THE ULTIMATE GENDER STEREOTYPE: EQUALIZING GENDER-CONFORMING AND GENDER-NONCONFORMING HOMOSEXUALS UNDER TITLE VII

ZACHARY A. KRAMER*

While gay men and lesbians have increasingly gained legal rights in many areas of the law, they have not been as successful in the context of employment litigation, specifically in the realm of Title VII of the Civil Rights Act. Because sexual orientation is not a protected class under Title VII, gender-nonconforming homosexuals—that is, effeminate gay men and masculine lesbians—have utilized the Supreme Court's opinion in Price Waterhouse v. Hopkins *to argue that they were discriminated against by their employers or coworkers because they failed to conform to gender stereotypes, which is evidence of sex discrimination under Title VII. On the other hand, gender-conforming homosexuals—that is, masculine gay men and feminine lesbians—have, until now, not been able to make this sort of gender stereotyping argument. This note takes up that issue.*

After broadening the definition of gender to include both an idealized (anchor) and an idiosyncratic (expressive) component, the author argues that there is an "ultimate" gender stereotype in play when homosexual employees are discriminated against for failing to conform to gender expectations. Unlike the previous gender stereotyping theory, however, the ultimate gender stereotype incorporates sexual preference into a homosexual's expressive gender. The author argues further that, because of its breadth, the ultimate gender stereotype equalizes gender-conforming and gender-nonconforming homosexuals under Title VII.

* *The author would like to thank Professors Carlos Ball, Elaine Shoben, and Richard Storrow; other thanks to Jeff Bedell, Shelly Cohen, Melissa Economy, Blair Hanzlik, Michael Jarecki, Maria Saez, Becky Ray, Laura Dreznes, Beth Cobb, and Willy Lumpkin; and many, many thanks to my family and to Victoria Benson (even though she doesn't want to be thanked!). Any and all mistakes are, of course, my own.*

I. INTRODUCTION

In recent years, gays and lesbians[1] have made marked strides toward achieving legal rights. From obvious gains in the area of family law, including the expansion of parental and adoption rights[2] and the creation of quasi-marital status,[3] to the Supreme Court's opinion in *Romer v. Evans*,[4] striking down a Colorado state constitutional amendment that deprived homosexuals of protection under antidiscrimination laws,[5] the legal standing of gays and lesbians has clearly increased over time. This trend is all the more highlighted by the Supreme Court's recent decision in *Lawrence v. Texas,*[6] where the Court struck down a Texas law that criminalized same-sex sodomy.[7] One area of the law where gays and les-

1. In terms of locution, this note purposely employs the most limiting definitions of "gays" and "lesbians," so as to avoid any conceptual problems related to defining a person's sexuality. There is, however, extensive scholarship that addresses those more complicated, definitional questions of sexual orientation. For a natural law conception of sexuality, see John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); for an economic rendering of sexuality, see RICHARD A. POSNER, SEX AND REASON (1992) (laying out a cost-benefit analysis of sexuality); or, for a postmodern reading of the sexuality question (or, at least, a social constructionist rendering), see MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1990) (1976). This list, of course, is in no way meant to be comprehensive.

2. *See, e.g.*, *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993) (holding that state adoption law permits second-parent adoption by same-sex couples). For a recent discussion of the legal hurdles facing same-sex mothers, see Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002). For more general discussions of how family law has changed to meet the needs and interests of gays and lesbians, see David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523 (1999); Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497 (1998).

3. *See, e.g.*, VT. STAT. ANN. tit. 15, §§ 1201–1207 (2003) (providing civil unions for same-sex couples); Baker v. State, 744 A.2d 864 (Vt. 1999) (declaring the state bar on homosexual marriage a violation of the state constitution).

During the publication of this note, the Massachusetts Supreme Judicial Court issued two opinions dealing with the constitutionality of same-sex marriage under the state constitution. These decisions, taken together, determined that the state must confer gays and lesbians full-scale marital rights, and that civil unions would not suffice under this standard. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (striking drown Massachusetts's marriage licensing law on the grounds that it violated the state's constitution); *In re* Opinion of Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (declaring that only full civil marriage, and not civil unions, would suffice under the state constitution).

4. 517 U.S. 620 (1996).

5. *See id.* at 635–36.

6. 123 S. Ct. 2472 (2003).

7. *Id.* at 2484. *Lawrence* is a monumental decision for a number of reasons, most of which are beyond the scope of this note. Nevertheless, there are two aspects of the decision that are relevant here. First, *Lawrence* overruled the Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Court had held that the Constitution did not confer a fundamental right for homosexuals to engage in sodomy in the privacy of their homes. *Id.*

Second, the language of the *Lawrence* opinion is rather progressive, employing a broad definition of "liberty," *see, e.g.*, *Lawrence*, 123 S. Ct. at 2484 ("[Homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."), and discussing homosexual relationships in practically moral terms, *see, e.g., id*. ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."). Although it may be hard to predict the full effect of *Lawrence*, there is no doubt that it is a gigantic legal victory for gay men and lesbians.

bians have been less successful, however, is in employment law, primarily in the context of Title VII of the Civil Rights Act of 1964.[8]

It is noted quite often in Title VII case law, as well as in Title VII scholarship, that Title VII's prohibition on discrimination "because of sex" does not extend to discrimination based on sexual orientation.[9] The obvious implication of this trend is that homosexuals, unlike similarly situated racial minority members, women and the elderly, are not able to state claims for discrimination under Title VII. Because of the inaccessibility of relief in federal court under a sexual orientation theory, homosexuals have recently begun seeking alternative avenues of relief under Title VII. This note will examine one such theory—namely, the gender stereotype theory of sex discrimination.[10]

In *Price Waterhouse v. Hopkins*,[11] the Supreme Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[12] The Court's reasoning constitutes what is conventionally known as the gender stereotyping theory.[13] The thrust of the *Hopkins* theory is that an employer discriminates on the basis of the employee's sex because the employee's behavior and demeanor are not consistent with commonly accepted gender stereotypes.[14] To follow this argument, one must first understand the subtle differences between how scholars define "sex," "gender," and "sexual orientation."

In the context of gender stereotyping, "sex" and "gender" are not automatically intertwined. According to Professor Francisco Valdes, "sex" refers to "the physical attributes of bodies, and specifically the external genitalia of those bodies,"[15] whereas "gender" refers to the "personal appearance, personality attributes, and sociosexual roles that soci-

8. 42 U.S.C. §§ 2000e–2000e-17 (2000).

9. For the judicial version of this refrain, see Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989). For the best statement of this in the scholarly literature, see Recent Case, *Employment Law—Title VII—Sex Discrimination—Ninth Circuit Holds That Male Coworkers' and Supervisor's Harassment of Male Employee for Failing to Meet Sex Stereotype Constitutes Sex Discrimination.* Nichols v. Azteca Rest. Ent., *256 F.3d 864 (9th Cir. 2001)*, 115 HARV. L. REV. 2074, 2074 (2002) [hereinafter, Recent Case, Nichols] ("It is a common refrain in Title VII jurisprudence that the statutory prohibition on 'discrimina[tion] . . . because of . . . sex' does not extend to discrimination on the basis of sexual orientation.") (alterations in original) (footnote omitted) (quoting 42 U.S.C. § 2000e(a)(1) (1994)).

10. *See infra* Part III (discussing gender stereotyping theory).

11. 490 U.S. 228 (1989).

12. *Id.* at 250.

13. *See* Recent Case, *Employment Law—Title VII—Sex Discrimination—Ninth Circuit Extends Title VII Protection to Employee Alleging Discrimination Based on Sexual Orientation*. Rene v. MGM Grand Hotel, Inc., *305 F.3d 1061 (9th Cir. 2002) (en banc),* petition for cert. filed*, 71 U.S.L.W. 3444 (U.S. Dec. 2002) (No. 02-970)*, 116 HARV. L. REV. 1889, 1892 (2003).

14. *Id.*

15. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society,* 83 CAL. L. REV. 1, 21 (1995).

ety understands to be 'masculine' or 'feminine.'"[16] Similarly (but not too similarly), "sexual orientation" refers to "the apparent or actual inclination(s) of sexual or affectional interests or desires among humans toward members of the same sex, the other sex, or both sexes."[17] With these definitions in tow, homosexual plaintiffs have raised Title VII claims that focus not on sexual orientation, but instead on grounds of gender discrimination, specifically that the plaintiff's gender does not conform to the stereotypical notions of how a person of that sex should appear and behave.[18] Such an argument has proved successful for gender-nonconforming homosexuals—that is, effeminate gay men and masculine lesbian women—who can make the argument that employers discriminated against them because they failed to conform to stereotypical conceptions of masculinity or femininity.[19] Conversely, gender-conforming homosexuals—that is, masculine gay men and feminine lesbians—cannot utilize this theory because they conform to the stereotypical notions of masculinity and femininity.[20] Thus, the gender stereotyping theory from *Hopkins* affords protection to only the gender-nonconforming portion of the homosexual community. In the hope of extending the theory to cover gender-conforming homosexuals, this note will put forth the theory of an "ultimate" gender stereotype,[21] which will enable gender-conforming homosexuals to likewise assert Title VII claims premised on a gender discrimination theory.

Part II of this note will present a brief history of Title VII, considering both the legislative history of Title VII and its "because of . . . sex" language[22] and the treatment of sexual orientation discrimination under Title VII.[23] Part II will also discuss the development of sexual harassment law as it pertains to gay and lesbian plaintiffs, as well as describe how sexual harassment law and the gender stereotyping theory intersect.[24] Building on this background, part III will consider the role of gender stereotyping in Title VII jurisprudence.[25] This analysis will examine *Price Waterhouse v. Hopkins* and discuss the application of the gen-

16. *Id.* at 22.
17. *Id.* at 23.
18. *See infra* Part III.C.
19. This note will primarily focus on two such cases, both of which involve gender nonconforming plaintiffs. *See* Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (dealing with an effeminate gay man raising a Title VII gender stereotyping claim); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002) (dealing with a masculine lesbian woman raising a Title VII gender stereotyping claim).
20. The reason for this will become apparent in later portions of this note. *See infra* Part III.D (detailing how homosexual plaintiffs are left out of conventional gender stereotyping). For now, however, it is enough to say that gender conforming homosexuals cannot raise gender stereotyping claims because they, as persons who *do* conform to gender stereotypes, cannot be discriminated against for failing to conform to those stereotypes.
21. *See infra* Parts IV–V.
22. *See infra* Part II.A.
23. *See infra* Part II.B.
24. *See infra* Part II.C–D.
25. *See infra* Part III.

der stereotyping theory to claims raised by gender-nonconforming homosexuals,[26] as well as explain the consequences of the theory for gender-conforming homosexuals.[27] Part IV presents the bulk of this note's analysis. This analysis will first present the ultimate gender stereotype theory,[28] and will then examine how three courts have unknowingly embraced this reasoning.[29] From there, part V will proceed to apply this theory to equalize the standing of gender-conforming and gender-nonconforming homosexuals under Title VII.[30]

II. BACKGROUND

Title VII of the Civil Rights Act of 1964[31] is the primary federal antidiscrimination statute in the employment law context. Although originally conceived to remedy racial and ethnic inequalities in employment,[32] Title VII also extends protection to individuals discriminated against because of their "sex."[33] The birth of "sex" as a protected class, however, has had a drastic, limiting effect on litigation by gays and lesbians.

