

Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena

“Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained.”—James A. Garfield (1831–1881), July 12, 1880

INTRODUCTION

Tommy Schroeder was a fifteen-year veteran schoolteacher in Hamilton School District in Wisconsin when he began to teach sixth grade at Templeton Middle School.¹ At that time, he publicly announced his homosexuality.² As a result of this, Schroeder was forced to endure students accusing him of having AIDS, calling him “faggot” or “queer,” and painting graffiti in the school bathrooms describing in detail the type of sexual actions the students believed he was performing and more, while these indignities were ignored by the school district.³ Schroeder’s story is an all too common one in this country. While this nation very gradually becomes more open-minded to the equal treatment of persons discriminated against because of their sexual orientation, the courts have long adhered to legislation that is outdated and yields problematic results for those injured, particularly educators.

Title VII established freedom from discrimination because of sex, *inter alia*, in the workplace.⁴ The key prohibition against discrimination

1. Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 948 (7th Cir. 2002).

2. *Id.*

3. *Id.* at 948–49.

4. 42 U.S.C. § 2000e-2(a)(1) (2000); see Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 628–29 (1987); Meritor Savs. Bank v. Vinson, 477 U.S. 57, 63 (1986). There are other protections under the Constitution that provide protection from discrimination based on sex and/or gender, and may, in some cases, extend to sexual orientation such as the Equal Protection Clause of the Fourteenth Amendment or the First Amendment. See Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 EDUC. L. REP. 1, 1, 12 (1995) (addressing the the Constitutional issues in the juxtaposition between the right to privacy of a teacher and the school district’s desire for their employees to have exemplary conduct); Ralph D. Mawdsley, *The Law in Providing Education: School Board Control Over*

based on sex states:

It shall be an unlawful employment practice for an employer 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* race, color, religion, sex, or national origin⁵

The language of Title VII omits the words “sexual orientation,” yet states that an employer may not lawfully discriminate against any individual because of sex. In 1964, the protection of the “because of . . . sex”⁶ provision was ambiguous, and in the forty years since then, the Supreme Court has attempted to provide some rules and guidelines to interpret the provision.

Although some protections from same-sex harassment have been recognized, “because of sex” discrimination is a limited concept.⁷ Outside the sexual harassment sphere, private employers do not need to fear legal repercussions for discrimination against homosexuals.⁸ In addition, while the Supreme Court has recognized that Title VII protects

Education and a Teacher's Right to Privacy, 23 ST. LOUIS U. PUB. L. REV. 609, 609 (2004) (discussing teachers' Fourteenth Amendment right to privacy in juxtaposition to school boards' authority); Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public Schoolteachers*, 6 COMMLAW CONSPPECTUS 25, 26, 49 (1998) (discussing the Constitutional implications of broad anti-discrimination legislation encompassing gays and lesbians in schools); Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on the Basis of Gay, Lesbian, or Bisexual Sexual orientation or Conduct*, 96 A.L.R.5th 391 (2002) (surveying state and federal constitutional challenges against discrimination on the basis of sexual orientation). This is merely a brief survey, and is by no means an exhaustive representation of the plethora of articles and other materials available on the Constitutional questions.

5. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

6. *Id.*

7. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998); *Rene v. MGM Grand (Rene II)*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc), *modifying* 243 F.3d 1206 (9th Cir. 2001). These are cases that deal exclusively with sexual harassment, not the broader issue of sex discrimination by employers in the workplace. Before *Oncale*, circuits were split on the same-sex harassment question. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996) (same-sex harassment claims not actionable) *rev'd* by 523 U.S. 75, 82 (1998); *Doe v. City of Belleville*, 119 F.3d 563, 569 (7th Cir. 1997) (finding that same-sex harassment is actionable under Title VII); *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1996) (holding same-sex harassment actionable where based on “sex”); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141-42 (4th Cir. 1996) (distinguishing that same-sex harassment is only actionable where harasser is gay) *abrogated by Oncale*, 523 U.S. at 79.

8. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000).

workers from sex or gender stereotypes,⁹ it has not expanded Title VII to become a general prohibition against all sex-related discrimination.

The time has come for Title VII to be reexamined and expanded to become a complete federal prohibition on sexual orientation discrimination in the educational arena and beyond. As this article will show, the cases that have interpreted Title VII's requirement that an employer may not discriminate "because of sex" have enabled lower courts to afford protections to workers that, while sensible, were certainly not explicit in the language of the statute.¹⁰ Nonetheless, the Supreme Court has failed to accord the same implicit protection to workers suffering discrimination based on sexual orientation. Subsequently, the myriad of Supreme Court decisions has greatly expanded the scope of Title VII. Despite the general expansion of the scope of Title VII, the Court's refusal to likewise expand the statute to ban sexual orientation discrimination has led to confusing results in the federal courts of appeals, most notably the Ninth Circuit. Realizing the inadequate protection given by Title VII, many states have been far more responsive to the changes in the political and social climate of this country in the past forty years and have granted homosexual workers much needed protection from sexual orientation discrimination.

The Supreme Court's refusal to modernize its interpretation of Title VII is perplexing because many of the Court's opinions have reflected the desire that the workforce reflect the surrounding population.¹¹ This desire has greatly changed the field of education, once an essentially male-dominated field.¹² However, there is another concern in the field of education: that educators should serve the student clients and reflect their population in certain characteristics.¹³

There has been little to no protection under Title VII for victims of sexual orientation discrimination in the workplace, while other similar

9. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. U.S. Film Prods.*, 541 U.S. 244, 251 (1994).

10. See 42 U.S.C. § 2000e-2(a)(1).

11. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1989).

12. See PAUL MONROE, *FOUNDING OF THE AMERICAN PUBLIC SCHOOL SYSTEM: A HISTORY OF EDUCATION IN THE UNITED STATES* 295 (1971). Schools were staffed by male "masters," except for the "dame school" and the summer and women's school. *Id.* at 120-21. The dame schools were private or separate schools where women taught children the rudiments of education such as the alphabet or basic reading skills, before they went to public schools. *Id.* at 127-28.

13. *Contra Hazelwood*, 433 U.S. at 307 (holding that the correct statistical population was the qualified labor pool of teachers in the area, while the lower court relied on statistics of the local student population to show disparate impact).

types of discrimination have been banned.¹⁴ In the educational environment, this has been a particular problem. Education is an area in which there has been an especially strong fight for gay, lesbian, bisexual, or transgender individuals to stay out of the classroom.¹⁵ Opponents usually say that lesbian, gay, bisexual and transsexual (“LGBT”) educators are poor role models and do not provide the proper moral infusion for American youth.¹⁶ While there is no place for an unskilled or inadequate teacher, a homosexual teacher is certainly neither, simply because of his or her sexual orientation, and his or her sexuality should not give co-workers, administrators, or students an opportunity to discriminate without repercussion. Title VII’s protection of sex-based discrimination should be expanded to include all employer discrimination; this includes both the already recognized protection of the heterosexual man with stereotypical gay features, as well as the man discriminated against for his known homosexuality.¹⁷

Teachers provide an invaluable resource to this country and deserve to be treated with the utmost respect, never derogation. Teachers should be unafraid to publicly acknowledge their sexuality, and should be able to serve as homosexual role models in today’s supposedly more progressive and democratic society. Currently, the faculty of public schools does not accurately reflect the makeup of the student population or the population at large with respect to race, ethnicity and sexual orientation; it may not even reflect the population of qualified teachers. The emphasis on teachers as role models should not be ignored, but rather, the educator work force needs to provide role models for every kind of student that walks through the schoolhouse door—including lesbian, gay, bisexual, transgender, and questioning students.¹⁸

14. See generally *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (holding that sex-discrimination consisting of same-sex harassment is actionable under Title VII); *Rene II*, 305 F.3d 1061, 1063 (9th Cir. (en banc) (holding that Title VII prohibits offensive physical sexual conduct that is sufficiently severe or pervasive without regard to whether the perpetrator and victim are of the same or different genders); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that discrimination based on a stereotype that a man should have a virile rather than effeminate appearance is barred by Title VII).

15. See Katherine M. Franke, *Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5-6 (1995) (particularly addressing military academies).

16. See Michelle Eisenmenger, *Chalk Talk: Sexual Orientation Discrimination: Teachers as Positive Role Models for Tolerance*, 31 J.L. & EDUC. 235, 236 (2002).

17. See *Nichols*, 256 F.3d at 874-75; *Rene II*, 305 F.3d at 1064.

18. See Eisenmenger, *supra* note 16, at 237. There are several examples of suits brought representing student interests. See, e.g., *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003) (where the court granted a

Section I gives a brief history of Title VII, and the landmark Supreme Court cases in the past forty years that have refined the Court's interpretation of "sex" discrimination. Section II examines the subsequent treatment of Title VII in the federal courts of appeals, specifically the inconsistency in the Ninth Circuit between *Rene v. MGM Grand*,¹⁹ and *Nichols v. Azteca Restaurant Enterprises*.²⁰ These two cases provide a shocking example of how the line between gender stereotyping and sexual orientation discrimination has become so thin that the distinction is confusing, unworkable, and must be wholly abandoned. Section III, in turn, shows how states enacting legislation banning sexual orientation discrimination in the workplace have avoided such results. This section will further examine these states' rationale for taking the necessary step that the federal government has not. Section IV focuses on the inconsistency between the founding and purpose of public schools, the development of educational theories to denigrate sexism and applaud the characteristics of the individual, and also examines the specific problem of educators suffering from sexual orientation discrimination, unable to bring a proper claim under Title VII. Finally, Section V closely examines the key language of Title VII, specifically the purpose of Title VII to codify constitutional protections in the "because of sex" provision. In conclusion, after evaluating important circuit court decisions and the foundation and purposes of both Title VII and modern education, the authors argue that the statute, designed in part to protect Constitutional rights in public education, has been improperly interpreted by the federal courts and needs to be reexamined and expanded to include sexual orientation discrimination under the "because of sex" language, in order to protect the fundamental rights of all citizens.

preliminary injunction to a gay rights group that demanded equal access to school facilities, under the Equal Access Act and the First Amendment, as were given to other student groups); *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1096 (C.D. Cal. 2003) (plaintiff sued a school district for violating her civil rights when they suspended her from gym class after finding out that she was a lesbian).

19. (*Rene II*) 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc), *modifying* 243 F.3d 1206 (9th Cir. 2001).

20. 256 F.3d 864 (9th Cir. 2001).

I. HISTORY OF TITLE VII

A. *Enactment of Title VII*

Section 703 of the Civil Rights Act of 1964 makes it illegal for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²¹ Admittedly, Title VII was not passed with “sex” discrimination as its primary concern, but rather, as a response to the civil rights movement; its design was mainly to protect African Americans and other racial minorities from discrimination in the workplace.²² In fact, Howard Smith, a Representative from Virginia, proposed the inclusion of “sex” as a protection because he thought this would lead to the failure of the bill.²³ However, the bill passed in the House and Senate,²⁴ with little debate over the interpretation of “because of sex.”²⁵ As a result, the courts have little legislative history to rely upon in its Title VII jurisprudence.²⁶ Nevertheless, Title VII has become this country’s primary federal anti-discrimination legislation over the past forty years.²⁷

B. *The Supreme Court Expands “Because of Sex” Requirement*

Since Title VII was first enacted in 1964, the Supreme Court’s conception of “sex” discrimination, under the “because of sex” provision, has continuously expanded. “Sex” was originally understood to mean discrimination requiring actual sexual advances upon the affected party.²⁸ Later, the Court modified “because of sex” to prohibit discrimination against a person because of his or her gender, or more specifically, whether she or he does or does not fit certain gender stereotypes.²⁹ Recently, the Court clarified the “because of sex”

21. 42 U.S.C. § 2000e-2(a)(1) (2000).

22. See 110 Cong. Rec. 2577-2584 (1964).

23. Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1123 (2003).

24. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e).

