GENDER TYPING IN STEREO: THE TRANSGENDER DILEMMA IN EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] (Title VII) prohibits discrimination against men because they are men and against women because they are women. This familiar characterization of the Act has been quoted in dozens of sex discrimination cases to support a narrow view of who is protected against sex discrimination in this country. When transsexuals file suit,

> [e]mployment discrimination jurisprudence at both the federal and state levels . . . captures transsexuals in a discourse of exclusion from social participation. This wide net, using a remarkably refined system of semantic manipulations, snags all claims launched by transsexuals and reveals that no matter how a transsexual frames her discrimination claim, it will fail.[2]

In this Article, I explore whether those words, written after a thorough examination of employment discrimination claims brought by transsexuals in both federal

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1. 42 U.S.C. § 2000-e (2000).

2. Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism*," 4 MICH. J. GENDER & L. 275, 310 (1997) [hereinafter *Naming*]. In *Naming*, I explained my theory about "why the issues of gender incongruence posed by transsexualism are troubling to the bench." *Id*. at 276. At the risk of the article's offending commentators who object to applying the techniques of literary criticism to interpret the law, see, for example, RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 13, 17, 216, 218, 249-55 (1988), I drew on my background as a student of literature and decided to compare critical responses to the literary convention of the grotesque, *Naming*, *supra*, at 278-79, 329-30, 333-34, post-structuralist literary criticism, *id*. at 279, 298, and certain of Sigmund Freud's writings, see *id*. at 279-80, 298, 299-302, with judicial responses to transgendered plaintiffs and their legal claims. In writing the article at all, I realize now I was hazarding creating scholarship that would have no credibility even among members of the subject class, see Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 151 (2000) (noting that while nontransgender writers on transgenderism may be sensitive and caring, they are not "in-the-skin, living-the-life, or feeling-the-pain"). I nonetheless take reassurance from the knowledge that the struggles of disenfranchised groups often inspire commentary from those not disenfranchised in exactly same way, *id*., and that these commentators do not always suffer thereby any great diminution in their authority to express their views on the matter. *See, e.g*., ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002) (Professor William N. Eskridge, Jr., of the Yale Law School, reviewing this book, commented that "Koppelman's arguments cannot be ignored by any official or person who must consider gay rights claims.").

and state courts, need revision in light of recent case law suggesting that the courts are prepared to recognize gender stereotyping as a viable legal theory of sex discrimination for both men and for women. In Part II, I describe the fictional case of a transgendered worker suing her employer for sex discrimination under Title VII of the Civil Rights Act of 1964 and the challenges faced by the law students working on both sides of the matter. In Part III, I explore the current contours of the gender stereotyping theory of sex discrimination and consider how useful such a theory could be to transgendered employees seeking redress for sex discrimination under Title VII of the Civil Rights Act of 1964. I conclude that sex discrimination claims brought by transgendered workers still confront enormous obstacles and that, despite the expanded judicial recognition of gender stereotyping claims, will continue to be difficult to advance into the future.

II. A VERY CHALLENGING ASSIGNMENT

In the spring of 1998, students in Section B-2 of Introduction to Advocacy at the University of Illinois College of Law were given a very challenging assignment. The course requires students to argue one side of a complex legal problem both in writing and orally. From a pedagogical standpoint, one of the goals of the course is that students learn how to transform the emotional reactions a problem engenders into convincing legal arguments.[3] The topics of the problems I had assigned the previous two times I had taught the course were, in 1996, same-sex sexual harassment and, in 1997, the compulsory sterilization of developmentally disabled individuals. Although these topics were and remain volatile, I wanted students in B-2 to tackle a problem that would cause them to question their assumptions about the world in ways the other two problems would not.

