Heterosexuality and Title VII

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INTRODUCTION

Dawn Dawson was an outsider among outsiders.1 A self-described gender-nonconforming lesbian woman,2 Dawson worked as a hair assistant and stylist trainee at Bumble & Bumble, a high-end salon in New York City.3 Her coworkers at the salon were an eclectic mix of outsiders, and the salon management encouraged its employees to express their nonconformist identities openly.4 Yet Dawson could not fit in with her coworkers. They teased her, saying she should act less like a man and more like a woman.5 They demeaned her in front of clients by referring to her as “Donald.”6 And they ridiculed her because of her sexuality, announcing that she “needed to have sex with a man” and that she wore her sexuality “like a costume.”7 After working at Bumble & Bumble for less than two years, Dawson was fired from her hair assistant position and kicked out of the salon’s stylist training program.8 When the salon manager met with Dawson to inform her of these decisions, the manager explained that Dawson would never be able to get a stylist position outside New York City because her demeanor and appearance would frighten people.9

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3 *See Dawson II, 398 F.3d at 213 (noting that Dawson describes herself as a “lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman”).

4 *See id. at 213.

5 The district court described Bumble & Bumble, the salon where Dawson worked, as a “heterogeneous environment that strives for the avant garde and extols the unconventional.” Dawson I, 546 F. Supp. 2d at 311. The court also noted that the salon’s employees “embody many lifestyles and sexual preferences and reflect varying physical appearances, overall looks, and different manners of hair dress and clothing.” Id. at 310. While Dawson worked at the salon, her coworkers included numerous lesbians and gay men, a bisexual, a female-to-male transsexual, and a pre-operative male-to-female transsexual, who was transitioning on the job at the time of the relevant events. See Dawson II, 398 F.3d at 214.

6 Id. at 215.

7 Id.

8 Id. According to Dawson, one coworker said, “You know what you need, Dawn, you need to get fucked.” Dawson I, 546 F. Supp. 2d at 307.

9 Dawson II, 398 F.3d at 214–215.

10 Id. at 215–216.
Dawson brought a sex discrimination claim under Title VII, alleging that she was both fired and harassed because of, among other things, her failure to conform to traditional gender stereotypes. Ultimately, Dawson lost her lawsuit. In rejecting her claims, the Second Circuit held that Dawson was discriminated against not because of her gender-nonconformity but because of her sexual orientation. And because sexual orientation is not a protected trait under Title VII, the court held that Dawson did not state an actionable discrimination claim.

The lesson of Dawson’s case is that an employee’s sexual orientation can swallow up an otherwise actionable claim of sex discrimination. Even though Dawson’s Title VII claims were based on her sex and her gender-nonconformity, the court concluded that Dawson was trying to bootstrap protection for sexual orientation into Title VII by framing discrimination targeted at her sexual orientation as a claim of discrimination based on her gender-nonconformity. This has become a common story for lesbian and gay employees. In the absence of statutory protection for sexual orientation discrimination at the federal level, lesbian and gay plaintiffs frequently lose their sex discrimination and gender-stereotyping claims because of their sexual orientation, with courts relying on the same reasoning as the court in Dawson’s case used to reject her claims.

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11 In addition to her gender-stereotyping claim, Dawson also brought a discrimination claim under the New York Human Rights Law and the New York City Human Rights Law, alleging that she was discriminated against because of her sexual orientation. See Dawson II, 398 F.3d at 213.

12 See Dawson II, 398 F.3d at 217–220.

13 See id. at 217–218 (“Thus, to the extent that she is alleging prima facie case under Title VII because the statute does not recognize homosexuals as a protected class.”).

14 See id. at 218–220 (noting that “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII”) (internal citations omitted) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)).

15 All courts agree that Title VII’s prohibition on discrimination “because of” sex does not cover cases involving discrimination targeted at a plaintiff’s sexual orientation. See, e.g., Bibby v. Phila Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).

In this paper, I offer a critique of these “bootstrapping” cases from a perspective that has been overlooked in employment discrimination law and scholarship. The focus of my critique is heterosexuality. In contrast to homosexuality\(^\text{17}\) and, to a lesser extent, bisexuality\(^\text{18}\)—both of which have been the subject of extensive scholarly attention—heterosexuality is largely missing from scholarly discussions about sexuality. Yet the absence of heterosexuality from the scholarly literature is not surprising once one realizes that, in our culture, we tend not to think of heterosexuals as having a sexual orientation. Instead, heterosexuality is merely the normative measuring stick against which we judge non-normative sexual orientations.\(^\text{19}\) As such, heterosexuality tends to slink into the background of discussions about sex and sexuality. This is especially true of legal discourses about sex and sexuality, as courts rarely even acknowledge the existence of heterosexuality, let alone consider its legal implications.

In the realm of employment discrimination law in particular, courts hardly ever consider the ways in which employees’ discrimination claims implicate their heterosexuality.\(^\text{20}\) This is the heart of my critique of the “bootstrapping” cases. As I argue in this paper, because heterosexuality is invisible in our culture, courts often fail to recognize when an employee’s...
discrimination claim implicates her heterosexuality. To amplify this claim, I offer a novel reading of the Supreme Court’s groundbreaking decision in Meritor Savings Bank v. Vinson,\textsuperscript{21} where the Court established that claims of hostile environment sexual harassment can constitute unlawful sex discrimination in violation of Title VII.\textsuperscript{22} Specifically, my reading of Meritor demonstrates that even though plaintiff Mechelle Vinson’s sexual harassment claim was based at least in part on her heterosexuality, the Court did not regard her sex discrimination claim as an attempt to bootstrap protection for sexual orientation into Title VII.

Thus, my reading of Meritor suggests that there is a double standard at work in employment discrimination cases. For lesbian and gay employees, their sexual orientation amounts to a burden in employment discrimination cases, as courts are primed to reject otherwise actionable discrimination claims on the theory that such claims are an attempt to bootstrap protection for sexual orientation into Title VII. Yet rather than being burdened by their sexual orientation, heterosexual employees are free from theirs. Because heterosexuality is invisible in our culture, courts simply cannot recognize when an employee’s discrimination claim implicates her heterosexuality. As a result, no court will ever conclude that a heterosexual employee is raising a sex discrimination claim as a means to bootstrap protection for sexual orientation into Title VII. Put simply, heterosexuality and homosexuality are not similarly situated under Title VII.

In general, I have two broad goals in this paper. The first is to call greater attention to heterosexuality. Because heterosexuality is presumed in our culture, we rarely think of heterosexuals as having a sexual orientation. In the discussion that follows below, I argue that this is the result of what I call the “paradox of privilege.”\textsuperscript{23} The thrust of the “paradox of privilege” is that heterosexuality is at once everywhere and nowhere—everywhere because it is normative, yet nowhere because its normativity works to render it invisible. One consequence of the paradox of privilege is that “sexual orientation” has become synonymous in our culture with “homosexuality.” As a result, heterosexuality is effectively erased from discussions of sexual orientation. In exploring these ideas, I tap into an emerging field of literature often referred to as “critical heterosexual studies” (CHS).\textsuperscript{24} CHS is part of a new generation of critical

\textsuperscript{21}477 U.S. 57 (1986).

\textsuperscript{22}Id. at 64–67.

\textsuperscript{23}See infra Part II.B.2.

\textsuperscript{24}I discuss “critical heterosexual studies” (CHS) infra Part II. CHS is a recent addition to the critical scholarship on sex and sexuality. The seminal text in the field is a 1995 book by historian Jonathan Ned Katz. See Jonathan Ned Katz, The Invention of Heterosexuality (1995).
scholarship that focuses on insider identities, such as whiteness and masculinity. My hope is that this paper will contribute not only to the CHS literature, but also to this larger body of critical work on insider identities. In particular, my goal is to highlight the ways in which the cultural construction of heterosexuality informs the legal construction of heterosexuality in the realm of employment discrimination law.

Although this paper can provide a free-standing contribution to our understanding of the legal construction of heterosexuality, my hope is that it will do more than that. At the same time as it shines a light on heterosexuality, this paper also reveals a great deal about how employment discrimination law treats sexual minorities, most notably lesbians and gay men. In fact, the discussion that follows is as much about homosexuality as it is about heterosexuality. This is intentional. Perhaps the most exciting aspect of the CHS literature is that it pushes us to reconsider our attitudes toward not only heterosexuality but also homosexuality. Because heterosexuality is invisible in our culture, homosexuality tends to overshadow heterosexuality. CHS challenges this tendency. And in doing so, CHS forces us to re-examine the relationship between heterosexuality and homosexuality. Thus my second broad goal in this paper is to use heterosexuality as a lens through which we can reconsider the legal standing of lesbians and gay men in employment discrimination law.

This paper proceeds in three parts. Part I provides context for my argument by situating the “bootstrapping” cases more broadly in Title VII case law. In particular, it sketches the contours of the case law interpreting Title VII’s prohibition on discrimination “because of” sex. Significantly, courts have distinguished discrimination claims based on biological sex (i.e. femaleness and maleness) and gender-nonconformity (i.e. femininity and masculinity) from claims based on sexual orientation, holding that

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27 I elaborate on the differences between these traits further below. See infra Part I (defining “sex,” “gender,” and “sexual orientation” for purposes of Title VII discrimination cases).
the former claims are actionable under Title VII, while the latter claims are not. This distinction undergirds the reasoning of the “bootstrapping” cases. In these cases, courts presume that lesbian and gay employees are bringing discrimination claims based on their gender-nonconformity as a means to steer courts away from rejecting their claims on the grounds that sexual orientation is not a protected trait under Title VII.

In Part II, the paper turns to my reading of Meritor Savings Bank v. Vinson. This case study begins with a review of the facts of Meritor, and then proceeds to consider the Court’s conclusion that Mechelle Vinson was discriminated against “because of” sex in violation of Title VII. From there, I argue that the Court’s analysis is incomplete, as it does not take into account Vinson’s heterosexuality. By focusing on the relational nature of sexual orientation, this discussion demonstrates that Vinson was not discriminated against solely because of her sex, but because of both her sex and her sexual orientation. In this regard, Vinson’s case is perhaps the best example of how courts take heterosexuality for granted in employment discrimination cases, as the Court never even acknowledges that Vinson’s sexual harassment claim implicated her heterosexuality. Moreover, Vinson’s case is also useful as a means to compare how courts treat heterosexuality and homosexuality differently. Indeed, in contrast to Dawn Dawson’s case, the Court in Meritor did not even consider the possibility that Vinson’s sexual harassment claim was an attempt to bootstrap protection for sexual orientation into Title VII. Thus heterosexual employees like Mechelle Vinson are not affected by their heterosexuality, while lesbian and gay employees like Dawn Dawson are burdened by theirs.

In Part III, I carve out a new path for courts to follow in considering discrimination claims that implicate an employee’s sexual orientation. In a word, this new approach seeks to “re-orient” Title VII. My approach urges courts to treat sexual orientation as a neutral trait for purposes of Title VII discrimination claims. Under my approach, an employee’s sexual orientation should neither prevent an employee from bringing an otherwise actionable discrimination claim, nor make it easier for an employee to articulate such a claim. In effect, my new approach renders an employee’s sexual orientation irrelevant for purposes of Title VII discrimination claims. In this sense, an employee’s sexual orientation is no different than any other trait that is not protected under Title VII.

I. CONTEXT

In this Part, I lay the foundation for my argument by outlining the ways in which sexuality is constructed in employment discrimination law. In particular, I focus my discussion on how the courts have patrolled the boundary between sex and gender on the one hand and sexual orientation
on the other. This boundary is important because it establishes what is and is not actionable under Title VII, as sex and gender are protected traits while sexual orientation is not. At the same time, this boundary also dictates which theory of discrimination employees must put forth in order to bring actionable discrimination claims. For instance, in response to such line-drawing by the courts, lesbian and gay plaintiffs have sought to frame their discrimination claims in terms of their sex and gender and not their sexual orientation, so as to increase their chances of articulating an actionable claim. As Dawn Dawson’s case demonstrates, however, courts are primed to reject their claims on the grounds that sexual orientation is not protected under Title VII.