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

26. Bovalino, *supra* note 23, at 1123.

27. See *id.*

28. See *Meritor*, 477 U.S. at 64.

29. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 257-58 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf v. Usi Film Prods.*, 541 U.S. 244, 251 (1994).

requirement to show that Title VII encompasses violations between members of the same sex.³⁰

The first major interpretation of the “because of sex” requirement by the Supreme Court came in *Meritor Savings Bank, FSB v. Vinson*.³¹ In *Meritor*, the respondent claimed that the petitioner bank had subjected her to constant sexual discrimination in her employment, violating Title VII.³² The petitioner conceded that were its harassment because of the subordinate’s sex or gender, such behavior would constitute a Title VII violation,³³ but it contended that based upon the existing Title VII cases and existing legislative history of Title VII, Congress only intended to apply the “because of sex” requirement to “tangible loss of an economic character,” rather than “purely psychological aspects of the workplace environment.”³⁴ The Supreme Court rejected the employer’s interpretation of Title VII, holding that Congress did not intend to limit sexual harassment claims to those of a tangible economic nature, but to those where the harassment was so pervasive as to create a “hostile work environment.”³⁵ Consistent with the decisions to follow, *Meritor* was decided not upon any concrete language that established a hostile work environment claim in Title VII, but upon past constructions and a sparse record of legislative intent.³⁶

The next decision by the Supreme Court to greatly expand the “because of sex” interpretation was *Price Waterhouse v. Hopkins*.³⁷ The respondent, Anne Hopkins, charged the petitioner accounting firm, her employer, with failing to reconsider her for a partnership solely based upon her sex as a woman.³⁸ In Hopkins’ case, she was praised for being an aggressive, intelligent, and capable professional.³⁹ However, Hopkins was derided for not “walk[ing] more femininely, talk[ing] more femininely, dress[ing] more femininely, wear[ing] make-up, hav[ing] her hair styled, and wear[ing] jewelry.”⁴⁰ She was also

30. See *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

31. 477 U.S. 57 (1986).

32. See *id.* at 60.

33. See *id.* at 64.

34. See *id.*

35. See *id.* at 64-65.

36. See *id.* at 65.

37. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. U.S. Film Prods.*, 541 U.S. 244, 251 (1994).

38. *Price Waterhouse*, 490 U.S. at 235.

39. See *id.* at 234.

40. *Id.* at 235.

criticized for being “a lady [who] us[ed] foul language.”⁴¹ The Supreme Court expanded its interpretation of discrimination “because of sex” to prohibit discrimination against a woman not only because she was a woman generally, but because of her failure to conform to gender stereotypes requiring an individual to possess or lack certain stereotypical traits, whether they be male or female.⁴²

In his majority opinion, Justice Brennan wrote for the court, “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”⁴³ As was the case with the decision in *Meritor*, to expand Title VII to protect against a “hostile work environment,” the decision in *Price Waterhouse*, that Title VII’s “because of sex” discrimination was intended to bar gender or sex stereotyping, has no explicit foundation in the language of Title VII.

Few commentators argue that *Price Waterhouse*, as a plurality opinion, does not extend to sex-stereotyping.⁴⁴ However, most scholars and courts cite *Price Waterhouse* as extending protections based on sex to prohibit the most invidious types of sex discrimination, sexual stereotyping, or discrimination against an individual because she or he does not fit the traditional “feminine” or “masculine” model of gender expression.⁴⁵ As Title VII litigation has progressed, some commentators have urged an expansion of “because of . . . sex” to include sexual orientation, not just gender.⁴⁶

More recently, the Supreme Court made the next logical extension of Title VII’s “because of sex” clause when a male claimant alleged sexual harassment under the statute. In *Oncale v. Sundowner Offshore Services, Inc.*, the petitioner, Joseph Oncale, claimed that he voluntarily

41. *Id.*

42. *See id.* at 250.

43. *Id.* at 251.

44. *See, e.g.*, Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 113-14 (2004); James Leonard, *Bilingualism and Equity: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 51, 86 (2004); Phillip McGough, *Same-Sex Harassment: Do Either Price Waterhouse or Oncale Support the Ninth Circuit’s Holding in Nichols v. Azteca Restaurant Enterprises, Inc. that Same-Sex Harassment Based on Failure to Conform to Gender Stereotypes is Actionable?*, 22 HOFSTRA LAB. & EMP. L.J. 206, 207 (2004).

45. *See, e.g.*, Jonathan A. Hardage, Comment, *Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit “Effeminacy” Discrimination?*, 54 ALA. L. REV. 193, 193-94 (2002) (discussing the expansion of “gender stereotype” discrimination).

46. *Id.*

left his job feeling that if he did not he would be “raped or forced to have sex” with two male coworkers.⁴⁷ Although the Supreme Court had never before ruled for a male claimant asserting a Title VII violation, it readily extended the doctrine to apply to both genders.⁴⁸ In a unanimous opinion by Justice Scalia, the court stated that there was “no justification in the statutory language or our precedents for a categorical rule” against same-sex harassment suits under Title VII.⁴⁹ The court specified that the prohibition of “discrimination . . . because of sex” raises the issue of “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not”⁵⁰

Before this decision, the federal courts of appeals took a confusing and inconsistent variety of stances regarding same-sex Title VII violations. Some asserted that a Title VII claim is never supported in instances of same-sex harassment.⁵¹ Others required that the harasser be homosexual and then presumptively motivated by sexual desire.⁵² The Supreme Court cleared up this confusion by holding the important issue in a Title VII claim is not whether the parties are the same sex, or opposite sexes, or if the party discriminated against was a woman, but whether “*members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.*”⁵³

Consistent with *Meritor* and *Price Waterhouse* before it, *Oncale* is another logical extension of Title VII, providing a remedy that was clearly not established by the plain language of the statute. However, despite the Supreme Court’s willingness to broaden the coverage in Title VII over the past forty years, the Supreme Court has failed to accord the same protection and expansionary treatment to claims of sexual orientation discrimination under Title VII.

47. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1996).

48. *See id.* at 79.

49. *Id.*

50. *See id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

51. *See, e.g.*, *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

52. *See, e.g.*, *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5 (4th Cir. 1996) (dictum), *abrogated by Oncale*, 523 U.S. at 79-80.

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

C. *Lawrence v. Texas Greatly Increases the Fundamental Rights of Homosexuals.*

This subsection examines the evolution of Title VII in protecting the rights of homosexuals to engage in private, intimate sexual acts. Although these cases were not in the employment context and not decided under Title VII, the core principles at issue, such as a fundamental right to exist in peace, strongly relate to the core values of Title VII. As such, an analysis of these cases and their potential impact on Title VII in the future is necessary.

Until 2003, homosexual couples did not have the right to engage in sodomy in the privacy of their home.⁵⁴ The Supreme Court first addressed the issue of privacy for gay couples in *Bowers v. Hardwick*,⁵⁵ when the Court was faced with a facial challenge to a Georgia statute prohibiting the act of sodomy.⁵⁶ A person violating the state law could be imprisoned for up to twenty years.⁵⁷ In a 5-4 decision, Justice White wrote for the majority, explaining that the Court was called upon to decide whether the Constitution protects the right to engage in homosexual sodomy as a fundamental right.⁵⁸ In the Court's opinion it did not.⁵⁹

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens authored the seminal dissent in *Bowers*.⁶⁰ Justice Blackmun recognized that the majority had fundamentally misunderstood the issue of *Bowers*.⁶¹ Addressing the case in terms of "decisional" and "spatial" rights to privacy long recognized by the Constitution, the dissent noted that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"⁶² Justice Stevens, in a separate dissent, came to the following conclusion:

54. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

55. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578.

56. *Bowers*, 478 U.S. at 187.

57. *Id.* at 188.

58. *See id.* at 190.

59. Justice White and the *Bowers* majority examined the history of homosexual sodomy laws. *Id.* at 193. At common law, sodomy was illegal in all thirteen of the original colonies, and after the Civil War, 32 of 37 existing states had laws prohibiting homosexual sodomy. *Id.* at 193 n.5. Against this historical backdrop, the majority concluded that homosexual sodomy could not be a right "deeply rooted in this Nation's history and tradition" and was not protected by the Constitution. *Id.* at 192-194.

60. *Id.* at 199 (Blackmun, J., dissenting).

61. "[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" *Id.*

62. *Id.* at 204.

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.⁶³

The dissent keenly recognized that homosexuals, like all private citizens in America, have a fundamental right to privacy and to exist as autonomous persons, free from unnecessary invasion from society. This recognition was a critical step toward a later reversal of the majority ruling. The fundamental right of a homosexual to live in this country as his or her own person is an essential notion warranting a reexamination of Title VII.

In 2003, *Lawrence v. Texas*⁶⁴ reversed *Bowers*, ending a seventeen year span in which homosexuals were denied one of their most fundamental liberties—the right to engage in sex with another person of the same gender in the privacy of the home.⁶⁵ The Supreme Court recognized that *Bowers* had been based on long-standing historical and religious Judeo-Christian moral values, but showed that cases to follow and the evolution of more liberal stances toward homosexuality had rendered it outdated law.⁶⁶ The majority relied heavily on the *Bowers* dissent authored by Justice Stevens,⁶⁷ and held that the Texas statute was unconstitutional under the Fourteenth Amendment of the United States Constitution.

Less than two years after the decision, *Lawrence*’s impact on the sexual discrimination law is as of yet unclear. *Lawrence* was not a Title VII decision; although phrased in the language of due process, the decision may have been based on equal protection concerns.⁶⁸

63. *Id.* at 216 (Stevens, J., dissenting).

64. 539 U.S. 558 (2003).

65. *See id.* at 578.

66. *See id.* at 573.

67. Justice Kennedy noted that Justice Steven’s analysis should have controlled in *Bowers* and “should control here.” *Id.* at 578.

68. *Lawrence* reads like an equal protection decision disguised in the language of due process, but with the inherent concern to grant equal protection, regarding privacy rights, as have been bestowed on heterosexuals, so that homosexuals may live in a society with their dignity and personal autonomy intact. *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 564 (2004).

Nonetheless, with the current absence of legislation that formally prohibits sexual orientation discrimination, it is possible that *Lawrence* could be a “tipping point” toward a better judicial understanding of the rights of homosexuals.⁶⁹

Following *Lawrence*, Title VII faces an uncertain future. The *Lawrence* Court was prepared to overrule statutes criminalizing homosexual conduct, even though the Court did not go so far as to include homosexuals under the Equal Protection Clause of the Fourteenth Amendment. *Lawrence* gave reason to hope that its protection of homosexual behavior could influence Title VII litigation. However, the composition of the Court changed radically in 2005; Chief Justice Rehnquist passed away and Justice O’Connor retired. Justices Roberts and Alito respectively replaced them. Both justices were recommended by President Bush and are expected to take conservative approaches to issues such as homosexuality. Although the Supreme Court and Congress have slowly showed signs of moving away from rigid stances that denied homosexuals fundamental rights, it remains to be seen whether Title VII will be amended in the coming years so that Schroeder⁷⁰ and all his colleagues can obtain the remedies that they are currently denied under the Title VII jurisprudence.

II. THE CIRCUIT COURTS AGREE THERE IS NO SEXUAL ORIENTATION DISCRIMINATION CLAIM UNDER TITLE VII, BUT REMAIN CONFUSED WHERE TO DRAW THE LINE BETWEEN THIS AND OTHER RECOGNIZED CLAIMS

A. Background to the Lower Courts’ Response

The Supreme Court has never decided the specific question of whether a claim of harassment against an individual based upon that person’s sexual orientation is automatically cognizable under Title VII’s “because of sex” requirement. In *Oncale*, the Supreme Court, faced with

69. See Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics Review of Daniel R. Pinello, Gay Rights and American Law*, 92 GEO. L.J. 941, 979 (2004) (observing that the Supreme Court only engages in transformations of reverses of legal discourse only after a tipping point in the political climate has occurred). The tipping point may have come in this country as a flurry of state supreme court rulings in recent years have overwhelmingly overturned sodomy laws, longstanding in this country, and most likely signal a marked change in this country’s perception of gay rights, and the correct time for the advent of a federal statute like Title VII, that will ban sexual orientation discrimination. See *id.*

70. See *supra* note 1 and accompanying text.

an opportunity to address the possibility of a cause of action under Title VII for sexual orientation-based harassment,⁷¹ sidestepped the issue, perhaps because the petitioner, not wishing to publicly be classified as a homosexual, instead asserted only that he had suffered discrimination under Title VII because the statute protects victims of same-sex harassment.⁷² The Supreme Court has remained silent on the actionability of a claim based upon an individual's sexual orientation under Title VII. Most courts, recognizing that the Supreme Court has not reversed a Circuit decision rejecting sexual orientation as a protected class, continue to reject claims of harassment based on sexual orientation.⁷³

*Bibby v. Philadelphia Coca Cola Bottling Co.*⁷⁴ provides a good illustration of how the several courts of appeals treat Title VII claims based solely on sexual orientation. In *Bibby*, the petitioner's energy level was significantly decreased following a period of hospitalization for a severe illness, however, defendant accused him of sleeping on the job. Seeking to remove petitioner from his employ one way or the other, defendant offered him a deal by which he would receive \$5,000 and benefits if he were to resign, otherwise he would be terminated and receive nothing.⁷⁵ Bibby also claimed that he was verbally insulted by his co-workers, and that he was mistreated and yelled at by supervisors because of his sexual orientation.⁷⁶ Bibby brought suit, claiming that he had been sexually harassed in violation of Title VII.⁷⁷

71. During his brief employment with Sundowner, Oncale was the victim of constant sexually abusive conduct by his supervisors Danny Pippen, John Lyons, and Brandon Johnson, including the following incidents: Pippen grabbed and held Oncale's head as Lyon's told Oncale he would fuck him in the behind; the next morning Johnson grabbed Oncale's while Lyons placed his penis on Oncale's arm and told him they would force him to submit; in the shower later that day, Pippen cornered Oncale while Lyons inserted a bar of soap into Oncale's rear. Brief for Petitioner at n.2, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1997) (No. 96-568).