A. The "Sex" Amendment

Title VII jurisprudence has consistently noted that Representative Howard Smith of Virginia, a southern Democrat who opposed the Civil Rights Act, proposed to the House of Representatives the addition of "sex" as a protected class under Title VII.[34] Smith's objectives in proposing the amendment, although seemingly egalitarian, were instead motivated by his desire to kill the bill: knowing that the addition of "sex" would be controversial, Smith proposed the amendment in an attempt to sabotage the law and prevent its passage.[35] Smith's strategy backfired,

26. *See infra* Part III.A–B.
27. *See infra* Part III.C–D.
28. *See infra* Part IV.A.
29. *See infra* Part IV.B.
30. *See infra* Part V.
31. 42 U.S.C. § 2000e-2(a)(1) (1994). The statute provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer . . . (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." *Id.*
32. *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) ("The major concern of Congress at the time the Act was promulgated was race discrimination."); *see also* Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1537 n.15 (1993) (noting that Congress, in drafting Title VII, sought to deal not with sex, but with race and national origin).
33. *See* 42 U.S.C. § 2000e-2(a)(1).
34. *See* 110 CONG. REC. 2577 (1964) (remarks of Rep. Smith). For an extensive examination of the history of the Civil Rights Act of 1964, see CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).
35. *See* Barnes v. Costle, 561 F.2d 983, 986–87 (D.C. Cir. 1977) (noting that Representative Smith proposed the bill as "a last-minute attempt to block the bill"); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc) (stating that Representative Smith's intent was to sabotage the act); *see also* WHALEN & WHALEN, *supra* note 34, at 115–17 (describing Representative

however.[36] The House, notwithstanding Smith's efforts to defeat the law, adopted Smith's "killer" amendment the following day[37] by a vote of 168-133.[38]

The legislative history of Title VII's "sex" amendment has had a substantial effect on litigation by gays and lesbians.[39] The timing of Smith's "sex" amendment—namely, the lateness of the amendment—prevented legislators from engaging in any detailed debate over the inclusion of "sex" as a protected class[40] and the possible scope of the amendment.[41] This lack of legislative discussion and debate has created a problem for those seeking to interpret the scope of the statute's use of "sex": because there is no record of what Congress intended the "sex" class to encompass, courts are essentially left alone to interpret the scope of the law's "because of sex" language.[42] Unaided by evidence of congressional intent, courts have construed the term "sex" narrowly,[43] which

Smith's strategy in proposing the "killer" amendment). For the argument that Representative Smith did not intend to sabotage the act, see Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) (maintaining that, though ubiquitous, the sabotage argument is not accurate).

36. Whalen and Whalen argue that the "sex" amendment gained the momentum it needed to pass the House from the support of a bipartisan group of five congresswomen who spoke up in defense of the amendment. *See* WHALEN & WHALEN, *supra* note 34, at 117. Whalen and Whalen further contend that the passage of the bill was related to the impassioned words of Representative Katherine St. George, a New York Republican, who stated that women "do not need any special privileges. We outlast you—we outlive you—we nag you to death . . . [but] we are entitled to this little crumb of equality. The addition of the little, terrifying word 's-e-x' will not hurt this legislation in any way." *Id.* (alterations in original).

For a less idealistic look at the history of the "sex" amendment, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–25 (1995) (focusing more on the role of the Equal Rights Amendment in Title VII's history rather than on Representative St. George's House floor speech).

37. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (stating that the proposed addition was adopted the day before the statute's passage).

38. *See* WHALEN & WHALEN, *supra* note 34, at 117; *see also* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 899 (1997) (citing Francis Vass, *Title VII: Legislative History,* 7 B.C. INDUS. & COM. L. REV. 431, 441–42 (1966)).

39. *See generally* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1974); Dillon v. Frank, 952 F.3d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436 at *8–10 (6th Cir. 1992).

40. *See* Stephen J. Nathans, Comment, *Twelve Years After* Price Waterhouse *and Still No Success for "*Hopkins *in Drag": The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713, 716–17 (2001) (asserting that due to its lateness, Congress did not engage in much debate over the scope or impact of the sex amendment).

41. The amended Title VII likewise passed the Senate with little debate as to the meaning and scope of the "sex" category. *See* Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 71 (2000).

42. *See Diaz*, 442 F.2d at 386 (stating that the absence of legislative history has hindered courts in interpreting the scope of "sex" in the statute); *see also* Peluso, *supra* note 32, at 1537 ("The amendment's hasty introduction and passage leave little history from which to divine the boundaries of the concept of 'sex.'"); Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968 (1973) ("The late introduction of the sex amendment precluded extensive consideration of the scope of its applicability of the broad impact that such an amendment might have on society.").

43. *See* Tiffany L. King, Comment, *Working out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1010 (2002) ("Traditionally, federal

has effectively precluded gays and lesbians from stating a claim for sexual orientation discrimination under Title VII.[44]

B. Sexual Orientation and Title VII

Considering that Title VII permits sexual orientation discrimination,[45] the history of sexual orientation discrimination litigation under Title VII is a bleak one. To date, no federal court has allowed recovery under a sexual orientation discrimination theory.[46] This trend, moreover, is unlikely to change any time soon.[47] Various courts have painstakingly distinguished between sex and gender discrimination on the one hand,[48] and sexual orientation discrimination on the other.[49] By doing so, the federal judiciary has demarcated sexual orientation discrimination, rendering it both a pitfall for plaintiffs and a safety net for employers to exploit in the hope of avoiding liability. Professor Valdes calls the latter scenario the "sexual orientation loophole."[50] To escape liability via this loophole, employers may defend against a discrimination claim by asserting that the employer based her actions not on sex or gender, but on the employee's sexual orientation, an entirely permissible form of discrimination.[51]

To better understand gender stereotyping claims, one must first look at how courts have historically treated claims brought by homosexual plaintiffs. This, hopefully, will place the gender stereotyping in its

courts have narrowly defined the term 'sex' under Title VII, restricting it to a plain meaning interpretation.").

44. The most well-known statement of this holding comes from *DeSantis*, 608 F.2d 327. My discussion of *DeSantis* follows shortly below. *See infra* Part II.B.1.

45. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 58 (1995) ("It may be because at the moment it is permissible almost everywhere to discriminate on the basis of sexual orientation that the firing of an effeminate man is often overdetermined. Even if it is not permissible to fire him for his effeminacy, it may be permissible to fire him for the sexual orientation that is presumed and may in fact go with it.").

46. *See* King, *supra* note 43, at 1010 ("[N]o federal court has construed Title VII to proscribe sexual orientation discrimination.").

47. In a recent case, the Ninth Circuit, sitting en banc, stated that Title VII is not concerned with a plaintiff's sexual orientation. Rene v. MGM Grand Hotel, 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc) (Fletcher, J., plurality opinion) ("We hold that an employee's sexual orientation is irrelevant for purposes of Title VII.").

48. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 36–38 (2d Cir. 2000) (discussing the difference between a sex-based claim and a sexual orientation-based claim, while also considering plaintiff's gender-based, sex stereotyping claim).

49. *See, e.g.*, L. Camille Hébert, *Sexual Harassment Discrimination "Because of . . . Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439, 458 (2001) ("[C]ourts have been quite careful to make clear that recognition of same-sex harassment does not mean that harassment because of sexual orientation can now state a claim under Title VII.").

For a comprehensive discussion of the difference between sex, gender, and sexual orientation discrimination, see Valdes, *supra* note 15. If a shorter discussion better suits your fancy, see Recent Case, Nichols, *supra* note 9, at 2074–75 n.8.

50. *See* Valdes, *supra* note 15, at 18, 26, 146–47.

51. *Id.*

proper context. This note divides sexual orientation-related claims into two general categories: early and modern claims.[52]

1. Early Sexual Orientation Claims

The early sexual orientation claims are best exemplified by one case, *DeSantis v. Pacific Telephone & Telegraph*,[53] which actually consisted of three consolidated claims. Although the court consolidated the plaintiffs' claims, there are three separate legal theories asserted in *DeSantis*. The first theory, raised by Donald Strailey, a male nursery school worker who wore an earring, reasoned that the school discriminated against Strailey on the basis of his sex because "the school felt that it was inappropriate for a male teacher to wear an earring to school."[54] The thrust of this argument was that the school based its decision to fire Strailey upon his apparent effeminacy (i.e., the earring), making his claim gender-based;[55] however, the court dismissed Strailey's argument by conflating gender and sexual orientation claims. According to the court, "[]Title VII thus does not protect against discrimination because of effeminacy . . . . [D]iscrimination because of effeminacy, like discrimination because of homosexuality or transexualism, does not fall within the purview of Title VII."[56]

Similarly, the court quickly dismissed the second claim, which was brought by gay men alleging that Pacific Telephone & Telegraph Company discriminated against them because of their sexual orientation.[57] Unlike the analytic gymnastics the court undertook in dismissing Strailey's claim, the court effortlessly rejected the sexual orientation claim as beyond the scope of Title VII: "[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."[58] Courts continue to deny claims brought by homosexuals,[59] reasoning primarily, as *DeSantis* did, that the plain meaning and legislative history (or lack thereof) of Title VII dictate

52. These classifications are, to some extent, grossly generalized; however, they are helpful in that they highlight the fundamental purpose of gender-based claims: namely, that traditional arguments were entirely unsuccessful in the early cases.

53. 608 F.2d 327 (9th Cir. 1979).

54. *Id.* at 331.

55. In that respect, one could consider Strailey's argument as the precursor to, and foundation for, Ann Hopkins's gender stereotyping theory. *See infra* Part III (discussing Ann Hopkins's case and the dynamics of the gender stereotyping theory).

56. *DeSantis*, 608 F.2d at 332 (internal citations omitted).

57. *Id.* at 328–29, 332.

58. *Id.* at 329–30 (footnote omitted).