Before turning to that discussion, I first need to define how I will be using three key terms—sex, gender, and sexual orientation. For purposes of this paper, “sex” refers to physical and biological traits, that is, a person’s maleness or femaleness. The most common of these traits, of course, is sexual genitalia. By contrast, “gender” refers to cultural expressions of masculinity and femininity. A person’s sex and gender need not correspond with each other, as some men are more feminine than they are masculine and some women are more masculine than feminine. The third term, sexual orientation, denotes a person’s sexual attractions and


See Francisco Vlades, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to its Origins*, 8 Yale J. & Humanities 161, 164 (1996) (“‘[S]ex’ . . . denotes the physical attributes of bodies, specifically the external genitalia.”).


See Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int’l L. 379, 379 (1999) (“The term ‘gender’ here refers to the social construction of differences between women and men and ideas of ‘femininity’ and ‘masculinity’—the excess cultural baggage associated with biological sex.”). This understanding of gender is widely accepted, so widely in fact that it has made its way into the law. See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (“Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word “gender” has acquired the new and useful connotation of attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.”)


desires, that is, whether a person is sexually attracted to members of the same, different, or both sexes.\textsuperscript{34} That sex, gender, and sexual orientation are interconnected is clear. What is more important for purposes of this paper, however, is that although these traits are closely intertwined, courts are often forced to draw fairly strict lines between them because sex and gender are protected traits under Title VII and sexual orientation is not.

### A. Protected Traits

In order to articulate a discrimination claim under Title VII, plaintiffs must satisfy a causation requirement set forth by the statute.\textsuperscript{35} The relevant statutory provision for purposes of this paper is Title VII’s prohibition on sex discrimination.\textsuperscript{36} In order to state an actionable sex discrimination claim, a plaintiff must prove that she suffered unlawful discrimination “because of” sex and not “because of” some other characteristic that is not protected by Title VII, such as eye color or whether she is a Chicago Cubs fan.\textsuperscript{37} While this requirement is easy to meet in some cases,\textsuperscript{38} in others it is hard to pinpoint whether the alleged discriminatory conduct is targeted at a plaintiff’s sex and not at some other unprotected trait. This is especially true in cases involving lesbian and gay employees, such as Dawn Dawson, who often have great difficulty convincing courts that the discrimination they faced in the workplace was on their sex or gender and not their sexual orientation.

Courts have reacted unfavorably to these claims in large part because of the legislative history surrounding the passage of the Civil Rights Act.\textsuperscript{39}

\textsuperscript{34} See Holning Lau, \textit{Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law}, 94 CAL. L. REV. 1271, 1286 (2006) (noting that “sexual orientation is the ‘direction of one’s sexual interests towards members of the same, opposite, or both sexes,’ and it seems that this definition is widely accepted.”) (citing the \textit{American Heritage Dictionary}).

\textsuperscript{35} See 42 U.S.C. § 2000e-2(a)(1) (“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 individuals race, color, religion, sex, or national origin”) (emphasis added).

\textsuperscript{36} See id.


\textsuperscript{38} See, e.g., EEOC v. Farmer Bros. Co., 31 F.3d 891, 896 (9th Cir. 1994) (involving case where employer said that he “‘would spend every last dime’ to keep women employees from coming back” and that “the only people you will be seeing running the lines will be men; there will be no more women hired”).

In its original formulation, Title VII did not include a provision banning sex discrimination, as the primary purpose of the bill was to put an end to race discrimination. Only days before the House of Representatives was set to vote on the bill that would become the Civil Rights Act, Representative Howard Smith, the chairman of the House Rules Committee and a staunch opponent of the Civil Rights Act, offered an amendment to add sex to the list of impermissible bases for employment discrimination. As an opponent of the bill, Smith’s goal in proposing the amendment was not to broaden the scope of the bill but to kill it. Of course, his strategy failed and the final version of Title VII included the sex provision.

Because Smith introduced the amendment toward the end of the legislative process with the intent to kill the bill, however, there was no substantive legislative history defining the scope and meaning of the sex provision. And even though a number of scholars have offered exceedingly persuasive accounts of the history of Title VII’s sex amendment, challenging the view that the amendment was nothing more than an attempt to derail the legislation, courts have largely ignored these accounts in favor of the prevailing version. As a result, without legislative guidance as to the meaning and scope of the sex provision, courts have tended to interpret it narrowly.
1. **Sex**

Title VII protects against discrimination on the basis of sex. As the Supreme Court has made clear, this protection covers both male and female employees. In order to bring a sex discrimination claim, however, employees must prove that they were discriminated against because of their maleness or femaleness—that is, in their capacity as men and women—and not because of some other trait. For instance, say a female employee is fired for persistent absenteeism. Although Title VII prohibits discrimination on the basis of sex, this employee would not automatically be able to raise an actionable sex discrimination claim just because she is a woman. Rather, she must establish a nexus between the adverse employment action—in her case the firing—and her status as a woman. This is the causation requirement discussed above. In order to state an actionable claim for sex discrimination under Title VII, male and female employees alike must establish that the discrimination was “because of” sex. Throughout the paper I refer to these sex-based claims as sex *simpliciter* claims.

2. **Gender**

Title VII’s prohibition on sex discrimination extends beyond biological sex to protect against discrimination that is targeted at an employee’s gender. The Supreme Court first recognized the prohibition on gender discrimination in 1989, in *Price Waterhouse v. Hopkins*. In *Price Waterhouse*, Ann Hopkins was denied partnership at her consulting firm

F.2d 385, 386 (5th Cir. 1971) (noting that judicial interpretation of the sex provision is hindered by the absence of legislative history); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084–87 (7th Cir. 1984) (relying on the lack of legislative history to conclude that the sex provision does not forbid discrimination targeted at transsexuality). *But see, e.g.*, Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (holding that a gay plaintiff could bring an actionable discrimination claim based on his gender-nonconformity); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that transgender plaintiff can bring an actionable sex discrimination claim).

Of course, “sex” is actually in the text of the statute. See 42 U.S.C. § 2000e-2(a)(1) (“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 origin”) (emphasis added).


490 U.S. 228 (1989).
Despite having quite a successful work record,\textsuperscript{49} The partners’ primary reason for denying Hopkins partnership was that they thought she lacked the necessary interpersonal skills.\textsuperscript{50} In their reviews of Hopkins, some of the partners at the firm said that she was at times abrasive and overly aggressive and that she did not always treat the staff with respect.\textsuperscript{51} There were, however, undertones of sex discrimination in some of the reviews of Hopkins’s personality.\textsuperscript{52} For instance, one partner described her as “macho”; another partner said that she “overcompensated for being a woman”; and a third suggested that she take a course at charm school.”\textsuperscript{53} The most telling statement, though, came from the partner who was tasked with informing Hopkins of the firm’s decision not to promote her to partner. He suggested that in order to improve her chances for partnership, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.”\textsuperscript{54}

Ruling in favor of Hopkins, the Supreme Court held that such gender-stereotyping is evidence of sex discrimination.\textsuperscript{55} According to the Court, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”\textsuperscript{56} The Court went on to say that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”\textsuperscript{57} The thrust of the Court’s holding in \emph{Price Waterhouse} is that an employer cannot discriminate against employees for failing to conform to stereotypical expectations of how men and women are supposed to look and behave. Thus the gender-stereotyping claim is anchored to Title VII’s prohibition on discrimination “because of” sex.

To articulate such a gender-stereotyping claim, plaintiffs need to establish that they were discriminated against because they expressed a

\textsuperscript{49} See \textit{id.} at 233–34 (describing Hopkins’ many successes at the firm); \textit{id.} at 233–35 (describing Hopkins’ failed attempt at making partner). For a detailed discussion of Hopkins’ time at Price Waterhouse, see \textsc{Ann Branigar Hopkins, So Ordered: Making Partner the Hard Way} (1996).

\textsuperscript{50} \textit{See Hopkins}, 490 U.S. at 234.

\textsuperscript{51} \textit{See id.} at 234–35.

\textsuperscript{52} \textit{See id.} at 235 (“There were clear signs, though, that some of the partners reacted negatively to Hopkins’ personality because she was a woman.”).

\textsuperscript{53} \textit{See id.}.

\textsuperscript{54} Id.

\textsuperscript{55} \textit{See id.} at 250.

\textsuperscript{56} \textit{Id.} at 251.

\textsuperscript{57} Id.
gender that is stereotypically inconsistent with their sex.\footnote{I outline this way of understanding \textit{Price Waterhouse} in some detail in an earlier work. \textit{See} Zachary A. Kramer, Note, The “Ultimate” Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII, 2004 U. ILL. L. REV. 465, 483–89.} There are two component parts to this claim. The first is what I call the plaintiff’s “anchor gender.” A person’s anchor gender is the gender commonly associated with the person’s sex.\footnote{\textit{See id.} at 484.} Thus, a man’s anchor gender is masculinity, whereas a woman’s anchor gender is femininity. The second component is what I call “expressive gender.” Unlike a person’s anchor gender, which is tethered to and determined by a person’s sex, expressive gender refers to the person’s actual gender expression, that is, the gender expression the employee performs in the workplace.\footnote{\textit{See id.} at 484–85.} The gender-stereotyping theory announced in \textit{Price Waterhouse} relies on the relationship between a person’s anchor and expressive genders. For instance, consider the facts in Ann Hopkins’s case. Hopkins was a woman. Thus her anchor gender was femininity. Hopkins’ expressive gender, however, was not femininity but masculinity. Her coworkers saw her as macho and overly aggressive and they encouraged her to downplay her masculinity and highlight her femininity by putting on makeup, dressing more femininely, and talking more femininely.\footnote{\textit{See Price Waterhouse}, 490 U.S. at 250–51.} Because the partners reacted to the discrepancy between Hopkins’ anchor gender (femininity) and her expressive gender (masculinity), they discriminated against her because of her sex.

The gender-stereotyping theory is likewise available to male employees.\footnote{\textit{See Higgins v. New Balance Athletic Shoe, Inc.}, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotypical expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”) (citing \textit{Price Waterhouse}).} For a male employee to articulate such a claim, he must show that he was discriminated against because he failed to conform to stereotypical expectations of manhood, that is, that his expressive gender (femininity) did not correspond with his anchor gender (masculinity).\footnote{\textit{See Case, supra note} ____ at 46–57 (discussing cases involving effeminate men).} In terms of its overall scope, however, the prohibition against gender discrimination is more limited than the prohibition against sex discrimination. For instance, it only protects against discrimination
targeted at an employee’s gender-nonconformity.\textsuperscript{64} Thus, if a male employee is discriminated against because he is too masculine, he will not be able to avail himself of the gender-stereotyping theory.\textsuperscript{65}

Moreover, the gender-stereotyping theory does not capture discrimination based on gender identity. Although transgender employees can raise gender-stereotyping claims under Title VII,\textsuperscript{66} they must do so in their capacity as gender-nonconforming men and woman and not as transgender persons. For instance, in \textit{Smith v. City of Salem},\textsuperscript{67} Jimmie Smith, a firefighter in Salem, Ohio, was fired shortly after he began the process of transitioning from male to female.\textsuperscript{68} Smith brought a sex discrimination claim, which the Sixth Circuit sustained on the basis of the gender-stereotyping theory.\textsuperscript{69} In ruling for Smith, the court noted that \textit{Price Waterhouse} had “eviscerated” earlier cases which held that Title VII does not protect against discrimination based on transsexuality.\textsuperscript{70} According to the court, “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”\textsuperscript{71} The court went on to say that “a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where a victim has suffered discrimination because of his or her gender non-conformity.”\textsuperscript{72} In other words, Smith was able to articulate a sex discrimination claim based on the gender-stereotyping theory not because he was transgender, but


\textsuperscript{65} Once commentator seems to argue that the gender-stereotyping theory announced in \textit{Price Waterhouse} should extend to this situation. See Thomas Ling, \textit{Smith v. City of Salem: Title VII Protects Contra-Gender Behavior}, 40 HARV. C.R.-C.L. REV. 277 (2005).