72. Oncale contended that his argument did not rely upon an automatic extension of Title VII to prohibit discrimination on the basis of sexual orientation, but that the Supreme Court could find a violation of Title VII if he established "the existence of an unlawful hostile work environment, for example, by showing that the harassment of a sexual nature occurred, or that respondent Sundowner would have accorded a greater degree of protection to a woman complaining about such harassment." Reply Brief for Petitioner at 13-14, *Oncale*, 523 U.S. 75 (No. 97-568).

73. See, e.g., *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Rene II*, 305 F.3d 1061, 1075 (9th Cir. 2002) (en banc); *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) *abrogated by Oncale*, 523 U.S. at 79.

74. 260 F.3d 257 (3rd Cir. 2001).

75. *Id.* at 259.

76. *Id.* at 260.

77. *Id.*

The Third Circuit Court of Appeals dismissed the claims against the employer, citing the opinion of several circuits that Title VII did not apply to claims of sexual orientation discrimination.⁷⁸ The court implicitly assumed that sexual orientation is not “because of sex” although the Supreme Court has never so specifically held.⁷⁹ *Bibby* based this assumption on the fact that in recent years Congress has been unsuccessful in several efforts to amend Title VII to include sexual orientation discrimination.⁸⁰ The court concluded that in order to state a Title VII claim upon which relief could be granted, *Bibby* would have to show either that he endured same-sex harassment based upon his harasser’s sexual desires, or that he was improperly sexually stereotyped based upon his male gender.⁸¹

In the Sixth Circuit, a male with gender identity disorder can establish a *prima facie* case for sex discrimination under Title VII.⁸² In *Smith v. City of Salem*,⁸³ the court held that the employee in question, a man with gender identity disorder who worked for a fire department for seven years without incident until his diagnosis, made valid claims under Title VII for sex stereotyping and adverse employment action.⁸⁴ The court criticized the district court’s reliance on pre-*Price Waterhouse* cases to decide against *Smith*.⁸⁵ It then established its grounds for equaling Title VII’s “sex” language with gender, and delineated the precise meaning of treating someone differently on the basis of sex as:

[A]n employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. 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.⁸⁶

This logical construction of Title VII leaves open the door to

78. *Id.* at 261.

79. *See id.*

80. *Id.* (citing Employment Non-Discrimination Act of 1996, S.2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)).

81. *Id.* at 262-63.

82. *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004).

83. 378 F.3d 566 (6th Cir. 2004).

84. *Id.* at 570.

85. *Id.* at 573.

86. *Id.* at 572.

recognizing causes of action against employers discriminating against men who like men, as discrimination on the basis of sex because such men are treated differently from female employees who have relationships with men. If the purpose of Title VII is to eradicate sex discrimination, in all of its forms, and sex discrimination includes sex stereotypes, then Title VII should also prohibit discrimination based on sexual preference. This conclusion is only logical since such discrimination is rooted in the failure of an individual to meet the sex stereotypes of the heterosexual majority.

Basing the “because of sex” requirement upon gender becomes increasingly unworkable when claims are filed by transsexuals. Courts have been unable to uniformly define the gender of transsexuals and have broken their gender into three categories:

- (1) cases that consider sex to be immutably fixed at birth as either male or female;
- (2) cases that consider sex to be either male or female but not necessarily fixed at birth; and
- (3) cases that place transsexuals outside of the categories male and female and thus outside of sex entirely.⁸⁷

This variation among judicial decisions is equally as illustrative of the difficulty that the courts have had in drawing distinct, bright-line boundaries with sex discrimination in general. Just as the legal definitions of transsexuals are changing, the legal definitions of sex are changing. Therefore, these definitions should include sexual orientation, especially since in many cases, transsexuality may be a part of sexual identification and orientation.⁸⁸

The Second Circuit has rejected sexual orientation as a gender norm under Title VII because not all homosexual men are feminine, and not all heterosexual men are masculine.⁸⁹ In *Simonton v. Runyon*,⁹⁰ the court considered the question of sexual harassment focused on the target individual’s homosexuality.⁹¹ The court called the behavior of

87. See Rebecca J. Moskow, *Broader Legal Implications of Transsexual Sex Determination Cases*, 71 U. CIN. L. REV. 1421, 1422 (2003).

88. Sonya K. Parrish, *The Plight of Same-Sex Harassment Victims Under Title VII: Why Sexual Orientation Discrimination Should Be Recognized as a Form of Sex Stereotyping*, 4 NEV. L. J. 471, 479 (2004).

89. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

90. 232 F.3d 33.

91. *Id.* at 35. The conduct complained of included comments such as “‘go fuck yourself, fag,’ ‘suck my dick,’ and ‘so you like it up the ass?’,” notes in the employee bathroom, posting of explicit pornography, “Playgirl” subscriptions, “posters stating that Simonton suffered from mental illness as a result of ‘bung hole disorder,’ . . . [and] repeated statements that Simonton was a ‘fucking

Simonton's co-workers "morally reprehensible," but relied on the traditional rule that the role of the judiciary is to interpret statutes according to Supreme Court precedent, not according to how it believes the law should be.⁹² The court stated that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."⁹³

However, the court still found it important to look at the legislative history of Title VII as a guide.⁹⁴ The court noted that there was little in the way of legislative history, and that Congressional silence does not always provide a guide to statutory interpretation.⁹⁵ Nonetheless, the court interpreted Congress' failure to amend Title VII as instructive, especially in light of many court decisions construing the "because of sex" language in Title VII to exclude sexual orientation discrimination.⁹⁶ The court also relied on its prior decision in *DeCintio v. Westchester County Medical Center*,⁹⁷ where it held that "sex" "logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender."⁹⁸ This case failed to recognize that such an interpretation of sex and gender, or sexual activity as a result of gender expression, creates a double standard and reinforces normative stereotypes of heterosexual gender expression.

The Second Circuit threw out all three of Simonton's arguments that sexual orientation discrimination should fall under "sex" in Title VII.⁹⁹ First, the court refused to evaluate Simonton's claim that his harassers singled him out because he was male because he did not offer comparative evidence regarding the treatment of other male co-workers.¹⁰⁰ Therefore, the court concluded that the conduct could just as well have been directed at a female.¹⁰¹ Second, it declined to find that "sexual orientation is discrimination based on sex because it disproportionately affects men," as Simonton suggested, determining that this would be an unwarranted judicial foray into the legislative

faggot." *Id.*

92. *Id.* (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 35-36.

97. 807 F.2d 304 (2d Cir. 1986).

98. *Simonton*, 232 F.3d at 36 (quoting *DeCintio*, 807 F.2d at 306-07).

99. *Id.*

100. *Id.* at 37.

101. *Id.*

arena.¹⁰²

Lastly, the court struck down Simonton's third argument, not on the merits of the argument, but for insufficient pleading.¹⁰³ Simonton argued, based on *Price Waterhouse*, that he suffered actionable sex discrimination because sexual orientation discrimination is based on sex stereotypes.¹⁰⁴ The court noted that other courts have mentioned that "failure to conform to gender norms" might be capable of recognition under Title VII,¹⁰⁵ but even so, the sexual stereotype theory creates a protection that would not only cover sexual orientation, but rather a protection that bleeds over to cover those whom, regardless of sexual orientation, do not fit traditional gender stereotypes.¹⁰⁶ The court reserved its opinion on the impact of *Price Waterhouse* on sexual orientation discrimination to "a future case in which [it] is squarely presented and sufficiently pled."¹⁰⁷ Unfortunately for Simonton, and for the proponents of the expansion of Title VII's "because of sex" requirement to incorporate sexual orientation, insufficient pleading may have derailed the expansion of this protection.

The cases cited in this section demonstrate that lower courts are interpreting the "because of sex" clause inconsistently from each other. While the Third Circuit adopts a narrow interpretation that no claim with relation to sexual orientation may be recognized under Title VII, other courts such as the Sixth Circuit have seemingly more liberal interpretations, at least allowing claims by trans-gendered individuals. However, while these courts are externally at odds with each other, a larger fundamental problem has arisen in the Ninth Circuit, where two recent cases have established holdings that are inconsistent with each other, and are improperly derived from Supreme Court precedent.

B. Inconsistency between Rene and Nichols in the Ninth Circuit

This section of the note closely examines two recent cases in the Ninth Circuit, the only two cases yet decided that attempt to identify a

102. *Id.* This argument, if accepted, could lead in two directions. First, it could open the door to recognition of sexual orientation discrimination against males as having a disproportionate effect on males, specifically gay males. Second, however, it could shut the door to claims of sex discrimination for females or persons of transgender identity if they are unable to show a tangible disproportionate impact.

103. *Id.* at 37-38.

104. *Id.* at 37.

105. *Id.* (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).

106. *Id.* at 38.

107. *Id.* at 37.

boundary between sexual stereotyping and sexual orientation discrimination.¹⁰⁸ The analysis of these cases will show that as a result of the inability of the courts to distinguish these two lines of cases effectively, Title VII must be expanded to incorporate sexual orientation discrimination to avoid inconsistent and illogical results.

Medina Rene, an openly homosexual man, was employed by the MGM Grand Hotel as a butler on the twenty-ninth floor of the hotel, catering to very high-profile and wealthy guests.¹⁰⁹ Rene was subject to pervasive abuse by his all-male coworkers, significant enough to constitute a hostile work environment violation under Title VII.¹¹⁰ His superiors failed to respond to his complaints against his coworkers.¹¹¹ Rene brought suit against MGM Grand for a violation of Title VII, alleging unlawful sexual harassment. The district court dismissed Rene's claim, reasoning that Rene's sole claim was that he was a victim of sexual orientation discrimination, not prohibited by Title VII.¹¹²

The Ninth Circuit Court of Appeals heard the case twice, including an en banc rehearing.¹¹³ The first panel dismissed Rene's claim because it overlooked the *Oncale* requirement for physical sexual abuse and narrowly focused on Title VII's denial of discrimination based on sexual orientation.¹¹⁴ The court later concluded en banc that *Oncale* "forbids severe or pervasive same-sex sexual touching," and that Title VII prohibits offensive touching,¹¹⁵ a requirement that is found nowhere in the text of *Oncale*. Furthermore, *Rene's* requirement of "physical conduct of a sexual nature" is directly inconsistent with *Nichols v. Azteca Rest. Enterprises, Inc.*,¹¹⁶ in which a man who was the target of slurs regarding his sexuality, yet suffering no physical or sexual abuse, was found to have shown an actionable claim of "because of sex"

108. See Parrish, *supra* note 88, at 472.

109. *Rene v. MGM Grand (Rene I)*, 243 F.3d 1206, 1207 (9th Cir. 2001).

