly 24% to 45% self-report as exclusively or preferentially gay or lesbian (Kinsey 4, 5, or 6),<sup>250</sup> as necessary to show causation under a low degree-of-causation regime.

Thus, it is difficult to argue that a presumption of monosexuality (that is, homosexuality) is empirically supported in same-sex cases.

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harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.”)

246. *E.g.*, *Holman v. Indiana*, 211 F.3d 399, 405-06 (7th Cir. 2000) (summary judgment granted to defendant where plaintiff admitted in pleading that harasser was bisexual). *But see* *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010-11 (7th Cir. 1999) (holding that plaintiff's speculation of harasser's bisexuality was irrelevant and that determination of bisexuality by jury is proper). Whichever approach future courts might take, plaintiffs are less likely after *Holman* and *Shepherd* to admit a belief that their harassers are bisexual.

247. *See* BUSINESS WOMEN'S NETWORK, *supra* note 172, at 618 (study among gay, lesbian, and transgendered population indicates that 91% self-report as gay, lesbian, or homosexual, while only 6% self-report as bisexual); Tremblay, *supra* note 171 (surveying literature and concluding that the best estimate of those who are gay/lesbian or predominantly gay/lesbian is in the 5% range—that is, roughly 50% of the 10% estimated to be gay/lesbian or bisexual).

248. *See* KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499; KINSEY ET AL., HUMAN MALE, *supra* note 147, at 635; *see also* Tremblay, *supra* note 171 (surveying literature and concluding that the best estimate of those reporting homosexuality or bisexuality is in 10% range; BUSINESS WOMEN'S NETWORK, *supra* note 172, at 624 (“Gay lesbian and bisexual employees make up anywhere from four to 10% of the workforce.”); San Francisco Public Library Gay & Lesbian Center, *supra* note 171 (surveying literature). Of course, it is possible that the population of harassers has a different distribution.

249. *See* KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499; KINSEY ET AL., HUMAN MALE, *supra* note 147, at 635; *see also* Tremblay, *supra* note 171, app. A.

250. *See* KINSEY ET AL., HUMAN FEMALE, *supra* note 169, at 499; KINSEY ET AL., HUMAN MALE, *supra* note 147, at 635.

This is not to say that courts should not adopt a bilateral presumption of monosexuality. It is only to say that such a bilateral presumption, while supported by numerous other compelling arguments, is not supported by population statistics.

## (2) Arguments Against a Presumption of Monosexuality

Despite these benefits, such a presumption would raise several potential concerns. First, there might be concerns about the non-individual nature of presumptions in general. To the extent that a presumption is based on population statistics, it seems to allow an inference about an individual's mindset (and, indirectly, the individual's guilt) based on group behavior and inclinations. It does not seem a far cry from this reasoning to suggest that if 51% of a population were thought to be inclined toward theft, that a factfinder might infer (at least to a civil standard) that a randomly chosen member of that population was inclined toward theft, and thus might have committed a particular theft. This seems contrary to individualistic conceptions of justice.

Yet we seem to engage in similar reasoning in many areas of the law. For example, we permit juries to convict criminals based on proof of motive—that is, proof that an individual acted in a manner in which a large segment of humanity might have been inclined to act under the circumstances. And in the area of anti-discrimination law, we permit an inference of discriminatory intent where some of the more common reasons for an employment action have been eliminated—which seems to reflect an assessment that, in such circumstances, there is a significant probability that discrimination played a role in the decision, even though there might be no other individualized proof.<sup>251</sup>

Another objection to presumptions in general might be raised on doctrinal grounds: Disparate treatment doctrine—at least outside the area of sexual harassment—has made clear that a plaintiff generally bears the burden of persuasion in showing discriminatory causation.<sup>252</sup> Thus, to the extent that a presumption of monosexuality puts on defendants a burden of persuading the factfinder that the harasser was bisexual, this might be doctrinally problematic. However, there are two potential responses to this doctrinal issue.

First, in at least some disparate treatment cases (so-called “mixed motive” cases), the burden of persuasion does shift to the defense upon a showing by the plaintiff that a protected characteristic, such as sex, was a “motivating factor.”<sup>253</sup> The problem is that, as we have seen, absent some presumption, many plaintiffs will be hard-pressed to prove that sex was a “motivating factor.”

A second, and more promising, response is that presumption of monosexuality may be characterized as shifting only the burden of coming forward with evidence—not as shifting the burden of persuasion. This characterization makes sense as an evidentiary matter. As discussed above, based on population statistics, it would seem possible for the plaintiff to create an inference of monosexuality (at least in opposite-

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251. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

252. See *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 142 (2000); *Hicks v. St. Mary's Honor Ctr.*, 509 U.S. 502, 507 (1993). But see 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2003) (stating that once plaintiff shows that sex was a “motivating factor,” burden switches to defense to show absence of “but for” causation); *Desert Palace, Inc. v. Costa* 123 S. Ct. 2148, 2150 (2003).

253. See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (stating that once plaintiff shows that sex was a “motivating factor,” burden switches to defense to show absence of “but for” causation); *Costa*, 123 S. Ct. at 2150.

sex cases) based solely on a showing of attraction-based conduct. If the defendant does not come forward with some evidence to rebut this inference, it might make sense to find for the plaintiff on the issue. That is, based on the inference that can be raised from the plaintiff's showing, it makes sense to require the defendant to present evidence to rebut that inference.

Such evidentiary presumptions are consistent with general disparate treatment law.<sup>254</sup> Under the *McDonnell Douglas* framework, once a plaintiff establishes a prima facie case of causation, the defendant must come forward with evidence to rebut that case.<sup>255</sup> One reason for shifting the evidentiary burden in *McDonnell Douglas* cases is similar to one of the reasons that would underlie a presumption of monosexuality: The information necessary to resolve the issue of causation is largely within the defendant's control.<sup>256</sup>

### (3) A Bilateral Presumption of Monosexuality

The benefits of a presumption of monosexuality discussed so far (increased practical utility for attraction theory for plaintiffs, appropriate burden shifting to the party with control over the relevant information, and increased privacy for accused harassers) would exist even if the presumption were only a one-way presumption—that is, even if only heterosexuality were presumed (as the courts currently do), or only homosexuality were presumed, but not both. However, these benefits would be increased if the presumption were bilateral—that is, if both heterosexuality (in opposite-sex attraction cases) and homosexuality (in same-sex attraction cases) were presumed. Simply put, such a bilateral presumption would apply, and therefore provide its benefits, in more cases than would a one-way presumption.

In addition, such a bilateral presumption of monosexuality would avoid a number of significant problems inherent in a one-way presumption. First, a one-way presumption results in inequalities among victims (victims of same-sex harassment are treated differently than victims of opposite-sex harassment) and harassers (heterosexual harassers are treated differently than gay/lesbian harassers). A bilateral presumption of monosexuality would avoid these inequalities.<sup>257</sup>

A second problem with a one-way presumption is that it may have the effect of putting the courts' imprimatur on one sexual orientation (heterosexuality) over others. Although the court might only be saying that heterosexuality is statistically more common than other sexual orientations,<sup>258</sup> such a presumption might (reasonably) be perceived as saying that heterosexuality is somehow more normal, or even better than, other sexual orientations. As Professor Franke aptly put it, such a message would be "deeply heterosexist."<sup>259</sup> A presumption of monosexuality would avoid such heterosexism; there would be no appearance of preferring heterosexuality over

254. See *Reeves*, 530 U.S. at 142; *Hicks*, 509 U.S. at 507.

255. See *Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 506-07; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 802-03.

256. See *Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 507.

257. Of course, even under a bilateral presumption, victims of monosexual harassers would be treated differently than victims of bisexual harassers, and monosexual harassers would be treated differently than bisexual harassers. These inequalities are discussed below in Part IV.A which argues that these inequalities are not cause for concern.

258. See *supra* Part II.D.2.b.(1).

259. Franke, *supra* note 3, at 735.

homosexuality.<sup>260</sup>

Courts have resisted a bilateral presumption—that is, hesitated to presume homosexuality in same-sex cases. This resistance might have two bases. First, courts may hesitate to presume homosexuality in same-sex cases based on the sense that, in such cases, sexual conduct might be explained by factors other than sexual attraction.<sup>261</sup> However, this is not a valid basis for resisting a presumption of homosexuality in same-sex cases. The presumption would only come into play in cases where a plaintiff had proven that the conduct in question was based on sexual attraction (which should also be a precondition to application of the presumption in opposite-sex cases). Thus, there seems no reason to treat same-sex cases any differently than opposite-sex cases in terms of the possible explanations for sexual conduct.