59. *See, e.g.*, Dillon v. Frank, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436, *4 (6th Cir. 1992) ("The circuits are unanimous in holding that Title VII does not proscribe discrimination based on sexual activities or orientation."). The *Dillon* court also cites numerous courts that state the same proposition. *See also* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987).

that courts should construe "sex" narrowly, thereby excluding sexual orientation.[60]

This reasoning likewise defeated the third, and final, claim, which concerned a group of lesbians alleging that Pacific Telephone & Telegraph Company fired them, in violation of Title VII, because of their sexual orientation.[61] One other aspect of the court's reasoning is worth looking at when considering the evolution of sexual orientation claims under Title VII. The court swiftly rejected all of plaintiffs' arguments on the basis that they were attempts to "'bootstrap' Title VII protection for homosexuals."[62] The notion of bootstrapping is significant because it continues to be a reasonable criticism of the modern sexual orientation claims, arguing, as before, that such claims are an attempt to sneak sexual orientation claims within Title VII's coverage.

2. Modern Sexual Orientation Claims

Opposed to a pure sexual orientation discrimination claim,[63] as in *DeSantis*, gay and lesbian plaintiffs have been more successful raising either sex-based or gender-based Title VII claims.[64] That is, homosexual plaintiffs, reacting to the inaccessibility of the pure sexual orientation claim, must raise a non-sexual orientation-based claim. The rise of such hybrid claims is a direct result of the legislative history of Title VII's "because of sex" language.[65] Moreover, this relationship makes sense considering the nature of pure sexual orientation claims: because a pure sexual orientation discrimination claim will ultimately fail, plaintiffs must raise hybrid claims if they are going to obtain relief under Title VII. This renders sex and gender discrimination all the more important to gay and lesbian plaintiffs because such claims may provide gays and lesbians the

60. *See DeSantis*, 608 F.2d at 329 ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind. Later legislative activity makes this narrow definition even more evident.") (quoting Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977)).

61. *Id.* at 329–30.

62. *Id.* at 330.

63. By "pure sexual orientation discrimination claim," I mean a plaintiff's claim that is based solely on plaintiff's sexual orientation. Such a claim is barred from Title VII because "sex" has historically not included sexual orientation. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("It is clear . . . that Title VII does not prohibit discrimination based on sexual orientation.").

64. By modern, or "hybrid claim," I mean a claim that either includes sexual orientation and some other protected class (e.g., race or sex), or a claim for sex or gender discrimination that indirectly involves a plaintiff's sexual orientation. The first type of modern claim is actionable under Title VII as a mixed-motive claim. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (1994) (providing for the mixed-motive theory). For an example of the second type of hybrid claim, see *Centola v. Potter*, 183 F. Supp. 2d 403, 407 (D. Mass. 2002), where a homosexual plaintiff sued his employer under a gender stereotype theory, as opposed to a pure sexual orientation discrimination claim. The theory provided for in the latter portions of this note is a hybrid claim of the second order, because it incorporates both gender stereotyping and sexual orientation discrimination. *See infra* Part IV.

65. *See* King, *supra* note 43, 1010–11 nn.24–25 (2002) (citing cases and articles that highlight the relationship between the lack of "sex" legislative history and the growth of modern claims).

only avenue for relief under Title VII. Thus, it is imperative to study the viability of sex and gender discrimination claims for gay and lesbian plaintiffs.

In the context of Title VII, the gender discrimination argument—more precisely, the gender stereotyping theory—is a particular type of sex discrimination argument. It is possible, then, for a plaintiff to raise a sex discrimination argument without raising the issue of gender stereotyping. The primary difference between a gender-based and a sex-based argument[66] is that the comparison group in a gender-based argument is the stereotypical person of the same sex; that is, the legal theory compares the plaintiff to a stereotypical plaintiff.[67] Conversely, the sex-based argument compares men and women. For instance, in *Spearman v. Ford Motor Co.*,[68] Edison Spearman sued Ford under a sex discrimination theory, alleging that the company failed to investigate his claims of sexual harassment as quickly as it investigated complaints made by female employees. Because Spearman raised a sex-based claim, the comparison group in Spearman's claim was similarly situated women;[69] however, had Spearman made a gender-based argument, the comparison would have been to a stereotypical man.

The scope of this note's analysis is narrow, focusing only on a gender-based argument. The narrow focus of this note, however, should not diminish the potential of the broader sex discrimination argument.[70] Like the gender stereotyping theory, the value of the sex-based argument is that it switches the focus of the litigation from the plaintiff's sexual orientation to the conduct of the defendant, arguably where it belongs in the first place.[71]

66. A word of caution is necessary here. Earlier, this note referred to Professor Valdes's definitions of "sex," "gender," and "sexual orientation." *See supra* notes 12–17 and accompanying text. The instant uses of "sex" and "gender" do not perfectly conform to Valdes's definitions because they reflect the role of these classifications in legal claims rather than a socio-legal sense.

67. *See infra* Part III (breaking down the gender stereotyping theory).

68. 231 F.3d 1080 (7th Cir. 2000).

69. *See id.* at 1086–87. *Spearman* is not entirely helpful precedent because the court ultimately rejected Spearman's claim; however, the sex discrimination argument is nevertheless a better choice than a pure sexual orientation claim because it is more than likely that any federal court will summarily reject the sexual orientation claim.

70. For an excellent exposition of the sex discrimination argument for homosexuals, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Sex Discrimination*], and Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law As Sex Discrimination*, 98 YALE L.J. 145 (1988).

71. For an argument against the use of the sex discrimination theory by gay and lesbian plaintiffs, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001). For Professor Koppelman's response to Professor Stein's article, see Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001).

Apart from their disagreements, both Professors Koppelman and Stein agree that there is a moral objection to the sex discrimination argument because it does not allow persons to address the moral implications implicated by antigay discrimination:

> [Stein's] only persuasive [criticism] is the last, which claims that the sex discrimination argument ignores, and may render invisible, a central moral wrong of antigay discrimination. This is, in-

C. Hostile Work Environment Sexual Harassment as Sex Discrimination

In *Meritor Savings Bank, FSB v. Vinson*,[72] the Supreme Court held that plaintiffs may state a claim under Title VII for what it called "hostile environment sex discrimination."[73] According to the Court, quoting a circuit court opinion, "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[74] The availability of sexual harassment claims, rather than disparate treatment claims,[75] for homosexuals is important because many Title VII suits raised by homosexuals involve sexual harassment scenarios.[76] To prove a prima facie sexual harassment claim under Title VII, a plaintiff must establish five elements: (1) the plaintiff is a member of a protected class; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment was "because of sex;"[77] (4) the conduct in question affected the terms and conditions of plaintiff's employment; and (5) the employer knew or should have known about the harassment and failed to correct or end the harassment.[78] A related question to the "because of sex" prong of the prima facie case, taken up in the immediately succeeding section, is whether same-sex harassment is actionable under Title VII.

deed, a profound moral difficulty. It is, however, a difficulty that is present in almost any legal argument, and perhaps in language as such. It therefore cannot be an objection against any particular argument.

Id. at 521. For the argument that gay rights proponents must directly address the morality of gay rights, see CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003) (advocating a universalist conception of morality called "Moral Liberalism").

72. 477 U.S. 57 (1986).

73. *Id.* at 73. Hostile work environment sexual harassment is contrasted with *quid pro quo* sexual harassment, which concerns cases where an employer conditions some employment benefit on the employee's consenting to some sexual favor or act. *See, e.g.*, Henson v. Dundee, 682 F.2d 897, 908–09 (11th Cir. 1982).

74. *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 902).

75. The distinction between the gender stereotyping theory discussed in this note and the standard disparate claim is relevant because sexual orientation is not a protected group under Title VII. *See supra* note 9 and accompanying text (discussing the inapplicability of relief for plaintiffs under a sexual orientation theory).

76. *See, e.g.*, Rene v. MGM Grand Hotel, 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc) (describing a graphic harassment scenario, including how plaintiff's coworkers "grabbed his crotch" and "poked their fingers in his anus").

77. The gender stereotyping claim that is the subject of this note would fit into a plaintiff's sexual harassment claim under this element of the five-part test.

78. *Meritor*, 477 U.S. at 64–66.

D. Same-Sex Sexual Harassment: Oncale v. Sundowner Offshore Services, Inc.[79]

An important Title VII issue pertaining to gay and lesbian plaintiffs arising after *Meritor* was whether same-sex sexual harassment claims were actionable under Title VII. The Supreme Court took up this issue in *Oncale*. Joseph Oncale worked as a roustabout on an oil platform in the Gulf of Mexico.[80] The eight-person crew, including Oncale, was made up entirely of men.[81] Oncale alleged that members of the crew "forcibly subjected [Oncale] to sex-related, humiliating actions."[82] Oncale's suit, alleging that he was discriminated against because of his sex, presented the Supreme Court with the question of whether a same-sex sexual harassment claim was actionable under Title VII.[83]

1. Background Cases Leading up to Oncale

In *Oncale*, the Supreme Court, building on its holding in *Meritor*, addressed a circuit split concerning whether Title VII applied to same-sex sexual harassment.[84] Prior to the Court's decision, courts answered the question of whether Title VII applied to same-sex sexual harassment in three distinct ways.[85] The first approach, taken from the Fourth Circuit, recognized same-sex sexual harassment only if the harasser was a homosexual.[86] The second approach, advocated by the Fifth Circuit, reasoned that same-sex sexual harassment claims are never actionable, regardless of the sexual orientation of either the plaintiff or the defendant.[87] The third, and final, approach, asserted by the Seventh Circuit in *Doe v. Belleville*,[88] reasoned that same-sex sexual harassment is always actionable, regardless of the harasser's sex.[89]

Doe involved two brothers whom coworkers subjected to both verbal abuse and threats of forcible rape.[90] One of the brothers, moreover,

79. 523 U.S. 75 (1998). For an extremely informative (and well-researched) newspaper article that discusses many of the issues raised in this section of the note, see Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES, Oct. 13, 2002, § 6 (Magazine), at 52 (discussing the circuit split leading up to *Oncale*, the Supreme Court's opinion in *Oncale*, and some graphic examples of same-sex harassment).

80. *Oncale*, 523 U.S. at 77.

81. *Id.* at 77.

82. *Id* at 76, 78–79.

83. *Id.* at 78–79.

84. *Id.*

85. *See* Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 693–715 (1998) (discussing the pre-*Oncale* approaches taken by various courts in dealing with cases of same-sex sexual harassment); *see also* Nailah A. Jaffree, Note, *Halfway out of the Closet:* Oncale*'s Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799, 809–11 (2002).

86. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195–96 (4th Cir. 1996).

87. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir. 1996); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451–52 (5th Cir. 1994).

88. 119 F.3d 563 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998).

89. *Id.* at 570.