110. See *id.*

The sexual harassment consisted of, among other things, being grabbed in the crotch and poked in the anus on numerous occasions, being forced to look at pictures of naked men having sex while his co-workers looked on and laughed, being caressed, hugged, whistled and blown kisses at, and being called "sweetheart" and "Muneca"

Id. at 1208 (citations omitted). To successfully establish a hostile work environment, a plaintiff must show that he or she was "forced to endure a subjectively and objectively abusive working environment." *Id.*

111. *Id.*

112. See *id.*

113. See *supra* note 109.

114. *Rene II*, 305 F.3d 1061, 1066-67 (9th Cir. 2002).

115. *Id.* at 1067.

116. 256 F.3d 864 (9th Cir. 2001).

discrimination.¹¹⁷

The first Ninth Circuit *Rene* panel affirmed the judgment of the district court.¹¹⁸ It relied on *Oncale* to find that the Supreme Court required all Title VII plaintiffs to “prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’”¹¹⁹ The court then analyzed the three advisory methods given in *Oncale* by which a plaintiff could demonstrate “because of sex” discrimination and ultimately concluded that *Rene* stated an actionable Title VII violation.¹²⁰

The dissent observed that the majority glossed over the striking similarities between the petitioners in *Oncale* and *Rene*.¹²¹ The court hurried past the facts in order to analyze the three advisory methods in *Oncale* that the Supreme Court offered as examples of methods for determining “because of sex” discrimination. The majority, however, treated the three *Oncale* exemplar tests as if they were the only dispositive methods to show “because of sex” discrimination.¹²² Meanwhile, the *Oncale* court did not even address the specific validity of the petitioner’s Title VII claim, but instead overruled the Fifth Circuit’s refusal to extend Title VII to any claim of same-sex harassment.¹²³

117. *See id.* at 875.

118. *Rene I*, 243 F.3d at 1210.

119. *Id.* at 1208 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1997)).

120. The first method is to show the harasser is sexually drawn to the complainant, presumed when both harasser and victim are homosexual. *Oncale*, 523 U.S. at 80. The second route is to show the harasser used sex-specific and derogatory terms that evidence “general hostility to the presence of [such person] in work place.” *Id.* Finally, the complainant may “offer direct comparative evidence” showing the harasser treated members of the opposite sex differently. *Id.*; *Rene I*, 243 F.3d at 1208-09. The court first determined that *Rene* could not show that he was a victim of his harasser’s sexual desire, because he provided no evidence that the offenders were homosexual, rather his evidence suggested that the offenders merely intended to humiliate him. *Rene I*, 243 F.3d at 1208-09. Secondly, *Rene* failed to present evidence that the offenders were motivated by general hostility to the presence of *Rene*’s gender in the workplace, not surprisingly, because of all of the offenders were also male. *See id.* at 1209. Thirdly, the court observed that *Rene* could not provide comparative evidence that the offenders treated female coworkers differently than male coworkers, again, not surprisingly, because all of the workers on the twenty-ninth floor were male. *See id.*

121. *Oncale* was forcibly made to submit to constant sex-related physical abuse by his male coworkers at the Sundowner drill site, *Oncale*, 523 U.S. at 77, while *Rene* suffered very similar indignities from his all male coworkers. *See Rene I*, 243 F.3d at 1211 (Nelson, J., dissenting).

122. *See Rene I*, 243 F.3d at 1211 (Nelson, J., dissenting).

123. *See Oncale*, 523 U.S. at 82. The Supreme Court remanded to the Fifth Circuit for a determination of “because of sex” discrimination consistent with its opinion that same-sex harassment is actionable under Title VII. *See id.*

Oncale and *Rene* are virtually indistinguishable, but for one key difference: *Rene* was an openly gay man,¹²⁴ while the question of *Oncale*'s sexuality was conspicuously omitted from the court's opinion or either party's brief. To hold that *Oncale* has a claim for relief under Title VII while *Rene* does not is to say that a gay man may not recover for the identical same-sex harassment suffered by his heterosexual counterpart. This is wholly illogical. *Rene* was denied recovery, whereas *Oncale* was granted relief, solely because he was admittedly gay.

While the courts insist that Title VII does not extend to claims based solely on discrimination because of sexual orientation,¹²⁵ never has a court held that a valid claim of same-sex harassment in violation of Title VII would not be actionable for a gay man suffering nearly indistinguishable atrocities by his coworkers. The *Rene* majority claimed to be sensitive to the tremendous physical and mental anguish that *Rene* was forced to suffer as a result of his coworkers' deplorable actions.¹²⁶ Yet, the court manipulated *Oncale* to deny *Rene* the same protection he would have had were he a straight man, and this made his oppressors essentially "immune from legal recourse."¹²⁷ As a result of this conclusion, the court, in a rare action, ordered an en banc rehearing of the case.¹²⁸ Nonetheless, *Rene II* did not clarify the confusion underlying the original decision.

The subsequent en banc rehearing reversed the first panel's prior decision and found that *Rene* had a valid Title VII claim,¹²⁹ however, it once again reached a decision not supported by precedent. This time, the Ninth Circuit ruled that *Rene*'s sexual orientation was irrelevant because sexual orientation is also irrelevant for a woman.¹³⁰ In other words, the court concluded that because *Rene*'s homosexuality did not defeat his Title VII claim, he properly provided sufficient evidence of a hostile work environment.¹³¹ The court based its new rule on a different interpretation of *Oncale*, claiming that decision clearly prohibited "offensive sexual touching."¹³² This reading of *Oncale* is not based on

124. *Rene I*, 243 F.3d at 1211.

125. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated by Oncale*, 523 U.S. at 79.

126. *Rene I*, 243 F.3d at 1210.

127. *Id.* at 1212.

128. *Rene II*, 305 F.3d 1061, 1067 (9th Cir. 2002).

129. *See id.*

130. *See id.*

131. *See id.* at 1066.

132. *See id.* at 1077.

any language existing in the Supreme Court's opinion; *Oncale* merely addressed the cognizability of a Title VII claim of same-sex harassment.¹³³ The Supreme Court left to the lower courts the responsibility to determine whether the discrimination was "because of sex."¹³⁴ The *Rene II* court seems to imagine *Oncale* as an addition to the *Meritor* and *Price Waterhouse* cases, which refined the interpretation of "because of sex,"¹³⁵ when instead the *Oncale* court merely overruled the overbroad rule of the Fifth Circuit that no claim of sexual orientation discrimination was valid under Title VII, but purposely avoided a discussion of "because of sex."¹³⁶

Although the decision of the en banc court allowed Rene to recover for the outrageous physical abuse and anguish that he suffered,¹³⁷ the Ninth Circuit Court of Appeals did not improve its understanding of what type of discrimination is "because of sex." Furthermore, although the majority did not rely on gender stereotyping in its decision, the court seemed unclear whether gender stereotyping was actually involved.¹³⁸ Regardless of whether Rene suffered discrimination because of his sexuality or because he may not have conformed to the offender's idea of the typical male, his offenders clearly committed gender stereotyping in violation of *Price Waterhouse* doctrine.¹³⁹

The next case we will examine from the Ninth Circuit, *Nichols v. Azteca Restaurant Enterprises, Inc.*,¹⁴⁰ demonstrates that the court continues to struggle to identify the line between gender stereotyping and sexual orientation discrimination. *Nichols* presented the Ninth Circuit with a case of ongoing abuse, similar to that of Medina Rene,

133. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-82 (1996).

134. *See id.* at 81-82.

135. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 257-58 (1989) (extending discrimination because of sex to incidents where a person is discriminated against due to either one's failure to conform, or conformity with a gender stereotype of how a person of a certain gender should act), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No.102-166, 105 Stat. 1071, *as recognized in* Landgraf v. Usi Film Prods., 511 U.S. 244, 251 (1994); *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing that discrimination is because of sex when male superiors create a hostile work environment because of the subordinate's gender that affects her physically or psychologically).

136. *Oncale*, 523 U.S. at 78-82.

137. *Rene II*, 305 F.3d at 1068.

138. *See id.* at 1068 (Pregnerson, J., et al., concurring) (arguing that because the evidence showed that the offenders treated Rene like a woman, there was sufficient evidence of gender stereotyping.); *id.* at 1077 (Hug, Jr., J., dissenting) (claiming that the same evidence examined by the concurrence provides no evidence of gender stereotyping).

139. *Price Waterhouse*, 490 U.S. at 242, 258.

140. 256 F.3d 864 (9th Cir. 2001).

however, the complainant this time was not openly gay.¹⁴¹ During the four years in which Antonio Sanchez worked for Azteca Restaurant Enterprises, his coworkers constantly victimized him with verbal abuse because of his effeminate traits.¹⁴² The remarks were not isolated incidents over his tenure at the restaurant, rather, they were indicative of his general experience week in and week out.¹⁴³ After making repeated complaints to the human resources director, Arnie Serna, that he continued to suffer higher degrees of abuse over time, Azteca told Sanchez that if he had any further complaints he should report the incidents to the general manager and that routine spot checks would be conducted.¹⁴⁴ This proposal had no visible effect upon Sanchez's working situation, and following a heated argument with his assistant manager Sanchez walked off the job site.¹⁴⁵

Relying on *Price Waterhouse*, the Ninth Circuit held that Sanchez was a victim of gender stereotyping in violation of Title VII.¹⁴⁶ Writing for the majority, Judge Gould states:

At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray "like a woman"—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as "she" and "her." And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender.¹⁴⁷

The Court determined that Sanchez had proven an actionable "because of sex" claim under Title VII.¹⁴⁸

The court's holding in *Nichols* seems wholly at odds with the rationale in *Rene II*. Despite *Rene's* requirement that there must be

141. *Id.* at 870.

142. *Id.* Specifically, during his tenure, male coworkers and supervisors referred to Sanchez as a "she" or "her," mocked the way he walked and carried a serving tray "like a woman," and also referred to him as "a fucking whore." *Id.*

143. *See id.*

144. *Id.*

145. *See id.*

146. *Id.* at 874.

147. *Id.*

148. *See id.* at 875.

“physical conduct of a sexual nature,”¹⁴⁹ *Nichols* seemingly imposes no such requirement. Sanchez endured ongoing verbal abuse,¹⁵⁰ but did not suffer any physical abuse as required by the *Rene II*.¹⁵¹ Yet the court found Sanchez’s claim to be an actionable “because of sex” claim, knowing that his harassers called him “a faggot,” a term clearly showing that they perceived him to be a homosexual.¹⁵² To further complicate matters, the *Rene II* made the bold assertion that the sexual orientation of a victim is plainly irrelevant to Title VII litigation.¹⁵³ It would appear based on an examination of both that this statement is completely false.

The most notable difference in the facts between *Rene* and *Nichols* is that Medina Rene was an openly gay man while Antonio Sanchez was not.¹⁵⁴ The Ninth Circuit seems to take a convoluted approach when making the distinction between gender stereotyping and sexual orientation discrimination. It is clear that Rene and Sanchez were both victims of gender stereotyping under the *Price Waterhouse* analysis because both victims were forced to endure ongoing humiliation and abuse since their coworkers did not believe their conduct comported with traditionally accepted notions of masculinity.¹⁵⁵ Yet the final result after both cases is that a gay man cannot recover under Title VII for nearly identical suffering of analogous treatment based on gender stereotypes as his heterosexual counterpart, unless he is physically assaulted in a sexual manner.¹⁵⁶

The sexual orientation and gender stereotyping problem in these two cases could be rectified if the Supreme Court incorporated sexual orientation into the “because of sex” provision. Had the Supreme Court established a bright-line rule that “because of sex” applies to sexual orientation discrimination, then neither the court in *Rene* or *Nichols* would have had to struggle to find a way for the plaintiffs to recover for egregious behavior committed by their co-workers on alternate grounds. Instead, the Court could determine that the conduct constitutes a hostile working environment for the plaintiffs, and that such conduct is based on either the plaintiff’s actual sexual orientation, or perceived sexual orientation. There is clear sexual orientation discrimination in both

149. *Rene II*, 305 F.3d at 1064.

150. *See Nichols*, 256 F.3d at 870.

151. *See Rene II*, 305 F.3d at 1067.

152. *See Nichols*, 256 F.3d at 870, 873; Parrish, *supra* note 88, at 487.

153. *Rene II*, 305 F.3d at 1066.

154. *See Parrish*, *supra* note 88, at 487.

155. *See Rene II*, 305 F.3d at 1067; *Nichols*, 256 F.3d at 874-75.