Alternatively, the courts' hesitance to presume homosexuality in same-sex cases may be based on the population statistics discussed above. That is, while there seems to be strong empirical evidence to support a presumption of heterosexuality in opposite-sex cases, the evidence to support a presumption of homosexuality in same-sex cases is less clear at this point. However, the significant benefits from such a bilateral presumption seem sufficient to adopt such a presumption on policy or fairness grounds, even if not on evidentiary grounds.<sup>262</sup>

*E. Summary: The Significance of Attraction Theory's Coverage Gaps*

This Part has shown that attraction theory will work to show causation in a significant number of sexual harassment cases, both as a theoretical matter and as a practical matter. Although there are some theoretical gaps in attraction theory, notably in the areas of bisexuality and conduct not motivated by attraction, such gaps do not appear likely to affect a large number of cases. And although practical issues of proof may prevent some plaintiffs from proving the conditions necessary for attraction theory (especially monosexuality), there is good reason to believe that, in most cases, plaintiffs should be able to prove these conditions where they do in fact exist. Moreover, if the courts were to adopt a bilateral presumption of monosexuality, this would further reduce the significance of the problem of proof.

In summary, coverage gaps in the applicability of attraction theory cannot justify the intense criticism that has been leveled at that theory by power-based theorists. While it might make sense to criticize attraction theory if the gaps were so large that they rendered the theory practically useless, this Part has shown that this is not the case. To the contrary, despite its coverage gaps, there is good reason to believe that attraction theory has—and will continue to have—great practical utility.

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260. Of course, a presumption of monosexuality might be seen as monosexist—that is, preferring monosexual lifestyles over bisexual lifestyles. Although this concern is valid, the benefits of such a presumption are many. And perhaps the courts (or legislatures) adopting such a presumption could take extra steps to articulate that such a presumption is not intended, in any way, to suggest such a preference; that it is purely intended as an evidentiary device.

261. *E.g.*, *Tietgen v. Brown's Westminster Motors*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (stating that in same-sex cases, sexual conduct might be explained “as mere locker room antics, joking, or horseplay”).

262. However, the lack of a solid evidentiary basis for a presumption of monosexuality in same-sex cases might suggest a need for legislative, as opposed to judicial, adoption of such a presumption.

### III. POTENTIAL NORMATIVE CRITIQUES OF ATTRACTION THEORY

Despite its practical utility, power-theorists have attacked attraction theory on normative grounds. They argue that, despite its practical utility, attraction theory should not be used, or that, at the very least, plaintiffs should hesitate to use the theory and courts should hesitate to accept it.<sup>263</sup>

The following Parts will address the normative critiques that have been leveled—and those that might be leveled—against attraction theory. This Part will conclude that, while attraction theory is not without its normative problems, few of these problems are insurmountable and none warrant marginalizing, much less discarding, attraction theory.

#### A. Inequalities Resulting From Coverage Gaps

Several critics of attraction theory have been concerned about the fact that it may result in inequalities among victims or among harassers.

##### 1. Unequal Treatment of Victims

Critics have expressed concern that attraction theory treats different groups of victims differently.<sup>264</sup> Actually, there are three potential reasons why attraction theory might treat different groups of victims differently. But it turns out that only two of these reasons are inherently the product of attraction theory.

Many critics of attraction theory focus on differences in treatment of victims that result not from attraction theory itself, but from the presumption of heterosexuality that the courts have adopted in applying that theory.<sup>265</sup> Under this presumption, victims of opposite-sex harassment may presume monosexuality (heterosexuality) and attraction; while victims of same-sex harassment will need to prove these facts, which might be quite difficult, possibly precluding the ability to use attraction theory or even to obtain a remedy. However, as discussed above,<sup>266</sup> this one-way presumption is not a necessary part of attraction theory. (And, as also discussed above, the courts would be well advised to abandon this one-way presumption.)<sup>267</sup> Thus, the differences in treatment among victims that result from the courts' presumption of heterosexuality are not valid arguments against attraction theory.

There are, however, two other aspects of attraction theory itself that will have a tendency to treat different groups of victims differently. First, even absent a presumption of heterosexuality, inequalities may result from the practical aspects of attempting to prove harassers' sexual orientation. As noted above, it may be more difficult to prove homosexuality than it is to prove heterosexuality.<sup>268</sup> This inequality might be alleviated if the courts adopted a bilateral presumption of monosexuality, as I

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263. See, e.g., Franke, *supra* note 3, at 735-47 (containing extended discussion regarding “what . . . is wrong with understanding sexual harassment as an expression of sexual desire”—that is, with attraction theory).

264. E.g., Abrams, *supra* note 5, at 1188-91; Estrich, *supra* note 3, at 819-20; Franke, *supra* note 3, at 740-41; Schultz, *supra* note 4, at 1706-10.

265. E.g., Franke, *supra* note 3, at 740-41.

266. See *supra* Part II.A.

267. See *supra* Part II.D.2.b.(3).

268. See *supra* Part II.D.2.a.

have suggested.<sup>269</sup> However, absent such a bilateral presumption, victims of same-sex harassment might find it more difficult to prove monosexuality, and thus avail themselves of attraction theory, than would victims of opposite-sex harassment. And to the extent that such victims of same-sex harassment cannot prove monosexuality, and cannot find another method of proving causation, they might find themselves without a remedy for discriminatory conduct when victims of opposite-sex harassment might not.

A second form of inequality among victims results from the theoretical gaps in attraction theory—that is, the bisexuality gap and the non-attraction gap. As a result of these gaps, some plaintiffs are able to avail themselves of attraction theory, while others are not. Victims of harassers motivated by attraction are treated differently than victims of harassers motivated by factors other than attraction. Victims of bisexual harassers are treated differently than victims of monosexual harassers. Those who fall within its coverage gaps, and are therefore unable to use attraction theory, may face increased difficulty in proving causation—and might even be unable to obtain a remedy for discriminatory conduct.

To what extent should these inequalities be cause for concern? The answer is that, while such inequalities should be cause for concern in the sense of trying to find other theories of causation for use by plaintiffs who cannot avail themselves of attraction theory, these inequalities are not a good reason to attack attraction theory.

It seems somewhat strange to attack attraction theory based on the fact that it will only provide *some* plaintiffs with a way to show causation, and thus obtain a remedy. Such an attack essentially suggests that we should prevent those plaintiffs for whom attraction theory might work from using that theory, just because some other plaintiffs might not be able to use the theory. This critique does not make sense.

The folly of this critique can be seen by an analogy to theories of proof of causation under general disparate treatment law (outside the area of sexual harassment). Under one such theory, plaintiffs can prove causation by showing “pretext”—that is, that the defendant has been dishonest regarding the reasons he or she took the action in question.<sup>270</sup> Based on such dishonesty, a factfinder might infer that the defendant had engaged in a cover up and that what was being covered up was discrimination.<sup>271</sup> Of course, not all victims of discrimination will be able to demonstrate pretext. Yet no one has suggested that the pretext method of proving discriminatory causation should be scrapped for that reason. Similarly, it makes no sense to suggest scrapping attraction theory because it will not work in all cases—denying those plaintiffs that could use the theory the ability to do so solely because not everyone will be able use the theory.

## 2. Unequal Treatment of Harassers

The flip side of the fact that attraction theory will work for some victims and not others is the fact that attraction theory will work for some harassers and not others. Depending on the presumptions applied regarding sexual orientation, some harassers will find it easier than others to resist a showing of monosexuality, and thus causation, as a practical matter.<sup>272</sup> And, irrespective of any presumptions that might apply, the

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269. *See supra* Part II.D.2.b.

270. *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Hicks v. St. Mary’s Honor Ctr.*, 509 U.S. 502, 525 (1993) (Souter, J., Dissenting).

271. *See Reeves*, 530 U.S. at 142; *Hicks*, 509 U.S. at 525 (Souter, J., Dissenting).