90. *Id.* at 566.

wore an earring and was additionally harassed by coworkers, who called him "fag" and "queer" and made other statements relating the boy to a woman.[91] In terms of its relationship to *Oncale*, *Doe* is an especially important case for two reasons. First, *Doe*, on appeal to the Supreme Court, was vacated and remanded in light of the Court's opinion in *Oncale*.[92] Secondly, *Doe* is significant because the court, in dicta, reinforces the gender stereotyping theory discussed in this note.[93] The fact that the Court vacated *Doe*'s holding raises the question of whether the gender stereotyping theory remains actionable.[94]

2. Oncale *and the Gender Stereotypes Question*

The Supreme Court's opinion in *Oncale*, penned by Justice Scalia, answered in the affirmative the question of whether same-sex sexual harassment was actionable under Title VII.[95] One could characterize the Court's interpretation of Title VII's "because of sex" language as "dynamic."[96] In language that Justice Scalia may one day regret, the Court stated that, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[97] Furthermore, the Court provided "evidentiary route[s],"[98] or types of proof, that a plaintiff might present to a court to prove that same-sex sexual harassment was "because of sex."

The first type of proof a plaintiff may offer concerns explicit sexual proposals of sexual activity.[99] Just as in cases of male-female sexual harassment involving explicit proposals of sexual activity, "[t]he same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual."[100] The second evidentiary route available to same-sex sexual harassment plaintiffs is to show that the harasser was "motivated by general

91. *Id.*
92. 523 U.S. 1001 (1998).
93. *Doe*, 119 F.3d at 580–83.
94. I will take up this issue in the next subsection. *See infra* Part II.D.2.
95. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).
96. "Dynamic," that is, as it is considered in the context of Professor William Eskridge's notion of dynamic statutory interpretation, which reasons that statutes should be considered in light of societal changes that could not have been foreseen at the time a legislature passed the law. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1–25 (1994). For an application of Professor Eskridge's dynamic statutory interpretation theory to the issues facing gays and lesbians, see Hedi A. Sorenson, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105 (1993).
97. *Oncale*, 523 U.S. at 79. This language, it seems, may be quite useful for those who argue straight out that Title VII's "because of sex" language should include sexual orientation discrimination claims.
98. *Id.* at 81.
99. *Id.* at 80.
100. *Id.*

hostility" to members of his or her own sex.[101] Finally, the third route enables a plaintiff in a "mixed sex"[102] workplace to offer what the Court calls "direct comparative evidence" about how the harasser treats members of either sex.[103] The Court, not to lose sight of Title VII's language prescription, concluded that section by stating that, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'"[104]

Noticeably absent from the Court's discussion of evidentiary routes is the gender stereotyping theory from *Hopkins*. As suggested earlier, this raises the question of whether that theory remains actionable—namely, whether *Oncale* overruled *Hopkins*'s gender stereotyping theory as it was incorporated in *Doe*.[105] To address, and hopefully resolve, this question, one must first turn back to *Doe*.[106]

In *Doe*, the Seventh Circuit's opinion can be characterized as having two distinct holdings.[107] The first holding "was that where the harassment was sexual in nature, it was not necessary for the plaintiff to prove that it was motivated by the victim's gender."[108] The court's second holding "was that if proof of sex discrimination was necessary, [then] the evidence that the victim's harassers sought to punish him for failing to live up to expected gender stereotypes would be sufficient to prove[ ] discrimination."[109] Upon deciding *Oncale*, however, the Supreme Court vacated and remanded the judgment in *Doe* "for further consideration in light of *Oncale*."[110] The question remains, therefore, whether the Court, in vacating *Doe*, meant to overrule both of that case's holdings.

Although it seems apparent enough that *Doe*'s first holding was "clearly wrong in light of *Oncale*'s requirement that all sexual harass-

101. *Id.*

102. Obviously, by "mixed sex" the Court means a workplace that includes both men and women. This route was not available to Oncale because there were no women workers on his rig. *Id.* at 77.

103. *Id.* at 80–81.

104. *Id.* at 81 (alteration, citations and emphasis all in original).

105. For a discussion of whether the gender stereotyping theory—namely, the theory as it is found in *Doe*—was overruled by *Oncale*, see Jaffree, *supra* note 85, and B.J. Chisolm, Note, *The (Back)Door of* Oncale v. Sundowner Offshore Services, Inc.*: "Outing" Heterosexuality As a Gender-Based Stereotype*, 10 LAW & SEXUALITY 239, 271–73 (2001).

106. *See supra* notes 85–94 and accompanying text (discussing *Doe* as it related to the pre-*Oncale* circuit split).

107. This reasoning comes directly from the Third Circuit's opinion in *Bibby*. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001). Although the court in *Bibby* ultimately rejects plaintiff's gender stereotyping claim as insufficiently pleaded, the court's discussion of the gender stereotyping theory as it relates to *Doe* and *Oncale* is not affected by the court's holding. *Id.* at 264.

108. *Id.* at 263 n.5 (citing Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997)). The *Bibby* court's use of "gender" corresponds with this note's use of "sex," further highlighting how federal courts have historically conflated "sex" and "gender" in the Title VII jurisprudence.

109. *Id.* (citing *Doe*, 119 F.3d at 580–83).

110. City of Belleville v. Doe, 523 U.S. 1001 (1998) (mem.).

ment plaintiffs must prove that the harassment was discrimination because of sex,"[111] *Oncale* does not address the applicability of the gender stereotyping theory. This suggests, then, that *Oncale* did not overrule *Doe*'s second holding. According to the Third Circuit in *Bibby v. Philadelphia Coca-Cola Bottling Co.*, "[a]bsent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse v. Hopkins*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question."[112] Because the evidentiary routes prescribed in *Oncale* are generally seen as *not* being exhaustive,[113] this note, therefore, will likewise rely on the *Bibby* court's assumption that *Hopkins*'s (and for that matter, *Doe*'s) gender stereotyping theory of sex discrimination remains actionable. Indeed, if the opposite were true, this note's analysis would prove ineffectual because, after *Oncale*, a plaintiff would not be able to plead the gender stereotyping theory of sex discrimination.

III. ON GENDER STEREOTYPES

In *Price Waterhouse v. Hopkins*,[114] the Supreme Court expressly held that gender stereotyping was evidence of sex discrimination.[115] This holding created a new avenue for relief under Title VII and expanded the statute's definition of "sex." No longer constrained to only sex-based claims, *Hopkins* enabled plaintiffs to raise gender-based claims that focus instead on an employer's stereotypical conceptions of the sexes. Under this theory, then, a plaintiff may argue that an employer discriminated because of the employee's sex because the employee failed to conform to commonly accepted gender stereotypes.

This section of the note will discuss the inner-workings of the gender stereotyping theory. To do this, this section will first examine *Price Waterhouse v. Hopkins*, looking at both the facts of the case and the Court's opinion.[116] From there, this section will dissect the gender stereotyping theory by dividing the elements of the theory into their compo-

111. *Bibby*, 260 F.3d at 263 n.5.

112. *Id.* (citations omitted). The *Bibby* court supports this reading of *Doe* and *Oncale* by pointing out that district courts in the Seventh Circuit continue to treat *Doe*'s second holding as binding law, further suggesting that the gender stereotypes theory of sex discrimination is alive and well. *Id.* (citing Jones v. Pac. Rail Servs., No. 00 C 5776, 2001 WL 127645, at *2 (N.D. Ill. Feb. 14, 2001); Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999); EEOC v. Trugreen Ltd. P'ship, 122 F. Supp. 2d 986, 989–90 (W.D. Wis. 1999)).

113. *See, e.g.*, Jaffree, *supra* note 85, at 822–25 (discussing *Oncale's* evidentiary routes and their effect on later cases).

114. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

115. *Id.* at 250; *see also* Matthew Fedor, Comment, *Can* Price Waterhouse *and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of* Oncale *Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455, 464 (2002) ("The Court held that when an employer acts on the basis of stereotypical beliefs about a particular gender, that employer has made an employment decision 'because of sex.'").

116. *Hopkins*, 490 U.S. at 250.

nent parts and explaining how these parts interact to formulate the force of the theory.[117]

A. Price Waterhouse v. Hopkins

1. The Case of Ann Hopkins[118]

Ann Hopkins was a senior manager with Price Waterhouse, practicing in the firm's Office of Government Services in Washington, D.C.[119] She had been employed at the firm for five years when the partners proposed her promotion to partner in 1983.[120] After considering Hopkins's colleagues' reviews of both her work performance and her appearance and demeanor, the firm decided against promoting Hopkins, choosing instead to place her partnership candidacy on hold.[121] Hopkins's work record at Price Waterhouse was a successful one: she had been with the firm for five years and, in that time, secured multimillion dollar contracts with the Department of State[122] and the Farmers Home Administration.[123] A partner at the firm characterized her work on the State Department contract as a project that "enabled the firm to win similar business from other federal agencies,"[124] and that earned Price Waterhouse somewhere between $34 to $44 million.[125] Hopkins's colleagues respected her work performance, calling her "'extremely competent, intelligent,' 'strong and forthright, very productive, energetic and creative.'"[126] Moreover, the district court found that Hopkins had generated more business for the company than any of the other candidates up for partnership in 1982.[127] The reviews of Hopkins's demeanor and appearance, however, were far less favorable.

The partners' critiques of Hopkins's interpersonal skills related a great deal to Hopkins's gender. Coworkers described Hopkins as overly

117. *See infra* Part III.B.

118. The D.C. Circuit's opinion in Ann Hopkins's case provides an extensive fact section that serves as a great history of the case. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 461–65 (D.C. Cir. 1987).

119. *Hopkins*, 490 U.S. at 228, 231, 233.

120. *Id.* at 233. Hopkins joined Price Waterhouse after leaving a similar position at Touche Ross, an accounting firm that competed with Price Waterhouse. Hopkins left Touche Ross because her husband was likewise employed at that firm, and the firm's rule prohibited its partners from considering both a husband and wife for partner. After Hopkins left Touche Ross, her husband became a partner of the firm. In order to hire Hopkins, however, Price Waterhouse had to waive its own rule that barred employment of a potential employee who was married to a partner at a competing firm. *See Hopkins*, 825 F.2d at 461–62 (detailing Hopkins's work history).

121. *Hopkins*, 490 U.S. at 233–35.

122. *Id.* at 234.

123. *Hopkins*, 825 F.2d at 462.

124. *Id.*

125. *Id.*

126. *Hopkins*, 490 U.S. at 234.

127. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985); *see also Hopkins*, 825 F.2d at 462 ("The District Court expressly found that none of the other candidates considered for partnership in 1983 had generated more business for Price Waterhouse than plaintiff.").

"macho,"[128] that she "overcompensated for being a woman,"[129] and that she should take "a course at charm school."[130] On informing Hopkins that her promotion was being put on hold, a partner told her that if she wanted to secure the promotion in the future, then she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[131]

Hopkins sued Price Waterhouse under Title VII, alleging that the firm discriminated against her on the basis of her sex.[132] The District Court for the District of Columbia concluded that "Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping."[133] The D.C. Circuit, while reversing the district court's decision on other grounds,[134] affirmed the district court's decision as to its determination that Price Waterhouse discriminated against Hopkins because of her sex.[135]

2. Ann Hopkins and the Supreme Court

The Supreme Court granted Price Waterhouse's petition for certiorari[136] to "resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[137] The Court's treatment of the mixture of "legitimate and illegitimate motives" aspect of the case gave rise to the "mixed motive" approach, later refined and adopted by the Civil Rights Act of 1991,[138] that established the respective burdens for a plaintiff and an employer when the employer's employment decision was based on both legal and illegal factors.[139] The Court's

128. *Hopkins*, 490 U.S. at 235.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Hopkins*, 618 F. Supp. at 1111 ("Plaintiff then resigned and filed this suit alleging sex discrimination in violation of Title VII.").