156. Parrish, *supra* note 88, at 487.

cases and a revision of Title VII would have resulted in simpler and more equitable results in both *Nichols* and *Rene*.

III. MANY STATES HAVE RESPONDED TO TITLE VII WITH OVERLY BROAD STATUTES

Perhaps wary of the open-endedness of current Title VII protections, many states have stepped into the arena to better protect lesbian and gay individuals from sexual orientation discrimination in the workplace.¹⁵⁷ As of 2005, the District of Columbia and eighteen states prohibited workplace discrimination based on one's sexual orientation.¹⁵⁸ This section will explore state decisions that have expanded beyond the floor protections of Title VII in order to show that the states have been forced to enact broader, and sometimes equally problematic legislation, to provide for Title VII's failure to give necessary protection.

In *Goins v. West Group*¹⁵⁹ the Minnesota Supreme Court found that the respondent's claim did not violate the Minnesota Human Right Act's ("MHRA") prohibition against sexual orientation discrimination.¹⁶⁰ Respondent, a transgendered worker biologically born a male, took female hormones for several years and had been declaring herself a

157. Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 419 (2003) (exploring the legal basis for employer decisions based on lifestyle choices or activities outside the workplace).

158. *E.g.*, D.C. CODE § 2-1402.41(1) (2006); MASS. GEN. LAWS. ch. 151B, § 3(6) (2002); MINN. STAT. ANN. §§ 363A.01-08 (West 2007); N.J. STAT. ANN. § 10:5-12(a) (West 2008); R.I. GEN. LAWS § 28-5-7 (2007); *see also* Lambda Legal Defense & Education Fund, Quick Facts About Workplace Discrimination, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/quick-facts-about-workplace.html>.

159. 635 N.W.2d 717 (Minn. 2001).

160. MINN. STAT. ANN. § 363A.08(1) (2004). The statute states in pertinent part:

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age: (1) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) to discharge an employee; or (3) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment

Id. The MHRA is notably broader than the language of Title VII. Unlike Title VII, the statute adds the exception that discrimination because of one the enumerated reasons is permissible when based on a bona fide occupational qualification. *See id.* Furthermore, the statute specifically enumerates sexual orientation as a basis for unfair employment discrimination, separately from discrimination because of sex, thus showing the clear intent to differentiate the meaning of sex from the meaning of sexual orientation. *See id.*

female to the public in 1995.¹⁶¹ The suit arose over a dispute regarding respondent's insistence that she be allowed to use the female public bathroom, and petitioner's counter-demand that she use a single-occupancy bathroom on a different floor in the building, or a different building entirely.¹⁶²

Although specifically prohibiting discrimination based on both sex and sexual orientation, Minnesota has interpreted sexual orientation as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."¹⁶³ Following the language of the MHRA, the court in *Goins* interpreted the statute to uphold the exclusionary policy as non-violative of the state's prohibition on sexual orientation discrimination.¹⁶⁴ While the MHRA seeks to be more expansive and protective of the rights of homosexuals, its separate definitions of sex and sexual orientation still lead to confusing results. The statute defined sexual orientation as relating to one having a self-image not in accord with society's traditional notion of maleness or femaleness.¹⁶⁵ However, such language overlaps with an understanding of sex as relating to biological characteristics. Currently, no conclusive answer has ever been offered to show whether biology is pre-determinative of one's sexual orientation, and it is unknown whether the two may be intertwined.¹⁶⁶ The MHRA's definition of sexual orientation is too close

161. *Goins v. West Group*, 635 N.W.2d 717, 720 (Minn. 2001).

162. *See id.* at 721. Responding to concerns by female coworkers sharing a bathroom with someone biologically a male, petitioner's director of human resource brought the matter to the attention of other human resource personnel and legal counsel before announcing their policy decision. *Id.* After respondent was apprised of the policy to enforce, she requested instead that the other female workers go through educational training to better understand her situation so that she could continue using the female restroom. *Id.* Petitioner refused respondent's proposal and demanded that she follow their rules. *Id.* She continued to use the female bathroom, leading to threats of disciplinary action, and ultimately her resignation, in which she alleged that petitioner's human resource department treated her "in a manner that had caused her undue stress and hostility." *Id.*

163. MINN. STAT. ANN. § 363A.03(44) (2004). The statute states, in pertinent part:

"Sexual orientation" means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. "Sexual orientation" does not include a physical or sexual attachment to children by an adult.

Id.

164. *See Goins*, 635 N.W.2d at 723.

165. MINN. STAT. ANN. § 363A.03(44); *see supra* note 163.

166. *See* Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 999 (2007).

to an understanding of sex to be distinct and easily understood, which is why the respondent's claim in *Goins* failed.¹⁶⁷ The fact that the legislature goes to such lengths to define the concept of "sexual orientation," and what is known colloquially as transgender identity, contributes to the argument that the simple term "sex" should be construed broadly enough to include all of these concepts.¹⁶⁸

New Jersey has deviated from the structure of Title VII and enacted far broader legislation for regarding employment law.¹⁶⁹ One of the most famous cases to interpret the New Jersey law is *Boy Scouts of America v. Dale*.¹⁷⁰ *Dale* prohibited the Boy Scouts from expelling a scout solely on the grounds of his homosexuality.¹⁷¹ The Court noted that the legislature enacted the statute to meet the broad goal of eradicating discrimination in all its forms from New Jersey, and should therefore be construed liberally.¹⁷² The decision turned upon the issue of whether the Boy Scouts fell under the prohibition of discrimination in "places of public accommodation."¹⁷³ The court decided that because the Boy Scouts reached out to the entire public and were closely connected with federal, state, and local government supports, the organization qualified as a place of public accommodation.¹⁷⁴ The court ruled that the Boy Scouts, as a group of public accommodation, could not ostracize or exclude gay scouts.¹⁷⁵

Dale incorporates the intent of the New Jersey Law Against Anti-Discrimination more successfully than the federal decisions regarding

167. See *Goins*, 635 N.W.2d at 723.

168. MINN. STAT. ANN. § 363A.03(44).

169. N.J. STAT. ANN. § 10:5-12 (West 2004). The command of the statute, that an employer shall not discriminate:

because of the race, creed, color, national origin, ancestry, age, marital status, domestic partnership status, affectional or sexual orientation, genetic information, sex, disability or atypical hereditary cellular or blood trait of any individual . . . or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . .

Id. at § 10:5-12 (a), is not clarified elsewhere in the statutes. The law does, however, cover same-sex harassment or discrimination based on sex stereotypes. *Zalewski v. Overlook Hosp.*, 692 A.2d 131, 132, 136 (N.J. Super. Ct. Law Div. 1996).

170. *Dale v. Boy Scouts of Am. (Dale I)*, 734 A.2d 1196 (N.J. 1999), *rev'd*, *Boy Scouts of Am. v. Dale (Dale II)*, 530 U.S. 640, 661 (2000).

171. *Dale I*, 734 A.2d at 1230.

172. *Id.* at 1208.

173. *Id.*

174. See *id.* at 1211-12.

175. *Id.* at 1219.

Title VII. The key purposes of Title VII were to better protect the constitutional rights of citizens in public places and in public education.¹⁷⁶ While *Dale* prohibited the Boy Scouts from sexual orientation discrimination on the grounds that homosexuals were protected in places of public accommodation,¹⁷⁷ the Supreme Court has not afforded the same protection against sexual orientation discrimination to teachers. Certainly, it cannot be argued that teaching in a school is not a public activity; regardless of whether the school is classified as private or public, the teacher is always in the presence of students, staff, and faculty. It is then unclear why federal legislation as currently enacted fails to meet its goal of better public protection against discrimination.

Most states, like Rhode Island, have enacted employment discrimination legislation closely following the structure of Title VII.¹⁷⁸ Although not all states have closely followed Title VII's mold,¹⁷⁹ the statute is highly influential in guiding state legislators when deciding what measure of protection they will accord for employment discrimination.¹⁸⁰ Although states like Minnesota attempted to successfully incorporate sexual orientation discrimination into their laws, the best means of protection is not to add sexual orientation as a separate class, but for courts to redefine the definition of "because of sex," so that sexual orientation is understood to be implicit within that phrase.

176. 42 U.S.C. § 2000e (2000).

177. See *Dale I*, 734 A.2d at 1230. The case was eventually decided on constitutional free association and First Amendment grounds by the Supreme Court. *Dale II*, 530 U.S. at 661. The case has led to much controversy, including cases where universities that have policies against discrimination including discrimination based on sexual orientation, have filed challenges against the military's use of school facilities for recruiting, charging that such use violates non-discrimination statutes and a school's First Amendment rights. Adam Liptak, *Colleges Can Bar Army Recruiters*, N.Y. TIMES, Nov. 30, 2004, at A1.

178. For example, Rhode Island courts have noted that the statute "bears a striking resemblance to Title 7 of the Civil Rights Act of 1964." *Gonsalves v. Alpine Country Club*, 563 F. Supp. 1283, 1287 (D.R.I. 1983), *aff'd*, 727 F.2d 27, 28 (1st Cir. 1984). The courts of Rhode Island apply "the analytical framework developed in federal Title VII cases" to cases brought under the Rhode Island statute "[b]ecause the Rhode Island Fair Employment Practices Act is nearly identical in its remedial provision to its federal analog, Title VII[.]" *Marley v. UPS, Inc.*, 665 F. Supp. 119, 128 (D.R.I. 1987).

179. The District of Columbia applies a "generous construction" principle to its District of Columbia Human Rights Act (DCHRA). *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 888 (D.C. 2003). Washington's statute, unlike Title VII, is not limited to employment discrimination and contains a broad statement of the right to be free from discrimination beyond those enumerated in Title VII. See *Galbraith v. Tapco Credit Union*, 946 P.2d 1242, 1248 (Wash. 1997).

180. See *Marley*, 665 F. Supp. at 128; *Gonsalves*, 563 F. Supp. at 1287.

IV. SPECIAL PROBLEM OF PROTECTING TEACHERS IN PUBLIC EDUCATION

The public education arena presents a pressing need for extending protections against sex discrimination to include sexual orientation. The origins of the school system and its continued development over the last two hundred years are illustrative of a pattern of development, progress, and interdependency with the law. The development of the school system occurred during the colonial period beginning in 1760 and extending through 1830 and was heavily influenced by the political challenges of forming a democracy.¹⁸¹ Founded on the principle that every citizen, for the benefit of the republic, has the right to a free and public education, public education and public schools provide the opportunity for every student to grow into full participants in the political process.¹⁸² The pioneers of the public school system sought an environment that would produce a well-rounded, well-educated citizen; many believed that education was the key to stability and development of the nation.¹⁸³ Ratification of the Constitution occurred during this period, and although the theme of the day was freedom, liberty, and democracy, suffrage, and representation were limited to white male property owners.¹⁸⁴ Early schools, where established, were not free.¹⁸⁵ The patriotic foundations are still at the heart of the American school system, illustrated at least in small part by a salute to the American flag acknowledged every weekday morning by millions of school children across the land, although the social and political landscape has changed.¹⁸⁶

181. MONROE, *supra* note 12, at 186.

182. See LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION* 55 (1951), *cf.* MONROE, *supra* note 12, at 295 (suggesting that proponents struggled to encourage the public to pay for schools). Public schools were opposed by those that viewed such institutions as a suspicious expansion of government. *Id.* at 334.

183. MONROE, *supra* note 12, at 186.

184. *Id.* at 192. There is no mention in the Constitution of public education. *Id.* at 194. Rather, the provisions for schools were made by statutory land grants authorized in 1787. *Id.* at 196. The idea was that blacks and women would be represented through masters, fathers, and brothers. See generally DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 306-07 (1990); DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 89 (2003).

185. MONROE, *supra* note 12, at 295.

186. The pledge of allegiance has been hotly contested in recent years. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004) (dismissing because of lack of standing a suit by an elementary school student's father against Congress, the President, California, the school district and its superintendent seeking an injunction and invalidation of the pledge of allegiance's inclusion of the words "under God," added by Congress in 1954, as a violation of the First Amendment).