\textsuperscript{66} See, e.g., Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

\textsuperscript{67} See id. at 568–69 (describing the circumstances surrounding Smith’s termination from the fire department). Technically, Smith was fired for insubordination. After Smith informed his supervisors that he had been diagnosed with Gender Identity Disorder (GID), he began to adopt a more feminine appearance in the workplace. In response, the department devised a plan whereby Smith would have to submit to extensive psychological examination. When Smith refused to comply with this plan, he was fired for insubordination. See id.

\textsuperscript{68} See id. at 571–75.

\textsuperscript{69} See id. at 573.

\textsuperscript{70} Id. at 575.

\textsuperscript{71} Id.
because he was a man whose feminine gender expression did not correspond with stereotypical expectations of his sex.\textsuperscript{73}

B. Sexual Orientation

Unlike sex and gender, sexual orientation is not a protected trait under Title VII.\textsuperscript{74} As a result, employees cannot articulate what I call a sexual orientation \textit{simpliciter} claim under Title VII. This should not, however, bar employees from bringing what I call intersectional discrimination claims, that is, sex discrimination and gender-stereotyping claims that implicate the employee’s sexual orientation. I discuss these two types of claims in turn.

1. Sexual Orientation Simpliciter Claims

The first type of sexual orientation claim is what I call a sexual orientation \textit{simpliciter} claim.\textsuperscript{75} The basis for this type of claim is that an employee suffered discrimination solely on account of his or her sexual orientation. As the law currently stands, sexual orientation \textit{simpliciter} claims are not protected under Title VII. This is true regardless of whether the claim is based on homosexuality, heterosexuality, or bisexuality. For instance, in \textit{Medina v. Income Support Div., New Mexico},\textsuperscript{76} Rebecca Medina alleged that her supervisor, a lesbian woman, subjected Medina to a hostile work environment because of her heterosexuality.\textsuperscript{77} The court rejected Medina’s claims on the grounds that Title VII does not protect

\textsuperscript{73} See \textit{id.} (“[D]iscrimination against a plaintiff who is transsexual—and therefore fails to act/or identify with his or gender—is no different from the discrimination directed against Ann Hopkins in \textit{Price Waterhouse}, who, in sex-stereotypical terms, did not act like a woman.”).


\textsuperscript{75} See William B. Rubenstein, \textit{Is Sexual Orientation Discrimination (Just) Sex Discrimination? (Williams Institute CLE Presentation)}, \textit{at} http://www.law.ucla.edu/williamsinstitute/programs/Rubenstein4-25-02.html (last visited Aug. 27, 2007) (providing that the employer policy “We don’t hire lesbians here” as an example of sexual orientation discrimination simpliciter).

\textsuperscript{76} 413 F.3d 1131 (10th Cir. 2005).

\textsuperscript{77} \textit{Id.} at 1135 (“We construe Ms. Medina’s argument as alleging she was discriminated against because she is a heterosexual.”).
against discrimination because of sexual orientation,\textsuperscript{78} just as it would have rejected any other sexual orientation \textit{simpliciter} claim based on homosexuality or bisexuality.\textsuperscript{79}

Since the 1970s, however, Congress has regularly considered bills that would expand federal law to cover discrimination claims based on sexual orientation discrimination.\textsuperscript{80} The current version of this proposed legislation is the Employment Non-Discrimination Act ("ENDA").\textsuperscript{81} In terms of its scope, ENDA covers intentional discrimination claims targeted at an employee’s sexual orientation,\textsuperscript{82} which it defines as "homosexuality, heterosexuality, or bisexuality."\textsuperscript{83} If passed, ENDA would substantially alter the landscape of employment discrimination law for all employees who face discrimination because of their sexual orientation. Until then, even though federal law does not currently protect against discrimination based on sexual orientation, employees can still bring discrimination claims under state antidiscrimination laws.\textsuperscript{84} Indeed, antidiscrimination laws in twenty states and the District of Columbia prohibit discrimination based on sexual orientation.\textsuperscript{85} Thus, in these states, employees can do

\textsuperscript{78} See \textit{id.}

\textsuperscript{79} For other cases involving heterosexual plaintiffs who bring discrimination claims under Title VII, see La Day v. Catalyst Technology, Inc., 302 F.3d 474 (5th Cir. 2002); Rivera v. City of New York, 392 F. Supp. 2d 644 (S.D.N.Y. 2005); Miller v. Vesta, Inc., 946 F. Supp. 797 (E.D. Wis. 1996).

\textsuperscript{80} For a detailed account of this history, see Chai R. Feldblum, \textit{The Federal Gay Rights Bill: From Bella to ENDA}, in \textit{Creating Change: Sexuality, Public Policy, and Civil Rights} 149–87 (John D’Emilio et al. eds., 2000).


\textsuperscript{82} Under the current version of ENDA, “intentional” discrimination is limited to disparate treatment claims. Thus, if the bill passes, plaintiffs will not be able to bring disparate impact claims based on sexual orientation. \textit{See id.} at § 4(g) (“Only disparate treatment claims may be brought under this Act.”).

\textsuperscript{83} \textit{See id.} § 3(a)(9).


under state antidiscrimination law what cannot currently be done under federal law—bring actionable sexual orientation simpliciter claims.

2. Intersectional Claims

The second type of sexual orientation discrimination claim is what I call an intersectional claim.86 In antidiscrimination law, an intersectional claim is one that is based on at least two or more overlapping identity traits.87 For instance, imagine a discrimination case involving an Asian-American woman.88 Even if her employer is not hostile toward Asian-American men and white women, the employer may still harbor negative stereotypes about Asian-American women in particular.89 For my purposes in this paper, an intersectional sexual orientation claim is one that simultaneously implicates the employee’s sexual orientation and at least one other identity trait, such race, sex, or even gender. For instance, Dawn Dawson’s gender-stereotyping claim is an example of an intersectional claim. Although Dawson’s claim was ostensibly based on her gender-nonconformity, it is clear that her claim also implicated her sexual orientation.90 After all, the court ultimately concluded that Dawson’s sexual orientation was so integral to her gender-stereotyping claim that the former effectively overwhelmed the latter.91

Indeed, the gender-stereotyping theory is perhaps the best example of an intersectional claim because, by definition, it is based on the interplay of an employee’s sex and gender. For instance, consider again Ann Hopkins, the first plaintiff to take advantage of a gender-stereotyping theory of sex

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88 See, e.g., Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994).

89 See Carbado & Gulati, supra note____, at 709 (discussing the example of discrimination aimed at an Asian American woman)

90 Dawson v. Bumble & Bumble, 398 F.3d 211, 215 (2005) (describing how Dawson’s coworkers said that she needed to have sex with a man and that she wore her sexuality like a costume).

91 See id. at 217–20.
Heterosexuality and Title VII

The thrust of Hopkins’s claim was that she was discriminated against in her capacity as a woman because she failed to conform to stereotypical notions of how a woman should look and behave in the workplace. Underlying this claim is the idea that Hopkins suffered discrimination not because she was a woman or because she was a gender-nonconformist, but because she was both a woman and a gender-nonconformist, that is, a gender-nonconforming woman. Dawn Dawson’s gender-stereotyping claim involves adding yet another layer of intersectionality, namely, that of sexual orientation. The thrust of Dawson’s claim was not that she was discriminated against because she was a woman or because she was a gender-nonconformist, or because she was a lesbian. Rather, Dawson’s argument was that she was discriminated against because she was a gender-nonconforming lesbian woman.

C. Bootstrapping

As discussed above, the court in Dawn Dawson’s case ultimately rejected Dawson’s gender-stereotyping claim on the grounds that it was an attempt to bootstrap protection for sexual orientation into Title VII. The accusation embedded in this conclusion is that Dawson’s gender-stereotyping claim was nothing more than a kind of litigation sleight of hand, an attempt to create statutory protection where no such protection exists. Dawson’s case is not an isolated occurrence in this regard. Courts regularly treat gender-stereotyping claims brought by lesbian and gay employees as if they are sexual orientation simpliciter claims in disguise. And because sexual orientation simpliciter claims are not currently actionable under Title VII, these courts ultimately reject these gender-stereotyping claims accordingly.

In these “bootstrapping” cases, lesbian and gay plaintiffs are losing their gender-stereotyping claims because their sexual orientation—that is, their homosexuality—is what sociologists call a “marked” identity trait. In his extensive writings on the social aspects of gay identity, sociologist

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93 See id. at 250–51.
94 See Dawson, 398 F.3d at 218–20.
95 See sources cited in note ___.
Wayne Brekhus notes that because it is stigmatized, people are hyper-aware of homosexuality. Brekhus contrasts this perception of homosexuality with that of heterosexuality, an unmarked identity trait, which “remains unarticulated and taken for granted.” For lesbian and gay employees, their sexual orientation tends to overshadow their sex and gender. Once employees are marked as being lesbian or gay, courts view their gender-stereotyping claims through the lens of homosexuality. Indeed, that homosexuality is a marked identity trait no doubt explains why several commentators, writing together in a practitioners’ guide to representing lesbian and gay plaintiffs in employment discrimination cases, offer the following advice: “When bringing a gender stereotyping claim under Title VII, it is almost never a good idea to affirmatively plead or introduce evidence of a plaintiff’s [homosexuality.] It does not help the case and can seriously damage it.” A plaintiff’s homosexuality can seriously damage her gender-stereotyping claim precisely because homosexuality is, in the words of renowned sociologist Erving Goffman, a “spoiled identity.” In such a “bootstrapping” case, a plaintiff’s homosexuality quite literally spoils what is an otherwise actionable discrimination claim based on the plaintiff’s failure to conform to stereotypical gender expectations.

II. HETEROSEXUALITY AND TITLE VII

In the remainder of this paper, I critique of the “bootstrapping” cases from a perspective that is often overlooked in employment discrimination law and scholarship. The centerpiece of this critique is heterosexuality. What is particularly troubling about the reasoning underlying the “bootstrapping” cases, I argue in this part, is that no court would ever rule the same way in a case brought by a heterosexual employee. For lesbian and gay employees, homosexuality is a liability in employment discrimination litigation. This is not the case for heterosexual employees, whose sexual orientation will never spoil an otherwise actionable sex discrimination claim. Indeed, as I argue below, even in a case where a heterosexual employee raises a sex discrimination claim that directly

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98 See BREKUSS, supra note ____, at 11–14.
99 Id. at 14.
100 Justin M. Swartz et al., Nine Tips for Representing LGBT Employees in Discrimination Cases, 759 PRACTICING LAW INSTITUTE: LITIGATION 95, 103 (2007). They go on to say that introducing evidence of a plaintiff’s sexual orientation—by which they mean homosexuality—can be fatal. Id. This advice comes from a section of the guide titled “Don’t Plead It Unless You Need It,” with the “it” being a client’s homosexuality.
implicates her sexual orientation, the court will not even acknowledge that her heterosexuality is involved in her sex discrimination claim, let alone reject the claim because of it.