272. *See supra* Part II.D.

theoretical gaps in attraction theory will result in unequal treatment of harassers. Attraction theory will work to show causation when the harasser is motivated by attraction, but not when the harasser is motivated by factors other than attraction. And attraction theory will work to show causation when the harasser is monosexual but not bisexual. Several critics of attraction theory have been concerned about these inequalities among harassers. These criticisms can be understood as addressing two potential problems that stem from attraction theory's differential treatment of perpetrators.<sup>273</sup>

#### a. Rule of Law Issues

Some critics have used attraction theory's arguably unequal treatment of perpetrators to attack not just attraction theory, but to attack sexual harassment law more generally—that is, the treatment of sexual harassment as a form of sex discrimination.<sup>274</sup> Richard Epstein for example, has claimed that sexual harassment law is “bankrupt” because it cannot be used to hold a bisexual harasser liable.<sup>275</sup> Ellen Frankel Paul has taken the argument further, suggesting that such unequal treatment of perpetrators presents a rule of law problem. She argues that the rule of law precludes different treatment of offenders for the same conduct, based solely on the status or identity of the offender; and that when sexual harassment is treated as a form of sex discrimination, bisexuals are treated differently than monosexuals for the same conduct.<sup>276</sup>

These critics make two errors. First, they equate attraction theory with sexual harassment law. They fail to recognize that attraction theory is only one way to prove causation in sexual harassment cases. Thus, it makes little sense to criticize sexual harassment law as a whole for an alleged shortcoming of one theory of causation.

Second, these critics confuse the concepts of proof and liability. The bisexuality gap (the focus of both the Bork/Epstein criticism and the Paul criticism) is not an exception to liability; it is only an exception to the applicability of one theory for proving causation. If a bisexual harasser did what the law prohibits (for example, select his or her targets based on their sex), and this could be proven, the harasser would be held liable. There is no immunity based on the status or identity; there is only a gap in the applicability of one potential method of showing causation.<sup>277</sup>

These critics might attempt to resist this distinction between proof and liability. They might argue that if a bisexual and a monosexual engage in what appears to be the exact same conduct (e.g. making coercive sexual advances), the law itself would condemn the monosexual but not the bisexual—not just as a matter of proof, but as a

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273. This part does not discuss different treatment of perpetrators that might result from a one-way presumption of monosexuality (for example, a presumption of heterosexuality), such as that adopted by the courts. Such a presumption is not a necessary part of attraction theory. The desirability of such a presumption, as opposed to either a bilateral presumption of monosexuality in all cases or the use of no presumptions at all, is discussed above in Part II.D.2.b.

274. *E.g.*, *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1984) (Bork, J., dissenting from denial of rehearing en banc); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 357-58 (Harvard Univ. Press 1992).

275. *E.g.*, EPSTEIN, *supra* note 274, at 357-58.

276. Paul, *supra* note 120, at 352.

277. The possibility that a monosexual harasser might escape liability by feigning bisexuality will be addressed immediately *infra* Part III.A.2.b.

matter of liability. The problem with this argument is that the conduct is *not* exactly the same for purposes of the law. The point of sex discrimination law is to not to punish people for mistreating other people. Rather, the point of sex discrimination law is to punish people for selecting other people to mistreat based on their sex. Thus, if a bisexual harasser mistreats someone, but cannot be considered to have selected that person for mistreatment based on that person's sex, the bisexual harasser has not violated the law—not because the harasser is bisexual (status), but because the harasser has not engaged in sex-based selection (action). There is no rule of law problem.<sup>278</sup>

#### b. Potential for Evasion of Liability

Several courts and commentators have expressed concern that the gaps in attraction theory—particularly the bisexuality gap—might present opportunities for discriminators to avoid liability. There are two possible variations of this argument.

First, because of its gaps, certain types of discrimination are not amenable to proof of causation by attraction theory. For example, suppose that a perpetrator engages in destructive sexual conduct against women (but not men) based on animosity toward women, as opposed to attraction toward women. As noted above, attraction theory will not work to prove causation in such a case, even though the conduct in question is discriminatory. Depending on the evidence available to show causation by other means, in such a case there is a danger that it might not be possible to prove causation—and that the perpetrator would escape liability.

The danger that perpetrators might escape liability as a result of plaintiffs' inability to prove causation in cases where attraction theory does not apply is not really a problem with attraction theory. If anything, this argument—that is, that, where attraction theory does not apply, some discriminators may get away with it—is a testament to the effectiveness of attraction theory. It brings into focus the fact that attraction theory provides a relatively effective method for proving causation; and that, where this method is not available, discriminators may be able to avoid being proven to have engaged in discriminatory causation.

Moreover, as with the criticism that attraction theory treats different groups of victims differently, the argument that attraction theory should be discarded because it treats different groups of harassers differently does not seem to make sense. If we can detect and prove causation in cases against some discriminators using this theory, it hardly seems to make sense to argue that we should scrap the theory because it will not help us detect and prove causation against all discriminators.

However, other courts and commentators have focused on a second variation of the evasion problem to criticize attraction theory. These writers are worried that harassers may escape detection or liability by *falsely* claiming to fall within one of the gaps in attraction theory. In particular, some critics of attraction theory are concerned that monosexual harassers may feign bisexuality to escape detection.<sup>279</sup> Worse, they argue, such harassers may do so by harassing people they would not otherwise have

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278. This is not to say bisexuals cannot engage in sex-based selection of targets to harm. It is only to say that, by definition, a bisexual does not engage in sex-based selection of potential sexual partners based on attraction. Thus, if the decision at issue involves this type of selection, there is no discrimination.

279. *E.g.*, *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994); *Ciapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337-38 (D. Wyo. 1993).

harassed.<sup>280</sup>

The first response to this criticism is that it is far from clear how likely it is that many monosexuals would pose publicly as bisexuals—much less make sexual advances toward people to whom they are not attracted—for the purpose of protecting their employers from liability.<sup>281</sup> The social stigma that unfortunately continues to be attached to bisexuality would seem to provide a major deterrent to such action—at least in cases where the harasser is purely heterosexual,<sup>282</sup> and quite possibly in cases where the harasser is purely gay/lesbian.<sup>283</sup> Moreover, to the extent that such evasion were to take the form of making additional sexual advances, the idea of engaging in sexual conduct toward those to whom one is not attracted would seem to be its own deterrent. (And recall that a finding of causation under attraction theory would only be avoided if the factfinder believed the harasser were either purely bisexual or preferred partners who were not the same sex as the target.<sup>284</sup> So a monosexual who set out to avoid a finding of causation in this way would need to harass a substantial number of persons to whom he or she was not attracted in order to make a convincing case.) Finally, under most anti-discrimination laws, harassers themselves are not held liable; liability attaches only to the employer.<sup>285</sup> Thus, any incentive the harasser might have to feign bisexuality would seem small. This reasoning seems borne out by the fact that there are very few reported cases in which harassers claim to be bisexual.

The second response would be that it does not seem to make sense to scrap a method of proof because it may permit some individuals wrongly to escape its reach. Again, an analogy to the pretext theory under general disparate treatment law seems in order. Some defendants who in fact discriminated will likely be able to articulate reasons for their actions, which a plaintiff might not be able to prove false. In such a case, the defendant would, by his or her deception, (wrongly) avoid a finding of causation under pretext theory.<sup>286</sup> But pretext theory—like attraction theory—works to prove causation in countless other cases. It seems senseless to argue that either theory should be scrapped because some people may wrongfully escape its reach.

In summary, the fact that attraction theory does not work in all cases suggests a need to develop additional theories of causation that might cover those cases that attraction theory cannot. Several writers have taken great strides toward developing such theories.<sup>287</sup> But neither the coverage gaps in attraction theory, nor the inequalities

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280. *E.g.*, *Steiner*, 25 F.3d at 1464; *Ciapuzio*, 826 F. Supp. at 1337-38.

281. This point has been suggested by Professor Calleros. Calleros, *supra* note 123, at 77.

282. Schaffner, *supra* note 169, at 18-20 (discussing “the social stigma and marginalization arising from homophobia.”); *See also* Laarman, *supra* note 169, at 569 (acknowledging the social stigma attached to homosexuality makes the abuse of domestic partner benefits unlikely).

283. *See* Rover, *supra* note 218.

284. *See supra* Part II.B.2.

285. *E.g.*, 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination by “employers”); *Falbaum v. Pomerantz*, No. 00-9039, 2001 WL 1019616, at \*14-15 (2d Cir. Sept. 6, 2001) (finding no personal liability under Title VII); *Wathen v. General Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997) (finding no personal liability under Title VII); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (finding no personal liability under Title VII).

286. In such a case, as in a case where a monosexual harasser successfully persuaded a factfinder he or she was bisexual, other theories of causation would remain available. Only pretext theory, or in the harassment context, attraction theory, would be unavailable as a result of the perpetrator’s deception.

287. *E.g.*, Abrams, *supra* note 5; Estrich, *supra* note 3; Franke, *supra* note 3; Schultz, *supra* note 4; *see also* *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81 (1998) (suggesting ways other than attraction theory by which plaintiffs might prove causation, such as

created by these gaps, provide an argument for doing away with attraction theory.

