# The Trouble with Heuristics in Sexual Harassment Litigation

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Jessica A. Clarke, *Inferring Desire*, 63 **Duke L.J.** (forthcoming 2013), available at SSRN.

Fifteen years ago, the Supreme Court recognized that harassment between members of the same sex could be actionable under Title VII, in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80 (1998). Prior to that case, lower courts had struggled to determine whether such intra-group harassment could be because of sex. In its decision, the Supreme Court identified several heuristics, or evidentiary shortcuts that could be used to support an inference that the harassment was because of sex, including that the harasser was gay. If the harasser were gay, we could infer that the harasser desired the plaintiff sexually, and could further infer that the harasser would not have treated a member of the opposite sex the way the harasser treated the plaintiff. Focusing on this heuristic, Jessica Clarke's new article, *Inferring Desire*, is an important contribution to the literature on sex discrimination, not only in this context, but also more broadly. In the article, she studies all of the same-sex harassment cases that have resulted in opinions since *Oncale* was decided. The article's primary focus is on the large number cases in which the courts attempt to infer the sexual orientation of the harasser as part of the analysis, focusing on desire to the exclusion of other ways to prove that the harassment is because of sex. Clarke's study reveals that the courts seem to posit an idealized romantic version of same-sex desire that privileges heterosexuality and camouflages sexism.

The article begins by explaining how the sexual orientation and desire heuristics work. As Clarke notes, the Supreme Court defined the critical issue in sexual harassment cases to be "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." It further outlined some ways this could be proven including that proposals of sexual activity could demonstrate the different treatment if "there were credible evidence that the harasser was homosexual," and thus presumably motivated by sexual desire that would operate differently on the sexes. Although this was not the only route to proof of sex-different treatment, Clarke found that courts had relied on desire in allowing plaintiffs to proceed past summary judgment more often than all other reasons combined. Moreover, the courts conflated homosexuality with desire in most of those cases, which meant that they often engaged in extended analysis of the sexual orientation of the harasser.

Clarke delved further than the numbers, analyzing how the courts defined and divined the sexual orientation of the harasser. Overall, courts seemed to require that the harasser be out as gay at work before they would find credible evidence that the harasser was gay. This was a powerful finding. Without it, courts tended to find that there was no evidence that sexual conduct was motivated by desire and therefore no evidence that it was because of sex. Conversely, with it, the courts assumed that conduct the plaintiffs complained about was motivated by desire and because of sex, even if the conduct would not be interpreted as sexual in other contexts. Moreover, the picture of same-sex desire these courts perpetuate is an idealized version of romantic love that interprets the conduct at issue as attempts at earnest romance.

The article's bottom line is that these heuristics and the view of homosexuality they perpetuate result in discrimination against sexual minorities in the workplace. Additionally, they cannot be justified by any of the normative theories on why harassment is discrimination and in fact distract us from the question of discrimination. Clarke thus urges courts to stop using desire as a heuristic in any sex harassment case. While the description of what courts have been doing in same sex harassment cases is important to our understanding of what is happening in this area, this section of the paper comparing the courts' analyses to the normative question is arguably the most valuable contribution of this paper.

Clarke identifies the three primary theories of the harm of sexual harassment, in admittedly broad and stylized terms. The three schools of thought are these: harassment is sex discrimination (1) because it facilitates masculine domination; (2) because it perpetuates female disadvantage; or (3) because it constitutes sex differential treatment. Using desire as the heuristic does not satisfy the normative goals of the dominance theorists because cases that define harassment as caused by an idealized form of romantic love don't see the way that humiliation, hostility, or threats of violent sexual assault between members of the same sex could perpetuate masculine domination and be sexual harassment. Conversely, in opposite sex contexts, this conduct would easily be seen to be discriminatory. The critique from the female disadvantage theory is similar. A focus on desire miscasts harassment as awkward attempts at romance rather than as an expression of hostility towards members of one sex or as a way to penalize employees for failing to conform to gender roles. Finally, even though it seems a better fit for the disparate treatment school, the desire heuristic is not actually being applied in the same-sex context; rather, sexual orientation is being used as a heuristic for desire so that sexual conduct by harassers who are not out as gay at work is not considered sex harassment even if their conduct strongly suggests they were motivated by sexual desire, and conduct by gay employees is found to be harassment even when that conduct would not be perceived as sexual or harassing in an opposite sex context. Essentially, all three schools of thought would criticize the focus on desire as distracting from the question of whether the conduct at issue was sex discrimination.

The paper ends by tracing some of the implications of these findings for other contexts where courts may have to define sexual orientation or make inferences about it. In this way, the main focus of the paper is made clearer, that the article's critique is about the undertheorized nature of sexual orientation in law and the failure of courts or legislators to tailor a definition of sexual orientation to the purposes of the statute or program at issue.

To the extent that the article contains a weak point, it might be that the same could be said of sex or gender more broadly. Everywhere that sex is a classification, used legitimately or not, we have to ask what sex is. It is not clear whether it is a genetic question, a question about reproductive organs, or a behavioral question. And within each of those categories, there is significant variation. Sometimes genes, reproductive organs, and behaviors don't line up in ways we expect. Thus, in many contexts, the courts are struggling to define what sex and gender mean. In discrimination law alone there is significant indeterminacy. For example, the Supreme Court decided in the early 1970s, and reaffirmed just a few years ago, that pregnancy and sex are distinct enough that discrimination on the basis of pregnancy is not usually discrimination on the basis of sex. And the sex stereotyping line of cases are creating some seemingly inconsistent results especially where issues involving sexual orientation or sexual identity might be concerned, but also where sex-linked conduct like caregiving is at issue.

Despite this small critique, Clarke's article remains a very valuable contribution to the way courts are mishandling same sex harassment cases and the need to look for better understandings of what sexual orientation might be and how law might protect sexual minorities better. It also adds one potential facet to the discussion about what sex and gender encompass for purposes of legal analysis. And although Clarke explicitly declined to take a normative stand on the harm of harassment, I look forward to reading more about her normative theories in future work.

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