

THE QUEER TRUTH: THE NEED TO UPDATE TITLE VII TO INCLUDE SEXUAL ORIENTATION

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I. INTRODUCTION

Wadell Sells worked for the Pittsburgh and Lake Erie Railroad Company.¹ After sixteen years of uninterrupted employment, Sells obtained a license from the city of Pittsburgh to become a stationary engineer.² Sells became overqualified for his position. Despite his qualifications, Sells continued to work as an ash wheeler in the boiler room for presumably lesser pay, and was consistently overlooked for a promotion when positions opened.³ Sells claimed the Company's actions were part of a systematic scheme to maintain a color line within the organization; the company barred Sells from even bidding on an engineer's position solely because of his race.⁴ Though Congress had at that time failed to comprehensively protect against racial discrimination in the workplace, the district court determined it was within its inherent power to protect both Sells and others similarly situated from such "invidious discrimination."⁵ As a result, the court took an active step to prevent such manifest injustice at the height of the Civil Rights Movement, employing the auspices of the Railway Labor Act—instead of a then non-existent general prohibition on employer racial discrimination.⁶

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1. *Sells v. Int'l Bhd. of Firemen & Oilers*, 190 F. Supp. 857, 858–59 (W.D. Pa. 1961).

2. *Id.* at 859.

3. *Id.*

4. *Id.* at 859–60.

5. *Id.* at 860 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

6. *Sells* was a part of a line of cases brought under the Railway Labor Act, which follows the Supreme Court's precedent established in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). In *Steele*, the court held a union could not discriminate in its representative capacity arbitrarily—for example, based on race—as opposed to performance-related criteria. *Id.* at 202–03. *Steele*, *Sells*, and other similar cases were a result of federal courts finding a creative avenue to prevent discrimination in certain contexts prior to federal employment discrimination law or the Fourteenth Amendment's applicability to such cases. See Emily Sherwin, *The Jurisprudence of Pleadings: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 87–88 (2008).

It was against this backdrop that the Civil Rights Act of 1964 was enacted. The Act's aim was to protect individuals from employment discrimination on the grounds of race, color, religion, sex, or national origin.⁷ As a result, Sells and others similarly situated no longer needed to rely on judicially creative maneuvers, such as the court's interpretation of the limited Railway Labor Act, to bring a discrimination claim. After the Civil Rights Act's passing, all employers regardless of industry⁸ were flatly prohibited from discrimination, eliminating such odious discrimination practices as those employed against Sells. The Civil Rights Act has since progressed, now playing a preventative role against workplace discrimination, notably with respect to sex-based discrimination.⁹ It represented a giant step forward at the height of the Civil Rights Movement for individuals of all walks of life.

Though Title VII of the Civil Rights Act of 1964 was enacted to equally protect various forms of discrimination, including race and sex discrimination, in reality, the social landscape for sexual equality was only beginning to parallel the long struggle for racial equality.¹⁰ Thus while courts had a wealth of discussion surrounding equal racial rights, the discussion was just beginning on how to treat the sexes equally.¹¹ As a result, the evolution of what constitutes sex discrimination has been an uneven and expanding process playing out within the courts ever since Title VII's enactment.¹²

The focus of this note is on the evolving protections offered in sex and gender discrimination actions brought through Title VII of the Civil Rights Act.¹³ Specifically, this note argues gender stereotyping prohibitions protect employees from discrimination based on sexual orientation, despite Congress's current unwillingness to explicitly extend the Act in such instances.¹⁴ Due to the congressional silence, courts are attempting a misguided effort to partition sexual orientation claims from sex and gender orientation claims, leading to inconsistent results.¹⁵ Section One of this note

7. See 42 U.S.C. §2000e-2(a)(1) (2006).

8. Note that Title VII of the Civil Rights Act of 1964 only applies to employers who employ at least fifteen employees; when originally enacted the Act only applied to employers with at least twenty-five employees. *Id.* §2000e-2(a)(1).

9. See *Lehmann v. Toys R. Us, Inc.*, 626 A.2d 445, 452 (N.J. 1993) (stating that sexual harassment under Title VII should be applied with flexibility and not bound to historical precedent).

10. LISE VOGEL, *MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKPLACE* 54-56 (Rutgers University Press 1993).

11. *Id.* at 56-59 (noting that unlike race discrimination, the definition of what constituted sex discrimination substantively began its evolution *after* Title VII's passage).

12. See *infra* Section I.

13. 42 U.S.C. §2000e-2 (2006).

14. For examples of courts inferring congressional intent to specifically exclude sexual orientation, see, e.g., *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 260-61 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

15. See *infra*, Section II.

describes the evolution of sex discrimination claims under Title VII, including the expanding evolution of gender stereotyping over the past half-century. Section Two identifies the current circuit split in defining sexual discrimination, highlighting the high profile *Prowel v. Wise Business Forms*¹⁶ case where the Third Circuit expressly recognized the blurred line between discrimination based on gender stereotyping and sexual orientation.¹⁷ Section Three discusses the need for reform and clarity. Section Four offers a simple yet effective solution to bring consistency within the circuits and, accordingly, the law. Title VII's need to explicitly encompass sexual orientation parallels the necessity of the Civil Rights Act as originally enacted. This note concludes that Congress should step in to avoid the potential situation whereby courts must either employ a creative and generous judicial interpretation or deny otherwise-deserved justice to a plaintiff who suffered "invidious discrimination."¹⁸

Before discussing the substantive law, it is necessary to define the key terms used throughout this article to avoid conflation, which has arguably been part of the problem for courts.¹⁹ "Sex" is the physical or biological trait associated with an individual; sex is most familiarly expressed in sexual genitalia.²⁰ "Gender" refers to the cultural understandings, or stereotypes, associated with masculinity and femininity, imposed on individuals by society as a result of sex assignments.²¹ Finally, "sexual orientation" reflects an individual's personal desires or sexual interests, denoting whether a person is attracted to a member of the same sex, different sex, or both sexes.²² Thus, a person can have the sex (genitalia) of a male, while having a feminine gender (as is culturally understood), and the sexual orientation (subjective sexual attraction) to others of the same *sex* (homosexuality) or opposite *sex* (heterosexuality).

II. EVOLUTION OF TITLE VII AND SEXUAL DISCRIMINATION

The origins of sex discrimination are almost as ambiguous as the current protections it offers. Title VII's inclusion of sex discrimination was the result of a late amendment added to the bill by Congressman Howard W. Smith of Virginia. Smith's motives, however, were unclear. In fact, his effort is widely believed to have been an attempt to kill the bill at the last

16. 579 F.3d 285 (3d Cir. 2009).

17. *Id.* at 291.

18. *Sells*, 190 F. Supp. at 860 (quoting *Conley*, 355 U.S. at 46).

19. For a comprehensive examination of the conflation of "sex," "gender," and "sexual orientation" in the courts and an argument that this conflation is inherently opposed to the elimination of gender and sex based stereotyping, see generally, 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 (1995).

20. *Id.* at 20–21.

21. *Id.* at 21.

22. *Id.* at 22–23.

moment, thinking no one would vote for a bill requiring eradication of sex discrimination.²³ Fortunately, the bill passed with the amendment intact, though the result left courts with little legislative history for guidance in regards to sex discrimination.²⁴ There was little understanding—judicially and socially—as to exactly what sex and gender equality meant in practice.²⁵ As a result, Title VII's protections for "sex" are constantly evolving.