Social change is evident when looking at the social and political climate of the writers of the Constitution until present day; however, the founders of the public school system, like the founders of America, had timeless theories that are still at issue when addressing public school curriculum today. Some public, or common school, proponents argued that schools should be the breeding ground of the next generation and should reflect the morals and values of society.¹⁸⁷ The main tenet of this argument advocated for the indoctrination of republican values in the American public, to first, “perpetuat[e] . . . the values and institutions which constituted the basis of republican society and government,” and second, to provide “the training required to make sound decisions within the framework of these institutions.”¹⁸⁸ Politics played itself out in the classroom. Horace Mann, for example, a leading advocate for public education, proposed that the “middle ground” between political groups lay in teaching “those articles in the creed of republicanism, which are accepted by all, believed in by all, and which form the common basis of our political faith, shall be taught to all.”¹⁸⁹ The standard curriculum consisted of the indoctrination of democratic theories and democratic government institutions; where topics of political conflict were discussed, the teaching standard was the utmost neutrality.¹⁹⁰ This view persisted through the nineteenth century,¹⁹¹ and still exists today.

A second contingency thought that schools should not merely be a breeding ground for republican life but that schools should provide practical vocational training.¹⁹² In this view, the purpose of schools “was to train, not scholars, statesmen, and philosophers, but ‘practical business men [sic], or intelligent, independent citizens.’”¹⁹³ This view of vocational utility persisted through the early 1900s, as many children preferred to gain technical skills as opposed to book learning, and still persists today by leading educational authorities, although the number of children enrolled in vocational programs has declined.¹⁹⁴ The need for

187. See CREMIN, *supra* note 183, at 69.

188. *Id.* at 71.

189. *Id.* at 72 (quoting HORACE MANN, TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION, TOGETHER WITH THE TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD 118 (Boston, Dutton and Wentworth 1849)).

190. *Id.*

191. See TYACK, *supra* note 184, at 101.

192. CREMIN, *supra* note 183, at 64.

193. See *id.* (quoting ROBERT RANTOUL, JR., THE INTRODUCTORY DISCOURSE, DELIVERED BEFORE THE AMERICAN INSTITUTE OF INSTRUCTION AT THEIR ANNUAL MEETING, IN 1839, at 21 (Boston, Marsh, Capen, Lyon & Webb 1840)).

194. See TYACK, *supra* note 184, at 99 (describing a study by Helen Todd in 1909 of children between fourteen and sixteen, who said they preferred to work rather than attend school); OLIVER S.

an engaged and enlightened citizenry has not declined, despite the push for academic standards that supposedly leave no child behind.¹⁹⁵ The schools, by reflecting the diversity of the workplace that young adults will encounter, can address the need for enlightened citizenry by preparing students for the workforce.

Technological preparation has expanded in education; the social environment, while progressing from inception by the integration of women and minorities in the educator workforce, needs to further match the facilities' improvement by incorporating openly gay teachers as part of today's modern society. Educational instruction has expanded from the sparse and mean existence of the one room school house to the full-featured educational facilities in existence today. Early schools consisted as single rooms with poor temperature control.¹⁹⁶ In the early days after the American Revolution, children memorized material from primers and the Bible, and classroom management systems consisted of the rod.¹⁹⁷ In contrast, American schools have now evolved to have fully expounded curriculum, master lesson plans, mentors, staff development, full administrations, school boards, state committees, state-proponded curriculum objectives, and fully developed facilities that can span acres.¹⁹⁸ Education has since evolved from the "one size fits all" attitude of the past and changed in recognition of the fact that students have different learning modalities and academic abilities, and that the curriculum should reflect and build on those individualistic

IKENBERRY, AMERICAN EDUCATION FOUNDATIONS: AN INTRODUCTION 38 (1974) (discussing a report by the U.S. Department of Education indicating the lack of career preparation by the nation's secondary students entering the workforce).

195. See generally No Child Left Behind Act, 20 U.S.C. §§ 6301-78 (2001).

196. MONROE, *supra* note 12, at 340.

197. See *id.* at 341, 348.

198. For example, today's expanded facilities include the Harvey Milk School. *First Public Gay High School to Open in New York City*, CNN, Jul. 29, 2003, <http://www.cnn.com/2003/EDUCATION/07/28/gay.school.ap>. Other facilities are built for energy-efficiency. See generally, U.S. Dep't. of Ed. Website, <http://www.ed.gov> (last visited Mar. 19, 2008). "As of 2002, 99 percent [sic] of public schools have access to the Internet. The ratio of students to computers with Internet access in public schools is approximately 4.8 to one." Krista Kafer, The Heritage Foundation for Policy and Analysis, Frequently Asked Questions about Education in America, http://www.heritage.org/Research/Education/wm478.cfm#_ftn22. A recent compilation of school statistics by the Center for Educational Reform reports that there are 94,112 total public schools in the United States. The Center for Educational Reform, K-12 Facts, <http://www.edreform.com/index.cfm?fuseAction=section&pSectionID=15&cSectionID=97#SCHOOLS> (last visited Mar. 19, 2008). 47,917,774 children are enrolled in public schools; 2,997,748 teachers are employed in public schools. *Id.* Expenditures for public schooling now range in the \$350-450 billion range, with over \$200 billion spent on instructional services. *Id.* Additionally, roughly \$119 billion is spent on student services and almost \$14 billion on food services. *Id.*

characteristics.¹⁹⁹ Since individualism is now the student model, the teaching model should also reflect that individualism at the head of the class. The key to this is to represent diversity in all its forms, including sexual orientation.

V. ANALYSIS OF TITLE VII'S PURPOSE AND APPLICATION, REGARDING "BECAUSE OF SEX" DISCRIMINATION

Title VII states in the preamble that the purpose of the act is to "authorize the Attorney General to institute suits to *protect constitutional rights in public facilities and public education . . . to prevent discrimination in federally assisted programs . . . and for other purposes.*"²⁰⁰ Title VII is intended to protect rights in education and federally funded programs, of which public schools are a part.²⁰¹ Since the stated purpose of Title VII is to apply its protections to education and federally funded institutions, including all the public schools in the nation, discrimination against teachers has been particularly singled out by Congress for protection.

Section 701 defines the terms "because of sex" or "on the basis of sex" as including "but not limited to . . . pregnancy, childbirth, or related medical conditions."²⁰² Congress added this section to expressly overrule the Supreme Court's opinion that "because of sex" did not implicate pregnancy.²⁰³ The "but not limited to" language therefore implies the incorporation of the Court's holdings in *Meritor Savings Bank* and *Price Waterhouse*.²⁰⁴ If the Supreme Court correctly followed legislative intent, Congress would not have found the need to insert this provision. Similarly, although not expressly stated, "because of sex"

199. TYACK *supra* note 184, at 114.

200. 42 U.S.C. § 2000e (2000) (emphasis added).

201. *See generally* JOHN H. JOHANSEN, ET AL., *AMERICAN EDUCATION: THE TASK AND THE TEACHER* 445 (2d ed. 1975) (citing a number of acts that have provided federal money for education, including the Northwest Ordinance of 1787 and the Elementary and Secondary Education Act of 1965).

202. § 2000e(k).

203. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)), *overruling* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

204. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (holding that discrimination "because of sex" includes discrimination based on sex stereotyping), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. Uxi Film Prods., 511 U.S. 244, 251 (1994); Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (holding that discrimination based on sex can be shown by establishing a hostile work environment of discriminatory harassment based on sex).

should be implicitly understood to include sexual orientation.²⁰⁵ It is unclear why Congress has not amended Title VII after countless decisions by the Supreme Court and the lower courts that frustrate the bill's purpose to provide and ensure constitutional rights in the public teaching sector.

As the conflict in the Ninth Circuit shows, the outcomes of the court are not standardized between what does and does not fall under "because of sex" in Title VII within the circuits.²⁰⁶ In the Third Circuit, Title VII does not apply to discrimination because of sexual orientation.²⁰⁷ In the Sixth Circuit, transgender individuals are protected under Title VII.²⁰⁸ In the Second Circuit, sexual orientation is not actionable unless the individual is targeted because of sex stereotypes.²⁰⁹ In the First, Fourth, and Seventh Circuits, discrimination based in any part upon sexual orientation is not actionable.²¹⁰

The circuits' proffered rules for determination of "because of sex" in Title VII have not been uniform between each circuit.²¹¹ For instance, the Third Circuit requires that for a homosexual plaintiff to recover for a "because of sex" violation, the harassment must have as its basis same sex attraction to the victim, or the harassment must qualify as a result of

205. If *Lawrence v. Texas* is understood to be decided on due process grounds, rather than equal protection as the concurrence contends, then the Supreme Court appears to recognize that homosexual individuals have a fundamental due process right to engage in homosexual acts in peace, so long as the acts are kept private and do not disturb others. To omit the protection of sexual orientation discrimination from Title VII seems inconsistent with *Lawrence's* extension of due process.

206. See *supra* Part II B.

207. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (2001).

208. *Smith v. City of Salem*, 378 F.3d 566, 570 (3d Cir. 2004). Another possible argument under Title VII would be to expand the "gender-identity" issue from transgender individuals to other transgender variants, including "butch" lesbians and "queenie" gay men that do not fit into the stereotypical male/female gender roles, and thereby falling under the sex stereotyping protections of *Price Waterhouse*. This might have some success, at least in the Sixth Circuit.

209. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000). In this case, the court recognized the discriminatory nature of the plaintiff's claim, but refused to acknowledge its merit based 1) on poor pleading and 2) on the fact that Congress has not amended Title VII to include sexual orientation in spite of judicial decisions determining sexual orientation is not covered under Title VII. *Id.* However, little is to be inferred from Congressional silence, given the sparse legislative history of Title VII and the sheer difficulty of defining "sex" discrimination and distinguishing it from sexual orientation, as outlined in this paper.

210. See *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) *abrogated by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

211. See *supra* Part II B.

the type of gender stereotypes announced in *Price Waterhouse*.²¹² While the Sixth Circuit has established a similar requirement that gender stereotyping is clearly a violation because such conduct would not occur but for the sex of the worker, its interpretation lacks the Third Circuit's requirement that a same-sex harasser be motivated by sexual desire towards the victim.²¹³

The Ninth Circuit's inconsistencies have been obvious without comparisons to other circuits. *Rene I* decision denied a homosexual man the right to recover for actionable same-sex harassment because that person was homosexual, holding that sexual orientation discrimination is insufficient to bring a claim under Title VII.²¹⁴ *Rene II* cured one inconsistency²¹⁵ but was still unsupported by precedent.²¹⁶ Furthermore, the en banc requirement of physical sexual abuse was a complete departure from the judgment of the Court of Appeals just one year prior in *Nichols*, in which the court announced that a plaintiff stated an actionable Title VII claim when suffering ongoing and persistent verbal abuse from his coworkers based on gender stereotypes.²¹⁷

The Second Circuit's rejection of a homosexual man's right to suffer from outrageous verbal abuse is both shocking and inconsistent with the Ninth Circuit's opinion in *Nichols*. In *Simonton* the plaintiff was subject to pervasive and consistent verbal comments of a sexual nature from his co-workers because of his sexual orientation.²¹⁸ There can be little doubt that the abuse suffered by Simonton would be sufficient to show a hostile work environment under Title VII.²¹⁹

212. See *Bibby*, 260 F.3d at 261.

213. See *Smith*, 378 F.3d at 572; *Bibby*, 260 F.3d at 264.

214. See *Rene II*, 305 F.3d 1061, 1067 (9th Cir. 2002).

215. The en banc rehearing was more consistent with the Sixth and Third Circuits regarding its new rule, that any plaintiff suffering same-sex harassment that was severe enough to constitute a hostile-work environment claim could validly state a Title VII claim upon which he could recover, regardless of his or her homosexuality. See *id.* at 1066. The rehearing did correct the error made when the initial panel of the Ninth Circuit implied that a homosexual man could never state a Title VII cause of action, see *Rene I*, 243 F.3d 1206, 1210 (9th Cir. 2001), a notion that has never been explicitly stated in the Title VII jurisprudence.

216. In order to cure the taint of the first decision, the en banc panel based its decision on *Oncale*'s prohibition against "offensive sexual touching," although *Oncale* never created any such rule. *Rene II*, 305 F.3d at 1067; see *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75-82 (1988).