A. Craig v. Hudson Airtool & Compressor Co.

At the beginning of the term, each student received a memo announcing that, for the rest of the semester, he or she would act as a lawyer working on one side of a fictional Title VII employment discrimination matter brought in federal district court under the caption *Craig v. Hudson Airtool & Compressor Co*.[4] Each student's task would be to write a memorandum of law in support of a motion for summary judgment. A few days later, each student received a file containing a complaint alleging illegal sex discrimination brought by June G. Craig in the United States District Court for the Central District of Illinois against Hudson, a Champaign, Illinois, company subject to federal employment discrimination provisions and co-owned by sisters Blanche and Jane Hudson.[5] Following the complaint was

3. *See* Grace Tonner & Diana Pratt, *Selecting and Designing Effective Legal Writing Problems*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163, 170 (1997); Jeanne Curran et al., *Moot Court: Collaborative Thinking on Your Feet*, Sept. 7, 2000, *at* http://www.csudh.edu/dearhabermas/apsawashver.htm (on file with Maine Law Review) ("One of the problems in moot court is the difficulty of finding balanced legal issues.").

4. Memorandum from Richard F. Storrow, to Introduction to Advocacy Section B-2, University of Illinois College of Law (Jan. 20, 1997) (on file with Maine Law Review).

5. Complaint ¶¶ II, IV, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Nov. 24, 1997) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review) [hereinafter Complaint].

Hudson's answer, laying out its denials, admissions, and affirmative defenses to Craig's complaint.[6] In essence, Hudson denied discriminating against Craig on the basis of her sex and asserted that its termination of Craig was in full compliance with Title VII.[7]

In addition to the pleadings, the file contained documents generated in the discovery process. These were excerpts from the depositions of Craig and of Blanche Hudson, who was responsible for decisions regarding the hiring and retention of personnel at Hudson, and an affidavit of Dr. J. Joris Hage,[8] Craig's attending physician and a medical expert on the causes and treatment of transsexualism.

The excerpts from Craig's deposition revealed that Craig had begun living as a female three years before taking a job on the assembly line in Hudson's airtool division in June of 1995.[9] As a part of her transition, Craig obtained a court order to have the gender marker on her birth records and other legal documents altered to indicate that she was a female.[10] At all times during the application process and during her employment with Hudson, Craig represented herself as a woman.[11] Craig described her employment at Hudson as relatively uneventful, except for certain incidents in the women's restroom.[12] Craig mentioned that women in the restroom would sometimes linger while she was present and seemed to take a keen

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6. Answer, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Nov. 24, 1997) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review) [hereinafter Answer].

7. *See* Answer, *supra* note 6, ¶¶ 5, 7.

8. J. Joris Hage is fictionalized in *Craig* as the chairman of the Department of Gender Identity Disorders at Champaign County General Hospital, Champaign, Illinois, and his testimony is a composite of the opinions of several medical experts on transsexualism. Hage wrote *Medical Requirements and Consequences of Sex Reassignment Surgery*, published in Transsexualism, Medicine and Law, Proceedings of the XXIIIrd Colloquy on European Law in 1995.

9. Deposition of June G. Craig at 1, 2, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Jan. 5, 1998) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review) [hereinafter Craig Deposition].

10. *See* Craig Deposition, *supra* note 9, at 2, 4, 5. Illinois's change-of-birth-certificate statute, in relevant part, reads as follows:

> For a person born in this State, the State Registrar of Vital Records shall establish a new certificate of birth when he receives any of the following:
>
> . . . .
>
> (d) An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed. The State Registrar of Vital Records may make any investigation or require any further information he deems necessary.

410 ILL. COMP. STAT. 535/17(1)(d) (West, WESTLAW through 2002 Reg. Sess.). An Illinois driver's license may be reissued "to correct a statement appearing upon the original permit or license . . . ." 625 ILL. COMP. STAT. 5/6-114 (West, WESTLAW through 2002 Reg. Sess.).

Phyllis Frye, the Executive Director of the International Conference on Transgender Law and Employment Policy pioneered the procedure of changing the gender marker on birth certificates and other legal documents prior to sex reassignment surgery. *Naming*, *supra* note 2, at 331 n.294.