A quarter century ago, the Supreme Court squarely addressed Title VII's protection of sex-based discrimination in *Meritor Savings Bank, FSB v. Vinson*.²⁶ There the plaintiff, Mechelle Vinson, was given a job at a bank by Sidney Taylor, a vice president of the bank.²⁷ After initially appearing as a father-figure to Vinson, Taylor took Vinson out to dinner and requested they go to a motel to have sexual relations.²⁸ Vinson initially refused, but later consented out of a fear of losing her job.²⁹ Subsequently, Taylor continued making unwelcomed sexual advances towards Vinson, going so far as to fondle her in front of other employees, expose himself to her in the restroom, and rape her on several occasions.³⁰ Though both Vinson and Taylor conceded that Vinson's promotions were solely merit based,³¹ the Court held nonetheless that Taylor's actions constituted sex discrimination under Title VII because it created for Vinson a repugnant and even fear-inducing working environment—an environment that was the result of her sex.³² The holding carved two avenues for a Title VII sex discrimination claim: first, Title VII protects against an employer predicating a promotion or economic advancement based on an employee's sex, or willingness to engage in sexual relations ("quid pro quo"); second, Title VII forbids sexual advances that create a hostile working environment for the employee ("hostile environment").³³

The Supreme Court's Title VII sex discrimination protection jurisprudence expanded considerably three years later in *Price Waterhouse v. Hopkins*.³⁴ There the Supreme Court considered the case of Ann Hopkins, a senior manager who was effectively denied partnership at the accounting

23. Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991). Freeman notes Smith's staunch opposition to civil rights legislation. His suggestion of including "sex" in Title VII was followed by "several hours of humorous debate." *Id.* (quoting 10 Cong. Rec. 2577 (1964)).

24. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

25. See *supra* notes 10-12 and accompanying text.

26. 477 U.S. 57 (1986).

27. *Id.* at 59.

28. *Id.* at 60.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 73.

33. *Id.* at 65.

34. 490 U.S. 228 (1989).

firm Price Waterhouse.³⁵ Despite high evaluations, partners at Price Waterhouse denied her advancement, describing her as “macho,” “overcompensating for being a woman,” and in need of “a course at charm school.”³⁶ Hopkins was advised she could improve her chances at becoming a partner if she were to, “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³⁷ The Court held that under Title VII, *gender* must be irrelevant to employment decisions,³⁸ and that Price Waterhouse engaged in “sex stereotyping” when it failed to promote Hopkins due to a belief that a woman could not be aggressive or otherwise did not conform to social stereotypes of her gender.³⁹

The Court’s distinction relied on the notion that since sex is linked to gender, Congress intended Title VII to prohibit gender-based discrimination as well as purely sex-based discrimination.⁴⁰ The Court reasoned that if Price Waterhouse was treating Hopkins adversely because she was a woman (her sex) and her behavior was too masculine (her gender), then sex stereotyping was implicated.⁴¹ Thus, the court established that Title VII’s reference to “sex” encompasses both the biological differences between a man and a woman, as well as the perception of whether a person complies with stereotypical gender norms.⁴² As a result, this landmark decision opened the doors for plaintiffs to bring sex-stereotyping (gender)⁴³ discrimination claims against employers when the employer bases a decision on an employee’s failure to conform to the employer’s gender behavior expectations.

Nearly a decade later, the Supreme Court formally recognized that gender discrimination under Title VII also applied to same-sex discrimination.⁴⁴ In *Oncale*, male plaintiff Joseph Oncale brought suit alleging he was subjected to humiliating sex-related discrimination by his

35. *Id.* at 231–32.

36. *Id.* at 234–35.

37. *Id.* at 235.

38. *Id.* at 239–40.

39. *Id.* at 250–51. The plurality stated,

[W]e 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.”

Price Waterhouse, 490 U.S. at 251 (quoting *L.A. Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

40. *Price Waterhouse*, 490 U.S. at 239–40.

41. See *id.* at 250 (“In the specific context of sex stereotyping, 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”).

42. *Id.* at 251.

43. See definition of gender, *supra* note 21, stating that gender reflects cultural stereotyping of how sex roles act.

44. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

male supervisors and co-workers.⁴⁵ Both the district and appellate courts held that Oncale did not have a cause of action because same-sex discrimination was not “because of sex” under Title VII and therefore was not protected.⁴⁶ The Supreme Court reversed the decision, with Justice Scalia drawing an analogy to Title VII’s protection of racial discrimination from members of the same race.⁴⁷ Though same-sex discrimination may not have been the principal evil Congress intended to protect against with Title VII, the Court held nonetheless that statutory provisions go beyond the principal evils to cover “reasonably comparable evils,” and sexual harassment “must extend to sexual harassment of any kind that meets the statutory requirements.”⁴⁸ Moreover, like opposite-sex discrimination, a plaintiff in a same-sex discrimination suit does not need to prove the harasser had any sexual desires towards the plaintiff; thus a plaintiff does not need to demonstrate whether the harasser is homosexual or heterosexual.⁴⁹

Oncale expressly acknowledged that Title VII’s discrimination protections advance beyond Congress’s original scope, expanding employee protections as our understanding of discrimination likewise evolves.⁵⁰ As a result of this developing precedent, current Title VII jurisprudence supports a general prohibition on gender-motivated discrimination in the workplace, regardless of the sex of the plaintiff or harasser. Indeed, the Title’s developments diverged from the bill’s Congressional origins are stark; Title VII’s gender discrimination protection is now a far cry from its questionable origins as merely a bill-killing amendment.⁵¹ Today, an employee may bring a claim of gender discrimination against an employer under a hostile environment theory⁵² or a *quid pro quo* theory⁵³ as long as the discrimination was because of the plaintiff’s sex or gender. The statute has been modified slightly, extending the breadth of the doctrine to now apply to “mixed motives” cases, declaring an employer in violation of Title VII if sex was a motivating factor amongst other (non-protected) motivating factors.⁵⁴ Accordingly, Title VII’s protections have expanded to even afford employees recourse when a protected attribute is merely one of the bases of discrimination in

45. The discrimination included both verbal and physical abuse. *Id.* at 77.

46. *Id.*

47. *Id.* at 78.

48. *Id.* at 79.

49. *Id.* at 80–81.

50. *Cf. id.* at 79 (Justice Scalia expressly acknowledged that Title VII could not be limited to its original Congressional intent, but must expand to eradicate sexual discrimination as they manifest in new forms).

51. Freeman, *supra* note 23 and accompanying text.

52. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (affirming hostile work environment theory). *See also Vinson*, 477 U.S. at 65.

53. *See Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir. 1994) (recognizing *quid pro quo* theory). *See also Vinson*, 477 U.S. at 65.

54. 42 U.S.C. § 2000e-2 (2006).

employment.⁵⁵

III. PROWEL AND THE CIRCUIT SPLIT OVER GENDER DISCRIMINATION

Brian Prowel worked for Wise Business Forms ("Wise") operating a machine called a nale encoder for thirteen years before learning he was being laid off for lack of work.⁵⁶ Prowel claimed the rationale supplied for the firing was pretext; instead, Prowel asserted his termination was the result of gender stereotyping.⁵⁷ Prowel described himself in the pleadings as an effeminate man who did not fit in with the "genuine stereotypical males" at the plant.⁵⁸ Prowel, a homosexual, was "outed" at work when an anonymous individual left a newspaper clipping of a "male-seeking-male" advertisement with a note reading, "Why don't you give him a call, big boy."⁵⁹ Following the outing, Prowel was subjected to constant harassment from his coworkers.⁶⁰ After becoming increasingly dissatisfied with his work environment, in April of 2004 Prowel considered suing Wise for "not 'fitting in'" and began asking non-management personnel if they would testify on his behalf.⁶¹ On May 6, 2004, Prowel met with members of management to discuss his working conditions as well as whether he had asked other employees to testify in a possible lawsuit, with Prowel denying any such action.⁶² On December 13, 2004, Prowel was terminated effective immediately for lack of work.⁶³

After the district court dismissed the case in favor of Wise, the Third Circuit reversed Prowel's gender discrimination claim, holding that Prowel adduced evidence sufficient to demonstrate harassment based on gender stereotypes.⁶⁴ The court admitted the distinction between discrimination because of sex and because of sexual orientation was a blurred line, and since it was ambiguous it was therefore necessarily a jury question.⁶⁵ The

55. See 110 Cong. Rec. 2728, 13837 (1964) (rejecting an amendment to add "solely" in front of the words "because of" in Title VII).

56. *Prowel*, 579 F.3d at 286.

57. *Id.* at 291.