### B. Accounting for Power

Some authors have criticized attraction theory for failing to account for what they believe is the true dynamic behind sexual harassment—that is, that sexual harassment is ultimately about power, not attraction.<sup>288</sup> However, it is not clear exactly how this argument serves as an indictment of attraction theory.

At one level, this criticism appears to be nothing more than a coverage gap issue, or an issue with attraction theory's unequal treatment of victims or harassers. That is, the critics of attraction theory are concerned that the theory is not capable of proving causation where a harasser is motivated by power, as opposed to attraction. As discussed above, while this is true (albeit only in cases where attraction plays no part in the harasser's decision),<sup>289</sup> neither this coverage gap, nor the inequalities that result from it, provide a good reason for discarding attraction theory.<sup>290</sup>

But critics' concerns about attraction theory's inability to account for power-based harassment seem to go beyond the fact that this represents a coverage gap, and beyond the fact that this coverage gap may result in inequality between victims of power-based harassment and victims of attraction-based harassment. Rather, critics seem concerned that a theory based on attraction somehow misconceives reality. These critics insist that harassment is about power—not attraction.<sup>291</sup>

There are two possible variations of this argument. The strong version would be that *all* sexual harassers are motivated *solely* by a desire to demonstrate or exercise power, and that attraction plays no role. If this position were accurate, then there would be no role for attraction theory. Attraction theory cannot work to show

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by comparative evidence or by evidence of a sex-based negative attitude that might be derived from the conduct itself); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2002) (en banc) (stereotyping theory).

288. *E.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 586 (7th Cir. 1997) (noting that attraction theory “betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok—in other words, that the harasser is attracted to the victim and simply cannot restrain himself”); Estrich, *supra* note 3, at 818 (stating that sexual harassment doctrine based on attraction fails to account for the power dynamic between men and women in the workplace); *see also* MACKINNON, *supra* note 1, at 1 (“Central to the concept [of sexual harassment] is the use of power derived from one social sphere to lever benefits or impose deprivations in another.”); Franke, *supra* note 3, at 743 (“[M]en engage in offensive sexual conduct in the workplace *primarily* as a way to exercise or express power, not desire.” (emphasis added)); Schwartz, *supra* note 2, at 1721 (“It has long been broadly acknowledged ‘that men engage in offensive sexual conduct in the workplace *primarily* as a way to exercise or express power, not desire.’”).

289. *See supra* Part II.C.

290. *See supra* Parts II.C, E.

291. *See* Schwartz, *supra* note 2, at 1721 (“It has long been broadly acknowledged ‘that men engage in offensive sexual conduct in the workplace *primarily* as a way to exercise or express power, not desire.’” (emphasis added)); *see, e.g.*, *Doe*, 119 F.3d at 588 (“[H]arassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser.”); Estrich, *supra* note 3, at 820 (discussing that sexual harassment is about men exercising power over women); Franke, *supra* note 3, at 743 (“[M]en engage in sexual conduct in the workplace *primarily* as a way to exercise or express power, not desire.”); *see also* MACKINNON, *supra* note 1, at 1 (“Central to the concept [of sexual harassment] is the use of power derived from one social sphere to lever benefits or impose deprivations in another.”).

causation in cases where there is no attraction; and, under the strong power hypothesis, such cases cover the entire universe of sexual harassment cases.

However, such a strong position on power seems extremely problematic, since it suggests, without the benefit of any convincing, systematic empirical research: (1) that these writers have a pipeline into the mind of all sexual harassers; (2) that the entire universe of harassers has a single, uniform motivation for their actions; and (3) that the courts have been getting it wrong for the last twenty-five years.

In fact, it is not clear that anyone seriously takes this strong position. While most critics of attraction theory use strong language about how it “betrays a fundamental misconception” about the nature of sexual harassment,<sup>292</sup> most ultimately adopt a weaker version of this argument: that is, that some significant portion—but not necessarily all—sexual harassment is motivated by power. For example, Judge Rovner, after talking about “fundamental misconception[s],” describes the misconception as the belief “that sexual harassment *inevitably* is a matter of sexual desire run amok.”<sup>293</sup> That is, she is merely rejecting the argument that all sexual harassment is motivated by attraction.

Yet, it is not clear how such a weak argument about the “reality” of sexual harassment—that is, that it might be motivated by power, attraction, or both—serves as an indictment of attraction theory. If the only criticism is that sexual harassers are *sometimes* or even *often* motivated by power—while acknowledging that attraction may sometimes play a role—then there would not seem to be a problem with attraction theory. As noted above, this simply means that attraction theory will not work in all cases. It is nothing more than a coverage gap argument, which, as discussed above, is not a valid argument for rejecting attraction theory.

Moreover, it seems difficult to argue that a theory of causation, such as attraction theory, misconceives reality—or anything else. Theories of causation either work to prove causation or they do not. Attraction theory does not believe or disbelieve anything; it does not believe, for example, that “sexual harassment inevitably is a matter of sexual desire run amok.”<sup>294</sup> It simply provides a way of proving causation where sexual desire does motivate the harasser, at least in part (and where the harasser is monosexual). Thus, it does not make sense to say a *theory*, such as attraction theory, misconceives the nature of harassment.

That being said, the doctrines developed and used within the legal system, even if they work, and even if they do not have perceptions of their own, may often serve to influence perceptions in two important ways. First, legal doctrines can influence the perception of legal decisionmakers—both those who apply the law (e.g., lawyers, judges, and juries) and those who are governed by it (e.g., employers and employees). Second, legal doctrines can influence the perception of the lay public, as well as the legal public, who, based on such perceptions, may ultimately come to support or

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292. *Doe*, 119 F.3d at 586.

293. *Id.* (emphasis added); *see also id.* at 588 (“[H]arassment, like other forms of victimization, is *often* motivated by issues of power and control on the part of the harasser.”) (emphasis added); Franke, *supra* note 3, at 743 (“[M]en engage in sexual conduct in the workplace *primarily* as a way to exercise or express power, not desire.”) (emphasis added); Schwartz, *supra* note 2, at 1721 (“It has long been broadly acknowledged ‘that men engage in offensive sexual conduct in the workplace *primarily* as a way to exercise or express power, not desire.’”).

294. *See Doe*, 119 F.3d at 586 (noting that attraction theory “betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok—in other words, that the harasser is attracted to the victim and simply cannot restrain himself”).

oppose the activity regulated by those doctrines. The following two Subparts will deal with these issues respectively.

### 1. The Effect of Attraction Theory on Perceptions of Legal Actors

One possible criticism of attraction theory that might flow from the weak argument about the “reality” of sexual harassment is that attraction theory might somehow blind legal decisionmakers to the fact that some cases involve power, as opposed to attraction. There are two possible variations of this concern.

First, the concern might be that judges, and possibly juries, will mistake attraction theory for the entire law of causation in sexual harassment—and will thus treat attraction as a required element in sexual harassment cases. Thus, victims of discriminatory sexual conduct that was not based on sexual attraction would not have a cause of action, or would inevitably lose in a sexual harassment case. It is true that some early cases seemed to suggest that courts were making this error. And this approach certainly misconceived the nature of harassment, as well as causation. But it has been years since anyone seriously entertained the idea that causation could only be proven by attraction theory.<sup>295</sup> And in case there was any doubt on the subject in the lower courts, the Supreme Court has made clear that attraction theory is not the only way to prove causation.<sup>296</sup>

An alternative, and more valid, concern may be that, even if courts and other legal decisionmakers do not treat attraction theory as the exclusive way of showing causation, the theory may distract them, diverting their attention and preventing them from properly applying other theories of causation in certain cases. Vicki Schultz has offered a compelling version of this argument.<sup>297</sup> She has shown that judges who focus too much on attraction may fail to see sexual harassment as part of a broader discriminatory attitude (such as misogyny), and may therefore fail to find causation for discriminatory nonsexual conduct.<sup>298</sup> That is, judges who focus too much on attraction may give too little weight to evidence of causation that is not based on attraction theory. And employers and co-workers may do the same. As a result, legal decisionmakers may under enforce norms against discrimination.<sup>299</sup>

A related argument is that a focus on attraction might have a tendency to “normalize” harassing behavior.<sup>300</sup> That is, attraction theory, which is based on sexual

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295. *E.g., id.* at 577 (discussing that attraction theory is not the only way to show causation); *Quick v. Donaldson*, 90 F.3d 1372, 1378 (8th Cir. 1996) (same).