217. See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

218. See *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

219. In order to show a hostile work environment, the conduct suffered by the victim must be "pervasive enough 'to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring). The Supreme Court requires that the victim actually subjectively

However, the court threw out all three of his theories for which he had a claim for relief under Title VII.²²⁰ Most disturbing is the court's assertion that the harasser's conduct may have been the same for both males and females at the job site, based on his failure to present comparative evidence of how other male coworkers were treated.²²¹ This is plainly an attempt by the court to circumvent facts that show a prima facie case of intentional discrimination and harassment sufficient to create a hostile work environment. The plaintiff was clearly singled out because of his homosexuality; women at any job would never expect to be the recipient of the type of conduct of which Simonton was a victim. While women might be sexually harassed, they would not likely be referred to as a "fucking faggot" or one suffering from "bung hole disorder."²²² The Second Circuit, therefore, leaves open the possibility of a successful suit for sexual orientation discrimination if the case is properly pleaded, although the court may again recite the lack of Supreme Court case law to decide for the plaintiff.

The failure of the Supreme Court to enforce a meaningful guideline for "because of sex" discrimination has forced the lower courts to act based upon their own subjective values and biases. While the Ninth Circuit grants homosexuals the same right to recover under Title VII when the claim is analogous to one that could be asserted by a heterosexual, the First, Fourth, and Seventh Circuits would deny a homosexual the right to recover under Title VII completely.²²³ There is a clear difference in political ideology between the several circuits. The Ninth Circuit should not be the only Court of Appeals to allow homosexuals to recover for violation of the basic right to work absent ridicule, mockery, and assault for the simple reason that it may be a more liberal-minded court than, for instance, the Seventh Circuit.

The biggest concern for the courts, illustrated by Section II B's analysis of the *Nichols-Rene* inconsistency, is that courts have no bright line rule to distinguish between sexual orientation and gender

perceive the environment to be abusive. *Id.* at 21. Certainly, it is not an issue in any of the cases cited in this article whether or not the victim perceived the conduct as subjectively abusive. All are very extreme incidents of abuse by employers and co-workers.

220. *Simonton*, 232 F.3d at 35.

221. *See id.* at 37.

222. *Id.* at 35.

223. *See Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (distinguishing that same-sex harassment is only actionable where harasser is gay), *abrogated by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

stereotypes. Plaintiffs may recover when they are discriminated against because of gender stereotypes,²²⁴ but there is little difference between a stereotype based on gender and one based on sexual orientation. A gay man who likes to wear a dress to work does not exhibit behavior of a typical male in society, but behavior that is also atypical for an average gay male as well.

Not all homosexuals conduct themselves in a similar manner. When a homosexual is discriminated against, the discrimination manifests because of a perceived difference in typical behavior for a person of that gender, and as a result of the assumption that the behavior is abnormal for a homosexual person. This hypothetical is merely the tip of the iceberg; every single instance of gender stereotyping involving a homosexual person necessarily implicates sexual orientation discrimination. The courts are left to make the determination as to the true cause of the discrimination without any bright line rule; it is only human nature that judges fall back on experience and bias to make a decision.

As illustrated by state statutes that attempt to define sexual orientation, the category is simply too broad to allow for easy definition and instead find coverage under the umbrella term of “sex” in Title VII. While the federalist system allows for states to make their own constitutional protections more liberal than the federal government, in Title VII the federal government has specifically targeted public education and the ever expanding category of sex to protect.²²⁵ States may enact parallel protections in other occupational areas, but such statutes should be considered unnecessary and redundant under a correct jurisprudence concerning Title VII.

If the morals and values of society are found in republicanism, and republicanism encourages free discourse, raising citizens and raising good business people should not be adversely affected by lesbian, gay, bisexual, or transgender teachers any more than teaching by mediocre scholars, philosophers, and businesspeople. Courts have enforced equal access to schools for gay students;²²⁶ the Fourth Circuit has determined that retaliation against teachers for pushing for minority inclusion in

224. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No.102-66, 105 Stat. 1071, *as recognized in* *Landgraf v. Usi Film Prods.*, 541 U.S. 244, 251 (1994).

225. 42 U.S.C. § 2000e-16(b).

226. *See* *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003); *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1094-95 (C.D. Cal. 2003).

educational programs is contrary to Title VII.²²⁷ If such protections are extended to a diverse student body, these protections must equally extend to a diverse faculty that is representative of the diversity of society at large.

Teachers are singularly important to children as role models, but a role model is not a narrow stereotype.²²⁸ As America has become liberalized in the forty years since Title VII, America's perception of homosexuals and the attitude towards homosexual rights have changed greatly. In 2000, 83% of Americans believed that homosexuals deserved protection from employment discrimination based upon their sexual orientation.²²⁹ The most obvious way to protect homosexuals is to update Title VII's interpretation of "because of sex" discrimination to include discrimination based upon sexual orientation. Despite efforts in recent years for an amendment of Title VII, this goal has not yet been achieved, and perhaps no field suffers more from Title VII's deficiencies than the field of education.

An expansion of Title VII's protection was a key issue debated between Democratic Presidential candidates Bill Bradley and Al Gore in 2000.²³⁰ In the 2004 Presidential race, incumbent George W. Bush and Senator John F. Kerry debated gay marriage and the validity of Bush's proposal to amend the Constitution to define marriage as only between a man and a woman, or "to write discrimination into the Constitution," the description offered and firmly railed against by Kerry.²³¹ These key debates show that homosexual issues have not receded into the past, but are on the forefront of current events. The gay rights movement that began in the 1960s and 1970s continues to gain ground,²³² showing that there is a population of individuals in America who will not subvert to opinions that homosexuality is a choice, but recognizes distinct biological characteristics.²³³ This recognition is not only limited to

227. See *Peters v. Jenney*, 327 F.3d 307, 320-21 (4th Cir. 2003).

228. Hooker, *supra* note 4, at 2.

229. See John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46, 48. Compare this finding with that of a 1977 study which found only 55% of Americans would support protection for sexual orientation discrimination in the workplace. *Id.* See also Eisenmenger, *supra* note 16, at 236.

230. See Chris Bull, *Bill Bradley Wants You!*, THE ADVOCATE, Oct. 12, 1999, at 26, 31 (arguing that while Al Gore attempted to extend sexual orientation rights through the promulgation of the Employment Non-Discrimination Act, Bradley proposed instead that Title VII extend to protect sexual orientation discrimination).

231. Adam Nagourney & David D. Kirkpatrick, *The 2004 Campaign: Same-Sex Marriage; Urged by Right, Bush Takes on Gay Marriages*, N.Y. TIMES, July 12, 2004, at A-1.

232. See DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* passim (St. Martin's Press 2004).

233. Wardle, *supra* note 166, at 999.

lesbian and gay individuals, but to straight allies and politicians who must contend with this growing demographic and constituency.²³⁴ In the 2004 election, although many states passed constitutional amendments barring gay marriage or defining marriage as between a man and a woman, the issue became a part of national discussion.²³⁵ In many cases, the states that passed such amendments also provide expanded protections against workplace discrimination and increased benefits for domestic partnerships.²³⁶

Teaching is one of the most important jobs in America, requiring the care, responsibility, and education of children, and this significance makes extending gay rights into this arena particularly controversial. Several concerns are repeatedly voiced by those who disagree with the employment of homosexual teachers, such as the idea that homosexuality will be taught in the classroom, that the presence of homosexual teachers as teachers and role models to the students might turn them queer, or that students may be in danger of attack by homosexual teachers.²³⁷ These fears may prevent the hiring or retention of many qualified teachers.²³⁸ The reality is that students are at greater risk of attack by apparently straight parents, family members, and other community leaders.²³⁹ These fears can prevent the hiring and retention of qualified teachers, doing a greater disservice than a service to students, particularly during times of educator shortages.²⁴⁰ During

234. See Gary J. Gates, *Gay Demographics Could Reshape Electoral Landscape*, USA TODAY, Nov. 15, 2007, at A-11.

235. *Voters Approve Gay Marriage Bans*, CHICAGO TRIBUNE, Nov. 3, 2004, at 17.

236. See, e.g., Mark Niquette, *Law an Obstacle for Gay Workers: Marriage Ban Limits Rights*, Governor Says, COLUMBUS DISPATCH, May 18, 2007, at B-3; *Domestic Partners Bill Approved*, LOS ANGELES TIMES, May 3, 2007, at 16; *Michigan Governor Forbids Sexual Discrimination*, DETROIT FREE PRESS, Dec. 24, 2003, at 2B.

237. See Robert N. Rowe, *Homosexual Teachers in the Classroom: The Debate Continues*, 79 CLEARING HOUSE: J. OF EDUC. STRATEGIES, ISSUES & IDEAS 207, 207 (2006).

238. See *id.* Research has also shown that sexual orientation of children is determined either at birth or very early in a child's development, long before he reaches school. See Women's Ctr., S. Conn. State Univ., *Homophobia: Fighting the Myths*, <http://www.southernct.edu/womenscenter/homophobia/> (last visited Mar. 19, 2008).

239. Studies have shown the theory that homosexuals are more likely than heterosexuals to be pedophiles and child molesters to be a myth. See A. NICHOLAS GROTH, *MEN WHO RAPE* 148-49 (1979) (citing that heterosexual adults are more likely to be a threat to children than homosexual adults); see also DIANA E. H. RUSSELL, *THE SECRET TRAUMA passim* (1986) (arguing that 95% of women participating in a study in San Francisco who had experienced sexual abuse had experienced that abuse from a male family member rather than from a stranger).

240. During World War II, there was an extreme teacher shortage in the United States, and many teachers held emergency certificates. JOHANSEN, *supra* note 201, at 28. Based on Ms. Hatami's personal experience, high demand for teachers similarly existed in Texas circa 2000, where many teachers received probationary and emergency certificates via alternative educator

shortages, and to a lesser extent during times of regular market supply and demand, the imperative of getting certified, qualified, and talented teachers in the classroom is difficult.²⁴¹ The No Child Left Behind Act is an example of the government's emphasis on the employment of exemplary teachers;²⁴² if gay, lesbian, and bisexual teachers are excluded from this workforce, then students become the true victims of such discrimination, suffering injury to their educational potential when taught by lesser qualified individuals who may have their jobs solely because they fit the heterosexual "norm."

A homosexual teacher is not by definition an unskilled teacher, rather, his or her sexuality has no bearing upon the ability to teach. The knowledge that a person is homosexual confuses morality or lifestyle with skill level.²⁴³ Lesbian and gay teachers are just as competent as their heterosexual counterparts but cannot be expected to perform as highly without adequate employment protection because of constant fear that they will be mocked, insulted, and emotionally attacked because of their sexuality without a means to seek recourse.

The curriculum of public schools has changed over the decades, evolving to meet the social and political needs of the day and is now a more fluid, individually tailored endeavor.²⁴⁴ The curriculum of early schools was heavily indoctrinated with Christian values. However, there were a number of reformers who sought to change this indoctrination, arguing that the rights of the individual were being subordinated by common education.²⁴⁵ Additionally, democracy was not as we know it today, but instead was wrought with the inequities of a colonial aristocracy.²⁴⁶ As American democracy developed, so did the American

preparation programs.

241. Michael J. Pitrelli, Assoc. Deputy Under-Sec'y, U.S. Dep't of Educ., Speech at Southwest Regional Summit on Teacher Quality: Meeting the Highly Qualified Teachers Challenge (Apr. 4, 2003), available at <http://www.ed.gov/news/speeches/2003/04/04082003.html>.

242. See *id.*

243. Transcript: Gregory Koukl, Confusing Skills and Morals, Stand to Reason, Feb. 27, 1995, available at <http://www.str.org/site/News2?page=NewsArticle&id=5184>.

244. See, e.g., The Individuals With Disabilities Education Act, 20 U.S.C. § 1414 (requiring Individualized Education Plans and vocational transition plans for learning disabled students).

245. See CREMIN, *supra* note 82, at 69. See also LESTER A. KIRKENDALL ET AL., GOALS FOR AMERICAN EDUCATION, WRITTEN FOR THE COMMISSION ON EDUCATIONAL RECONSTRUCTION OF THE AMERICAN FEDERATION OF TEACHERS 8 (1948) ("This concept of democracy closely parallels the teachings of Christianity in its emphasis upon moral stamina and personal integrity. These traits of character are essential to effective democratic social organization. Since democracy implies a society concerned with the worth of each individual as a personality, those things which do violence to the personality of individuals are undemocratic.").