58. *Id.* at 287. Prowel is quoted in the opinion as describing the men at the plant as men "rough around the edges," who hunted, fished, drank beer (as opposed to gin and tonics), and were fans of sports. The court described Prowel as well-groomed, an upscale dresser, with a general effeminate demeanor, having a rainbow on the trunk of his clean car, and that he pushed the buttons on the nale encoder with "pizzazz." *Id.*

59. *Id.*

60. Certain coworkers would call him "Princess," "Rosebud," and "Faggot." Additionally, tiaras and sexual lubricant were left at his work station, messages were written on the men's room walls claiming Prowel had AIDS and engaged in sexual intercourse with other male employees, and he was told he would "burn in hell" for his lifestyle. Prowel reported these incidents, but it was to little avail. *Id.* at 287-88.

61. *Id.* at 287.

62. *Id.*

63. *Id.*

64. *Id.* at 291.

65. *Id.*

court decided that the evidence suggested that Wise discriminated against Prowel because of *both* his sexual orientation and his gender nonconformity—not conforming with “Wise’s vision of how a man should look, speak, and act[.]”⁶⁶ Thus, Prowel was not precluded from bringing a cognizable Title VII claim merely because he is a homosexual.⁶⁷

The Third Circuit’s recent opinion is indicative of the courts’ slow movement to recognize claims that could be categorized as either sexual orientation discrimination, gender-conformity discrimination, or both, as gender stereotyping claims.⁶⁸ Though courts have made clear that a claim based solely on sexual orientation discrimination is barred, there is certainly ambiguity in distinguishing the difference between discrimination based on sex, on gender, and on sexual orientation.

Given *Prowel*’s novelty, there are few citing sources. One case, however, immediately sought to distinguish *Prowel* despite similar facts. *Ayala-Sepulveda v. San German*⁶⁹ distinguished *Prowel* by stating there the defendant’s only well-pled claim of sexual stereotyping was simply the fact that he was a homosexual.⁷⁰ Many of the facts suggested the hostile environment created in *Alaya-Sepulveda* were a result of a failed relationship;⁷¹ however, the facts also seemed to suggest gender discrimination more akin to *Prowel* than the district court acknowledged.⁷² Regardless, the court held that this was merely a complaint of sexual orientation discrimination and therefore dismissed the action on summary judgment.⁷³

Prowel is not the first Court of Appeals case to highlight that a blurred line between sexual orientation and gender discrimination prevents dismissal at the pleadings stage. Five years before *Prowel*, the Sixth Circuit held in *Smith v. City of Salem*⁷⁴ that gender stereotyping applied to a

66. *Id.* at 292.

67. *Id.*

68. See, e.g., *Heller v. Colombia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (stating that one way to determine if discrimination was based on sex was to look at whether the harasser would have acted the same way if victim’s gender had been different. “A jury could find that Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.”); *Centola v. Potter*, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002) (holding that plaintiff “does not need to allege that he suffered discrimination on the basis of his sex alone or that sexual orientation played no part in his treatment.”).

69. 661 F.Supp. 2d 130 (D.P.R. Sept. 30, 2009).

70. *Id.* at 137.

71. *Id.*

72. *Id.* at 133-35. *Ayala-Sepulveda*, a municipal worker, had been ridiculed and mocked for being attracted to men, told he could never be promoted because of his sexual orientation, and in response to threats from a coworker, told by the mayor that he should transfer. When he refused to transfer, the mayor visited *Ayala-Sepulveda*’s family and denounced *Ayala-Sepulveda*’s homosexuality. All of this points towards *Ayala-Sepulveda* not fitting within what his coworkers, as well as the mayor, considered being an appropriate lifestyle for a male (heterosexuality)—which would be gender stereotyping, just as *Prowel* was seen as not fitting in with the typical male at Wise. See *supra* notes 49-51.

73. *Ayala-Sepulveda*, 661 F.Supp 2d. at 138.

74. 378 F.3d 566 (6th Cir. 2004).

transgender employee. Though the court did not comment on the sexual orientation of the plaintiff, it did find the defendant's adverse employment decisions were based on gender nonconformity.⁷⁵ Relying on *Price Waterhouse*, the court noted that gender discrimination is part of the evolution of Title VII's sex discrimination prohibition.⁷⁶ After summarizing *Price Waterhouse's* fact pattern, the court stated: "It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."⁷⁷ An employer cannot then discriminate against an employee for behavior it perceives inappropriate for the employee's sex.⁷⁸ Therefore, even if an employer believes (correctly or not) that an employee is homosexual, he cannot discriminate against that employee because he believes an individual should engage in sexual activity only with members of the opposite sex.⁷⁹

Whether a plaintiff is *actually* homosexual or not is irrelevant to Title VII's protections via gender stereotyping. In the Seventh Circuit case *Doe v. City of Belleville*, twin teen boys brought an action for same-sex gender discrimination for hostile environment discrimination in their city job.⁸⁰ One of the twins, "H", who wore an earring, was nicknamed "fag" or the "queer" by his coworkers, and his coworkers repeatedly told H to go to San Francisco "with the rest of the queers."⁸¹ One of H's co-workers, Jeff Dawe, threatened H repeatedly, saying he'd take H to the woods and "get [him] up the ass."⁸² H's co-workers would inquire in graphic terms if H was having anal sex, and Dawe went so far as to trap H against a wall and grab his testicles in front of other co-workers, while announcing to the group, "Well, I guess he's a guy."⁸³

The court went to great length describing the behavior in the case as gender discrimination, stating that the discrimination existed independent of whether H was actually homosexual or not.⁸⁴ Despite the opinion's

75. *Id.* at 573-74.

76. *Id.* (citing *Price Waterhouse*, 490 U.S. at 251).

77. *Id.* at 574.

78. *Id.* The court in *Salem* comes to this conclusion as a result of discrimination for plaintiff's transgender identity. However, the same proposition supports discrimination for sexual orientation: both involve an employer's perception of gender behavior.

79. *Cf. id.* at 573-75 (The court addresses the issue in terms of transgender discrimination, but the exact same issues are implicated by sexual orientation discrimination, rendering the court's conclusions sound within this context.).

80. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998) (case vacated in light of *Oncale*, 523 U.S. 75). The case was settled before rehearing.

81. *Id.* at 566-67.

82. *Id.* at 567.

83. *Id.*

84. *See id.* at 592. This case, as apparent by its subsequent history, came before the decision in *Oncale* which expressly approved a same-sex discrimination suit. At the time, there was a split among the Courts of Appeals, which the Seventh Circuit sought to address in its decision. *See id.* at 597-98 n.1.

length, the court made it a point to emphasize the simplicity of the case.⁸⁵ Using *Price Waterhouse* as guidance, the court held that the homophobic epitaphs and assaults towards H established that he did not conform to his coworkers' view of appropriate masculine behavior, which is gender harassment, irrespective of the parties' actual sexual orientations.⁸⁶ The court did note that discrimination based on sexual orientation as opposed to sex is beyond Title VII.⁸⁷ While the court refused to create a rule saying anti-gay discrimination is *per se* gender discrimination, it was careful to point out that it is not so easy to categorize gender discrimination as distinct from sexual orientation discrimination, especially at the pleadings stage.⁸⁸

Belleville represented great strides by the Seventh Circuit in Title VII understanding, especially in taking the time to painstakingly illustrate why sexual orientation is virtually irrelevant for the purposes of gender discrimination.⁸⁹ Together, *Belleville*, *Salem* and *Prowel* signal careful judiciary admissions that while the legislature has expressly declined to include sexual orientation discrimination within Title VII, in application Title VII's evolved to cover sexual orientation discrimination as "gender discrimination" after *Price Waterhouse*.⁹⁰

IV. TITLE VII'S NEED FOR CLARITY

The irony of the decisions outlined in Part III, that recognize homosexual discrimination claims under the auspices of gender discrimination (perhaps more properly, gender nonconformity) is that Title VII now recognizes—in effect—sexual orientation discrimination.⁹¹ Courts

85. *See id.* at 575.

86. *Id.* at 580. Again this pre-*Oncale* decision from 1997 is interesting to contrast with *Ayala-Sepulveda*, 661 F. Supp 2d at 137 where the court felt that despite express remarks against Ayala-Sepulveda's homosexuality by coworkers, managers, and the mayor to his family, the case was distinguishable as *not* pleading gender stereotyping.

87. *Belleville*, 119 F.3d at 592.

88. *Id.* at 593, n.27.