To flesh out my critique, I present a case study of the Supreme Court’s landmark decision in Meritor Savings Bank v. Vinson,102 where the Court established that sexual harassment is an unlawful form of sex discrimination under Title VII.103 I have chosen to use Meritor as the point of departure for my critique of the “bootstrapping” cases for two reasons. The first is because Meritor is such a well-known case—both in terms of the Court’s legal conclusions as well as its description of the facts—that most readers will be at least somewhat familiar with the case.104 The second reason why I have centered my critique on Meritor flows from the first: that Meritor is familiar better enables me to cast the decision in a new light. Indeed, the overall goal of my critique is to use Meritor as a lens through which to reconsider the reasoning underlying the “bootstrapping” cases. Mechelle Vinson, the plaintiff in Meritor, was a heterosexual woman who brought a successful sex discrimination claim against her employer. Although Vinson’s discrimination claim was based on her sex, her claim directly implicated her sexual orientation. Yet the Court made no mention of Vinson’s heterosexuality. Nor, for that matter, did the Court reject Vinson’s claim by treating it as an attempt to bootstrap protection for sexual orientation into Title VII. Thus, Mechelle Vinson succeeded where Dawn Dawson and many other lesbian and gay employees have failed. I argue that Vinson’s success, in contrast to Dawson’s and other lesbian and gay employees’ failures, is a result of the invisibility of her heterosexuality.

My case study of Meritor proceeds in two parts. In the first part, I lay out the factual circumstances that gave rise to Vinson’s sexual harassment suit. Included in this part is a brief discussion of the Court’s conclusion that discrimination faced by Vinson was “because of” sex. From there, in the second part of the case study, I set out to demonstrate that Vinson was not discriminated against solely because she was a woman, but rather because she was a heterosexual woman. Even though the Court did not


103 See Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2064 (2003) (“In the United States, sex harassment has been viewed primarily as a form of sex discrimination under Title VII of the Civil Rights Act, the federal statute that prohibits sex discrimination in employment.”).

104 That the law and facts of Meritor are deeply engrained in sexual harassment law is clear. After all, as the Supreme Court’s first sexual harassment case, Meritor laid the foundation of sexual harassment law. See Theresa M. Beiner, Sexy Dressing Revisited: Does Target Dress Play A Part in Sexual Harassment Cases?, 14 Duke J. Gender L. & Pol’y 125, 127 (2007) (noting that Meritor was the “first sexual harassment case that the Supreme Court assessed”).

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characterize it as such, Vinson’s sex discrimination claim was really an intersectional claim based on her sex and her sexual orientation.

Throughout this discussion, I also reach beyond Meritor to consider more broadly the ways in which heterosexuality in general, and not just Mechelle Vinson’s heterosexuality, is constructed in employment discrimination law. In doing so, I tap into an emerging scholarly literature that is often referred to as “critical heterosexual studies” (“CHS”).\textsuperscript{105} CHS is part of a new generation of critical scholarship that focuses on insider—that is to say, culturally normative—identities, such as whiteness and masculinity. According to sociologist Chrys Ingraham, a leading scholar in the study of heterosexuality, CHS seeks to “interrogate the meanings and practices associated with straightness—the historical, social, political, cultural, and economic dominance of institutionalized heterosexuality.”\textsuperscript{106} As another scholar has noted, CHS calls on related fields like feminism and queer theory “to focus more closely and comprehensively on the relationship between heterosexuality and heteronormativity with an eye to improving the quality and moral stature of heterosexuality.”\textsuperscript{107}

As a methodological approach, CHS is especially valuable because it serves a kind of dual purpose: it not only provides new insight into an identity that is quite often overlooked, but it also allows us to use heterosexuality as lens through which to reconsider how we understand homosexuality. I seek to achieve both of these ends with this paper. As a subject of study in and of itself, heterosexuality has largely been overlooked and taken for granted in employment discrimination law and scholarship. In this paper, I seek to expose some of the ways in which heterosexuality is constructed in employment discrimination law. In doing so, this discussion will hopefully help to produce a better understanding of the cultural and legal construction of heterosexuality. At the same time, my discussion of heterosexuality also serves as a vehicle to reassess the ways in which courts have conceptualized homosexuality, in particular as it relates to related traits like sex and gender-nonconformity.


\textsuperscript{106}Chrys Ingraham, Introduction: Thinking Straight, in THINKING STRAIGHT, supra note XXX, 1, 11.

\textsuperscript{107}Jose Gabilondo, Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual, 21 WISC. WOMEN’S L.J. 1, 29 (2006).
A. Because of Sex

Mechelle Vinson was nineteen-years-old when she met Sidney Taylor, a branch manager for the Capital City Federal Savings and Loan Association, in a parking lot in Washington, D.C.\textsuperscript{108} They got to talking and, when Taylor learned that she was looking for work, he encouraged Vinson to apply for a job at his bank.\textsuperscript{109} Days later Vinson began working at the bank as a teller-trainee.\textsuperscript{110} Initially, Taylor was something of a father figure to Vinson, expressing concern about her general well-being, taking her out for meals, and helping her out financially so she could rent an apartment.\textsuperscript{111} The nature of their relationship changed, however, after Vinson completed her probationary training period. One night during dinner, Taylor suggested that they go to a nearby motel to have sex.\textsuperscript{112} When Vinson declined his offer, Taylor tried to convince her that she owed it to him because he got her the job at the bank.\textsuperscript{113} Even though she continued to resist his advances throughout dinner, Vinson accompanied Taylor to the motel after the meal and had sex with him.\textsuperscript{114} She explained later that she had sex with Taylor only because she did not want to lose her job.\textsuperscript{115}

After their first sexual encounter, Taylor’s behavior at work changed considerably. No longer the father figure he had once been to Vinson, Taylor frequently made sexual demands upon Vinson while at the bank. Taylor forced Vinson to have sex with him some forty or fifty times in the bank, both during and after banking hours, in various rooms in the bank, including the bank vault.\textsuperscript{116} He fondled her and made lewd comments in front of coworkers and customers.\textsuperscript{117} He followed Vinson into the


\textsuperscript{109} See id. at 58.

\textsuperscript{110} See Meritor, 477 U.S. at 59.

\textsuperscript{111} See id. at 60.

\textsuperscript{112} See id.; see also Vinson v. Taylor, 1980 WL 100 *1 (D.D.C.) (hereinafter Taylor I).

\textsuperscript{113} See Vinson v. Taylor, 753 F.2d 141, 143 (D.C. Cir. 1985) (hereinafter Taylor II); Taylor I, 100 WL 100 *1 (D.D.C. 1980).

\textsuperscript{114} See Meritor, 477 U.S. at 60; Taylor I, 1980 WL 100, *1.

\textsuperscript{115} See Meritor, 477 U.S. at 60; Vinson I, 1980 WL 100, *1.

\textsuperscript{116} See Meritor, 477 U.S. at 60; Vinson II, 753 F.2d at 143–44; Vinson I, 1980 WL 100, *1.

\textsuperscript{117} See Meritor, 477 U.S. at 60; Vinson II, 753 F.2d at 144; Vinson I, 1980 WL 100, *1.
bathroom and exposed himself to her.\footnote{118} He even raped her on several occasions—once so brutally that she sought medical care.\footnote{119} This harassment lasted for nearly three years; it did not stop until Vinson began a steady relationship with another man.\footnote{120}

During her tenure at the bank, Vinson was promoted from teller to head teller and then to assistant branch manager.\footnote{121} In that capacity, Vinson reported directly to Taylor. Both Vinson and Taylor agreed that Vinson’s promotions were based solely on merit and not the result of special treatment because of her relationship with Taylor.\footnote{122} Vinson stopped reporting to work, however, when a series of work disputes resulted in Taylor threatening her life.\footnote{123} At that time, she notified Taylor that she was taking an indefinite sick leave.\footnote{124} Two months later, on the same day that Vinson sent a letter informing the bank of her decision to resign from her position as assistant branch manager,\footnote{125} the bank terminated Vinson for excessive absenteeism.\footnote{126}

Vinson brought a Title VII claim against Taylor and the bank, alleging that Taylor harassed her because of her sex.\footnote{127} Prior to Vinson’s case, most sexual harassment plaintiffs brought suit under a quid pro quo theory, whereby an employer conditions a job benefit in exchange for sexual favors.\footnote{128} The quid pro quo theory was not a good fit for Vinson’s harassment claim because Vinson earned her promotions on merit alone and Taylor never threatened to punish her if she refused to have sex with him. There was, however, an emerging theory of harassment percolating in the lower courts around the same time Vinson was bringing her

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\footnote{118}{See Meritor, 477 U.S. at 60; Vinson II, 753 F.2d at 144; Vinson I, 1980 WL 100, *1.}

\footnote{119}{See Vinson I, 1980 WL 100, *1.}

\footnote{120}{See Meritor, 477 U.S. at 60.}

\footnote{121}{See id. at 59–60.}

\footnote{122}{See id. at 60.}

\footnote{123}{See id. at 59–60.}

\footnote{124}{See Cochran, supra note …, at 59.}

\footnote{125}{See id.}

\footnote{126}{See id. at 59–60.}

\footnote{127}{See Meritor, 477 U.S. at 60.}


\footnote{128}{See, e.g., Barnes v. Costle, 561 F.2d 983, 990 (1977) (“[S]he became the target of her superior’s sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job…Thus gender cannot be eliminated from the formulation which [the plaintiff] advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII.”).}
lawsuit. Inspired by the work of feminist attorneys such as Catherine MacKinnon, this emerging theory posited that a claim of “hostile environment” sexual harassment is likewise prohibited by Title VII even though it does not involve an adverse employment action, such as being fired or demoted. According to this theory, such hostile environment harassment is prohibited by Title VII because it affects the terms and conditions of employment.

In Vinson’s case, in a groundbreaking decision, the Supreme Court established that sexual harassment is an illegal form of sex discrimination under Title VII. Relying heavily on EEOC Guidelines that recognized both quid pro quo and hostile environment claims, the Court held that Title VII affords employees the right to work in an environment free from sexual harassment. As for Vinson, the Court had no trouble concluding that the harassment she suffered amounted to a violation of Title VII. According to the Court, “[Vinson’s] allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for hostile environment sexual harassment.” And as for the causation requirement, the Court concluded that Taylor’s harassment was targeted at Vinson’s sex. According to the Court, “[W]hen a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”

**B. Because of Sex and Sexual Orientation**

The Court was no doubt correct in concluding that Mechelle Vinson was discriminated against because of her sex. Indeed, it is clear that Taylor targeted Vinson in her capacity as a woman. Yet the Court’s causation analysis overlooks an important part of Vinson’s story. Sidney Taylor did not harass Vinson just because she was a woman; he harassed her in her capacity as a heterosexual woman. In other words, Mechelle Vinson was


131 See Bundy, 641 F.2d at 943–48 (discussing Professor MacKinnon’s work, supra).


133 See id. at 65 (citing 29 CFR § 1604.11 (1985)).

134 See id. at 66.

135 Id. at 67.

136 Id. at 64 (alterations in original).
discriminated against not just because of her sex, but because of her sex and her sexual orientation. Vinson’s sexual harassment claim was not, as the Court would have it, a sex simpliciter claim, but rather an intersectional claim based on her sex and her sexual orientation.

In order to show that Vinson was discriminated against in her capacity as a heterosexual woman, it is first necessary to establish that Vinson was in fact heterosexual. I set out do so in the first section by focusing on the relational nature of sexual orientation, highlighting that there are two heterosexualities involved in Vinson’s case—Taylor’s and Vinson’s. In the second section, I discuss the process by which employment discrimination doctrine erased Vinson’s heterosexuality, thereby rendering it invisible for purposes of her sexual harassment claim. I suggest that this process results from the paradox of privilege.