133. *Hopkins*, 490 U.S. at 237; *see also Hopkins*, 618 F. Supp. at 1119–20.

134. There is a discussion going on in *Hopkins* at all three levels of the case involving the standard of causation under Title VII in a mixed-motive situation. For example, the appellate court in *Hopkins* affirmed the trial court's determination as to the sex discrimination issue, but reversed as to the respective burdens of proof for the parties. Hopkins v. Price Waterhouse, 825 F.2d 458, 461 (D.C. Cir. 1987). For the Supreme Court's explanation of this conflict, the Court's description of the split among the Courts of Appeals on the matter, and the Court's ultimate determination of the conflict, respectively, see *Hopkins*, 490 U.S. at 237, 238 n.2, 239–52.

135. *Hopkins*, 825 F.2d at 468–69.

136. Price Waterhouse v. Hopkins, 485 U.S. 933 (1988) (mem.).

137. *Hopkins*, 490 U.S. at 232; *see supra* note 134 (discussing the Court's consideration of the issue of standards of proof in mixed-motive cases).

138. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (1994).

139. *Hopkins*, 490 U.S. at 240–41.

consideration of the nature of gender stereotyping fell within this discussion.

As for the role of gender stereotyping in Title VII cases, the Supreme Court's opinion in *Hopkins* established that gender stereotyping is evidence of an impermissible form of sex discrimination under Title VII.[140] In so holding, the Court rejected Price Waterhouse's argument that gender stereotyping was not discrimination "because of sex."[141] According to Price Waterhouse's argument, Title VII's "because of" language was, in fact, "colloquial shorthand"[142] for "but-for causation."[143] The Court rejected this argument, stating that, "[w]e need not leave our common sense at the doorstep when we interpret a statute[,]"[144] meaning that the statute's "because of sex" language only required a plaintiff to prove that the employer "relied upon sex-based considerations in coming to its decision."[145] Moreover, the Court stated that courts are to interpret the intent of Title VII broadly[146] and that "gender must be irrelevant to employment decisions."[147]

As for gender stereotyping—namely, whether Price Waterhouse discriminated against Hopkins because she was too masculine—the Court stated that, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[148] Addressing the issue of gender stereotyping more broadly as a legal theory, the Court had this to say:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[149]

140. *See* Varona & Monks, *supra* note 41, at 79 ("In 1989, the Supreme Court expressly declared that sex stereotyping was sex discrimination under Title VII in *Price Waterhouse v. Hopkins*.").

141. *Hopkins*, 490 U.S. at 240.

142. *See id*.

143. *See id.* For a discussion of causation in employment discrimination cases, see David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

144. *Hopkins*, 490 U.S. at 241.

145. *Id.* at 242.

146. *Id.* at 243. ("In *McDonnell Douglas*, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: 'The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973))).

147. *Id.* at 240.

148. *Id.* at 250.

149. *Id.* at 251 (citations and internal quotes omitted).

The Court's opinion, therefore, establishes that it is illegal sex discrimination in violation of Title VII for employers to discriminate against employees for failing to conform to gender stereotypes.

B. The Dynamics of Gender Stereotyping

If *Hopkins* established that plaintiffs can utilize a gender stereotype theory to prove sex discrimination under Title VII, then how do plaintiffs articulate such a claim? The Court's exegesis of the gender stereotyping theory is far from exhaustive: that is, the Court does not explicitly describe the inner-workings of the theory. Since *Hopkins*, however, numerous plaintiffs have employed the gender stereotype theory of sex discrimination[150] and many scholars have written to explain just how the theory works.[151] Building on that body of work, this note will articulate an original framework for conceptualizing the gender stereotyping theory.[152] Accordingly, in articulating this framework, this section will focus on how the gender stereotyping theory conceives a plaintiff's gender and why such discrimination is "because of sex."

Professor Valdes characterizes gender as relating to a person's "social dimensions of personhood."[153] In the context of gender stereotyping, a person's gender constitutes both societal expectations associated with the person's sex and, simultaneously, the person's actual expressed gender.[154] The gender stereotyping theory of sex discrimination reflects the dual nature of gender. Whether applied to a man or a woman, gender stereotyping relies on the existence of both a masculine and a feminine stereotype. These stereotypes are interrelated in that the purpose of either stereotype is to contrast with the other, rendering masculinity and femininity polar opposites on a gender continuum.[155] The legal theory of gender stereotyping encompasses both the dual nature of gender (socie-

150. *See, e.g.*, Rene v. MGM Grand Hotel, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc); Bibby v. Phila. Coca Cola Bottling Co., 260 F.2d 257, 260–61 (3d Cir. 2001); Nichols v. Azteca Rest. Enter., 256 F.3d 864, 869 (9th Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 34–35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Centola v. Potter, 183 F. Supp. 2d 403, 403–04 (D. Mass. 2002); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1225 (D. Or. 2002); *see also*, Varona & Monks, *supra* note 41, at 80 ("[S]ince Price Waterhouse, lower courts have consistently recognized that, at least in cases with very similar facts, sex stereotyping is an impermissible basis for discrimination under Title VII.").

151. For an extensive discussion of gender stereotyping in light of *Hopkins*, see Case, *supra* note 45.

152. This framework—namely, the anchor/expressive gender framework that appears below—grew out of both a close reading of *Hopkins* and a common sense notion of what a stereotype encompasses.

153. Valdes, *supra* note 15, at 21.

154. This can be seen in the Supreme Court's opinion in *Hopkins*, where the Court discusses that Hopkins's coworkers reacted to the discrepancy between her being a female and her expressing masculine qualities. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989). The gender stereotypes framework articulated in this note reflects this duality through its conception of an "anchor" and an "expressive" gender, respectively.

155. For a sociological look at how masculinity and femininity differ as gender identities, see Margaret Mooney Marini, *Sex and Gender: What Do We Know?*, 5 SOC. F. 95, 98–102 (1990).

tal expectations and idiosyncratic gender expressions) and the polarity of masculinity and femininity. To do this, the legal theory likewise conceives of gender in two parts: a person's "anchor" gender and a person's "expressive" gender.

1. Anchor Gender

The notion of an anchor gender depends on a person's given sex; that is, the anchor gender reflects the identity that people commonly associate with a person's sex. A woman's anchor gender would be her femininity, whereas a man's anchor gender would be his masculinity.[156] Both femininity and masculinity are idealized, stereotypical conceptions of gender, commonly associated with sex, be it male or female.[157] Take Ann Hopkins, for example: Hopkins's biological sex, indisputably, was female. Hopkins's anchor gender, then, would be femininity, because a woman's anchor gender corresponds with the stereotypical conception of womanhood.[158] Masculinity, on the other hand, must always be the anchor gender for a man. The next step in the analysis is to determine a plaintiff's expressive gender.

2. Expressive Gender

A person's expressive gender refers to a person's actual, or idiosyncratic gender expression. Whereas a person's anchor gender is an idealized characteristic solely determined by that person's sex, a person's expressive gender is determined by that person's appearance or behavior. In the context of Title VII, a person's expressive gender is the gender of the person that the employer and coworkers encounter in the workplace. Professor Valdes, in describing the law's often-conflated views of sex, gender, and sexual orientation, recognizes that people take for granted the conflation of a person's sex and a person's gender;[159] however, a plaintiff such as Ann Hopkins dispels such a myth. Ann Hopkins's sex was female and, accordingly, her anchor gender was femininity. Hop-

156. Jenny Wald likewise recognizes the relationship between biological sex and fixed gender categories. *See* Jenny Wald, Note, *Outlaw Mothers*, 8 HASTINGS WOMEN'S L.J. 169, 169–70 (1997) ("The institution of heterosexuality depends on a rigid distinction between male and female gender roles [that] are equated with traditional notions of masculinity and femininity. Thus, one's biological sex supposedly corresponds to a fixed gender category. These gender categories are then justified as natural.").

157. *See, e.g.*, Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 379 (1999) ("The term 'gender' here refers to the social construction of differences between women and men and ideas of 'femininity' and 'masculinity'—the excess cultural baggage associated with biological sex.").

158. Hopkins's anchor gender, femininity, is reflected in the comments made to her by one of the hiring partners at Price Waterhouse. By suggesting that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," the partner was identifying that Hopkins, as a woman, is expected to be stereotypically feminine. *See Hopkins*, 490 U.S. at 235.

159. Valdes, *supra* note 15, at 13–14.

kins's expressive gender, however, was masculinity, not femininity.[160] The disparity between Hopkins's anchor and expressive genders highlights how the component parts create discrimination.

3. The Discriminatory Relationship

The central idea of the gender stereotyping theory is that an employee is being judged against the standard of how a stereotypical person of the same sex should look and act. In the same way, the gender stereotyping theory compares a person's anchor and expressive gender. To establish whether the employer's acts were discriminatory, then, a court must compare the plaintiff's expressive and anchor gender and determine their relationship. If they coincide (e.g., masculine and masculine), the discrimination could not have been because the plaintiff failed to conform to a gender stereotype.[161] Conversely, if a plaintiff's anchor and expressive gender do not match (e.g., masculine and feminine), the plaintiff would have been discriminated against for failing to conform to gender stereotypes. Once again, consider the case of Ann Hopkins: Hopkins's feminine anchor gender did not match her masculine expressive gender.[162] Because Price Waterhouse based their partnership rejection on this discrepancy,[163] Price Waterhouse's actions were "because of sex" and, therefore, in violation of Title VII. Consider the following chart:[164]

	Anchor	Expressive	Discrimination
Case 1:	M	M	No
Case 2:	M	F	Yes
Case 3:	F	F	No
Case 4:	F	M	Yes

160. Hopkins's expressive gender, masculinity, is likewise reflected in the comments made to her by the hiring partners. Coworkers described Hopkins as "macho." *See Hopkins*, 490 U.S. at 235. Macho-ness is surely a masculine characteristic. Because Hopkins's coworkers perceived her to be—or, she may really have been—masculine, Hopkins's expressive gender was masculinity.

Note that the question of one's expressive gender is entirely separate from the question of one's anchor gender. For instance, in the case of lesbian women, a lesbian can express either femininity or masculinity. For a discussion of feminine, or "lipstick," lesbians and how they differ from more masculinized lesbian women, see Benoit Denizet-Lewis, *Putting on a Good Face*, THE BOSTON GLOBE, Mar. 2, 2003 (Magazine), at 11.