11. Craig Deposition, *supra* note 9, at 2.

12. *Id.*

interest in her.[13] She concluded that these women were lesbian and thought nothing more about their behavior.[14]

Not long after she began working for Hudson, Craig met and eventually married a man named Lane.[15] At this point, Craig's estrogen treatment had resulted in irreversible changes to her body, including infertility and chemical castration, rendering it impossible for her to use the restroom while standing up.[16] At this point, she and Lane decided the time had come to consider sex reassignment surgery.[17] Craig fully understood that the surgery would not give her ovaries or a uterus.[18] Hoping to obtain a six-month leave of absence from Hudson for this purpose, Craig approached Blanche Hudson on October 27, 1997, and asked her for time off to have surgery.[19] At no time did Blanche ask or did Craig reveal to Blanche the purpose of the surgery.[20] After Craig made her request, Blanche discharged her, claiming Craig had been a "disruptive influence at Hudson" and that Blanche herself and some of the other women at the company had been troubled by Craig's behavior.[21] At the time she was deposed in this litigation, Craig had been living as a woman for six years.[22]

The excerpts from Blanche Hudson's deposition told a different story. Blanche testified that she and others at Hudson had always known Craig "was a man" from the way she dressed and how she walked.[23] In particular, Blanche noticed that Craig, unlike the company's secretaries, never wore frilly or lacy blouses, high-heeled shoes, or jewelry and that Craig was, more generally, "just not ladylike."[24] Although Blanche admitted that feminine accoutrements were not commonly worn by female workers on the assembly line and that safety concerns might preclude the wearing of such items,[25] she also claimed to have received reports from con-

13. *Id*. at 2 ("I guess the only weird thing was that some of the other women were always a little funny with me. Like when I would go to the bathroom and stuff. Some of the women seemed to be hanging out in there and watching me.").

14. *Id.* at 2 ("I kind of thought they might be have been queers, but what the hell. Even though I'm not one, queers are cool.").

15. *Id*. at 4. To obtain a marriage license in Illinois, the parties need only submit "satisfactory proof that the marriage is not prohibited." 750 ILL. COMP. STAT. 5/203(2) (West, WESTLAW through 2002 Reg. Sess.). Marriages between males and postoperative male-to-female transsexuals have been deemed invalid in recent decisions based on reasoning that a person's chromosomal sex cannot be changed. *See, e.g.,* In re Estate of Gardiner, 42 P.3d 120, 121-22 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999). This reasoning has led commentators to characterize recent marriages between females and male-to-female transsexuals as valid same-sex marriages. *See* Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1033-34 (2001).

16. Craig Deposition, *supra* note 9, at 3, 5; *see* Affidavit, *infra* note 31, ¶ 11.

17. Craig Deposition, *supra* note 9, at 3. Craig made clear that the surgery was not essential to the survival of her marriage but was "something that seemed inevitable." *Id*. Craig refused to discuss how she functioned sexually with her husband. *See id.* at 5.

18. *Id*.

19. *Id*. at 3.

20. *Id*. at 3-4.

21. *Id*. at 3, 4.

22. *Id*. at 2.

23. *See* Deposition of Blanche Hudson at 1, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Jan. 7, 1998) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review) [hereinafter Hudson Deposition].

24. *Id*. at 1, 2.

25. *Id*.

cerned female employees that Craig was standing up to urinate in the women's restroom.[26] When asked her reasons for terminating Craig's employment, Blanche explained that when Craig asked for time off to have surgery, "it just clicked" that Craig was "queer."[27] Blanche concluded that Craig was a gay man who wanted to be a woman and that she understood Craig to be a cross-dresser.[28] She compared Craig to her cousin Edwin, a gay man who had been fired from numerous positions for his "flaunting" his homosexuality.[29] Blanche admitted she had a policy against allowing homosexuals to work at Hudson.[30]