1. Two Heterosexualities

Heterosexuality is nowhere to be seen on the face of the Court’s opinion in Meritor. The Court makes no mention of sexual orientation, let alone heterosexuality. Yet there are two heterosexualities very much on display in Vinson’s case—Taylor’s and Vinson’s. Although neither Taylor’s nor Vinson’s heterosexuality is articulated—that is, neither seems to have explicitly asserted a heterosexual status or “come out” as straight—we can infer their heterosexuality from their conduct. From the facts available to us about Mechelle Vinson, we can infer her heterosexuality from the steady relationship with another man that effectively ended her “relationship” with Taylor; from the fact that she eventually married another man; and from her sexual encounters with Taylor that she would characterize as consensual. As for Taylor, we can

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137 I will take it as a given that Mechelle Vinson was in fact a woman, as there is nothing in the case that indicates any reason to question Vinson’s sex or gender identity. See, e.g., Noa Ben-Asher, The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties, 29 HARV. J.L. & GENDER 51 (2006); Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 ARIZ. L. REV. 265 (1999).

138 One of the privileges of heterosexuality is that heterosexuals rarely if ever have to “come out” as heterosexual. There are, however, rare occasions when this is not the case and heterosexuals find themselves in a position where they are presumed to be homosexual and they must assert a heterosexual identity. See, e.g., Devon W. Carbado, Straight Out of the Closet, 15 BERKELEY WOMEN’S L.J. 76, 111–16 (2000); Bruce Ryder, Straight Talk: Male Heterosexual Privilege, 16 QUEEN’S L.J. 287, 303 (1991).


140 Augustus Cochran explains that Vinson originally sought out legal counsel not because of her difficulties at work but because she wanted a divorce from her husband.
infer his heterosexuality from his sexual conduct as recounted by Vinson, such as his persistent sexual advances toward Vinson and other female employees at the bank; from the sexually-infused comments he directed at female employees; and from his physical acts of sexualized violence directed at a woman. Moreover, there were no allegations that Taylor either subjected the male employees at the bank to such a sexually-infused work environment or that he tried to engage in a sexual relationship, whether forced or otherwise, with any male employees at the bank.

One reason why sexual orientation is different than other identity traits like race or sex is that sexual orientation is relational. Recall my definition of sexual orientation above: sexual orientation denotes a person’s sexual attractions and desires. Embedded in this definition is the idea that a person’s sexual orientation is defined in relation to others. Professor Mary Anne Case captures this idea when, in a discussion about the relational nature of homosexuality, she notes, “It takes two women to make a lesbian.” Something very similar can be said of heterosexuality: it takes a man and a woman to make a heterosexual.

Taken as a whole, Vinson’s and Taylor’s conduct suggest that they were both in fact heterosexual. Even though the Court in Meritor never discusses it, heterosexuality is laced throughout the Court’s opinion. We see heterosexuality on display every time Taylor propositions Vinson for sex. We see it in Vinson’s and Taylor’s repeated sexual encounters. We see it in every sexual comment Taylor makes. We see it in every sexual touching. And we see it in Taylor’s numerous acts of sexualized violence. Heterosexuality, in other words, is at the heart of Mechelle Vinson’s sexual harassment claim. Yet the Court renders Vinson’s heterosexuality invisible by only focusing on the elements of her discrimination claim that pertain to her sex. The doctrinal consequences of this move are considerable. By ignoring the ways in which Vinson’s sex discrimination claim implicated her heterosexuality, the Court effectively transforms Vinson’s intersectional claim—discrimination based on sex and sexual

According to Cochran,

In 1978, Mechelle Vinson had an interview with attorney Judy N. Ludwic to discuss a divorce from her husband. ‘Something just snapped,’ and she began weeping. Ludwic later told the Washington Post, ‘She wasn’t hysterical, it was like it came from deep inside. The tears were just rolling down her face.’ When Vinson chronicled her harassment at the bank, Ludwic responded, ‘Do you realize you have a case?’ and suggested that she see John Marshall Meisburg, Jr., an attorney to whom her Georgetown firm referred employment cases.


See id.; see also Lau, supra note ___, at 1286.


This is consistent with the aims of strategic essentialism, as explained by Katherine Franke: strategic essentialism involves "consciously choosing to essentialize a particular community for the purpose of a specific political goal." Katherine M. Franke, Homosexuals, Torts, and Dangerous Things, 106 YALE L.J. 2661, 2679 (1997) (book review). My specific political goal, in this case, is to identify the differing standards for homosexuals and heterosexuals in employment discrimination cases.


orientation—into a sex simpliciter claim. This is significant because unlike a sexual orientation simpliciter claim, a sex simpliciter claim is clearly within the scope of Title VII.

Of course, it is possible that Vinson—and Taylor for that matter—was not in fact heterosexual. For instance, it is certainly possible that Vinson had a wide variety of sexual experiences beyond what we see in the facts of her case or that she self-identified as something other than heterosexual. I would not dismiss any alternative reading of Vinson’s sexuality along these lines. But the evidence available to us about Mechelle Vinson does seem to suggest that she was a heterosexual and neither a lesbian nor a bisexual. Moreover, my conclusion that Vinson was a heterosexual is also motivated by my desire to engage in “strategic essentialism.” The specific issue of whether Vinson was in fact a heterosexual is far less important than the broader point in this paper, namely, that courts do not treat heterosexuality and homosexuality equally under Title VII. In order to address this broader point, we must set aside some of the nuances that necessarily inhere in talking about human sexuality. While recognizing that the categories of heterosexuality and homosexuality are not static, we must nevertheless accept that some people are heterosexual and others homosexual. Only then can we consider whether and how employment discrimination law treats these groups differently.

2. The Paradox of Privilege

If Mechelle Vinson was discriminated against because of her sex and her sexual orientation, why did the Court treat her harassment claim as if it was a sex simpliciter discrimination claim? Drawing on insights from the
CHS literature, I argue that the Court failed to appreciate the extent to which Vinson was discriminated against on account of her sexual orientation because heterosexuality is invisible in our culture. That is, the Court could not address the elements of Vinson’s claim that dealt with her heterosexuality because the Court did not even see her as having a sexual orientation. As a result, although it was an integral part of her harassment claim, Vinson’s heterosexuality was swallowed up by her sex.

In this section, I argue that the invisibility of heterosexuality is the result of what I call the paradox of privilege. The thrust of the paradox of privilege is that heterosexuality is at once everywhere and nowhere. To understand why this is the case, consider first the nature of sexual orientation. In general, sexual orientation is an invisible trait, as it is not observable by the naked eye. This is yet another reason why sexual orientation is different than other identity traits like race and sex, as they are, in most cases, noticeable by casual observation. Unable to see sexual orientation, we are forced to make assumptions about people. And because homosexuality is stigmatized in our culture, the baseline for our assumptions about sexual orientation is heterosexuality. Thus we presume all people are heterosexual until proven otherwise. In a groundbreaking work that laid the foundation for CHS, poet and social critic Adrienne Rich called this a system of “compulsory heterosexuality.” Within a system

147 Scholars have used the term “paradox of privilege” in other contexts. See, e.g., Kirby Moss, The Color of Class: Poor Whites and the Paradox of Privilege (2003).

148 I owe the idea here to the work of Professor Michael Selmi. See Michael Selmi, Privacy for the Working Class: Public Work and Private Lives, 66 La. L. Rev. 1035, 1035 (2006) (“At the turn of the twenty-first century, privacy has become the law’s chameleon, seemingly everywhere and nowhere at the same time.”).

149 See William N. Eskridge, The Relationship Between Obligations and Rights of Citizens, 69 Fordham L. Rev. 1721, 1746 (2001) (noting the “fact that sexual orientation, unlike race and sex, is perceived to be invisible”).

150 Indeed, the primary reason why courts subject sexual orientation classifications to a lower level of scrutiny under the Equal Protection Clause than either racial or sex classifications is because sexual orientation is an invisible trait. See Kenji Yoshino, Covering, 111 Yale L.J. 769, 876–879 (2002) (discussing how visibility explains race and sex classifications are subjected to a more searching scrutiny than sexual orientation classifications).


of compulsory heterosexuality, lesbians and gay men must assert a gay identity—or “come out”—in order to make their sexual orientation visible. Heterosexuals, by contrast, are privileged by compulsory heterosexuality in that they never have to come out as—but are simply presumed to be—heterosexuals.153

This is where the paradox of privilege comes into play. Consider first the “everywhere” prong of the paradox of privilege. One of the most important insights to come out of feminism, queer theory, and CHS is that heterosexuality is embedded in the fabric of our culture; it is everywhere we look, a part of nearly everything we do.154 At the same time, however, the pervasiveness of heterosexuality also works to render it invisible. This is the “nowhere” prong of the paradox of privilege. Because heterosexuality is all around us, it has ceased to exist apart from our culture. To see an example of this in action, think of a same-sex couple’s wedding announcement in the newspaper.155 Looking at the couple’s picture, the first thing we see is that they are a gay couple. By posing together in a picture, the couple is effectively putting their homosexuality on display. Now think of a similar announcement for a different-sex couple. Looking at this couple’s picture, we may see bride and groom, or husband and wife, or perhaps just a man and woman. Though we see many things in their picture, we simply do not see their heterosexuality.

The paradox of privilege can also be seen in the way we talk about sexual orientation. Because we do not think of heterosexuals as having a sexual orientation, we tend to use the term “sexual orientation” as if it is a synonym for “homosexuality.” For instance, consider two examples, both of which come from my own experiences. The first is an exercise I use in my Law & Sexuality seminar.156 Toward the beginning of the semester, I ask my students to play a kind of word association game. I ask them, “What comes to mind when they think about ‘sexual orientation?’” Their

153 Of course, sometimes straight people do have to assert a heterosexual identity. There is a surprisingly rich literature on the politics of straight people “coming out” as straight. See, e.g., Ayres & Gerarda Brown, supra note XXX, at 97–107 (discussing whether and when straight allies should engage in identity “ambiguation”); Carbado, supra note XXX, at 114–116 (discussing the politics of when heterosexuals “come out” as straight).

154 See Michael Warner, Introduction, in FEAR OF A QUEER PLANET, vii, xxi (Michel Warner ed., 1994) (“Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn’t exist.”).

155 In 2002, the New York Times began publishing reports of same-sex commitment ceremonies and other celebrations when same-sex couples enter into formal, registered relationships. See Times Will Begin Reporting Gay Couples’ Ceremonies, N.Y. TIMES, Aug. 8, 2002, at 23.

156 It goes without saying that I am not offering the results of this classroom exercise as an empirical claim to my prove thesis.
answers are always the same: the first things they think of are same-sex marriage, the “Don’t Ask, Don’t Tell” Policy, and the AIDS epidemic.

The second example comes from my work at the Williams Institute, an academic think tank at the UCLA School of Law.\textsuperscript{157} The Williams Institute’s full name is the Williams Institute on Sexual Orientation Law and Public Policy. On its website, the Institute describes its work as follows: “The Institute supports legal scholarship, legal research, policy analysis, and education regarding sexual orientation discrimination and other legal issues that affect lesbian and gay people.”\textsuperscript{158} This is another good example of how we tend to use “sexual orientation” as a synonym for “homosexuality.” In terms of its actual work product, the Institute does not study legal and policy issues relating to sexual orientation so much as it studies the legal and policy issues relating to lesbians and gay men. To be clear, this is in no way meant as a critique of either my students or my former employer. Rather, I offer these examples simply to illustrate my point about how we talk about sexual orientation. In short, the language we use is reflective of our tendency not to think of heterosexuals as having a sexual orientation.