161. This case would not prevent the plaintiff from recovering under a broader theory of sex discrimination; however, the gender stereotyping theory of sex discrimination would not apply to this potential litigant.

162. In the chart that follows, Hopkins's case would coincide with "case 4" because that case provides the scenario where a woman expresses a masculine gender. *See infra* note 164 and accompanying text.

163. By suggesting that Hopkins could improve her chances for promotion if she took on more feminine characteristics (such as wearing makeup and walking and dressing more femininely), the partners at Price Waterhouse acted because of the discrepancy between Hopkins's anchor and expressive genders. *See Hopkins*, 490 U.S. at 235.

164. One should not confuse this chart with Professor Case's chart in her article. *See* Case, *supra* note 45, at 5. My chart is far less comprehensive than Professor Case's chart and, moreover, only deals with the discriminatory relationship in a gender stereotyping claim.

This chart shows the relationship between a person's anchor and expressive gender. For a gender stereotype claim to be actionable, a plaintiff must show that there is a difference between his or her anchor and expressive genders and that the employer has acted "because of" this discrepancy. Cases "2" and "4" in the chart exemplify gender stereotyping in action. In either case, there is discrimination because the plaintiff expresses a gender different than his or her anchor gender, as in *Hopkins*, where there was a discrepancy between Hopkins's anchor gender (femininity) and her expressed gender (masculinity). Cases "1" and "3", on the other hand, would not constitute gender stereotyping because they present no discrepancy between a person's gender.

C. Gender Stereotypes in Action

Since *Hopkins*, numerous plaintiffs, including many homosexuals, have employed the gender stereotype theory to raise Title VII claims.[165] The vast majority of gender stereotyping claims brought by gays and lesbians concern one of two scenarios. First, gay men often bring gender stereotyping claims based on their apparent effeminacy, arguing that they were discriminated against because either they were too feminine, or they were not masculine enough.[166] The second scenario concerns lesbian women who have raised gender stereotyping claims based on their perceived masculinity.[167] This section will briefly discuss both of these scenarios.

165. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 446–47 (N.D.N.Y. 2002); Trigg v. N.Y. City Transit Auth., No. 99 CV 4730, 2001 WL 868336, at *5–6 (E.D.N.Y. July 26, 2001). The theory is also entirely applicable to heterosexuals, as it was originally conceived by the Supreme Court. *See, e.g.*, *Hopkins*, 490 U.S. at 228.

There are some, for instance Judge Richard Posner, who argue, however, that the gender stereotyping theory from *Hopkins* is not in and of itself a theory of recovery at all, and that courts have mistakenly treated *Hopkins* as though it "create[s] a subtype of sexual discrimination called 'sex stereotyping,' as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather." Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring). From there, Judge Posner goes on to discuss why such questions of the relationship between gender and sexual orientation are both too confusing and outside the scope of court's concern in a sex discrimination case:

> Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true—effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male heterosexuality than they are to lesbianism. To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.

Id. (Posner, J., concurring).

166. *See infra* Part III.C.1.

167. *See infra* Part III.C.2.

1. The Effeminate Gay Man

In *Centola v. Potter*,[168] a gay man brought suit under Title VII, alleging that his employer, the United States Postal Service, discriminated against him on grounds of both his sex and his sexual orientation. Acknowledging that Title VII does not cover sexual orientation, the district court quickly rejected Centola's sexual orientation claim.[169] From there, however, the court embarked on a detailed discussion of Centola's gender stereotyping claim.

After reviewing *Hopkins* and various other courts' decisions accepting the gender stereotypes theory,[170] the court distilled the gender stereotyping theory into a simple formula:

> Stated in a gender neutral way, the rule is: If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creations of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII's prohibition of discrimination on the basis of sex.[171]

Utilizing this approach, the court found evidence that Centola's employer and his coworkers had "discriminated against him because he failed to meet their gender stereotypes of what a man should look like, or act like."[172] The *Centola* court's approach is consistent with the gender stereotyping framework established above.[173] Centola is a man and, therefore, his anchor gender is masculinity. Centola's expressive gender, however, is femininity. Thus, the harassment was discriminatory because Centola's expressive gender, femininity, did not correspond with his anchor gender, masculinity.[174]

One can find a similar example of the gender stereotyping theory as applied to an effeminate gay man in the case of *Rene v. MGM Grand Hotel*.[175] In *Rene*, hotel coworkers harassed an openly gay man by calling him, among other things, "woman," and "muñeca," (Spanish for "doll"),

168. 183 F. Supp. 2d 403 (D. Mass. 2002).

169. *Id.* at 408 ("Indeed, the law is relatively clear that discrimination on the basis of sexual orientation is not barred under Title VII so long as the persons discriminating are not also discriminating on the basis of another prohibited characteristic, such as race or sex.").

170. *Id.* at 409. The court cited two important circuit court opinions that, although ultimately dismissing similar claims, recognized the gender stereotyping theory. *See* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) ("[A] suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex."); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[A] man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.").

171. *Centola*, 183 F. Supp. 2d at 409.

172. *Id.*

173. *See supra* Part III.B (laying out an original framework for understanding gender stereotyping).

174. Centola would coincide with "case 2" in the chart provided earlier. *See supra* note 164 and accompanying text.

175. 305 F.3d 1061 (9th Cir. 2002) (en banc).

and by physically assaulting him.[176] In a concurring opinion, Judge Pregerson, relying on a similar Ninth Circuit gender stereotyping decision, *Nichols v. Azteca Restaurant Enterprises*,[177] reasoned that Rene could state a claim under Title VII for failing to conform to gender stereotypes.[178]

Like Centola, Rene's claim fits within the gender stereotyping framework articulated above.[179] Rene's expressive gender, femininity, did not correspond with his masculine anchor gender. Moreover, Rene's coworkers, in harassing and assaulting Rene, exploited this discrepancy. Thus, the harassment was discriminatory because it was based on his failure to express the commonly accepted male anchor gender.[180]

2. The Masculine Lesbian Woman

A masculine lesbian woman can similarly exploit the gender stereotype theory. In *Heller v. Columbia Edgewater Country Club*,[181] an openly lesbian woman sued her former employer for discriminating against her because she was too masculine. In denying her former employer's motion for summary judgment, the district court first stated that, although Title VII does not expressly protect discrimination based on sexual orientation, "nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone."[182] The court went on to consider—and ultimately accept—Heller's gender stereotyping claim, reasoning that Heller's former employer harassed her because she failed to conform to commonly accepted notions of how a woman should appear and behave.[183]

Heller's case likewise fits within the framework established above: because she is a woman, Heller's anchor gender is femininity; yet her expressive gender is masculinity.[184] This is a textbook example of gender stereotyping. Heller's former employer discriminated against her because Heller expressed masculinity rather than femininity.[185] Heller's

176. *Id.* at 1064.

177. 256 F.3d 864 (9th Cir. 2001).

178. *Rene*, 305 F.3d at 1069 (Pregerson, J., concurring) ("For the same reasons that we concluded in *Nichols* that '[the] rule that bars discrimination on the basis of sex stereotypes' set in *Price Waterhouse* 'squarely applie[d] to preclude the harassment' at issue there, I conclude that this rule also squarely applies to preclude the identical harassment at issue here.") (alterations in original and internal cites omitted).

179. *See supra* Part III.B (outlining an original framework for understanding gender stereotyping).

180. Rene (the man) likewise falls within "case 2" from the discrimination chart. *See supra* note 164 and accompanying text.

181. 195 F. Supp. 2d 1212 (D. Or. 2002).

182. *Id.* at 1222.

183. *See id.* at 1224 ("Viewing the evidence in the light most favorable to plaintiff, a jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave.").

184. *See id.* (mentioning the word "butch" to describe to Heller).

185. This rendering of the theory is no different than the *Heller* court's reasoning. *See id.*

case suggests, therefore, that claims by masculine lesbian women, like those of effeminate gay men, are likewise protected under Title VII.

D. At the Margins of the Theory: Gender-Conforming Gays and Lesbians

As expressed in *Centola*, *Rene,* and *Heller*, the gender stereotyping theory is concerned not with a person's sexual orientation, but instead focuses on the relationship between the gender traits commonly associated with a person's sex and the person's actual expressed gender. Indeed, the *Centola* court's discussion of a homosexual plaintiff's inability to raise a sexual orientation claim under Title VII is evidence of this.[186] One could argue, then, that the exclusion of sexual orientation from this theory renders such claims inaccessible by gender-conforming gays and lesbians.[187]

Gender-conforming gays and lesbians are, in fact, marginalized by the standard gender stereotyping theory because, unlike gender-nonconforming gays and lesbians, gender-conforming homosexuals cannot state a claim for failure to conform to commonly accepted notions of gender.[188] The moniker "gender-conforming," moreover, reinforces the apparent inapplicability. The next section of this note will take up this idea and argue that there is a common gender stereotype in play for both gender-conforming and gender-nonconforming gays and lesbians. Furthermore, this argument will rely on *Centola*, *Rene,* and *Heller* to show that courts are willing to accept gender stereotyping arguments by gender-conforming gays and lesbians.

IV. THE ULTIMATE GENDER STEREOTYPE[189]

Title VII's case law has made it abundantly clear that sexual orientation is not a protected class under Title VII.[190] Such an argument by a

186. *See* Centola v. Potter, 183 F. Supp. 2d 403, 408–10 (D. Mass. 2002) (discussing generally that discrimination based on sexual orientation alone is not cognizable under Title VII) ("Thus, if Centola can demonstrate that he was discriminated against 'because of . . . sex' as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.").

187. Recent Case, Nichols, *supra* note 9, at 2079 ("Gay men and lesbians who conform to gender norms—masculine gays and feminine lesbians—will be outside the protective scope of Nichols because their gendered behavior will not occasion the harassment covered in Nichols.").

188. Gender-conforming homosexuals do not fit within the gender stereotyping framework articulated in this note because there is no disjunction between a gender conformist's expressive and anchor genders.

189. Then-attorney, now-Professor Samuel Marcosson, in referring to the relationship between sexual orientation and sex discrimination, coined the phrase "ultimate gender stereotype." *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992) ("On this level, sexual orientation harassment is indistinguishable from gender-based sexual harassment, for it is plainly sexual in nature, and it is based on the ultimate gender stereotype.").

plaintiff is something akin to litigation suicide because a court is more than likely to isolate such a theory and dismiss the plaintiff's claim.[191] Sex discrimination claims, including those that rely on gender, are not likely to be dismissed on those grounds, however. In fact, as the recent surge in litigation by gays and lesbians demonstrates, gay and lesbian plaintiffs are not deterred by this lack of protection for sexual orientation.[192]

This section will present an argument for a gender-based sexual orientation claim. The crux of this argument is that there is an ultimate gender stereotype involved in sexual orientation-based harassment, such that employers and coworkers often harass gays and lesbians in gender-based terms because the act of homosexuality—namely, engaging in same-sex sexual relations—is not the behavior that they commonly associate with how a "real man" or a "real woman" is supposed to behave. Although others have made, or at least considered, gender-based arguments in the past,[193] the novelty of this note's analysis stems from two places. First, the forthcoming argument fits within, and is therefore consistent with, the gender stereotyping framework articulated above. Secondly, this note will utilize three recent decisions that have either considered or flirted with similar, if not identical, reasoning to support the feasibility of its argument.