246. See MONROE, *supra* note 12, at 192-93.

school, through the New Deal Era, the Civil Rights movement, and the Gay Rights movements. Women took their place in the public schools from the early 1900s forward,²⁴⁷ but schools have always reflected the conflict over society and the role of gender in society.²⁴⁸ Viewing sexual orientation discrimination as a kind of sexism, we should no longer attempt to isolate and alienate gay students and prohibit gay teachers.

At any point in social history, there exists the view that certain moral standards are slowly eroding and that changes need to occur, but that is not caused by progressive social attitudes of schools or positive reinforcement of civic virtue.²⁴⁹ Rather, it is in response to social difficulties and the situations of at-risk youths that schools expand social welfare and inclusion programs.²⁵⁰ Studies have shown that gay youths are the statistical leaders in successful suicides;²⁵¹ one of the social difficulties that schools need to respond to is the discriminatory environment in the student body towards homosexuals, in order to decrease this statistic. If teachers reflected the relevant student population, providing guidance and positive role models as opposed to remaining in the closet, this statistic might decline.²⁵²

247. TYACK, *supra* note 184, at 90. The issue of race in schools and the place of African Americans has been fought out in schools since the Civil War era, with slow, incremental change as the purpose and methods of teaching have changed. *Id.* However, as a society, we no longer consider interracial marriage taboo, or isolate black from white students. In fact, schools now strive for diversity in the student body and in faculty. *Id.*

248. *See id.* at 91.

249. *See* KIRKENDALL ET AL., *supra* note 245, at 6. At the time, the AFT recognized seven goals for American Education. "1. The schools must help close the gap between scientific advance and social retardation." *Id.* at 9. "2. The schools must prepare individuals to create and live effectively in a cooperative, independent society." *Id.* at 10. "3. The school must extend the interest and concern of people in international cooperation and the maintenance of a just and durable peace." *Id.* at 13. "4. The schools must help in securing acceptance of the ideals of a democracy in social, economic, and political arrangements." *Id.* at 14. "5. The schools must develop values that will serve to guide the individual toward high standards of moral conduct and ethical living." *Id.* at 15. "6. The schools must provide for the development of creative abilities and afford avenues for expression in constructive activities." *Id.* at 16. "7. The schools must insure the mastery of the common integrating knowledge and skills necessary to effective daily living." *Id.* at 18. Of course, these goals were promulgated during a time when most of the nation was segregated and schools had little to no diversity, and hatred against Japanese-Americans was high. *Id.* at 4.

250. TYACK, *supra* note 184, at 109.

251. *See* Micki Archuleta, Suicide Statistics for Lesbian and Gay Youth: A Bibliography, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=105x754917 (last visited Mar. 19, 2008). *Contra* Peter LaBarbera, the Gay Youth Suicide Myth, <http://www.leaderu.com/jhs/labarbera.html> (last visited Mar. 19, 2008).

252. It is not unusual to see lesbian and gay celebrities or individuals on television (e.g., Ellen Degeneres, MTV's *The Real World*). However, such chimerical personalities continue to be out of reach for today's youth, who need a recognition of their worth and value from people they respect and know, namely, teachers.

The category of “sex” protection in Title VII has always been understood to include gender.²⁵³ It has been expanded to include discrimination on sex stereotypes and against transgender individuals.²⁵⁴ Because one of the key purposes of Title VII is to protect individuals from discrimination in schools, the expansion of the term “sex” should occur first in the public school setting, where teachers and administrators of public schools help to indoctrinate the next generation with the ideals of democracy, civil rights, equal protection under the law, and freedom from discrimination.

Once the “because of sex” protection is interpreted to include sexual orientation and other gender disparities, the door to the Title VII proof structure opens for plaintiffs. Possibly useful for victims of sexual discrimination in hiring practices is the disparate impact of a pattern and practice of discrimination in hiring, promotion, and other employment activities by educational institutions against gay, lesbian, bisexual, and even transgender teachers. The sheer amount of labels assigned to this group, however, makes the assessment of the relevant percentage of the population that reflects these characteristics difficult, and therefore almost impossible to compare to the workforce. Also problematic are the variations of self-identification among this multi-faceted population.

The leading case in this area is *Hazelwood School District v. United States*.²⁵⁵ In *Hazelwood*, the government created a pattern and practice offense, alleging that the school district had a history of “racially discriminatory practices,” “statistical disparities in hiring,” hiring practices that were mostly subjective, and “specific instances of alleged discrimination against fifty-five unsuccessful “Negro” applicants for teaching jobs.”²⁵⁶ The key conflict in *Hazelwood* was the differing analysis of the statistical evidence that the District Court and Appellate Court offered.²⁵⁷ The District Court, examining the relatively small number of “Negro” teachers, determined that population to be a sufficient reflection of the percentage of “Negro” students within the school district.²⁵⁸ The Court of Appeals for the Eight Circuit reversed the lower court decision, analyzing the statistical data by examining the small percentage of teachers employed in Hazelwood to the percentage

253. See *supra* Part I

254. See *supra* Part I-II.

255. 433 U.S. 299 (1977).

256. *Id.* at 303.

257. *Id.* at 304-05.

258. *Id.* at 304.

of “Negro teachers in the relevant labor market.”²⁵⁹

There is difficulty finding an appropriate procedure to determine the percentage of teachers in a particular school district that identify themselves with a specific segment of the sexual orientation spectrum that are employed in a certain school district. Given the current state of the law, teachers will often not self-identify because there is little legal protection for the property interest in their jobs if they identify as lesbian, gay, bisexual, or transgender.²⁶⁰ Additionally, there is difficulty determining the percentage of similarly situated teachers in the relevant labor market. Again, this would require self-identification in the census data, which is flawed at best: for example, the 2000 Census, while identifying the occupation and geographic location of individuals, identified them only by the characteristics of “gender, race, ethnicity, education, age, industry and earnings.”²⁶¹ Since the Census does not account for sexual orientation in its data gathering, other methods of statistical research would need to be employed, leading to fluctuations in statistical data given the varying reliability of other data collection tools.

There is also something to be said for the District Court’s analysis in *Hazelwood* that the teaching population should reflect the student population of the school or school district.²⁶² But this has less to do with the disparate impact on employment discrimination than the necessary function of public schools. If public schools are to provide a

259. *Id.* at 305. Of course, determining the relative labor market is a task in and of itself. The Court of Appeals determined that the relevant labor market was St. Louis County and St. Louis City. *Id.* However, the Supreme Court determined that the relevant labor market involved a five part factor test:

(i) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year in which the census figures were taken; (ii) to what extent those policies have changed the racial composition of that district’s teaching staff from what it would otherwise have been; (iii) to what extent St. Louis’ recruitment policies have diverted to the city, teachers who might otherwise have applied to Hazelwood; (iv) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and (v) what the experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market.

Id. at 311-12. Determining the relevant labor market according to this factor test adds to the complications of determining whether there has been disparate impact on the basis of sex or sexual orientation, and will not be explored here; rather, the argument assumes that the relevant labor market of qualified teachers is pre-determined. In any case, of course, the relevant labor market would be hotly contested.

260. *See supra* Parts I-II.

261. Press Release, U.S. Census Bureau, U.S. Department of Commerce (Dec. 29, 2003) (on file with author).

262. *Hazelwood*, 433 U.S. at 304.

representative illustration of society so that they may better achieve the ancient goals of indoctrination of democratic values, including liberty, freedom, and equality, then it is imperative that faculty are representative of the student body.

CONCLUSION

The category of “sex” discrimination in Title VII should be expanded to include sexual orientation. In the past, sex discrimination has been found where individuals, either women or men, have been discriminated against because they do not meet the perceived social norms or stereotypes for their gender. Likewise, when lesbian and gay individuals are discriminated against, it is because they do not meet the perceived social norms for behavior, personality, dress, and personal and sexual relationships. Discrimination against men because they sleep with men, instead of women, treats men in a different way than women, manifesting the dominant heterosexual sex stereotype that only women are allowed to sleep with men. This stereotype is further propounded when discrimination is allowed to pass unchallenged.

Giving teachers the safety and protection that should be accorded under Title VII begins with a judicial reinterpretation of “because of sex.” Although other Supreme Court decisions have willingly expanded the scope of this language to cover such abstract and indeterminate ideas as gender stereotyping,²⁶³ the Supreme Court has still denied sexual orientation discrimination the protection that it deserves in order to ensure the fundamental rights of America’s teachers. As a result, the Courts of Appeals have been left to their own discretion to fill-in the blanks, so to speak, and determine appropriate policy for grey areas, including cases involving transgendered individuals or conduct that is clearly discriminatory because of sexual orientation, but has an unclear overlap with gender stereotypes. This has led to the particularly conflicting results in the Ninth Circuit in *Nichols* and both *Rene I* and en banc *Rene II*. Given the change in the social climate over the past forty years, in conjunction with the public policy that is furthered by enforcing the stated purpose of Title VII to include within its scope public education and thereby protect all teachers in public schools, which protection promotes better role-models and a safer learning environment

263. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No.102-166, 105 Stat. 1071, *as recognized in Landgraf v. Usi Film Prods.*, 541 U.S. 244, 251 (1994).

as a result, the Supreme Court has no reason to rigidly insist that “because of sex” does not implicate sexual orientation. A bright-line rule prohibiting sexual orientation is both sensible for judicial application, and absolutely essential to the sanctity of public education institutions.

The goal of schools is to indoctrinate the next generation of citizens with republican values and maintain the status quo, or in other words, perceived social norms. In order to do this, schools seek to hire teachers who have high-quality character and traits that make them a desirable role model. If the school’s goal is to indoctrinate the next generation with the dominant “norm” of the day, then schools may be able to attempt to erect a bona fide occupational quality defense to a sex discrimination claim, saying that it is essential to the character of the business that as role models, teachers need to have normative heterosexual relationships and marriages. However, the social and political climate in America is such that this “norm” is not absolutely clear, and the issue of whether homosexuals have certain fundamental rights or whether their relationships should be recognized is subject to national political discussion, such that courts would have no clear guidance whether or not to recognize a bona fide occupational qualification defense.

Another pertinent argument reasons that teachers, as role models, should accurately reflect the population they serve. Often, students who do not identify with the status quo are bereft of positive role models such as “out” teachers, since teachers often fear losing their jobs. Such students are more prone to suicide and other destructive behaviors, and are less likely to become productive members of society.²⁶⁴ If the goal is to produce well-rounded citizens, then curbing this tendency towards destructive behaviors should be a part of the underlying school policy. Therefore, students should have the opportunity to utilize many resources at school, including teachers that reflect the diverse characteristics of *all* members of the student body.

Although the court in *Hazelwood* declined to use the relevant student population to determine the proportion of faculty in a school district should reflect different races, it did require schools to pull from the relevant qualified labor market.²⁶⁵ It is highly likely that looking at such a pool, there would be a number of gay or lesbian teachers. Hiring policies should create faculty that reflect this population, and receive

264. See sources cited *supra* note 251.

265. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 313 (1989).

protection in their working environment from Title VII, given the explicit mention of the application of Title VII to public education in its preamble. Teachers from all walks of life and sexual preferences are currently teaching in our schools; it is time to give them recognition for the job they perform and take them out of the dark shadow of fearing job loss because of sexuality. As always, the United States government needs to play “catch-up” with a number of states and foreign jurisdictions.

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* J.D., 2006, Hofstra University School of Law. Thanks to David Zwerin, for his excellent legal analysis, passion for the topic, and dedication. I also extend my gratitude to Professor Grant M. Hayden for his guidance and knowledge of employment and labor law. This note is dedicated to my parents, Siavash and Anne Hatami, along with my extended family, who have encouraged both my teaching and legal careers. A truncated version of this note appeared previously in the New York State Bar Association Labor and Employment Law Newsletter, Fall 2006.

** J.D., 2006, Hofstra University School of Law. First and foremost, I would like to specially acknowledge my wonderful co-author who was a constant inspiration and an endless source of information throughout this project. Thank you Mom, Dad & Sarah for always encouraging me in every way possible and giving me strength my whole life. Thank you also to my friends Tom, Nik, Brandon & Shaina, for presenting an excellent outside point of review, for challenging me to strive for utmost clarity, and for being among my closest friends.