Nor is heterosexuality unique in this regard. Indeed, a similar process takes place in the context of race. Much like our inability to see that heterosexuals have a sexual orientation, we tend not to see that white people have a race. This is because privilege functions to obscure whiteness.\textsuperscript{159} As Professors Stephanie Wildman and Adrienne Davis have written, “Whites do not look at the world through a filter of racial awareness, even though whites are, of course, a race.”\textsuperscript{160} The power to ignore race, according to Wildman and Davis, is the privilege of whiteness.\textsuperscript{161} Indeed, as Professor Barbara Flagg has noted, “The most striking characteristic of whites’ consciousness of whiteness is that most of the time [they] don’t have any.”\textsuperscript{162}

C. The Double Standard

\textsuperscript{157} For information on the Williams Institute, see http://www.law.ucla.edu/~williamsinstitute/home.html
\textsuperscript{158} Id.
\textsuperscript{159} As Professors Stephanie Wildman and Adrienne Davis have written, “Whites do not look at the world through a filter of racial awareness, even though whites are, of course, a race.”
\textsuperscript{160} The power to ignore race, according to Wildman and Davis, is the privilege of whiteness.
\textsuperscript{161} Indeed, as Professor Barbara Flagg has noted, “The most striking characteristic of whites’ consciousness of whiteness is that most of the time [they] don’t have any.”

Bringing it back to Meritor, then, the paradox of privilege worked to render Mechelle Vinson’s heterosexuality invisible. Much like the different-sex couple in the wedding announcement, Vinson’s heterosexuality was hiding in plain view. But because neither the Court nor the attorneys were looking for it, they simply could not see it and, as a result, the Court was able to treat her sexual harassment claim as if it was a sex simpliciter discrimination claim. This is in stark contrast to how the court in Dawn Dawson’s case dealt with her sexual orientation. There, the court was so fixated on Dawson’s homosexuality that it could barely see anything else. Consequently, the court’s inability to look beyond her homosexuality ultimately proved fatal for her gender-stereotyping claim, as the court concluded that Dawson’s gender-stereotyping claim was nothing more than an attempt to bootstrap protection for sexual orientation into Title VII.

There is a double standard at work here. Because homosexuality is such a highly-visible and stigmatized trait, courts are primed to reject discrimination claims brought by lesbians and gay men, even when their claims are based on protected traits like sex or gender-nonconformity. This puts lesbian and gay plaintiffs at a distinct disadvantage as compared to heterosexual plaintiffs, for whom sexual orientation in no way affects their ability to bring actionable sex discrimination and gender-stereotyping claims. In short, heterosexual privilege has seeped into employment discrimination jurisprudence, creating a doctrinal privilege for heterosexual employees.

III. Re-ORIENTING TITLE VII

The Meritor case study is useful as a means to identify the ways in which employment discrimination law privileges heterosexuality. This is not to say, however, that the Meritor Court’s analysis provides the best possible approach for addressing intersectional discrimination claims that are based in part on an employee’s sexual orientation. The Meritor Court’s implicit conclusion is that an employee’s sexual orientation should not swallow up an otherwise actionable sex discrimination claim. The problem with the Meritor Court’s approach, however, is that the Court only reached this conclusion because Mechelle Vinson was a heterosexual and, as such, her sexual orientation was invisible. Had she been a lesbian, the Court would have no doubt approached Vinson’s case more in line with the “bootstrapping” cases, most likely concluding that Vinson’s sexual

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orientation swallowed up her sexual harassment claim. For the Meritor Court to have offered a real alternative to the “bootstrapping” cases, the Court would have had to acknowledge Vinson’s heterosexuality and still ruled as it did. In this part, I propose an alternative approach for addressing intersectional discrimination claims that are based in part on an employee’s sexual orientation. This approach borrows from both the Meritor Court’s analysis and that of the “bootstrapping” cases. Although neither is satisfactory on its own, by borrowing aspects from both approaches I am able to carve out an alternative analytical framework that provides a more satisfying method for dealing with intersectional discrimination claims that are based in part on an employee’s sexual orientation. After laying out this new approach, I provide two examples of how it fits into existing employment discrimination jurisprudence. The first example involves a case where an openly gay man was harassed on the basis of his gender-nonconformity. My approach provides a theoretical foundation for the court’s decision in this case. The second example involves discrimination cases brought by transgender employees. Although I have formulated my new approach in the context of intersectional claims that are based in part on sexual orientation, it is nevertheless applicable to other types of intersectional cases, including those involving transgender employees. In the third and final section, I respond to three potential critiques.

A. A New Approach

How, then, should courts approach intersectional discrimination claims that are based in part on an employee’s sexual orientation? To answer this question, I bring together strands from the “bootstrapping” cases and from the Meritor Court’s treatment—that is, lack of treatment—of Mechelle Vinson’s heterosexuality. The result is a new approach to conceptualizing sexual orientation under Title VII. In essence, this new approach seeks to “re-orient Title VII.”

1. Acknowledging Orientation

The fundamental flaw of the “bootstrapping” cases is that they are fixated on homosexuality. Dawn Dawson’s case is a prime example. Earlier in its discussion of Dawson’s gender-stereotyping claim, the court

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165 See Rene v. MGM Grant Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc).

166 In this paper, I use “transgender” as an umbrella term which encompasses any person whose gender identity or expression is non-normative, including transsexuals, cross-dressers, or people who identify as genderqueer. For a far more comprehensive discussion of who falls within the transgender umbrella, see Mary Coombs, Characteristics of Transgenderism, 8 UCLA WOMEN’S L.J. 219 (1998).
acknowledges that it is especially hard for courts to evaluate gender-stereotyping claims brought by “an avowedly homosexual plaintiff” because gender norms “blur into ideas about heterosexuality and homosexuality.” That the court was focused on “avowedly homosexual” employees is telling, as “avowedly” is just another way of saying employees who are “out” at work about their homosexuality. Presumably, the court’s point in isolating openly-gay employees is to set up its conclusion that Dawson is using her gender-stereotyping claim to try to bootstrap protection for sexual orientation into Title VII, which the court addresses in the very next sentence. In highlighting Dawson’s homosexuality, the court effectively reframes Dawson’s discrimination claim, transforming it from a legitimate gender-stereotyping claim into a sexual orientation discrimination claim that is passing as a gender-stereotyping claim. As a result, Dawson’s gender-stereotyping claim was lost the moment the court identified her as a lesbian. As I noted earlier, this is the reason why commentators advise attorneys representing lesbian and gay employees to try hard to keep their clients’ homosexuality out of their employment discrimination cases.

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168 There is a rich literature on the costs and benefits of “coming out” at work. See, e.g., Nancy E. Day & Patricia Schoenrade, Staying in the Closet Versus Coming Out: Relationships Between Communication About Sexual Orientation and Work Attitudes, 50 Personnel Psych. 147 (1997) (finding that being “out” may reduce employees’ anxiety at work); Allen L. Ellis & Ellen D. B. Riggle, The Relation of Job Satisfaction and Degree of Openness About One’s Sexual Orientation for Lesbians and Gay Men, 30 J. Homosexuality 75 (1995) (finding that employees who are “out” report greater levels of satisfaction with their coworkers); Kristen H. Griffith & Michelle R. Hebl, The Disclosure Dilemma for Gay Men and Lesbians, 87 J. Applied Psychol. 1191 (2002) (finding that being “out” at work tends to increase employees’ job satisfaction).

169 See Dawson, 398 F.3d at 218 (“Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII.”) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)). The court also cites to a treatise for the following proposition: “It is not uncommon for plaintiffs to fall short in their Title VII pursuits because courts find their arguments to be sexual orientation (or other unprotected) allegations masquerading as gender stereotyping claims.” See id. (quoting Lex K. Larson, 10 EMPLOYMENT DISCRIMINATION § 168.10[1] (2d ed. 2003)).

170 See Yoshino, supra note __, at 811–38 (discussing how lesbians and gay pass as straight).


172 See, e.g., Kristin M. Bovalino, Note, How the Effeminate Man Can Maximize His Odds of Winning Title VII Litigation, 53 SYRACUSE L. REV. 1117, 1134 (2003) (“Courts tend to mistake gender stereotyping for discrimination based on sexual orientation. Due to the fact that Title VII does not prohibit workplace discrimination on the basis of sexual orientation, gay plaintiffs bringing claims under Title VII should emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.”) (footnotes omitted).
Yet there is at least some value in the court’s acknowledgment of Dawn Dawson’s homosexuality even though it ultimately proved fatal to her claim. There was no way Dawson could have concealed her homosexuality from the court because she was “out” about her lesbianism to her coworkers. Nor should we expect or want her to. The advice that lesbian and gay employees should try to deemphasize their homosexuality is especially troubling to the extent that it encourages lesbian and gay employees to conceal rather than acknowledge their homosexuality in the workplace. After all, there is a rich literature documenting the benefits for lesbian and gay employees of disclosing their homosexuality to their employers and coworkers. Of course, employees who are open to their coworkers about their homosexuality expose themselves to the possibility of being discriminated against because of their sexual orientation. Yet encouraging employees to “stay in the closet” in the workplace is not the solution to this dilemma. As a matter of employment discrimination law, we should not have to encourage lesbian and gay employees to conceal their homosexuality in order not to threaten their chances of articulating an actionable gender-stereotyping claim.

In this sense, the bootstrapping cases offer a more satisfying approach to dealing with an employee’s sexual orientation. At the very least, the positive side of the court’s decision in Dawn Dawson’s case is that it acknowledged her homosexuality. The same is not true about the *Meritor* Court’s handling of Mechelle Vinson’s sexual orientation. The Court in *Meritor* never acknowledged that either Mechelle Vinson or Sidney Taylor had a sexual orientation, as their heterosexuality was assumed. Thus the first step in my new approach is that, in cases where it is relevant to their discrimination claims, courts should acknowledge employees’ sexual orientation, whether heterosexual, homosexual, or otherwise.

2. Neutralizing Sexual Orientation

The second step in my new approach picks up where the first step ends. It holds that an employee’s sexual orientation should not affect the employee’s otherwise actionable discrimination claim. More to the point, an employee’s sexual orientation should be a neutral trait for purposes of

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173 As the trial court noted, many of Dawson’s coworkers also identified as lesbians and gay men. See Dawson v. Bumble & Bumble, 246 F. Supp.2d 301, 308–10 (S.D.N.Y. 2003).


See sources cited supra in note 173.
employment discrimination law, that is, it should be irrelevant in employment discrimination cases. This is the Meritor Court’s contribution. The Court’s implicit conclusion in Meritor was that Mechelle Vinson’s heterosexuality did not affect her sex discrimination claim. Of course, the benefit of being heterosexual for Vinson meant that her sexual orientation blended into the background of her sexual harassment claim. Dawn Dawson, by contrast, was not so lucky, as her sexual orientation was anything but an irrelevant trait.

The thrust of the second step is that an employee’s sexual orientation should neither privilege nor burden an employee when it comes to bringing an actionable discrimination claim. Mechelle Vinson was not affected her sexual orientation, whereas Dawn Dawson was burdened by hers. Neither outcome would be proper under my re-oriented approach. By neutralizing sexual orientation, my new approach seeks to put heterosexuals and lesbians and gay men on equal footing with regard to how their respective sexual orientations affect their ability to articulate actionable discrimination.177

B. The New Approach in Action

The two steps of my new approach work together to re-orient Title VII. Taking these steps, courts should be able to acknowledge an employee’s sexual orientation without it influencing the outcome of the employee’s case. In this section, I consider two applications of this approach. The first deals with a case where an openly-gay man was discriminated against because of his gender-nonconformity and his sexual orientation. The second is an example of how my new approach can be extended beyond the realm of sexual orientation. In particular, I consider recent trends in employment discrimination cases involving transgender employees.

1. Sexual Orientation Is Irrelevant

Medina Rene worked as a butler at the MGM Grand Hotel in Las Vegas, NV.178 He was assigned exclusively to the twenty-ninth floor of the hotel, which was reserved for high-profile and wealthy guests.179 All of his

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176 I further develop this point below in conjunction with my discussion of Rene v. MGM Grant Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc). See infra Part III.B.1.