296. In *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), the Court held that plaintiffs can prove causation in at least four different ways: (1) the presumption of heterosexuality in opposite-sex cases (that is, attraction theory); (2) proof of homosexuality in same-sex cases (that is, attraction theory); or other forms of proof, such as (3) comparative evidence; or (4) inferring biased attitude from the nature of the conduct. *Id.* at 80-82. The last two methods are clearly not attraction theory.

297. *See Schultz*, *supra* note 4.

298. *See id.* note 4, at 1689. Actually, Professor Schultz’s criticism is not reserved for attraction theory. Rather, her criticism is that focusing on sexuality has tended to blind legal decisionmakers to other forms of discriminatory conduct. *Id.* The attraction-based paradigm discussed in this Article is a subset of the conduct that concerns Professor Schultz. (In other words, this Article assumes that some sexual conduct is based on attraction.)

299. *Id.*

300. *See Franke*, *supra* note 3, at 743 (discussing the “inclination to normalize sexual harassment” by understanding it merely as the “inappropriate or boorish expression of otherwise healthy or robust heterosexual or homosexual desire”).

attraction, might cause judges, or others in society (including employers and potential harassers) to associate sexual harassment with “normal” sexual attraction and its “normal” manifestations—what might be thought of as the roses-and-chocolate model of courtship.<sup>301</sup> As a result of this (mistaken) association, such individuals might not see harassment for the deviant and harmful conduct that it is, but might instead tend to see it as somehow being normal, or not significantly harmful.<sup>302</sup> Legal decisionmakers (or society more generally) might tend to belittle the evil of harassment by conceiving it as simply “a matter of sexual desire run amok.”<sup>303</sup> Any such thinking may have the effect of increasing the prevalence of sexual harassment, causing courts to under enforce the proscription against discriminatory harassment, or both.<sup>304</sup>

Some critics have analogized this problem to early, misguided views of rape, which viewed it as a crime based on sex, and not power.<sup>305</sup> These early views of rape as being based on sexual attraction tended to normalize and legitimize rape in the public mind—including in the minds of police, prosecutors, judges, and jurors—

301. Sexual harassment, of course, is not “normal” in this sense. It does not involve the type of simple sexual attraction that might be reciprocated and that might lead to fulfilling personal relationships. By definition, sexual harassment involves unwelcomeness and offensiveness, and thus *unreciprocated* feelings. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (discussing that conduct must be unwelcome to be sexual harassment). By definition, sexual harassment involves severity or pervasiveness, and thus more than simple requests that might turn out to be unwelcome. *Id.* It often involves harassers who see it as their right to badger or, worse, coerce partners into sexual relationships or punish them for resisting.

302. In fact, some early judicial opinions suggested that this had occurred in the minds of some judges, who had trouble finding liability for what they considered normal—or at least inevitable—conduct between men and women. *E.g.*, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976); *Tomkins v. Pub. Serv. Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976); *Barnes v. Train*, No. 1828-73, 1974 WL 10628 at \*1 (D.D.C. Aug. 9, 1974). It is certainly possible that attraction theory, or a more general focus on sexuality, contributed to this confusion.

303. See *Doe v. City of Belleville*, 119 F.3d 563, 586 (7th Cir. 1997) (noting that attraction theory “betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok—in other words, that the harasser is attracted to the victim and simply cannot restrain himself”).

304. Conversely, Professor Schultz argues that focusing on sexual attraction—and thus sexuality—may tend to cause over-enforcement of problematic norms against sexuality. That is, by focusing on sexuality instead of discrimination, employers and courts may tend to punish or prohibit nondiscriminatory sexual or expressive conduct that we should value. Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL’Y 417, 432 (2001) (“[B]anish[ing] all hints of sexuality from the workplace . . . would not represent progress. On the contrary, I think it is part of a feminist vision of progress to be able to express ourselves more freely and to be more fully human while we are at work.”). Actually, attraction theory, which is designed to be able to show where sex-based decisionmaking has occurred, should never punish nondiscriminatory conduct. And the requirement of harm that exists in other areas of sexual harassment doctrine—such as the requirements that harassing conduct be unwelcome, offensive, and severe or pervasive—should prevent sanctions from being imposed on consensual sexual and expressive activity.

305. *E.g.*, *Doe*, 119 F.3d at 587 n.22 (citing *United States v. Powers*, 59 F.3d 1460, 1465-66 & n.5 (4th Cir. 1996)) (“The notion that harassment is only actionable sexual harassment when it can be attributed to the harasser’s sexual interest in the victim is reminiscent of the now discredited idea that rape is a sexual act, rather than an act of violence. Today we understand it as the latter.”); Estrich, *supra* note 3, at 820-21; Franke, *supra* note 3, at 740 (“To understand sexual harassment primarily in terms of sexual desire is wrong for many of the same reasons that it is a mistake to understand rape as primarily a crime of passion or lust.”).

blinding them to the abnormal and heinous nature of this crime. Critics of attraction theory have expressed a concern that a theory that expressly links sexual harassment with sexual attraction may have the same blinding effect.

These arguments are essentially about a struggle for the perceptive resources of legal decisionmakers and the public. They are arguments that, to the extent attraction theory (or any other theory based on sexuality) fills the field of our perception, such a theory may prevent us from recognizing the discriminatory nature of conduct that the theory does not cover. Thus, for example, where conduct is based not on sexual attraction, but on gender-based power, we may be so caught up in attraction theory that we would fail to recognize the discriminatory nature of the conduct (or, worse, fail to recognize the discriminatory nature of the gender-based power dynamic itself).

Yet even if these concerns are valid (and they seem to be), the question remains: Do we forego the use of an effective theory of causation because of some of the thinking it may encourage? Or do we try to encourage better thinking? My inclinations, at least at this point, lie with the second option: education.

Arguments about the effects of attraction theory upon our perceptive resources properly condemn our failure to focus our attention beyond attraction theory. These arguments suggest a need to educate practitioners and judges, as well as employers, about the nonattraction-based aspects of sexual harassment—including education about the discriminatory manner in which power may be exercised in the workplace, both in sexual ways and in nonsexual ways.

Education of this sort seems to be well underway. Articles like those written by Professor Schultz and the other second-generation feminists seem to take a large step in this direction. And many employers currently provide sexual harassment training to their employees, much of which tries to clarify that harassment may involve motivations other than attraction. Perhaps as a result of these efforts, it appears that there is less judicial distraction and confusion than there was twenty-five years ago, which is encouraging. And while distraction and confusion likely still exist, this would suggest a need for more education and more communication, not for marginalizing or scrapping attraction theory.

If anything, a proper articulation and understanding of attraction theory and its role may help in this enterprise. This Article should make clear that attraction theory is only one way in which causation may be proven. From this should follow an understanding that attraction, though helpful in proving causation, is not necessary. And the very fact that attraction theory will not work in cases where harassers are not motivated by sexual attraction should serve to focus attention on the fact that harassers may occasionally, or even often, have other motivations—and to focus attention on developing ways to prove these motivations and developing theories by which these motivations may be understood as discriminatory.

At bottom, unless we believe our attention span is insufficient to comprehend simultaneously both attraction theory and theories of causation that are not based on attraction or sexuality, arguments regarding perception do not suggest a need to do away with attraction theory. If we are concerned about the fact that attraction theory might distract either judges or some other segment of society, the remedy for this problem would seem to be to try to help the distracted individuals to focus properly—that is, to educate. It is not clear why an effective theory of causation should be marginalized, or even scrapped, just because some people appear to be distracted by it.

## 2. Public Perceptions: The Narrative Appeal—or Lack of Narrative Appeal—of Attraction Theory

A second possible criticism of attraction theory might flow from the weak argument about the “reality” of sexual harassment, that is, that harassment may be about power, as well as attraction. This argument relates to the effect of attraction theory—or lack of effect—on public perceptions of sexual harassment. The public, both inside and outside of the legal community, may ask themselves why the law should be concerned with sexual conduct in the workplace. To the extent that sexual harassment law seeks to create public norms, or survive as a public norm, it must tell a compelling story as to why the public should be concerned about sexual harassment.

Unfortunately, attraction theory does not tell such a compelling story. The type of sex-based selection that is covered by the theory does not look particularly evil. To the contrary, as noted above, such conduct may look quite normal. Millions of monosexual individuals throughout the country (indeed, the world) likely engage in the sex-based selection of potential mates every day. Such conduct, by itself, may not seem sufficiently egregious to give rise to a high degree of public concern. And, without such concern, sexual harassment law risks irrelevance or worse.<sup>306</sup>

By comparison, the power-theorists offer a far more compelling narrative: workplace sexual conduct is about power and its abuse. It is about keeping more than half of the population down, about excluding women and others who do not meet the requirements of entrenched stereotypes of masculinity from rewarding careers and from the halls of power. It is about social justice. This compelling narrative—in contrast to the lack of an appealing narrative in attraction theory—seems to motivate many power-theorists’ disdain for attraction theory.