A. Defining the Scope of Gender: What Is Masculinity? What Is Femininity?

Discrimination against gays and lesbians reinforces traditional sex roles.[194] The primary thrust of such discrimination is the gender-based stigmatization of gays and lesbians, deriving from the idea that homosexuality departs from traditional gender roles and that "real" men and women should not be attracted to a member of the same sex.[195] This portrayal relies heavily on what Bennett Capers calls the "binary gender system."[196]

190. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084–85 (7th Cir. 2000); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999).

191. *See, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 332 (9th Cir. 1979) (conflating plaintiff's gender-based argument with a sexual orientation argument and, therefore, rejecting it).

192. *See, e.g.*, Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002).

193. *See, e.g.*, Franke, *supra* note 36, at 1 (arguing against the tendency of federal courts to separate sex and gender in Title VII jurisprudence); Koppelman, *Sex Discrimination*, *supra* note 70 (arguing that sexual orientation discrimination violates gender norms); Marcosson, *supra* note 189, at 3 (arguing that sexual orientation is purely sexual in nature and, therefore, is gender-based sexual harassment); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1187 (1991) (arguing that sexual orientation is essentially a form of sex stereotyping); Peluso, *supra* note 32, at 1536 (arguing that sexual orientation warrants suspect classification under Title VII).

194. *See* Capers, *supra* note 193, at 1159.

195. *See* Koppelman, *Sex Discrimination*, *supra* note 70, at 203–04.

196. *See* Capers, *supra* note 193, at 1159.

1. The Binary Gender Construct[197]

Heterosexism[198] conceives of there being two, mutually exclusive genders: masculinity and femininity. Masculinity is conceived of as competitive and protective, whereas femininity is composed of more passive traits, such as submissiveness and modesty.[199] The relationship between the two genders is that of opposite attraction, in that masculinity is supposed to attract femininity, and that femininity is supposed to attract masculinity.[200] This construct, however, completely ignores the preferences and attractions of homosexuals.

Gays and lesbians do not fit within the binary gender construct because they personify an opposite relationship structure: homosexuals are attracted to the "wrong" sex and, therefore, the "wrong" gender. Professor Sylvia Law states that, "homosexuality is censured because it violates the prescriptions of gender role expectations."[201] A heterosexist society both expects and requires men and women to engage in only opposite-sex sexual relationships. The existence of same-sex relationships is, therefore, repugnant to heterosexist societal expectations.

2. The Conflation of Gender and Sexual Orientation

The structure of the binary gender construct naturally conflates gender and sexual orientation because it defines gender on the basis of heterosexuality. A discussion of gender, then, must invariably raise questions of sexual orientation, because the heterosexist definition of gender includes the commonly accepted proscriptions against homosexuality: part of the definition of masculinity, for example, includes the idea that a man will seek to mate with women and not other men.[202] This is akin to what then-attorney, now-Professor Samuel Marcosson calls the ultimate gender stereotype,[203] which equates gender discrimination and sexual orientation discrimination because both forms of discrimination are "plainly sexual in nature."[204] Considering the interdependency of gender and sexual orientation, it seems inappropriate for courts to dis-

197. Although Capers refers to this as the "Binary Gender System," this note will instead refer to this "system" as a "construct," primarily to import that this "system" is flawed because it excludes homosexuals, bisexuals, and transgendered persons.

198. Heterosexism is defined as "the valorization of heterosexual activity." *See* Capers, *supra* note 193, at 1159; *see also* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988) (discussing the role of heterosexism in gender and sexual orientation discrimination).

199. *See* Capers, *supra* note 193, at 1162.

200. *See* Law, *supra* note 198, at 196.

201. *Id.*

202. *Id.* (discussing attributes of male sexuality in heterocentric society, including that men and women should be attracted to each other).

203. Marcosson, *supra* note 189, at 3.

204. *Id.* at 3, 32–34.

cuss a plaintiff's sexual orientation without also considering issues of gender. Yet, the judiciary has done just this in the context of Title VII.[205]

B. "Real Men Don't Sleep with Men." "Real Women Don't Sleep with Women."

The general idea behind the ultimate gender stereotype, as it is conceived in this note, is that a person belies his or her gender when that person seeks to engage in a sexual relationship with a person of the same sex. According to Professor Law, "Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction."[206] The three cases that follow all address the ultimate gender stereotype as it relates to sexual orientation discrimination under Title VII. These cases are significant not only because they raise the issue of the ultimate gender stereotype, but also because they accept the gender stereotyping theory as it is articulated in this note.

1. Centola v. Potter[207]

As previously discussed, Centola, in defeating the United States Postal Service's motion for summary judgment, successfully raised a gender stereotyping claim.[208] The *Centola* court's opinion presents the most explicit example of a federal court's willingness to accept the ultimate gender stereotype argument.[209] Relying primarily on the work of Professor Sylvia Law, the court discusses in detail the relationship between sexual orientation and gender stereotyping, concluding that the two concepts are intertwined and that sexual orientation discrimination implicates gender stereotypes.[210]

The court begins its discussion by asserting that, "[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms."[211] So much so, according to the court, that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."[212] The *Centola* court takes the discussion even further, however, and plainly articulates the possibility for plaintiffs to raise claims for the ultimate gender stereotype:

205. *See, e.g.*, Dillon v. Frank, 952 F.2d 403 (unpublished table decision) No. 90-2290, 1992 WL 5436, at *8–10 (6th Cir. 1992) (ignoring the apparent gender implications of Dillon's claim and only focusing on Dillon's sexual orientation).

206. Law, *supra* note 198, at 196.

207. 183 F. Supp. 2d 403 (D. Mass. 2002).

208. *See supra* Part III.C.1 (discussing the posture of Centola's claim).

209. *See Centola*, 183 F. Supp. 2d at 408–10.

210. *See id.* at 410 n.8.

211. *Id.* at 410.

212. *Id.*

> The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do.[213]

Although the court later decides that such a theory is not necessary on the facts of Centola's case,[214] the significance of the court's reasoning is nevertheless apparent.

By asserting that a masculine gay man may conceivably state a claim for sex discrimination, the *Centola* court explicitly endorses the ultimate gender stereotype theory. The court's conception of gender is broad, encompassing the traditional notions of masculinity and femininity, as well as the conflation of a plaintiff's gender and sexual orientation. Under the *Centola* court's gender stereotyping theory, then, it does not matter whether a gay man is effeminate or masculine because there is an actionable gender stereotype deriving from the employer's belief that "real men don't sleep with other men."[215] Thus, *Centola* suggests that masculine and effeminate gay men may be, at the base level, the same under Title VII because they can both articulate a claim for the ultimate gender stereotype.[216]

2. Heller v. Columbia Edgewater Country Club[217]

Heller represents a prime example of how a gender-nonconforming lesbian may utilize the traditional gender stereotyping theory to recover under Title VII. As was the case in *Centola*, however, there is also specific language in *Heller* that implies that Heller's employer may have also discriminated against Heller because of her failure to conform to the ultimate gender stereotype.[218]

In describing how Heller did not conform to her employer's conception of how a woman should behave,[219] the *Heller* court briefly discusses

213. *Id.*

214. *Id.*

215. This reasoning also applies to the belief, as discussed in *Centola*, that "real men don't date men." *Id.*

216. This is, in the end, both the subject of Part V of this note and the main thesis I intend to convey: that the ultimate gender stereotype, in cases involving harassment based on gender expectations, equates gender conforming and gender nonconforming homosexuals under Title VII. *See infra* part V.

217. 195 F. Supp. 2d 1212 (D. Or. 2002). For this note's previous discussion of *Heller*, see *supra* Part III.C.3.

218. 195 F. Supp. 2d at 1224.

219. *See id*.

the connection between gender stereotyping and a person's sexual orientation. According to the court, "Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."[220] This is pure ultimate gender stereotyping. Cagle, Heller's employer, discriminated against Heller because her anchor gender was inconsistent with the ultimate gender stereotype. This suggests that a lesbian may be able to raise a gender stereotyping cause of action regardless of whether she is feminine or not, because either a gender-conforming or a gender-nonconforming lesbian could utilize this reasoning to assert a claim for failing to conform to the ultimate gender stereotype.[221]

3. Rene v. MGM Grand Hotel, Inc.[222]

Judge Pregerson's concurring opinion in *Rene* focuses specifically on the applicability of the gender stereotyping theory as applied to Medina Rene.[223] The concurring opinion relies heavily on the Ninth Circuit's opinion in *Nichols v. Azteca Restaurant Enterprises, Inc.*,[224] where the court held that an effeminate man may raise a Title VII discrimination claim for failing to conform to gender stereotypes.[225] At first blush, Judge Pregerson's concurring opinion in *Rene*, like that of *Nichols*, appears to only consider a gender-nonconforming stereotyping theory, as opposed to the ultimate gender stereotype. There is, however, an aspect of the ultimate gender stereotyping theory underlying Judge Pregerson's reasoning.

According to the concurrence, "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping."[226] Rene presented evidence that his harasser's whistled at him; blew him kisses; called him "sweetheart," and "muñeca" (Spanish for "doll"); gave him sexually oriented joke gifts; showed him pictures of men having sex; and caressed, hugged, and grabbed his crotch on numerous occasions.[227] There is some question in the case as to how the court should define Rene's gender—namely, whether Rene was, in fact, an effeminate man.[228] Rene testified in his

220. *Id.*

221. As part V will argue, *Heller*, like *Centola*, suggests that there may be no difference between gender-conforming and gender-nonconforming homosexuals for purposes of Title VII. *See infra* Part V.

222. 305 F.3d 1061 (9th Cir. 2002) (en banc).

223. Medina Rene is an openly gay man who works as a butler on the twenty-ninth floor of the MGM Grand Hotel in Las Vegas, Nevada. His duties as a butler "involved responding to the requests of the wealthy, high profile and famous guests for whom that floor was reserved." *Id.* at 1064.

224. 256 F.3d 864 (9th Cir. 2001).

225. *See id.* at 874–75.

226. *Rene*, 305 F.3d at 1068 (Pregerson, J., concurring).

227. *Id.* at 1064.