177 As I noted earlier, my approach also applies to bisexuality and other sexual orientations. In fact, as I discuss below, my new approach can be extended beyond the realm of sexual orientation. See infra Part III.B.2 (discussing transgender employees).

178 See Rene, 305 F.3d at 1064.

179 See id.
fellow butlers on the twenty-ninth floor were men, as was his supervisor. Some time after he was fired from the hotel, Rene brought a discrimination claim under Title VII, alleging that his coworkers and his supervisor subjected him to a hostile work environment on the basis of his sex. According to Rene, his harassers whistled and blew kisses at him; called him “muñeca” (Spanish for “doll”); told him crude jokes and gave him sexually oriented “joke” gifts; and forced him to look at pictures of naked men having sex. In addition, Rene alleged that on many occasions his harassers touched him in a sexual manner. According to Rene, they caressed and hugged him, they touched his body “like they would to a woman,” and they grabbed him in the crotch and poked their fingers in his anus.

Rene based his discrimination claim on his sex and his gender-nonconformity. In deposition testimony, however, Rene also explained that he believed the harassment occurred because he was gay. And at another point in his deposition, Rene explained that one of his harassers was skinny and “not masculine like I am.” The district court granted MGM’s motion for summary judgment, concluding that Rene could not maintain his sex discrimination claim because he believed he was discriminated against because he was gay. The Ninth Circuit Court of Appeals affirmed. Upon a rehearing en banc, however, the full court reversed its earlier panel decision, concluding that Rene’s sexual orientation was irrelevant for purposes of his sexual harassment claim.

Before turning to the court’s reasoning, it is helpful to situate Rene’s case by noting three interrelated points. First, Medina Rene was an openly gay man, in that he was “out” to his coworkers about his homosexuality. Second, Rene’s discrimination claim was anintersectional claim based at

180 See id.
181 See id.
182 See id.
183 Id.
184 See id.
185 See id.
186 See id. at 1077 (Hug, J., dissenting).
187 See id. at 1064, 1066.
188 See Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001).
189 See Rene, 305 F.3d at 1066.
190 Indeed, we learn of Rene’s homosexuality early on in the court’s opinion: “Medina Rene, an openly gay man, appeals from a district court’s grant of summary judgment in favor of his employer MGM Grand Hotel in his Title VII action alleging sexual harassment by his male coworkers and supervisors.” Id. at 1064.
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once on his sex and his sexual orientation. Third, much like the reasoning underlying the “bootstrapping” cases, the lower courts in Rene’s case isolated and elevated the part of his claim that related to his sexual orientation, the effect of which was to poison the viable elements of his discrimination claim.

In addressing Rene’s sexual harassment claim, the en banc court concluded that Rene’s case presented a “fairly straightforward sexual harassment claim.”

Because Rene’s harassers physically grabbed and touched him in a sexual manner, he was easily able to state what the court called “a sexual touching hostile work environment claim.”

As for the legal effect of his homosexuality, the court concluded that Rene’s sexual orientation “was simply irrelevant” to the question of whether he was discriminated against because of his sex. Title VII, the court concluded, protects against such physical conduct of a sexual nature without regard to the victim’s sexual orientation. In short, an employee’s sexual orientation “neither provides nor precludes a cause of action.”

The court’s reasoning in Rene is of a piece with my re-oriented approach to dealing with intersectional claims that are in part based on sexual orientation. First, the court does not shy away from the fact that Rene was a gay man, thus satisfying the first step by acknowledging Rene’s homosexuality. Having identified him as a gay man, the court then concludes that Rene’s homosexuality should not preclude him from bringing an actionable sexual harassment claim. In essence, the court rejects the foundational premise of the “bootstrapping” cases, namely, that an employee’s homosexuality can

191 Id. at 1068.

192 See id. at 1066 (“The premise of a sexual touching hostile work environment claim is that the conditions of the work environment have been made hostile “because of . . . sex.”).

193 Id.

194 Id. at 1063–64.

195 The Rene court relied heavily on the Seventh Circuit’s decision in Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 523 U.S. 1001 (1998). Indeed, the Doe court came to a similar conclusion about the legal effect of sexual orientation in Title VII cases: “[S]o long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? Personal vendetta? Misguided humor? Boredom?) is beside the point.” Id. at 578. The Supreme Court denied cert in Doe, remanding it the appellate court to be reconsidered in light of Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998). However, Oncale only addressed one aspect of Doe—whether a plaintiff can state a claim under Title VII for same-sex sexual harassment (yes, according to the Court in Oncale). Thus it is not clear whether the other aspect of Doe—namely, its causation analysis—is still good law. Attempting to answer this question, one court has pointed out that courts in the Seventh Circuit continue to rely on Doe even after Oncale, which suggests that Doe’s “because of” sex analysis is still good law. See Bibby v. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001).
swallow up an otherwise actionable sex discrimination claim. This is consistent with the second step of my approach.

What Rene and my re-oriented approach have in common is that both seek to transcend status. The court in Rene transcended Medina Rene’s homosexual status by treating his sexual orientation as a neutral trait for purposes of Title VII litigation. For the court, Rene’s homosexuality was no different than his eye color or his taste in music, in that his homosexuality could neither give rise to a cause of action nor prevent him from bringing a discrimination claim based on some other protected trait, such as his sex or his gender-conformity. This is indeed a far cry from Dawn Dawson’s case, where the court stalled at Dawson’s status. As a result of its inability to see past her homosexuality, the court gave only passing attention to Dawson’s gender-stereotyping claim.

2. Transcending Trans Status

A second example of my re-oriented approach in action involves discrimination cases brought by transgender employees. Indeed, we are witnessing an important moment in the legal recognition of gender identity. For a long time, courts were quite suspicious of discrimination claims brought by transgender employees. It was nearly impossible for these employees to bring actionable sex discrimination claims because the courts assumed that they were bringing sex discrimination claims as means to bootstrap protection for gender identity into Title VII. For instance, in Ulane v. Eastern Airlines, the plaintiff, a male-to-female transsexual, was fired from her job as a pilot for Eastern Airlines after she returned to work following sex reassignment surgery. She brought a discrimination claim under Title VII based on her sex and her transsexuality. Though the trial court ruled in her favor, the appellate court reversed, concluding that Title VII’s prohibition against discrimination “because of” sex does

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198 742 F.2d 1081 (7th Cir. 1984).
199 See id. at 1082–83.
200 See id. at 1082.
not encompass discrimination on the basis of transexuality. Moreover, the court also concluded that Karen Ulane was not discriminated against on the basis of her sex, thereby foreclosing relief under Title VII.

In the last few years, however, courts have begun to address transgender cases from a different perspective. There is an emerging strand of case law that holds that transgender employees can bring actionable discrimination claims under Title VII. The impetus for this change was the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, where the Court established the gender-stereotyping theory of sex discrimination. After *Price Waterhouse*, transgender employees began basing their claims not on their transgender status, but on their gender-nonconformity. Consider three cases as examples of this emerging trend. I have already discussed the first case, *Smith v. City of Salem*. There, Jimmie Smith, a firefighter in Salem, Ohio, was able to raise a gender-stereotyping claim against his former employer. The second case came directly on the heels of *Smith*. In *Barnes v. Cincinnati*, the Sixth Circuit ruled that Philecia Barnes, a police officer in Cincinnati, Ohio,

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201 See id. at 1085–87. According to the court, “Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term “sex” as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view... If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline on behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.” *Id.* at 1086.

202 See id. at 1087.

203 Commenting on *Ulane*, William Eskridge and Nan Hunter ask: “What could be a more logical example of ‘sex discrimination’ than firing a pilot because her sex as presented is not the same as the sex as the employer understood it?” They go on to suggest that, “This seems in many respects more of a core sex discrimination than the firing of a female pilot because the employer thinks that women do not fly as well as men.” WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW: TEACHER’S MANUAL (2d. ed., 2004) (on file with author).


207 See discussion supra accompanying notes ___–___.

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

209 See *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005).
could bring a gender-stereotyping against the police department for failing to promote her to the rank of sergeant.\textsuperscript{210} As in \textit{Smith}, that Barnes was a pre-operative male-to-female transsexual did not prevent the court from considering her gender-stereotyping claim. Both \textit{Smith} and \textit{Barnes} involved gender-stereotyping claims brought by transgender employees, and in both the employees were able to articulate actionable discrimination claims despite their transgender status.\textsuperscript{211}

The third case is especially interesting because it is at once consistent and inconsistent with the path laid out in \textit{Smith} and \textit{Barnes}. In \textit{Schroer v. Billington},\textsuperscript{212} the plaintiff, Diane Schroer, applied for and was offered a position as a terrorism research analyst with Congressional Research Service (CRS).\textsuperscript{213} At the time she applied for the position, Schroer, a pre-operative male-to-female transsexual, was already in the process of transitioning from male to female.\textsuperscript{214} Shortly after receiving the offer, Schroer informed her soon-to-be supervisor that, upon taking the position, she would be presenting herself as a woman.\textsuperscript{215} Up until then, CRS had only known Schroer as David John Schroer.\textsuperscript{216} The following day, the supervisor called Schroer to let her know that “given [Schroer’s] circumstances,” she would not be a “good fit” at CRS, and accordingly withdrew the offer.\textsuperscript{217} Schroer later received an email notifying her that the position had been filled.\textsuperscript{218}

Schroer brought a discrimination claim under Title VII, which the court ultimately sustained.\textsuperscript{219} \textit{Schroer} is consistent with \textit{Smith} and \textit{Barnes} because the court concluded that Schroer, a transgender employee, can raise an actionable discrimination claim under Title VII. It differs from these cases, however, in its reasoning as to why the discrimination faced by

\begin{footnotesize}
\textsuperscript{210} See id. at 737.
\textsuperscript{213} See id. at 205.
\textsuperscript{215} See id. at 206–07.
\end{footnotesize}
Schroer was based on her sex. In Schroer, the court rejected outright the path taken by the Smith and Barnes courts. According to the court, Schroer’s discrimination claim was based not on her gender-nonconformity, but on her sex. In particular, CRS withdrew the offer not because Schroer was a man who failed to appear masculine enough, but because of her intention to present herself as a woman. In this respect, Schroer is indeed significant because it carves out a new path for transgender employees to seek redress for employment discrimination under Title VII.

Viewed in another light, Smith, Barnes, and Schroer can be seen as an extension of my re-oriented approach, taking it out of the sexual orientation context and moving it into the realm of gender identity. In all three cases, the courts adhere to both steps of my approach. First, each court acknowledges that the employees are transgendered. While this fact alone would end many transgender employees’ chances of articulating an actionable claim under Title VII, the Smith, Barnes, and Schroer courts transcended the employees’ transgender status. Consistent with the second step of my re-oriented approach, these courts neutralized transgender status by treating it as irrelevant for purposes of Title VII doctrine. In this sense, these employees’ transgender status was like Medina Rene’s homosexuality—and therefore unlike Mechelle Vinson’s heterosexuality and Dawn Dawson’s homosexuality—as it was neither a privilege nor a burden.

C. Concerns

In this section, I respond to three potential critiques of my argument thus far. The first critique is that my reading of Meritor opens the door for employers to defend against sexual harassment claims by arguing that they discriminated against employees because of their sexual orientation. Embedded in this critique is a related concern, namely, that my re-oriented approach effectively transforms sexual orientation into a protected trait under Title VII. The second critique is that my reading of Meritor will

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220 See id. at 211 (“The problem she faces is not because she does not conform to [CRS]’s stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from [CRS]’s intolerance toward a person like her, whose gender identity does not match her anatomical sex.”).