89. *See id.* at 575 (stating that the divergent answers regarding whether same-sex harassment constitutes sex discrimination requires addressing their reasoning within the context of other decisions).

90. *See id.* at 593–94. (noting that though Title VII does not expressly protect against sexual orientation discrimination, the court declared that "juxtaposed alongside of the homophobic epithets that Belleville singles out are other remarks that implicate sex rather than sexual orientation—the references to H as a 'bitch' . . . and inquiries professing confusion as to whether H. was a 'girl or a guy,'" and thus constituted gender discrimination) *Salem*, 378 F.3d at 574 ("it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Prowel*, 579 F.3d at 292, (acknowledging that not every sexual orientation discrimination case can be a triable case under Title VII because it would contradict Congress' intentional omission of sexual orientation under Title VII. However, the court declared that in this case, merely because the evidence suggests the discrimination was motivated by Prowel's sexual orientation, it does not vitiate the claim that he failed to conform to gender stereotypes.).

91. It is necessary to highlight that since sexual orientation is not within Title VII's text, the courts must rely on gender stereotyping under *Price Waterhouse*. This, along with Congress' express

have for years attempted to artificially divorce sex, gender and sexual orientation. What followed was a confusing mess with some plaintiffs obtaining relief and others being thrown out of court at the pleadings stage for bringing a sexual orientation claim—in other words, a claim the court could not conceptually separate as a gender discrimination claim. While much of this came down to proper (and crafty) pleading,⁹² courts are suspicious of plaintiffs attempting to camouflage a sexual orientation claim as a gender or sex discrimination claim, since members of Congress insist Title VII's protections do not cover sexual orientation discrimination.⁹³ Still, the irony exists: gender discrimination claims include claims based on an employee's gender not matching the stereotypes of his or her sex, as perceived by their coworkers.⁹⁴ Homosexuality necessarily involves a person of one sex being attracted to someone of the same sex.⁹⁵ Thus when employees are harassed for not conforming to their sex roles by being homosexual, they are being discriminated against based on their sexual orientation and gender.⁹⁶ Sexual orientation discrimination and gender discrimination are synonymous; so by allowing gender discrimination claims, courts have passively acquiesced to sexual orientation claims under Title VII. But as illustrated above in the split authority,⁹⁷ this acquiescence is far from universal due to Title VII's current state requiring segregation of sexual orientation from sex and gender.

Consequently, the key flaw with Title VII, as currently enacted, is its attempt to separate discrimination based on sex or gender from discrimination based on sexual orientation.⁹⁸ Discrimination based on sexual orientation is intrinsically intertwined with gender and sex, and separating the topics is impossible.⁹⁹ When the courts do attempt to artificially separate the two, it almost always occurs in conjunction with a

refusal to incorporate sexual orientation, leads to inconsistent results. *See supra* Part III. However, as this Part argues, since sexual orientation stereotyping is indistinguishable from gender stereotyping, Title VII must be amended to provide judicial clarity.

92. *See, e.g.,* *Schroer v. Billington*, 424 F. Supp. 2d 203, 208-09 (D. D.C. 2006); *Simonton*, 232 F.3d at 38.

93. *See infra* note 105 and accompanying text.

94. "Coworkers" is used broadly to include any agent of the employer. 42 U.S.C. § 2000e(b) (2006).

95. *See* Merriam-Webster's Collegiate Dictionary (2010), available at <http://www.merriam-webster.com/dictionary/homosexual>. *See also supra* Part II.

96. *See Simonton*, 232 F.3d at 37-38. There, the court recognized this very logic without issuing an opinion on its merits, since plaintiff only presented the theory of sexual discrimination to the district court.

97. *See supra* Part III.

98. *See Centola*, 183 F. Supp. 2d at 406.

99. The difficulty in defining "sexual orientation" as its own category was famously highlighted in 1948, when Alfred Kinsey proposed that heterosexuality and homosexuality were part of a sliding scale (The "Kinsey Scale") akin to a continuum as opposed to rigid categories. Kinsey wrote, "Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats . . . The living world is a continuum in each and every one of its aspects." Alfred Kinsey, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 639 (W.B. Saunders Co. 1948). *See also supra* notes 20-22 (illustrating the interrelating roles between sex, gender, and sexual orientation).

homosexual plaintiff bringing a discrimination claim, but rarely with a heterosexual plaintiff. In fact, homosexual plaintiffs are often encouraged to hide their sexual orientation.¹⁰⁰ This is due to what Zachary Kramer has termed the “invisibility of heterosexuality.”¹⁰¹ Courts perceive a homosexual plaintiff as attempting to distort Title VII by bringing an otherwise Congressionally-characterized “barred claim” for sexual orientation by phrasing it as gender discrimination. Moreover, if a homosexual plaintiff does bring an otherwise valid sex or gender discrimination claim, a defendant is encouraged to defeat the claim by categorizing it as a sexual orientation claim.¹⁰²

Courts have acknowledged the interrelation between sex, gender and sexual orientation, and the near impossibility of their divisibility.¹⁰³ In *Heller*,¹⁰⁴ the plaintiff Liz Heller was allegedly subjected to a litany of homophobic comments from her employer.¹⁰⁵ As a result, she brought a sex discrimination claim under Title VII, asserting that the prohibition on gender stereotyping includes degrading homophobic comments as well as heterosexual comments.¹⁰⁶ The court agreed, noting that the benefits of Title VII should not be limited to heterosexual plaintiffs.¹⁰⁷ The court stated:

If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller—including numerous unwanted offensive comments regarding her sex life—the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual.¹⁰⁸

This is only a logical product of the interconnection between sex, gender and sexual orientation. Heller endured discrimination because her

100. Justin M. Swartz et. al., *Nine Tips for Representing LGBT Employees in Discrimination Cases*, 759 PRACTISING L. INST.: LITIG. 95, 103 (2007). The authors suggest pleading of homosexual orientation may prove fatal to a case, as federal courts are more involved in lip service when they claim sexual orientation is irrelevant to a Title VII claim.

101. Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 231-32 (2009) (discussing the “privilege” of heterosexuality).

102. See Valdes, *supra* note 19, at 123-25 (identifying a “sexual orientation loophole” where heterosexual plaintiffs can generally bring a claim for sex or gender orientation, but when a homosexual plaintiff brings the claim the defendant shifts the focus to the plaintiff’s sexual orientation and claims the plaintiff is attempting to bring an unprotected claim under Title VII).

103. E.g. *Schroer*, 424 F. Supp. 2d at 209 (noting that both lines of cases illustrate “claims of adverse action that partake in some measure of sex stereotyping, and yet the courts deciding them—rejecting claims of discrimination based on sexual orientation or violations of grooming and dress codes—have not clearly articulated what, if anything, distinguishes any of the cases from *Price Waterhouse*.”); *Hamm v. Weyauwega Milk Products, Inc.*, 199 F. Supp. 2d 878, 890 (E.D. Wis. 2002) (“The line between discrimination on the basis of sex and discrimination on the basis of actual or perceived sexual orientation is not always a clear one.”); *Centola*, 183 F. Supp. 2d at 408 (describing line as “hardly clear.”).

104. 195 F. Supp. 2d at 1212.

105. See *id.* at 1217-18.

106. See *id.* at 1217.

107. See *id.* at 1222.

108. *Id.* at 1222-23.

employer perceived that Heller was not attracted to the sex to which women are typically attracted.¹⁰⁹ Thus the employer's discrimination is rooted in its gender expectations, and Heller's perceived sexual orientation not conforming to those expectations.

Separating sexual orientation from gender and sex, however, begs the question at issue in discrimination contexts. A homosexual person is more likely than a heterosexual person to be perceived as not fitting in with gender stereotypes.¹¹⁰ By the court attempting to separate and eventually confusing the concepts of sex, gender, and sexual orientation, however, it becomes more difficult for a homosexual plaintiff to bring an action based on gender discrimination.¹¹¹ What results is double punishment for a homosexual person: a homosexual person is more likely to be subject to gender discrimination for not fitting in, and is at the same time less likely to have a day in court.