228. *See id.* at 1077 (Hug, J., dissenting).

deposition that he perceived himself to be masculine[229] and that he was more masculine than another coworker who was similarly harassed.[230] Nevertheless, the nature of the harassment suggests that Rene's coworkers may have discriminated against Rene based on the ultimate gender stereotype.

Rene's harassers use of "doll" and "woman" demonstrates their concern with Rene's expressive gender, primarily that of femininity, not Rene's sexual orientation.[231] Regardless of the fact that Rene is gay, Rene's coworkers nonetheless conceived of his behavior as not coinciding with gender expectations.[232] If we take Rene at his word and assume that he was, in fact, more masculine than effeminate, the harasser's use of "doll" and "woman," as opposed to, say, "fag" or "queer," suggests that Rene's harasser's may have been harassing Rene because his sexual orientation did not fit within the binary gender construct. Even if sexual orientation plays a role in such harassment (as it most likely did in Rene's case), one must still acknowledge that gender expectations likewise play some role in the harassment suffered by Rene. *Rene*, therefore, implicitly suggests that a harasser's concern with a person's sexual orientation implicates aspects of that person's gender.

V. EQUATING GENDER-CONFORMING AND GENDER-NONCONFORMING HOMOSEXUALS

A. Synthesizing Centola*,* Heller*, and* Rene

Taken together, *Centola*, *Heller*, and *Rene* propose that gender-conforming and gender-nonconforming homosexuals may, in fact, be the same under Title VII. For this to be true, a court must accept the notion that a person's sexual orientation is linked to that person's expressive gender. The ultimate gender stereotype acts as such a link.[233]

The gender stereotyping theory, as discussed in this note, conceives of sex discrimination in comparative terms.[234] To be actionable as sex discrimination, a claim must show that an employer discriminated against the plaintiff because the plaintiff's anchor and expressive genders do not

229. *Id.* at 1069 n.2 (Pregerson, J., concurring).

230. *Id.* at 1077 (Hug, J., dissenting).

231. *See id.* at 1064.

232. This relates back to Professor Law's discussion of why society scorns homosexuality: "[H]omosexuality is censured because it violates the prescriptions of gender role expectations." Law, *supra* note 198, at 196. Accordingly, Rene's coworkers harassed him because he was not "a real man" in the sense that he was not attracted to women.

233. In terms of its breadth, however, the ultimate gender stereotype need not be construed as a *per se* rule governing all discrimination cases involving gay and lesbian plaintiffs. This note only considers the theory in the context of sexual harassment cases. It may be possible, then, for one to consider the theory in the larger context as applied to other types of Title VII sex discrimination claims, such as disparate treatment cases, though I will refrain from taking up that issue in this note.

234. *See supra* Part III.B (describing the comparative nature of a person's expressive and anchor gender for purposes of gender stereotyping theory).

correspond.[235] In the context of the ultimate gender stereotype, a person's sexual orientation relates to that person's expressive gender. This note defined a person's expressive gender as the person's idiosyncratic gender identity. In the context of employment law, expressive gender is the gender that the discriminating actor encounters in the workplace. Both gender-conforming and gender-nonconforming homosexuals express homosexuality as part of their expressive gender. A person's expressive gender is not limited simply to masculinity and femininity; it also includes the ultimate gender stereotype—namely, that men should only be attracted to women and that women should only be attracted to men. Under both the explicit reasoning of *Centola*[236] and *Heller*[237] and the implicit reasoning of *Rene*,[238] then, homosexual plaintiffs may articulate a sex discrimination claim for failing to conform to the ultimate gender stereotype.

One must note, however, that although the ultimate gender stereotyping theory is available to both gender-conforming and gender-nonconforming homosexuals, gender-nonconforming homosexuals may prove more successful plaintiffs under the theory. Unlike gender-conforming homosexuals, gender nonconformists are capable of articulating gender stereotyping claims for both their failure to conform to accepted gender stereotypes—that is, simple masculinity or femininity—and for their failure to conform to the ultimate gender stereotype. These successes would stem not from their ability to avoid the discussion of sexual orientation, which some plaintiffs may choose to do, but because gender-nonconforming homosexuals are able to raise two theories of recovery to the gender-conforming homosexuals' single theory of recovery. Nevertheless, discrepancies in the possible success rates of such claims should not take away from the applicability of the ultimate gender stereotype as a part of a homosexual's sex discrimination claim under Title VII.

B. Putting the Ultimate Gender Stereotype to Use

For the ultimate gender stereotype to actually equalize gender-conforming and gender-nonconforming homosexuals, plaintiffs must take full advantage of the theory. Indeed, to best influence district court judges, plaintiffs must convince them of the validity of the theory. The best way to achieve this is for plaintiffs to raise the claim, either by itself or in addition to other actionable Title VII claims. The question still remains, however, whether courts would be as willing as the courts in *Centola* and *Heller* to adopt the ultimate gender stereotype theory.

235. *See supra* notes 160–65 and accompanying text (discussing the discriminatory relationship between a person's anchor and expressive gender).

236. *See supra* Part IV.B.1.

237. *See supra* PartIV.B.2.

238. *See supra* Part IV.B.3.

Title VII is a remedial statute and, as such, courts should broadly interpret its language.[239] This rationale, it seems, should extend to Title VII's case law as well. It has been well documented by the courts that Title VII's drafters did not consider sexual orientation when they drafted the statute.[240] Moreover, the Supreme Court did not consider the application of gender stereotyping to cases involving sexual orientation when it resolved Ann Hopkins's case.[241] Accordingly, the Supreme Court in *Hopkins* could not have possibly addressed the question about how to deal with extensive sexual orientation discrimination that is conflated with gender discrimination.[242] The approach taken by the courts in both *Centola v. Potter*[243] and *Heller v. Columbia Edgewater Country Club*,[244] however, presents an ideal solution to this problem. Conceiving of a person's expressive gender as including the stereotypical notion of to whom a "real man" or a "real woman" should be attracted naturally fits within the gender stereotyping framework.[245] Homosexual plaintiffs, both gender-conforming and nonconforming, should, therefore, take full advantage of this theory.

VI. CONCLUSION

Although originally conceived in the context of a heterosexual woman, the gender stereotyping theory of sex discrimination has proved beneficial to a substantial portion of the homosexual community—namely, those homosexuals who are gender nonconformists. There may be hope, however, in the form of the ultimate gender stereotype, for gender-conforming homosexuals, as well. That two district courts have explicitly adopted reasoning that mirrors the ultimate gender stereotype theory[246] and one circuit court has implicitly flirted with the theory[247] sug-

239. Schwenk v. Hartford, 204 F.3d 1187, 1201 n.12 (9th Cir. 2000) (citing Almero v. INS, 18 F.3d 757, 762 (9th Cir. 1994)).

240. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

241. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) ("There also is no evidence that the result in *Price Waterhouse* would have been different if only there was proof the plaintiff actually *was* a lesbian.") (emphasis in original).

242. *See, e.g.,* Rene v. MGM Grand Hotel, 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc) (describing how coworkers harassed plaintiff, a homosexual, by calling him "sweetheart" and "doll"). For the quintessential discussion of the conflation of sexual orientation and gender discrimination, see Valdes, *supra* note 15.

243. *See supra* Part IV.B.1.

244. *See supra* Part IV.B.2.

245. *See supra* Part III (explaining the dynamics of the gender stereotyping theory of sex discrimination).

246. Heller, 195 F. Supp. 2d at 1224 ("Viewing the evidence in the light most favorable to plaintiff, a jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); Centola v. Potter, 183 F. Supp 2d. 403, 410 (D. Mass. 2002) ("The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because

gests that gender-conforming homosexuals may, in the near future, be able to seek the equal relief for workplace sexual harassment that gender-nonconforming homosexuals currently enjoy.

This note's analysis of the ultimate gender stereotype is only the beginning. The above discussion is in no way meant to be comprehensive. In terms of the scope of the theory, this note's employment of the ultimate gender stereotype is only concerned with the specific case of where a homosexual plaintiff is sexually harassed for failing to conform to gender expectations.[248] That is not to say that a *per se* rule applying the ultimate gender stereotype in all sexual orientation discrimination cases is not possible; it is just that this note will leave that question for a later day. Moreover, there are questions concerning to whom the ultimate gender stereotype can apply. For example, how would the notions of anchor and expressive gender apply to a transgendered person,[249] or what role, if any, does the ultimate gender stereotype play in constitutional claims brought by homosexual plaintiffs?[250] These questions, though

he thinks, 'real men don't date men.' The gender stereotype at work here is that 'real' men should date women, and not other men.").

247. *Rene*, 305 F.3d at 1064 (noting that Rene's coworkers harassed Rene on gender-based grounds rather than because of his sexual orientation).

248. *See supra* note 233 (discussing the possibility of extending this analysis to a *per se* rule in discrimination cases).

249. The discussion of transgendered plaintiffs, especially in Title VII law, has become quite common in academic circles. *See, e.g.*, Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism"*, 4 MICH. J. GENDER & L. 275, 310–24 (1997) (discussing the inconsistencies for transgendered persons in employment law). For an excellent student-written piece, see Kristen W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283 (1997) (using constitutional theory in the context of transgendered employees).

In terms of case law, for the most (in)famous rejection of a transgendered plaintiff's claim, see *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."). For a somewhat confusing state supreme court statement that a transgendered plaintiff is neither a man nor a woman, see *In re Estate of Gardiner*, 43 P.3d 120, 135 (Kan. 2002) ("The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals.").

250. This question may have been rendered academic in light of the *Romer* Court's use of rational-basis review. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996). For a more general, pre-*Romer* discussion of constitutional law and sexual orientation, see Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994) (discussing the various constitutional claims concerning homosexuals). For a post-*Romer,* pre-*Lawrence* discussion of the Court's "rational review with bite" review of Colorado's Amendment 2, see Timothy M. Tymkovich, John Daniel Dailey & Paul Farley, *A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 U. COLO. L. REV. 287 (1997).

"Rational review with bite" falls somewhere in between rational-basis review and intermediate scrutiny, with it being stricter than the former and less rigorous than the latter; it is debatable whether one can characterize it as a form of heightened scrutiny. For a general discussion of this idea, see Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

This issue, moreover, remains unresolved after *Lawrence*. The *Lawrence* majority struck the Texas sodomy law down on due process grounds, *see* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003), with only Justice O'Connor's concurring opinion addressing the equal protection issue, *see id.* at 2484–88 (O'Connor, J., concurring). Thus, both courts and scholars are free to speculate on whether laws directed at homosexuals as a class will one day be subject to a heightened standard of scrutiny.

worthy of consideration, cannot be addressed in this space. This note's analysis does suggest, however, that gender-conforming homosexuals should, like their gender-nonconforming counterparts, be able to raise gender stereotyping claims under Title VII. Thus, for purposes of Title VII, the ultimate gender stereotype equalizes gender-conforming and gender-nonconforming homosexuals.