Dr. Hage testified that medical science regards an individual's sex as susceptible to placement along a spectrum "ranging from extreme masculinity on the one hand to extreme femininity on the other"[31] and that the precise determination is made after consideration of seven variables, namely, "chromosomal sex, gonadal sex, hormonal function, internal genital morphology, external genital morphology, assigned sex ([i.e.,] rearing) and psychosexual differentiation."[32] Dr. Hage defined gender dysphoria, the underlying cause of transsexualism, as a longstanding "compulsion to change anatomic sex"[33] and transsexualism itself as gender dysphoria's manifestation, that is, the "adoption of the desired sex role."[34] He then described the procedures required to perform genital sex reassignment,[35] and explained that, given the lack of any psychotherapeutic cure for transsexualism,[36] "[t]hese procedures are not properly called sex reassignments but more accurately sex *confirmations*."[37] Finally, Hage described Craig as a male-to-female (MTF) transsexual who, through estrogen therapy, had achieved partial chemical castration and the growth of breasts, giving her, medically speaking, "[the] external genital morphology of a female with a hyperextended clitoris."[38] Although Craig had yet to undergo sex reassignment surgery, Hage deemed her transition from male to female an unqualified success.[39] Chromosomes, he noted, play very little role in

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26. *Id*. at 2, 3.
27. *Id*. at 2.
28. *Id*. at 3.
29. *Id*.
30. *Id*. at 2, 3.
31. Affidavit of J. Joris Hage ¶ 8, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Jan. 9, 1998) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review) [hereinafter Affidavit]. The testimony of Dr. Hage is a composite of the writings of various medical professionals on transsexualism. *See infra* notes 32-40.
32. Affidavit, *supra* note 31, ¶ 9.
33. *See id*. ¶¶ 2, 3, 7. Dr. Hage's definition was taken from Richard Green, *Spelling "Relief" for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL'Y REV. 125, 126 (1985).
34. Affidavit, *supra* note 31, ¶ 3. *See* William A. W. Walters, *Human Sexual Differentiation and Its Disturbances*, *in* SEX CHANGE: THE LEGAL IMPLICATIONS OF SEX REASSIGNMENT 21 (H.A. Finlay ed., 1988). The American Psychiatric Association defines gender dysphoria as "[a] persistent aversion toward some or all of those physical characteristics or social roles that connote one's own biological sex." *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 823 (4th ed., txt. rev. 2000). Gender dysphoria is also known as gender identity disorder. *See id.* § 302.85.
35. Affidavit, *supra* note 31, ¶ 5.
36. *Id*. ¶ 7.
37. *Id*. ¶ 6 (emphasis added).
38. *Id*. ¶ 11.
39. *Id*. ¶ 10.

how an individual presents herself to the world and in how she interacts with others.[40]

The last two documents in the file were motions brought after the conclusion of discovery. Hudson brought a motion for summary judgment arguing that "a transsexual has no claim for sex discrimination under Title VII" and that, in any event, there was no material factual dispute that could support such a claim.[41] Craig brought a motion the same day, asking the court to rule, as a matter of law, that transsexuals may sue for sex discrimination under Title VII and requesting summary judgment, given the lack of any material factual disputes regarding either her claim or Hudson's defenses.[42]

B. Craig's Dilemma: Prickly Precedent

For years now, whether transsexuals have alleged discrimination based on sex, on transsexualism, or on sexual orientation, their claims have failed for one of several reasons. Some courts have recast transsexualism discrimination claims as sexual orientation discrimination claims, effectively removing them from the ambit of federal protection.[43] In certain jurisdictions where sexual orientation discrimination is prohibited, courts insist that transsexualism has nothing to do with sexual orientation.[44] Under these approaches, transsexuals have had no protection against discrimination on the basis either of their transsexualism or of their sexual orientation. When she complains of sex discrimination, some courts rule that a transsexual has a viable claim for sex discrimination only if she sues for discrimination based on her chromosomal sex, something a transsexual, by definition, is unlikely to do.[45] Postoperative transsexuals' anatomical sex and preoperative transsexuals' gender are often entirely disregarded, because courts are convinced that legislatures, when they enacted antidiscrimination legislation, had only a very narrow and traditional definition of sex in mind.[46]