The *Ayala-Sepulveda* decision highlights the double punishment homosexual plaintiffs endure under current Title VII construction. Courts are expected to delineate between two indivisible prongs: gender and sexual orientation discrimination. The court concluded, based on the pleadings, that Ayala-Sepulveda's allegations of gender discrimination were barred because in reality he was only pleading sexual orientation discrimination.¹¹² However, the facts suggest that his sexual orientation discrimination was a result of his not fitting in with gender stereotypes:¹¹³ Ayala-Sepulveda's discrimination began after a relationship with another male employee, Jose J. Rodriguez-Vega, ended.¹¹⁴ Following their separation, Rodriguez-Vega denied being homosexual himself, portrayed himself as heterosexual, and verbally and physically assaulted Ayala-Sepulveda for being homosexual.¹¹⁵ Rodriguez-Vega also allegedly recruited other employees as a part of a conspiracy to have Ayala-Sepulveda fired.¹¹⁶ When Ayala-Sepulveda approached his superiors about these issues, pointing out that they were both homosexual together despite

109. See *id.* at 1224.

110. Cf. Kramer, *supra* note 101, at 232 (stating that a homosexual man is more likely to deviate from the socially-determined stereotypical masculine man since a man is stereotypically expected to be attracted to women).

111. This is due to the perceived bootstrapping effect. See Valdes, *supra* note 19, at 123-24; Kramer, *supra* note 101, at 231-32.

112. See *Ayala-Sepulveda*, 661 F.Supp.2d at 137 (agreeing with *Prowel* and arguing that while the line between "because of sex" and "because of sexual orientation" can be difficult to draw, "plaintiff's allegations in this case do fall clearly on one side of the line.").

113. *Ayala-Sepulveda*, like many other cases involving double punishment of a homosexual plaintiff, was decided at the pleadings stage. It is well established that at the pleadings stage, the court must view all the evidence and factual inferences in favor of the nonmoving party. See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). This is noteworthy because the court is thus required to give deference to Ayala-Sepulveda's allegations, even if contested. Therefore, the court—and the reader, for the purposes of this exercise—should treat the allegations as true. See *Celotex*, 477 U.S. at 322-323.

114. *Ayala-Sepulveda*, 661 F. Supp. 2d at 134.

115. *Id.*

116. *Id.*

Rodriguez-Vega's ostracizing, the mayor allegedly came and echoed homophobic remarks to Ayala-Sepulveda and his family.¹¹⁷

Despite demonstrating that Rodriguez-Vega was the problematic employee, Ayala-Sepulveda's superiors demanded that Ayala-Sepulveda transfer, and did not punish Rodriguez-Vega.¹¹⁸ Using the test many courts employ in Title VII cases (asking whether the defendant would have acted differently if the plaintiff's sex had been different) it is manifest that Ayala-Sepulveda would have never have been treated to such torment if he were a woman engaged in the exact same behavior.

The same fact pattern restated illustrates the double standard. Imagine an employee who was physically and verbally assaulted by an ex-boyfriend coworker, and was further harassed and ostracized by other coworkers for the past relationship. The employee then complains to a supervisor, who instead of punishing the ex-boyfriend, instead requires the employee transfer to a job the employee does not want. The employee's boss then tells the employee that he does not approve of the employee's sexual life, and therefore he will not assist the employee.¹¹⁹ This recasting illustrates the double punishment for Ayala-Sepulveda: he was harassed for his orientation—including verbal and physical assaults—yet the court dismissed his case on the pleadings.¹²⁰

It seems that a reasonable person could have decided Ayala-Sepulveda was subjected to discrimination on account of a gender stereotype.¹²¹ However, since the court saw this as Ayala-Sepulveda bootstrapping his way to relief, his claim was dismissed before it ever left the ground.¹²² The standard for summary judgment dismissal is whether, accepting all of the complaint's allegations as true, the plaintiff has set out plausible grounds for relief.¹²³ While it is clear that a complaint containing only legal conclusions does not survive,¹²⁴ the standard is intended to be flexible, dismissing claims only if no reasonable juror could return a verdict for the non-moving party.¹²⁵ If it is not even clear to courts when a person is

117. *Id.* at 135.

118. *Id.*

119. *Cf. id.* at 134-135 (the facts are restated without using the gender or sexual orientation of the plaintiff).

120. *Id.* at 138.

121. *Cf. Prowel*, 579 F.3d at 291 ("As this appeal demonstrates, the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw." The court then said viewing the facts in favor of Prowel, as it is required to do on review, since it could be argued as both sexual orientation and gender discrimination, the question is necessarily a jury question.).

122. This case is a prime example of Kramer's point that courts see a homosexual plaintiff as bootstrapping their way into a Title VII claim, whereas a similarly situated heterosexual's sexual orientation is not even consciously considered. Kramer, *supra* note 101, at 219-20.

123. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

124. *Iqbal*, 129 S. Ct. at 1949.

125. *Mowlana v. Mukasey*, No. 08-cv-01769-LTB, 2009 WL 130571, at *2 (D. Colo. Jan. 20, 2009) (citing *Celotex*, 477 U.S. at 323).

pleading a sexual orientation claim as opposed to a gender discrimination claim,¹²⁶ how could it be so clear that no reasonable juror would find otherwise?¹²⁷ The *Ayala-Sepulveda* court held that, as a matter of law, the discrimination against Ayala-Sepulveda was permissible under Title VII because it was *only* sexual orientation and not gender discrimination.¹²⁸ In reality, sexual orientation is a combination of sex and gender in determining subjective sexual attraction.¹²⁹ Since sex and gender are inseparably related to sexual orientation, it is impossible to distinguish the claims and say, with certainty, a plaintiff's claim is gender discrimination *or* sexual orientation discrimination.¹³⁰ Any attempt to separate the concepts as discrete, independent entities leads naturally to conflation and inconsistent—and somewhat illogical—results.

Consequently, as it is currently articulated and emphasized by Congress—as well as interpreted by some circuits—Title VII allows employers to freely discriminate on the basis of sexual orientation,¹³¹ by converting legitimate gender discrimination claims by into sexual orientation claims,¹³² and disproportionately prevents homosexuals from relief via the judiciary.¹³³ In fact, employers are currently using what

126. See *supra* Part III.

127. If a material fact is in dispute, the case should not be dismissed as a matter of law. *Mowlana*, 2009 WL WL 130571, at *2. Needless to say, whether a plaintiff is claiming gender discrimination or trying to deceive the court by disguising a “purely” sexual orientation discrimination (despite explicitly claiming gender orientation) is a material fact. Also, it is important to remember that jurors “are not experts in legal principles.” *Carter v. Kentucky*, 450 U.S. 288, 302 (1981). Cf. *Belleville*, 119 F.3d at 589 (looking at the context of same-sex discrimination generally and noting that by worrying about whether sexual orientation can be grounds for an otherwise cognizable claim of discrimination, the results would be for a terrible and invasive discovery process, as well as judicial process as a whole).

128. See *Ayala-Sepulveda*, 661 F. Supp. 2d at 138. Again worth noting is that if gender discrimination was even one motive, then Title VII's mixed motives jurisprudence requires the motion be denied—even if it includes sexual orientation or any other motive not covered by Title VII. See *supra* note 54.

129. ANNE-MARIE MOONEY COTTER, *ASK NO QUESTIONS: AN INTERNATIONAL LEGAL ANALYSIS ON SEXUAL ORIENTATION DISCRIMINATION* 7-8 (2010).

130. See, e.g., *id.*; EDWARD STEIN, *THE MISEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 36-38 (2001); MARK BLASIUS, *SEXUAL IDENTITIES, QUEER POLITICS* 185 (2001).

131. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005) (stating that it was difficult to discern whether lesbian plaintiff was claiming discrimination based upon her gender, appearance, or sexual orientation and, as a result, holding that the plaintiff was, in essence, trying to “bootstrap” her sexual orientation discrimination claim into court, and dismissing the claim as not being cognizable under Title VII); *Rene v. MGM Grand Hotel*, 243 F.3d 1206, 1209 (9th Cir. 2001) (“The degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“[Sexual orientation discrimination] is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that . . . Title VII does not proscribe harassment simply because of sexual orientation”).

132. See *Kramer*, *supra* note 101, at 242-43. In fact, employers can use this approach for heterosexual cases as well, arguing that a heterosexual's gender stereotype claim is merely a sexual orientation claim in disguise.