This Article will not even try to argue that attraction theory can compete with power-based theories in terms of conceptual, or narrative, appeal. Attraction theory focuses on causation independently from harm, leaving the often-substantial harm in sexual harassment cases to be discussed in terms of other elements of the claim. As a result, attraction theory will never likely have the narrative appeal of a theory, such as those based on power, which conceptualizes the discriminatory nature of sexual harassment in terms of the harm from sexual harassment.

But this was never the goal of attraction theory. Attraction theory was not developed with an eye toward narrative appeal. Rather, it was developed as a response to the practical problems of proving discriminatory causation in the cases that came across lawyers’ and judges’ desks on a day-to-day basis—as a way to provide victims of workplace sexual conduct with a remedy.

More importantly, in terms of the criticism of attraction theory’s narrative weakness, there is no reason why attraction theory needs to interfere with the narrative told by power-based theorists or anyone else. Attraction theory, properly understood, is just one way to show causation and provide a remedy. It does not seek to, and should not be understood as, attempting to provide a conceptual basis—much less *the* conceptual basis—for understanding the harm that results from sexual harassment. Articulating such a basis is important. But it need not be done at the expense of attraction theory.

### *C. Burdening Sexual and Other Minorities*

A different perceptual problem may be cause for greater concern. Vicki Schultz

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306. Franke, *supra* note 3, at 762 (accusing current sexual harassment doctrines, including attraction theory, of “trivializ[ing] the legal norm against sex discrimination”).

and Kenji Yoshino have suggested that a theory of causation that focuses on sexuality—and which imposes sanctions based on sexuality—may tend to be applied disproportionately against those who are perceived as being highly sexual, or those who are perceived largely in terms of their sexuality.<sup>307</sup> Unfortunately, certain groups in our society continue to be stereotyped in sexual ways, and therefore to be perceived as highly sexual. Some of these groups are sexual minorities, such as gays, lesbians, bisexuals, and transsexuals. Others are racial minorities. For example, African Americans and Latinos continue to be stereotyped in terms of their sexuality. Thus, by using attraction theory (or any theory based on sexuality), we might expect that members of these and other minority groups could disproportionately become the target of sexual harassment complaints, actions, and verdicts.

In some ways, this is a perceptual problem like the ones discussed in the preceding Part. The focus of attraction theory on sexuality might cause people to make unwarranted associations (stereotypes) or blind people to what is really going on in a case. Like the associations and distractions discussed in the preceding Part, sexuality stereotyping may be amenable to being addressed through education.

However, there seems to be something different about this problem from those discussed in the preceding Part. Perhaps it is the consequence. The associations or distractions discussed in the preceding Part would cause some wrongdoers to get away with their wrongdoing. For example, if a court were unduly distracted by looking for attraction, it might not find causation in the case of a harasser who is motivated by power, and the harasser (or his employer) might escape liability. In contrast, the perception problem of sexuality stereotyping may cause people to be held liable when they should not—or to be held liable disproportionately. The difference is analogous to the concern we often have in criminal law when we say it is better to let a guilty person go free than to convict an innocent person.

But the sexuality-stereotyping problem may, in a sense, be worse than the traditional dilemma of setting standards to balance between the likelihood of imposing liability on innocents and ensuring that the guilty are caught. It may be more akin to the problem we see in terms of the disproportionate application of criminal laws. For example, though obviously different in degree, we might draw an analogy to critiques of the death penalty based on disparate application. Even if all those sentenced to death were in fact guilty, we might justifiably be concerned if guilty minority group members were more likely to be sentenced to death than guilty nonminorities.<sup>308</sup>

One way to approach the sexuality-stereotyping problem might be to focus on the fact that, at this point, it seems to be “only” a theoretical problem. That is, no one I am aware of has provided any empirical data to support the proposition that sexual or other minority group members are disproportionately charged with or held liable (or that their employers are held liable) for sexual harassment. Moreover, such data alone might not be sufficient. Assuming that there were disparities in charging or enforcement, one would still need to link those disparities to attraction theory, or other sexually-based theories of causation. That is, to make this argument as an empirical matter, one would need to show that, by eliminating the use of sexually-based theories of causation, at least some disparity in charging or enforcement would decrease.

Yet such a response would not address the core of the theoretical argument that, where we use a theory of causation that is based on sexuality, we might reasonably expect disparate application of sexual harassment law. Questioning the empirical

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307. See, e.g., Schultz, *supra* note 304, at 428; Yoshino, *supra* note 49, at 454-57.

308. *But see* McCleskey v. Kemp, 481 U.S. 279 (1987).

validity of this expectation does not tell us what we should do if it is confirmed.

Another possible answer, at least in the context of sexual minorities, may be that any potential disproportionality in charging or application of sexual harassment law that may result from sexuality-stereotyping might be offset by the difficulty of proving monosexuality, and thus causation, in same-sex cases. As discussed above, absent some sort of bilateral presumption of monosexuality, it will likely be more difficult to prove monosexuality in same-sex cases than it will be in opposite-sex cases.<sup>309</sup> In same-sex cases, the monosexuality that must be proven is homosexuality. That is, it may be more difficult to prove causation in cases against gay and lesbian harassers than it would be in cases against heterosexual harassers. Thus, while gay and lesbian harassers may be socially disadvantaged by sexuality-stereotyping, they may have an advantage in litigation over heterosexuals in terms of the difficulty of proving monosexuality.

There are a few problems with such a balancing inequities response. First, it is not clear that the fact that one aspect of a theory of causation decreases the chances of being held liable under the theory can excuse the fact that another aspect of the theory increases the chances of being held liable. Among other concerns, it is not clear that the offset is comparable, or that it would apply to charges, as well as findings of liability. Moreover, the argument that gays and lesbians may be less likely to be found liable under attraction theory does not address the harm to other minority groups predicted by the sexuality-stereotyping argument.

Thus, it is not clear that there is a good response to the sexuality-stereotyping argument. If the argument is valid, and supported by the data, we would be faced with a choice: on one hand, sexuality-based theories, such as attraction theory, might lead to disproportionate charging and enforcement of anti-harassment laws—a significant cost. On the other hand, as demonstrated above, sexuality-based theories of causation, such as attraction theory, are likely to provide significant aid to plaintiffs seeking a remedy for sexual harassment, where other theories may not—a significant benefit.

And the choice may be even more difficult. Note that, if sexuality stereotyping is a problem, it is a problem not just for attraction theory, but for any theory of sexual harassment that involves sexuality. Yet some commentators have argued persuasively that sexuality is essential to understanding the harm caused by sexual harassment.<sup>310</sup> Thus, the choice may not be just between the efficacy of and harm that might arise from attraction theory. The choice may be between the efficacy of any essential theory of sexual harassment and the harm that might result from such theories.

This choice does not seem to be resolvable by any logical means. And trying to resolve it is beyond the scope of this Article. My point here is only to try to begin to suggest what is at stake in this choice.

#### *D. Privacy and Proof of Monosexuality*

Several authors have expressed concern about the fact that attraction theory relies on the sexual orientation of the harasser.<sup>311</sup> Potential concerns in this area include both

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309. See *supra* Part II.D.

310. See Estrich, *supra* note 3, at 820-21; see also Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOYOLA L.A. L. REV. 845, 878-933 (2002) (arguing for increased focus on sexuality to improve understanding of harm from and motivation for rape).