221 See id. at 211–13.

To be clear, this is not meant to imply that all courts have fallen in line behind the Smith, Barnes, and Schroer courts. This is certainly not the case, as courts continue to hold that transgender employees cannot state an actionable sex discrimination claim under Title VII. See, e.g., Etsitty v. Utah Transit Authority, __ F.3d __, (10th Cir. 2007), available at 2007 WL 2774160 (holding that a male-to-female transsexual cannot maintain a sex discrimination claim under Title VII).
make it possible for heterosexual plaintiffs to bring reverse discrimination claims based on sex. The third critique addresses an issue of sexual harassment theory. It argues that my reading of *Meritor* relies on an outmoded theory of discriminatory causation, namely, one in which discrimination turns on attraction and sexual desire.

1. The “Sexual Orientation Loophole”

One potential consequence of my reading of *Meritor* is that it provides employers with a new defense to sexual harassment cases brought by heterosexual plaintiffs. Specifically, it enables employers to argue that they discriminated against a heterosexual employee because of her sexual orientation. And since discrimination based on sexual orientation is not unlawful under Title VII, this means that my reading of *Meritor* may make it easier for employers to avoid liability in sexual harassment cases, which in turn would make it harder for heterosexual employees—in particular, heterosexual women—to win sexual harassment cases.

The problem with this critique is that it overlooks the simple fact that employers are already employing this defense—indeed, with great success—in the “bootstrapping” cases. This defense is the product of what Professor Francisco Valdes calls the “sexual orientation loophole.”

According to Valdes, because sexual orientation is not protected under Title VII, this creates a loophole in employment discrimination law which “invites defendants and enables courts to shift the issues from sex and gender to sexual orientation.” In discussing the sexual orientation loophole, Valdes focuses exclusively on homosexuality. The thrust of the first critique is that my reading of *Meritor* expands the sexual orientation loophole, thus enabling employers in sexual harassment cases to shift the focus from sex and gender to heterosexuality.

If anything, this critique brings into sharper focus why it is so important to neutralize sexual orientation in employment discrimination law. In effect, my re-oriented approach closes up the sexual orientation loophole. Under the second step of my approach, employers cannot use an employee’s sexual orientation as a means to defeat an otherwise actionable discrimination claim. This does not mean, however, that the practical effect of my approach is to make sexual orientation a protected trait under Title VII. Consider two reasons why this is not the case. First, my re-oriented approach does not cover cases where employees bring sexual orientation *simpliciter* claims. For instance, my re-oriented approach would not apply in a case where an employer refuses to hire lesbians and

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223 See Valdes, supra note ___, at 123–24, 146–47.

224 Id. at 123.
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gay men. For an employee to challenge this employment policy, the employee would have to do so under a state or local antidiscrimination law that prohibits discrimination on the basis of sexual orientation.

The second reason why my re-oriented approach does not effectively transform sexual orientation into a protected trait is that, under the second step of my approach, employees must still prove that they suffered discrimination “because of” sex. The key here is that my approach only applies to intersectional claims based in part on sexual orientation and some other protected trait, usually sex or gender-nonconformity. An employee who raises such a claim must still prove the elements of the non-sexual orientation-based claim. Thus, even if a court does not reject an employee’s claim just because it implicates her sexual orientation, the employee must still prove that she was discriminated against on the basis of her sex, in violation of Title VII. In other words, that sexual orientation is irrelevant for purposes of Title VII doctrine does not mean that the employee will automatically win her discrimination claim.

2. Reverse Discrimination

A second possible consequence of my reading of Meritor is that it may pave the way for heterosexual employees to bring reverse discrimination claims based on sex. For instance, consider the situation where a heterosexual male employee feels he is being discriminated against because of his heterosexuality. Imagine that the employee is an extremely high testosterone male who exhibits many of the stereotypical trappings associated with male heterosexuality, such as being hairy and muscular, overtly masculine, excessively flirtatious with women, and outwardly homophobic toward his fellow gay employees. Say that this employee feels he is being discriminated against in the workplace because he is strongly heterosexual, perhaps in particular because of his outwardly homophobic behavior toward other employees. A possible consequence of my analysis is that this employee may be able to state a reverse discrimination claim.

This would be an example of what Professor Kim Yuracko calls “ontological discrimination.” Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 TEX. L. REV. 167, 169–70 (2004). Professor Susan Sturm would classify this as an example of first, as opposed to second, generation discrimination. By contrast, second generation discrimination claims “involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.” Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 460 (2001). In a recent paper, Professor Liz Glazer notes that the move from first to second generation discrimination presents a problem for sexual minorities, who continue to suffer first generation harms. See Elizabeth M. Glazer, When Obscenity Discriminates (unpublished manuscript, on file with author).

I thank Professor Michael Green for taking the time to help me think through this issue, and for helping me to visualize such reverse discrimination claims.
discrimination claim under Title VII based on his sex. Just as heterosexuality was, at least in part, the trigger for sex-based discrimination in *Meritor*, so too could this employee’s heterosexuality trigger a discrimination claim based on his sex.

In approaching the construction of heterosexuality in employment discrimination law, I did not anticipate finding a remedy for such an employee. Indeed, my primary goals in this paper were to expose the double standard that is being applied to employees depending on their sexual orientation and to carve out a new path for courts to follow in dealing with intersectional claims that are based in part on sexual orientation. To the extent that I have laid the foundation for such a reverse discrimination claim, however, it is in no way fatal to my overall project. After all, one of the foundational points I seek to communicate in this paper is that it is simply a mistake to assume that heterosexual employees do not face discrimination on the basis of their sexual orientation. Thus it is quite possible that my analysis paves the way, albeit inadvertently, for this heterosexual male employee to raise a reverse discrimination claim based on sex.227

3. Attraction and Orientation

Since the inception of sexual harassment law in the 1970s, lawyers and scholars have struggled over the question of why sexual harassment is “because of” sex.228 The early sexual harassment cases understood sexual harassment in terms of sexual attraction and desire.229 At that time, most sexual harassment cases involved the scenario where a male supervisor pressured a female subordinate into having sex with him. In these early cases, the courts concluded that the female employees were discriminated against “because of” sex in violation of Title VII because the male supervisors would not have made sexual advances toward similarly

227 That said, I suspect that an employee in this situation would have a fairly hard time convincing a court that he was discriminated on account of his sex. This does not mean that the potential cause of action would not be possible, but rather that the employee would not likely win the claim in court. My sense is that a court would disaggregate his sex from his sexual orientation, concluding that he was discriminated against on the basis of his sexual orientation rather than his sex.

228 See MACKINNON, supra note ___, at 106–18 (outlining the two theories of sexual harassment as sex discrimination).

situated male employees. Thus sexual attraction and desire were at the heart of the early sexual harassment cases.

Over time, however, scholars have grown suspicious of this way of thinking about sexual harassment. In particular, a group of feminist scholars, whom Professor David Schwartz calls “second generation feminists,”230 have challenged the attraction theory of sexual harassment on both descriptive and normative grounds.231 In its place, these scholars have put forth an alternative theory of sexual harassment. For these scholars, sexual harassment is an unlawful form of sex discrimination because it is an expression of sex- and gender-based power dynamics in the workplace.232 Today, the power-based paradigm is clearly the prevailing account of sexual harassment. As Professor Martin Katz notes, “Within the academy the attraction-based views is almost universally regarded as problematic at best, or backward and archaic at worst.”233

With these two theories of sexual harassment in mind, some may argue that my interpretation of Meritor is problematic because it relies on the more outdated attraction theory of sexual harassment. To be clear, there is no denying that my reading of Meritor does indeed rely on an attraction-based approach to sexual harassment. By conceptualizing Vinson’s sexual orientation in relation to Taylor’s, I am relying on their sexual conduct—in particular Taylor’s sexual advances and their later sexual activities—to show that the discrimination faced by Vinson was based in part on her heterosexuality. Thus, like the early sexual harassment cases mentioned above, sexual attraction and desire are at the heart of my reading of Meritor.

Yet there are still good reasons not to reject my reading of Meritor solely because it is steeped in the attraction-based approach. The first is that even though the attraction-based view is almost unanimously disfavored by the legal academics,234 courts continue to conceptualize

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230 See Schwartz, supra note __, at 1700.

For a good summary of the scholarship expressing this view, see Schwartz, supra note __, at 1700–1702. Like the attraction theory, the power theory of sexual harassment traces its origins back to the work of Catharine MacKinnon. See MacKINNON, supra note __, at 116–18 (discussing a “sex inequality” theory of sex discrimination).

Martin J. Katz, Reconsidering Attraction in Sexual Harassment, 79 IND. L.J. 101, 102 (2004). Katz goes on to say that “Modern scholars either attack the attraction-based view, or they ignore it.” Id. (citing the works of “second generation feminists”).

As far as I can tell, Professor Katz is the only member of the academy who has defended the attraction paradigm. See Katz, supra note __. According to Katz, “[W]hile the
sexual harassment in terms of sexual desire and attraction.\textsuperscript{235} For this reason alone, it is worth not rejecting the attraction paradigm altogether. Second, and perhaps more importantly for this paper, my reading of \textit{Meritor} suggests that, for purposes of sexual harassment law, sexual harassment based on attraction or desire might be linked in a particular way to a victim’s sexual orientation. This was true of Mechelle Vinson’s case. There, Taylor’s harassing behavior was no doubt based at least in part on his attraction to Vinson and his desire to have sex with her. As a heterosexual male, Taylor targeted Vinson in her capacity as a \textit{heterosexual} woman. As such, his harassing conduct was targeted at her sex and her sexual orientation.

This is in no way meant to suggest that power and dominance played no role in Vinson’s case. Indeed, they most certainly did. As her supervisor, Taylor used his position at the bank to pressure Vinson into engaging in a wide variety of sexual activity. Taylor actively sought to humiliate Vinson by exposing himself to her and following her into the bathroom at the bank. Not to mention the fact that Taylor raped Vinson on more than one occasion, which is perhaps the clearest piece of evidence that Taylor’s harassing behavior was based in part on gender-based power dynamics. My point is simply that, in the realm of sexual harassment law, there may be a relationship between attraction and sexual orientation that warrants further scholarly attention. To that end, my reading of \textit{Meritor} can serve as a point of departure for any further discussion of this relationship.

\section*{Conclusion}

Heterosexuality and homosexuality are not similarly situated under Title VII. While lesbian and gay employees frequently lose their discrimination claims because of their homosexuality, courts rarely even acknowledge that heterosexual employees have a sexual orientation, let alone reject their discrimination claims because of it. With this paper I have sought to put an end to this double standard. In its place, I have offered a re-oriented approach to dealing with discrimination claims that

\textsuperscript{235} See, e.g., \textit{Oncale} v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (noting that a plaintiff can rely on sexual attraction to show that the discrimination was “because of sex”); see also Katz, supra note \_, at 103 (“Outside of the academy, courts and practitioners continue to rely on the attraction-based view.”) (citing \textit{Oncale}).
are based in part on sexual orientation. The thrust of this approach is that sexual orientation is no different than any other trait that is not protected under Title VII, as it neither creates nor precludes an actionable discrimination claim. By rendering sexual orientation irrelevant for purposes of Title VII, my re-oriented approach seeks to put heterosexual employees and lesbian and gay employees on equal footing with regard to the legal implications of sexual orientation.

At the same time, this paper also serves to highlight some of the key characteristics of the legal construction of both heterosexuality and homosexuality. In particular, it showcases the effects of visibility in producing cultural attitudes about sexual orientation, attitudes which no doubt seep into and inform the legal construction of sexual orientation. The primary reason why courts tend to treat heterosexuality and homosexuality differently is because heterosexuality is normative and therefore invisible, while homosexuality is stigmatized and therefore highly visible. Thus this paper urges courts to recognize that heterosexual employees have a sexual orientation. By acknowledging the existence of heterosexuality, courts must confront the differing standards that have been applied to employees depending on their sexual orientation. In this regard, the paper has sought to harness heterosexual privilege for the benefit of all employees who suffer discrimination based on their sexual orientation.