133. Cf. Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the*

Kramer coined the “bootstrapping loophole” to take otherwise legitimate claims of gender discrimination and have the case dismissed as an impermissible sexual orientation claim.¹³⁴ This result is far from the anti-discriminatory goals behind Title VII’s enactment and evolution.¹³⁵

V. MOVING FORWARD: AMENDING TITLE VII

The proposed solution for revising Title VII is strikingly simple: Amend Title VII to include gender and sexual orientation.¹³⁶ The amended Title VII should prohibit discrimination on the grounds of race, color, religion, sex, *gender*, *sexual orientation* or national origin.¹³⁷ The first half of the proposal would merely reflect the law as it is interpreted today by the courts—on one hand explicitly (gender)¹³⁸ and on the other hand implicitly (sexual orientation)¹³⁹. The result would reinforce the existing protections on gender and remove the confusion regarding sexual orientation. No longer will courts be forced to artificially sever a “legitimate” gender-based claim from an “illegitimate” sexual orientation claim. This would also remove the significant barrier of the double punishment homosexuals face by the current construction of Title VII.¹⁴⁰ Finally, the statutory language would reflect the realities of sexuality: that gender and sexual orientation are inseparably linked, and not subject to categorical classifications—something Kinsey famously stated almost 70 years ago.¹⁴¹

Admittedly, this attempt is not necessarily novel. Congressional efforts

Boundaries of Actionable Conduct, 47 AM. U. L. REV. 677, 722 (1998) (discussing how critiques of Title VII are based on the presumption that, in theory, heterosexual expressions are not tolerated to the same degree that homosexual expressions are not tolerated in the workplace and, as a result, this presumption would then make Title VII fair, but in reality homosexuals are without redress in the courts while heterosexuals enjoy the invisibility of being the majority).

134. See Kramer, *supra* note 101, at 243. Again, the mixed motives jurisprudence suggests notwithstanding a belief that Title VII requires separating otherwise inseparable concepts, even if gender is a motivating factor, then the motion to dismiss claims should be denied. However, with the dismissals highlighted throughout this note, the double prejudice against homosexual plaintiffs clearly survives.

135. See generally Harvard Law Review Association, Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984). When it enacted Title VII, Congress intended to protect discrimination resulting from an imbalance of power—where a powerful group uses its power to discriminate against a vulnerable group.

136. Though gender is already included in Title VII, it is not delineated in the Act’s text but instead incorporated under *Price Waterhouse* jurisprudence. See *supra* Part II. By adding it into the statute’s text, it codifies the established precedent while protecting gender discrimination’s potential jurisprudence devolution.

137. Emphasis added where the proposal differs from the current Act.

138. See discussion of *Vinson*, *Price Waterhouse*, and *Oncale*, and the progression of Title VII’s current recognized protections of gender discrimination, *supra* Part II.

139. Admittedly the majority of courts do not allow sexual orientation claims even when framed solely as gender discrimination. Still, as I argue, the claims are the same as gender orientation claims. See *supra* Parts III, IV. To avoid confusion, however, within the courts, I assert it is essential the legislature add both gender and sexual orientation, so the courts no longer have to guess at the scope of Title VII’s purview.

140. See generally *supra* notes 110-12 and accompanying discussion of double punishment.

141. See Kinsey, *supra* note 99 at 639.

to include sexual orientation under Title VII date back to 1975.¹⁴² Though these efforts have come close since the first failed attempts, there has yet to be a breakthrough in legislatively expanding Title VII.¹⁴³ Lately, Congress began taking a more creative route to accomplish the same aims: introducing legislation separate from actually amending Title VII. The Employment Non-Discrimination Act (EDNA) proposes to eliminate sexual orientation discrimination in the workplace.¹⁴⁴ While these efforts appear to have momentum,¹⁴⁵ they are an inadequate remedy for Title VII's ills.

First, there is a very real chance that a separate bill would not enjoy protection under the Fourteenth Amendment while an amendment to Title VII would.¹⁴⁶ The Supreme Court has found anti-discrimination laws of the Civil Rights Act applicable to the states through the Fourteenth Amendment, including Title VII's prohibition on sex discrimination.¹⁴⁷ However, courts have held disability legislation, similar to ENDA where it prohibited discrimination apart from Title VII, to be inapplicable to states via the Fourteenth Amendment.¹⁴⁸ By enacting ENDA as a stand-alone statute, Congress heightens the risk that the judiciary will interpret sexual orientation discrimination as not addressing a suspect class¹⁴⁹ and not elevating it to Fourteenth Amendment applicability.¹⁵⁰ Though express inclusion of gender and sexual orientation classifications in Title VII cannot guarantee Fourteenth Amendment protection, Congress' incorporation of those classes with the rest of Title VII—already enjoying Fourteenth Amendment protection—sends a message to the judiciary that gender and sexual orientation should be treated the same.¹⁵¹ Moreover, by excluding sexual orientation from Title VII and instead introducing a separate bill, Congress is itself engaging in a symbolic contradiction: Title VII was generally enacted to protect discrimination against especially vulnerable groups of people and to promote equality in the workplace.¹⁵² Not

142. See H.R. 13019, 94th Cong. (2d. Sess. 1976); H.R. 10389, 94th Cong. (1st Sess. 1975); H.R. 2667, 94th Cong. (1st Sess. 1975). Three separate bills were introduced in a short timeframe to expand Title VII to include sexual orientation. All three bills failed to leave the Judiciary Committee.

143. See S. 2056, 104th Cong. (2d Sess. 1996). In fact, Sen. Ted Kennedy's bill was defeated in the Senate by only one vote, 49-50.

144. See H.R. 3017, 111th Cong. (1st Sess. 2009) and S. 1584, 111th Cong. (1st Sess. 2009), for the most recent proposed versions of the bill. A version of the bill has been proposed every session since 1994.

145. The House version has 194 co-sponsors, while the Senate version has 43 co-sponsors.

146. See Jennifer S. Hendricks, *Instead of EDNA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 214 (2008).

147. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003) (including sex discrimination's related cause of gender discrimination).

148. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-67 (2001) (holding that disabled individuals are not part of a traditionally suspect class to warrant Fourteenth Amendment protection).

149. See *id.* at 366.

150. See Hendricks, *supra* note 146, at 214-215.

151. *Id.* at 212.

152. Though the primary vehicle was race discrimination, Title VII's sweeping breadth to protect

including gender or sexual orientation discrimination in Title VII suggests that while employees should benefit from a discriminatory-free workplace, gender and sexual orientation discrimination is distinct from other protected characteristics in Title VII.¹⁵³

It may appear on the surface that this is not the time for Congress to succeed where it has previously failed. There is no ignoring the polarization issues of homosexuality in the modern political landscape. One needs to only look at legislative action on homosexual marriage to see the ardent debate engaged across the country.¹⁵⁴ This article is too narrow to address all issues raised by homosexuality, but it does warrant mention within the political context of any proposed amendment to Title VII. Amending Title VII is not analogous to gay marriage or other positive rights, because the proposed amendment is primarily a negative right: it restricts discrimination. Amending Title VII does not reflect an endorsement of homosexuality, but instead a prohibition against discrimination.¹⁵⁵ As it currently stands, some courts are rejecting otherwise clearly egregious discrimination claims in effort to fit within Congressional declarations that Title VII excludes sexual orientation but protects gender discrimination.¹⁵⁶ This results in abhorrent gender discrimination claims being permitted merely because the plaintiff was a homosexual, and the court trying to avoid recourse for sexual orientation claims.¹⁵⁷ With courts recognizing the

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vulnerable groups has often been noted by both courts and scholars. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)) (stating that Congress didn't enact Title VII to guarantee a job to everyone, but instead to require "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"); *Belleville*, 119 F.3d at 571; Amelia A. Craig, *Musings About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105, 110 (1995) (noting that sexual harassment is recognized by courts as being more about an imbalance of power than about an actual desire for sex).

153. *See* Hendricks, *supra* note 146, at 215.