311. Some writers have suggested that the sexual orientation of the *recipient* of the advances may be relevant. Melissa Manaugh Feldmeier, *Filling the Gaps: A Comprehensive*

(1) the loss of privacy for an accused harasser from investigation or discovery into his or her sexual orientation,<sup>312</sup> and the related issue that (2) the threat that such invasions of privacy (including the threat of “outing” a gay or lesbian harasser or falsely suggesting that a harasser is gay, lesbian, or bisexual in a society that attaches stigma to these orientations)<sup>313</sup> might place undue or dangerous leverage in the hands of a plaintiff or potential plaintiff.<sup>314</sup>

These concerns seem quite justified. Having litigated numerous harassment cases, I have seen the invasive nature of investigation and discovery, as well as the coercive aspects of these invasions first hand—even where sexual orientation is not at issue. And where sexual orientation is at issue, it only gets worse.<sup>315</sup>

To some degree, these privacy concerns may be ameliorated through the use of

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*Review of the Debate Over Same-Sex Sexual Harassment*, 65 U. CIN. L. REV. 861, 882 (1997); J. Banning Jasiunas, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1539 (2000); Tamanna Qureshi & Anthony Vaupel, *Should Sexual Harassment Based upon Sexual Orientation be Covered by Title VII or Prohibited?*, 27 OHIO N.U. L. REV. 679, 686 (2001). However, it is difficult to see why this would ever be the case. The supposed relevance of the target's sexual orientation seems to be based on the theory that gays/lesbians only make advances toward other gays/lesbians (and, by the same logic, heterosexuals only make advances only toward other heterosexuals). Yet even if this were true (and there is no evidence that this is the case, *Boy George, I Think He's Got It*, THE ECONOMIST, Jul. 15, 1995, at 63; Danylo Hawaleshka, *Gay Beeper*, MACLEAN'S, Apr. 17, 2000, at 41; Geneva Overholser, *Getting Past Goofy Stories*, CHI. TRIB., Jan. 25, 2000, at 13; David Rowan, *Lastword: Glossary for the 90s*, GUARDIAN NEWSPAPERS, Oct. 25, 1997, at 83), this would not render the recipient's sexual orientation relevant. This is because most anti-discrimination laws, including Title VII, do not protect against selection based on sexual orientation. Thus, the question is simply whether selection was based on sex. Put differently, even where selection is based on both sex and sexual orientation (or, at least, perceived sexual orientation), only the former is relevant.

312. John Davidson Miller III, *Same-Sex Sexual Harassment Is Actionable Under Title VII of the Civil Rights Act of 1964: Is This the End of Horseplay as We Know it?*, 29 SETON HALL L. REV. 787, 815 (1998); Wendy M. Parr, *When Does Male-on-Male Horseplay Become Discrimination Because of Sex?: Oncale v. Sundowner Offshore Servs., Inc.*, 25 OHIO N.U. L. REV. 87, 94 n.58 (1999); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U.L. REV. 677, 678-79 (1998); see also *Stanley v. Georgia*, 394 U.S. 557 (1969) (discussing Constitutional right of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing Constitutional right of privacy).

313. See Schaffner, *supra* note 169, at 18-20 (discussing “the social stigma and marginalization arising from homophobia”); see also Laarman, *supra* note 169, at 569 (acknowledging the social stigma attached to homosexuality makes the abuse of domestic partner benefits unlikely).

314. Locke, *supra* note 12, at 399 n.79.

315. While a moralist might argue that all of these concerns could have been avoided if the harasser had simply refrained from harassing, this argument seems flawed in two respects. First, when the harasser begins making advances, he or she may not know that the advances are unwelcome—that is, that he or she is harassing. Unwelcomeness is not measured by the subjective point of view of the specific defendant, but rather by a reasonable person standard. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). It is quite possible—particularly in same-sex cases, where the privacy and extortion issues seem most serious—that a “reasonable” (possibly homophobic) jury might find a single advance unwelcome, and even severe. Thus, moral judgment might be unwarranted in some cases. Second, this argument ignores the fact that, in many, if not most, cases involving same-sex advances, there is a serious question as to whether the conduct in question was in fact a sexual advance. And, in addressing that question, privacy and the potential for extortion become implicated.

presumptions regarding sexual orientation, limits on discovery, and procedural limits on disclosure. This Subpart will discuss these methods, concluding that, while none of these methods are likely to solve all of the privacy issues that arise from the use of attraction theory, they may serve to reduce the impact of these issues.

### 1. Protecting Privacy by Presuming Monosexuality

One approach that courts might take to reducing privacy concerns inherent in litigating over sexual orientation is to adopt presumptions regarding sexual orientation. The benefits, as well as the potential problems from, such presumptions are discussed above in Part II.D.2.b. From a privacy standpoint, the benefits from such a presumption include reducing the number of cases in which harassers' sexual orientations are likely to be at issue and giving accused harassers at least some modicum of choice over whether to litigate over their sexual orientation (even if such "choice" has a highly coercive aspect to it).

However, the use of such presumptions is not likely to ameliorate privacy concerns completely. First, even if sexual orientation is not litigated, it is still implicated. That is, even if the presumption lets an accused harasser avoid discovery and litigation over his or her sexual orientation, the very act of presuming—even discussing—his or her sexual orientation is likely to seem invasive. Moreover, the presumption itself may highlight this invasiveness, since a "choice" not to contest the presumption will feel a lot like a (coerced) public statement regarding one's sexual orientation. Courts may try to ameliorate this aspect of the presumption by making clear in court documents and hearings that a decision not to contest monosexuality does not amount to an admission of monosexuality—that declining to litigate an issue is not the same as admitting to it. However, observers of this procedure might not understand the difference. And at the end of the day, it may feel like such an admission to an accused harasser.

Moreover, presumptions of monosexuality are not likely to apply in all cases. In some cases, accused harassers will likely want to contest the presumption of monosexuality, triggering an invasive inquiry into the harasser's sexual orientation.

And presumptions of monosexuality will not help alleviate concerns regarding extortion, particularly in same-sex cases. In fact, if anything, a presumption of monosexuality in same-sex cases enhances the extortionate effect of filing such cases by adding the force of the presumption to a plaintiff's accusations of homosexuality.

These problems do not suggest that we should not adopt a bilateral presumption of monosexuality. The benefits of such a presumption are significant.<sup>316</sup> And absent some kind of presumption regarding sexual orientation, accused harassers would likely face greater inroads on their privacy. The point is only that the use of presumptions regarding sexual orientation will likely solve some, but not all, of the privacy issues inherent in attraction theory.

### 2. Discovery and Procedural Protections for Privacy

Another way in which privacy and extortion concerns might be addressed, at least in part, might be through the use of discovery and procedural tools. For example, courts might permit inquiry into the sexual orientation of an alleged harasser only upon

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316. *See supra* Part II.D.2.b.

some threshold showing by the plaintiff.<sup>317</sup> Such a discovery procedure might allow an alleged harasser to self-report regarding his or her sexual orientation, and only permit discovery on the issue where, prior to discovery, the plaintiff can produce sufficient evidence to suggest that the inquiry would be something more than a fishing expedition—presumably evidence beyond the mere fact of the sexual advances toward the plaintiff. In addition, the plaintiff might be required to submit a discovery plan showing what information is sought and why.

The problem with this discovery approach is that it would stack the deck against the plaintiff. The information that would be necessary for such a threshold showing would likely be solely within the alleged harasser's control. Thus, such a rule would compound the practical difficulties in proving sexual orientation that were discussed in Part II.D.2—perhaps insurmountably.

Another possible (and more promising) approach would be resorting to existing discovery procedures under Rule of Evidence 403 and Rule of Civil Procedure 26. Rule of Evidence 403 allows exclusion of evidence where its probative value is substantially outweighed by its potential for prejudice.<sup>318</sup> And discovery requests can be denied where they are not likely to lead to the discovery of admissible evidence.<sup>319</sup> As noted above, the most invasive form of discovery—that regarding accused harassers' sexual history—will often tend to have low probative value<sup>320</sup> and high potential for prejudice. Thus, judges might reasonably limit the most invasive forms of discovery.

Finally, in addition to limits on discovery, judges might consider using courtroom and record-closing procedures to shield information that is discovered regarding sexual orientation from public view. Courtrooms and deposition rooms can be closed during testimony regarding sexual orientation. Transcripts of such testimony can be sealed, as can briefs and motions reciting such testimony or making other statements regarding sexual orientation. Parties can be ordered not to discuss any of these materials or issues publicly upon pain of being cited for contempt.<sup>321</sup>

Such sealing and courtroom-closing procedures will not protect accused harassers from facing disclosure of private information to the plaintiff and his or her attorneys. But such procedures may at least protect the accused harasser from disclosure of private information to the public.

Using such procedures, in addition to discovery limits and presumptions of monosexuality, privacy and coercion concerns might be minimized, though not eliminated. At the end of the day, because attraction theory relies on proof or assumptions regarding sexual orientation, this theory will almost inevitably impinge on the privacy of at least some accused harassers. These concerns, once again, require a choice: On one hand, if courts or plaintiffs forewent the use of attraction theory to prove causation, these privacy and coercion concerns might be eliminated. But in many cases, this would likely mean that plaintiffs would be presented with a significant additional burden by having to use a less effective and streamlined method of showing causation. And in some cases, it would likely mean that plaintiffs who might have been able to prove causation under attraction theory would not be able to

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317. See FED. R. CIV. P. 26.