154. *See generally*, Celia Gamrath, *All in the Family: Gay Marriage Debate*, CHICAGO LAWYER, Aug. 1 2009, at 20014, available at

<http://www.chicagolawyeromagazine.com/Archives/2009/08/01/082009Family.aspx>; Abby Goodnough, *Vote in Doubt As a Senate Takes Up Gay Marriage*, N.Y. TIMES, Apr. 16, 2009, at A20.

155. The Mormon Church recently recognized this distinction when it backed a prohibition on sexual orientation discrimination in Salt Lake City similar to the one proposed here. *See Politics*, THE ECONOMIST, Nov. 14, 2009, at 11. This was the first time the Church had backed this type of legislation, stating that the anti-discrimination laws "do no damage to traditional marriage." *Id. But see, Unjust and Just Discrimination: Some Considerations Concerning the Catholic Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons*, CATHOLIC INSIGHT, Feb. 1, 2005, at 22(3) (stating that while Catholics should reject any discrimination against homosexuals as deplorable, sexual orientation discrimination should not be treated the same as race or ethnic background because homosexuality is an objective disorder).

156. *See* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258-59 (1st Cir. 1999) (holding that, despite plaintiff working in "a wretchedly hostile environment," and despite sexual orientation discrimination being "a noxious practice, deserving of censure and opprobrium," it is nonetheless settled Title VII precedent that if a discrimination claim is rooted in sexual orientation, it must dismiss the action).

157. *Cf. id.* If Higgins were a female and coworkers hung signs above her desk reading "Blow Jobs 25¢," called her vulgar names, mocked her feminine ways, made remarks about her imagined sexual activities, and even accosted her in the bathroom, it is difficult (and indeed undesirable) to

repugnant nature of sexual orientation discrimination, it makes little sense to legislatively require them to attempt to artificially separate two naturally conflated characteristics in order to permit some objectionable discrimination to continue.¹⁵⁸

Moreover, protecting sexual orientation discrimination is further distinct from other positive sexual orientation legislation, such as gay marriage, because Title VII will protect all from sexual orientation discrimination equally, not just homosexuals. In *Belleville*, the youth was subjected to degrading sexual orientation discrimination despite being heterosexual.¹⁵⁹ Sexual orientation discrimination is the result of a harasser's perceptions, not of an individual's actual sexual orientation.¹⁶⁰ This note does not suggest a court prod into the bedrooms of plaintiffs to determine actual sexual orientation, but instead acknowledge that gender discrimination includes, in part, sexual orientation discrimination; in other words, an employer discriminating against an employee because the employee does not match certain behavioral characteristics associated with his/her sex. Prohibiting sexual orientation discrimination thus benefits both heterosexuals and homosexuals, and therefore avoids the controversy surrounding granting affirmative rights to only homosexuals. Protection of the minority homosexual, who endures intolerance and discrimination due to other's perceptions, actually benefits the majority as well.¹⁶¹

To illustrate this point, imagine a hypothetical: take a homophobic heterosexual male, working in a male-dominated work environment, who is harassed by coworkers.¹⁶² The employee is perceived (incorrectly) by his coworkers to be in a homosexual relationship.¹⁶³ As a result, he is constantly called derogatory homosexual names such as faggot and Girl Scout, and is threatened with physical assault, rape, or death for his perceived homosexual way of life. He is assaulted in the hallways for being a

imagine a court would refuse relief under Title VII.

158. See *Kramer*, *supra* note 101, at 220 (noting that when a homosexual plaintiff brings a gender discrimination claim, courts examine whether the plaintiff is bootstrapping an otherwise impermissible sexual orientation claim, while they do not subject heterosexual plaintiffs to the same scrutiny, leading to inconsistent treatment and unfair results).

159. *Belleville*, 119 F.3d at 592.

160. See *Kramer*, *supra* note 101, at 226 (examining *Vinson*, 477 U.S. at 64) (noting that the victim's sexual orientation is less important than the harasser's perceptions of the victim's sexual orientation); cf. *Belleville*, 119 F.3d at 580 (noting that, despite plaintiff being heterosexual, he still was subjected to "humiliating . . . deeply personal" homosexual discrimination).

161. See Richard Kenyon, *Discrimination Law Applies to Everyone*, PERSONNEL TODAY, Jan. 22, 2008, at 1, available at <http://www.personneltoday.com/articles/2008/01/21/44016/discrimination-law-applies-to-everyone.html>.

162. This hypothetical is loosely based off of *Hamm*, 199 F. Supp. 2d at 878. In that case, the plaintiff's complaint was held to merely claim discrimination based on speculation of sexual orientation, and not because of sex as required by Title VII. *Id.* at 895. Also, the court felt that much of the claimed discrimination was related to job performance. *Id.* at 900. Thus, it was dismissed. *Id.*

163. The use of a homophobic heterosexual male suggests that he would be even more offended by being incorrectly assumed to be a homosexual. As a result, these hypothetical actions would presumably be even more hurtful.

homosexual, is the subject of profane graffiti describing him engaging in lewd behaviors, and consistently has objects (such as lubricant for anal sex and anal sex toys) left at his work station. Under the current construction of Title VII suggested by Congress, this homophobic heterosexual male would have no recourse in federal court because the discrimination was based on his (perceived) sexual orientation.¹⁶⁴ The proposed amendment, however, would expressly protect even the most homophobic heterosexual from a hostile workplace where coworkers discriminate against him or her for having a nonconforming sexual orientation in the harasser's eyes. This same logic would protect the same heterosexual homophobic employee from the rare occasion of being discriminated against by homosexual coworkers for being heterosexual. Thus the change does not induce the fears often associated with granting rights exclusively to homosexuals—claims that it would lead to a deterioration of the moral and religious sensibilities of Americans.¹⁶⁵ Congress needs to look past the superficial appearance of controversy to enact a change that is, in reality, not as controversial as it appears.¹⁶⁶ Thus, this Congress can surely succeed where past Congresses have failed.

Any suggestion that including sexual orientation in Title VII would open up the floodgates to litigation¹⁶⁷ is manifestly without merit.¹⁶⁸ The same fears have been expressed at every step of Title VII's sex discrimination evolution.¹⁶⁹ However, as the Supreme Court pointed out, Title VII does not act as a general civility code for the American workplace.¹⁷⁰ Instead, courts will continue to only let an action lie when conditions are so severe that they alter the conditions of the victim's

164. See *Hamm*, 332 F.3d at 1065 (citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000)).

165. 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Orrin Hatch) (claiming amendment to Title VII would "override the moral and religious sensibilities of millions of Americans").

166. Consider also that while gay marriage and other similar legislation crafts a decisive divide amongst Americans, public opinion regarding sexual orientation discrimination has remained consistently in favor of protecting against sexual orientation discrimination. See Timothy Smith, *Institutional Investors Find Common Ground With Social Investors*, 1694 PRACTICING L. INST.: CORP. LAW 257, 268 (2007).

167. See, e.g., 142 CONG. REC. S10129-02 (daily ed. Sept. 10, 1996) (statement of Sen. Nancy Kassebaum) (arguing that protection of sexual orientation discrimination would lead to more lawsuits and litigation, acting against greater tolerance in the workplace); *Employment Non-Discrimination Act of 1997: Hearing on S. 869 Before the S. Labor & Human Res. Comm.*, 105th Cong. 4 (1997) (statement of Sen. Ted Kennedy) (noting floodgate criticism).

168. See Tiffany L. King, Comment, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1041-42 (2002) (noting that, despite state and municipal governments expanding civil rights to protect sexual orientation discrimination, states have not suffered from frivolous lawsuits tying up the court system).

169. In fact, there is an argument that prohibitions on sex discrimination—as well as expanding coverage to sexual orientation—actually decreases litigation because it compels employers to deter discriminatory practices in the workplace. See Masako Kanazawa, Note, *Schwenk and the Ambiguity in Federal 'Sex' Discrimination Jurisprudence: Defining Sex Discrimination Dynamically Under Title VII*, 25 SEATTLE U. L. REV. 255, 269 (2001).