318. FED. R. EVID. 403.

319. FED. R. CIV. P. 26(b)(1).

320. See *supra* Part II.D.2.a.(2).

321. These issues might become public through published judicial opinions. A debate is currently going on about whether opinions must always be published. However, this problem might be avoided through the use of aliases to avoid identifying a party.

prove causation, and thus would have no remedy.

#### IV. THE EFFICACY OF ALTERNATIVE THEORIES OF CAUSATION

So far, this Article has argued that attraction theory provides an effective method by which plaintiffs can demonstrate causation in a large subset (if not the majority, or even vast majority) of sexual harassment cases. It has also argued that, while this theory raises some significant normative issues, none of these issues would seem to justify marginalizing or foregoing the use of an otherwise effective theory of causation.

However, it may still be possible to argue that attraction theory should be discarded if an alternative theory (or theories) of causation were available that does not contain any normative problems and that would work to provide a remedy in all cases that would have been covered by attraction theory. Some of the second-generation feminists offer power-based theories of causation that seem to promise problem-free, gap-free coverage.<sup>322</sup> Having offered such alternative theories, these writers seem to argue there is no need for attraction theory anymore.<sup>323</sup>

It is true that, if the promise of these alternative theories is realized, there may be no need for attraction theory. However, it is far from clear that we are at the point where we should assume that these alternative theories will work to show discriminatory causation in all cases where such causation exists.

First, as some of the second-generation theorists have pointed out, some of these theories cannot necessarily be expected to provide universal coverage as a theoretical matter.<sup>324</sup> For example, Professor Franke criticizes attraction theory as providing incomplete coverage and offers an alternative theory of causation based on the concept that sexual harassment operates as a “technology of sexism”—that is, it “perpetuates, enforces, and polices a set of gender norms that seek to feminize women and

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322. *E.g.*, Abrams, *supra* note 5, at 1227-28; Estrich, *supra* note 3, at 858-60; Franke, *supra* note 3, at 762-63; Schwartz, *supra* note 2, at 1697.

Other theorists have argued for the use of a sexuality proxy, or sex per se rule. *E.g.*, Schwartz, *supra* note 2, at 1697. This is essentially an argument that causation exists any time that a harasser engages in sexual conduct in the workplace. A related concept, suggested by Professor MacKinnon, is that causation should be presumed (subject to rebuttal) anytime a harasser engages in sexual conduct. MacKinnon, *supra* note 130, at 813. However, a claim that the existence of sexuality inherently suggests discriminatory causation requires some justification—that is, some theory or theories of causation that would support such an inference. The arguments offered by the second-generation feminists, along with attraction theory, might arguably support such a blanket inference. However, to date, there is no sufficient justification for such a blanket inference of causation in all cases involving sexuality.

Still another group of writers, apparently recognizing the problems in showing causation in all cases, have urged passage of sexual harassment laws that would be independent from anti-discrimination law—for example, a prohibition of all unwelcome sexual advances or all sexual conduct in the workplace. Such authors do not offer a theory of causation, but rather suggest an approach that would theoretically obviate the need to show causation. (However, such an approach would still require some normative foundation, if it is not linked to anti-discrimination law.)

323. *E.g.*, Abrams, *supra* note 5, at 1205-20; Estrich, *supra* note 3, at 858-61; Franke, *supra* note 3, at 762-64; Schultz, *supra* note 4, at 755-56.

324. *E.g.*, Abrams, *supra* note 5, at 1173-1205 (claiming that theories offered by Professor Franke and Anita Bernstein will not apply in all cases); Franke, *supra* note 3, at 714-20 (claiming that theory offered by Professor Estrich will not apply in all cases).

masculinize men.”<sup>325</sup> The promise seems to be that this theory does not contain gaps, as attraction theory does. However, Professor Abrams (persuasively) criticizes the technology-of-sexism theory on the ground that it does not seem to address cases in which men are harassed based on effeminacy—arguably a form of sex discrimination.<sup>326</sup>

Moreover, even if the second-generation feminists’ alternative theories work as a theoretical matter, these theories may contain significant gaps as a practical matter. For example, it is unclear how a plaintiff—or a court—would apply Professor Franke’s “technology of sexism” theory to show causation. How is a plaintiff faced with sexual conduct by his or her supervisor or co-workers supposed to show that the tormentors were trying to enforce any norms, much less sexist, gender-based norms? The same problem would seem to exist with Professor Abrams’s theory that causation exists because many harassers act to preserve male control over the workplace and keep women out of traditionally male domains.<sup>327</sup> How is a plaintiff supposed to show that this is what has motivated a particular harasser? Professor Schwartz tries to help by suggesting that factfinders should look at unconscious, as well as conscious, motivations.<sup>328</sup> But how does a plaintiff prove such unconscious motivations?

Similarly, consider the theory, offered by Professor Estrich, that causation exists because women tend to experience sexuality differently than men.<sup>329</sup> To the extent that this is a disparate treatment argument, the experience of victims would appear to be irrelevant to causation. And to the extent this is a disparate impact argument, it is not clear how a plaintiff would go about proving disparate impact.<sup>330</sup> Would experts be needed?<sup>331</sup> If so, this would significantly raise the cost of bringing such a case. What kind of showing would be required to show a disparate impact? Would a plaintiff be required to show that the sexual conduct in question had a disproportionate negative effect on women in the particular work unit or workplace? If so, there might be problems with small sample size. Or could a plaintiff look at effects of the conduct on men and women in some larger community? If so, what community? Moreover, in disparate impact cases, damages are limited and jury trials may not be available,<sup>332</sup> possibly reducing the practical utility of such a theory.

Some plaintiffs may not be able to prove causation under these theories. Others may be able to prove causation, but only with significant difficulty or at significant expense. This stands in contrast to attraction theory, which in many cases permits a streamlined, efficient way to prove causation.

Finally, in assessing the prospects of these alternative theories for providing universal coverage, it may also be worth considering that, at least at this point, the courts have had little experience applying these theories. Thus, it is not clear to what extent the courts will be persuaded by these theories. And, as these theories are

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325. Franke, *supra* note 3, at 696.

326. Abrams, *supra* note 5, at 1190.

327. *Id.*

328. Schwartz, *supra* note 2, at 1714-25.

329. Estrich, *supra* note 3, at 819.

330. *See generally* Kearney, *supra* note 21.

331. *See, e.g.*, *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1502-07 (M.D. Fla. 1991) (describing where plaintiff brought in expert to testify regarding effects of pornography on women).

332. 42 U.S.C. § 1981a(a)(1)-(2) (2003). *See* 2 LINDEMANN & GROSSMAN, *supra* note 21, at 1822 n.245 (“The remedies and jury trial provisions of § 1981a do not apply to claims of adverse impact discrimination.”).

applied, there might be gaps—either theoretical or practical—that have not yet been anticipated.

The point here is not to suggest that the theories offered by these commentators are unworkable. To the contrary, these theories, as well as others that have been offered, appear to hold great promise. The point is only that, at this stage, we should hesitate to assume—as a theoretical or practical matter—that these theories would inevitably provide robust, universal coverage. Thus, there would seem to be a danger in scrapping attraction theory based on the as yet unrealized promise of these alternative theories of causation. If we scrap attraction theory and these alternative theories cannot be used to prove causation in all cases in which it exists, many plaintiffs might be left without a remedy—plaintiffs who might have had a remedy had attraction theory been available to prove causation.

#### CONCLUSION

Sexual harassment doctrines based on sexual attraction have been largely discredited in the academy, particularly among second-generation feminists. The courts are increasingly being asked to discard the precepts of attraction theory in favor of power-based theories that claim to provide a richer conceptual understanding of, and a broader remedy against, sexual harassment. However, to address sexual harassment cases effectively, the courts would be wise to continue to rely on attraction theory, which has provided, and will likely continue to provide, an effective and streamlined mode of analysis in many cases.

To be sure, attraction theory can be revised at the margins. Indeed, the criticisms of attraction theory suggest, not a need to abandon that theory, but a need to understand it better, as this Article seeks to do. Even though power-based theories have much to commend them, their failure to provide an effective approach to causation leaves them vulnerable in practice. Although the courts should certainly acknowledge and attempt to apply these power-based theories, they should not do so to the exclusion of attraction theory. To do so would jeopardize the remedy that is currently available for many victims of discriminatory sexual conduct at work.