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

employment.¹⁷¹ This threshold requirement thus permits only meritorious complaints to survive the pleading stages, and would be the same standard applied to sexual orientation cases. Indeed, since courts are already permitting gender-based discrimination claims,¹⁷² which are inherent to sexual orientation discrimination, there is tangible evidence that the courts will not transform the American workplace. Sexual orientation claims, like gender and sex discrimination claims, will only be permitted where odious and otherwise arbitrary employment discrimination exists.¹⁷³

Action at the state level further undercuts many of the arguments made against amending Title VII. Currently, over twenty states already prohibit discrimination based on sexual orientation.¹⁷⁴ None of these states have transformed the workplace into a hypersensitive, overregulated forum nor opened the floodgates to litigation.¹⁷⁵ Even major companies are recognizing the need to stem sexual orientation discrimination, enacting anti-discrimination policies that cover sexual orientation.¹⁷⁶ This bottom-up approach is worthwhile and should be commended, but it also should send a signal to Congress that expanding Title VII to protect sexual orientation is not only beneficial at the local level, but not as controversial as it may appear on its face.¹⁷⁷ Accordingly, Congress appears archaic in its inaction to expressly remedy the artificial separation of sexual orientation

171. See *id.* at 81; *Harris*, 510 U.S. at 21-22; *Vinson*, 477 U.S. at 67.

172. See *supra* Part III.

173. See *Oncale*, 523 U.S. at 81.

174. See CAL. GOV'T CODE § 12,920 (West 2005); COLO. REV. STAT. § 24-34-402(1)(a) (2007); CONN. GEN. STAT. ANN. § 46a-81c(1) (West 2004); D.C. CODE § 2-1402.11(a) (LexisNexis 2008); HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2004); 775 ILL. COMP. STAT. ANN. 5/1-102A (West Supp. 2008); IOWA CODE ANN. § 216.6(1)(a) (West 2008); ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (Supp. 2007); MD. CODE ANN., STATE GOV'T §§ 20-603, 20-605, 20-606, 20-608 (West Supp. 2009); MASS. ANN. LAWS ch. 151B, § 4(1) (LexisNexis 2008); MINN. STAT. ANN. § 363A.08 (West 2004); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2006); N.H. REV. STAT. ANN. § 354-A:7 (LexisNexis 2007); N.J. STAT. ANN. § 10:5-4 (West 2002); N.M. STAT. ANN. § 28-1-7 (2008); N.Y. EXEC. LAW § 296 (McKinney 2002); OR. REV. STAT. § 659A.030 (2007); R.I. GEN. LAWS § 28-5-7 (2003); VT. STAT. ANN. tit. 21, § 495(a) (2003); WASH. REV. CODE ANN. § 49.60.180(1) (West 2008); WIS. STAT. ANN. § 111.36(d) (West 2002).

175. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-135R, SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT DISCRIMINATION: OVERVIEW OF STATE STATUTES AND COMPLAINT DATA (2009) (summarizing, on a state-by-state basis, sexual orientation discrimination statutes, and concluding there was no significant floodgate of litigation).

176. See Rebecca Tonn, More Employers Setting Policies to Protect Lesbian, Gay, Bisexual and Transgender Workers, COLORADO SPRINGS BUS. J. (Oct. 2, 2009, 9:57 AM), <http://csbj.com/2009/10/02/more-employers-setting-policies-to-protect-lgbt-workers/>; cf. Shawn M. Filippi & Edward J. Reeves, *Equality or Further Discrimination? Sexual Orientation Nondiscrimination in Oregon Statutory Employment Law After Tanner v. Ohsu*, 3 J. SMALL & EMERGING BUS. L. 269, 281-83 (1999) (discussing the economic aspects of sexual orientation discrimination, citing an estimate from the National Commission on Employment Policies that discriminatory environments for homosexual employees cost employers in excess of \$1.4 billion and, as a result, virtually all Fortune 500 companies have responded by attempting to create positive working environments free of sexual orientation discrimination).

177. Since state governments and virtually all major companies grant all employees the right to work in an environment free of sexual orientation discrimination, it follows there will likely be little resistance in giving an aggrieved party access to federal court to remedy injury to the right. This is especially true since federal courts already enforce sex and gender discrimination without private or state objection.

discrimination claims from gender discrimination.¹⁷⁸

VI. CONCLUSION

Nearly 50 years ago, Wadell Sells was forced to bring an action for blatant race discrimination through the Railway Labor Act, and the court recognized “invidious discrimination” based on perceived stereotypes was an evil that must be rooted out.¹⁷⁹ Following Sells’ and others’ endured injustices, Congress enacted Title VII. Today, the Third Circuit echoes that same policy from the *Sells* decision in favor of Brian Prowel, declaring perceived stereotypes based on gender and sexual orientation impermissible.¹⁸⁰ Like *Sells*, *Prowel* comes at a time where clear Congressional action is needed to protect employees from such forms of invidious discrimination. Title VII exists to protect specific vulnerable groups from intolerable treatment from those in power, based on the powerful group’s stereotypes of the vulnerable.¹⁸¹ As a result, it is necessary for Congress to fill the illogical void in Title VII and add specific language providing gender and sexual orientation as classes protected from discrimination.¹⁸²

Sexual orientation discrimination is a very real, very frequent problem in the American workplace.¹⁸³ This is far from surprising, given the invisibility of heterosexuality and the minority status of homosexuals.¹⁸⁴ This proposed amendment looks to harmonize both gender discrimination and Title VII’s aim to protect of the vulnerable minority in modern society. The proposal is far from radical or even novel, yet its effect would elucidate the federal legal landscape immensely and protect what is already recognized detestable behavior. The addition of “gender” reflects well-established legal landscape; adding “sexual orientation” recognizes the inseparable nature of gender and sexual orientation, and reflects the reality

178. It is worth emphasizing here, again, that the current Title VII standard of requiring significant, noxious discrimination repeatedly affirmed by the Supreme Court (*see supra* note 171) will still apply. Therefore, any amendment to Title VII will not require coworkers to support, or even approve of a person’s supposed sexual orientation. No person will be forced to accept homosexuality (or heterosexuality, for that matter), but instead merely be obliged to not create a working environment so discriminatory that it would be hostile to a potential victim.

179. *Sells*, 190 F. Supp. at 860 (citing *Conley*, 355 U.S. at 41).

180. *Prowel*, 579 F.3d at 286.

181. *See Belleville*, 119 F.3d at 571 (“The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.”).

182. The winds of change appear to be blowing in favor of action to fill this gap. President Barack Obama recently vowed to include gender identity in his administration’s nondiscrimination policy. *See Anna Stolley Persky, Free to Be: Recent Decisions Show Growing Acceptance of Transgender Rights*, 95 A.B.A. J. 22 (2009).

183. *See Smith, supra* note 166, at 268 (stating that nearly half of surveyed homosexuals have reported sexual orientation discrimination in the workplace, and approximately one in ten have reported they had been fired or dismissed improperly as a result of their sexual orientation).

184. *See Kramer, supra* note 101, at 208.

of modern American society.

The change is a simple fix that will reap benefits of clarifying the legal system and giving deserving plaintiffs a path to vindicate their rights, while discouraging intolerance and discrimination. In fact, it has been demonstrably successful at the state level already for virtually half the country.¹⁸⁵ Thus there is no evidence to suggest it would not work, nor that it would be rejected by the people.¹⁸⁶ We are past the days where homosexuality is a “disease.”¹⁸⁷ This simple solution is just that—simple. Its political hazards are minor and not analogous to wedge issues of granting homosexuals positive rights, but instead allows anyone—homosexual or heterosexual—to work in a society free of discrimination. This was the purpose and spirit behind Title VII’s original passage—to end arbitrary discrimination. Today, courts are forced into the impossible position, being asked to attempt separating the inevitably entwined. Courts should remain passive instead of being the governmental body to evolve sex discrimination over the years. Instead, Congress must take action as it did nearly 50 years ago when it first enacted Title VII and amend the statute to explicitly protect gender sexual orientation discrimination.

185. See *supra* note 174 and accompanying text.

186. See Smith, *supra* note 166.

187. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 3-5, 49-50 (Princeton Univ. Press 1987) (1981) (stating Evelyn Hooker originally scientifically proved that mental experts could not distinguish between homosexual and heterosexual patients, but it took the American Psychiatric Association twenty years to remove it from its registrar of mental illnesses and arguing that this slow movement was the result of homosexuality being a political and social issue, not a mental issue).