The *Craig* case is a composite of factors deemed legally significant by appellate courts ruling on discrimination claims brought by transsexuals. Craig's dilemma, as a transsexual bringing a Title VII violation claim, was that numerous

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40. *Id.* ¶ 11. It should be noted that Hage did not describe Craig's chromosomal make-up and that Craig admitted she did not know what it was. Craig Deposition, *supra* note 9, at 5. Hage did, though, attest that "[n]ew discoveries point to the fallacy in concluding that the presence of a Y chromosome as a distinct entity seen on conventional chromosome analysis is essential for the diagnosis of maleness." Affidavit, *supra* note 31, ¶ 11.

41. Notice of Motion and Motion of Hudson Airtool & Compressor Co. ¶ 1, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Jan. 22, 1998) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review).

42. Notice of Motion and Motion of June G. Craig ¶¶ 2, 3, Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Jan. 22, 1998) (97 Civ. 3384) (fictional document created by author for classroom use) (on file with Maine Law Review).

43. *See infra* note 48.

44. *See* Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995); Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96 (D.D.C. 1994).

45. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 35 (1995) (explaining the immutability of gender for transgendered persons).

46. *See*, *e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982).

hurdles in the form of adverse appellate rulings stood between her and a judgment in her favor. The majority of these rulings, at both the federal and state levels, have denied transsexuals the protection of sex and sexual orientation discrimination proscriptions.[47] These cases illustrate how courts routinely miscategorize transsexualism as a matter of sexual orientation, confuse the physiological bases upon which one's legal sex is said to be based, misunderstand the relation between sex and gender, and give employers' perceptions of their employees' gender identities determinative importance without explanation and without attention to the remedial nature of antidiscrimination legislation.

Many early decisions concluded that Title VII's prohibition of sex discrimination does not prohibit discrimination based on transsexualism, since transsexualism is a type of sexual orientation.[48] Moreover, since Congress has rejected several bills introduced to amend Title VII to prohibit discrimination on the basis of sexual preference,[49] the judiciary has concluded that, by implication,[50] discrimination on

47. The minority position advanced by the New York courts is discussed *infra* notes 53-57 and accompanying text. Some antidiscrimination legislation, namely, the Americans with Disabilities Act, the Rehabilitation Act of 1973, and certain state statutes *expressly* exclude transsexuals from their purview. *See* 42 U.S.C. § 12211(b)(1) (2000); 29 C.F.R. § 1630.3(d)(1) (2002); 29 U.S.C. § 705(20)(F)(i) (1994); IND. CODE § 22-9-5-6(d)(3) (West, WESTLAW through end of 2002 lst Spec. Sess.); IOWA CODE § 225C.46(2)(b) (1997); LA. REV. STAT. ANN. § 51:2232(11)(b) (West, WESTLAW through 2001 Reg. and 2nd Ex. Sess. Acts 1996); NEB. REV. STAT. § 48-1102(9) (West, WESTLAW through end of 2002 1st Spec. Sess.); OHIO REV. CODE ANN. § 4112.01(16)(b)(ii) (West, WESTLAW through 124th GA (2002)). A discussion of these statutes is beyond the scope of this Article.

48. *See* Ulane v. E. Airlines, Inc., 742 F.2d at 1084; Sommers v. Budget Mktg., Inc., 667 F.2d at 750; Voyles v. Ralph K. Davies Med. Ctr., 570 F.2d 354 (9th Cir. 1978), *aff'g* 403 F. Supp. 456, 457 (N.D. Cal. 1975); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (overruling recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)) ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."); Grossman v. Bernards Township Bd. of Educ., 538 F.2d 319 (3d Cir. 1976), *aff'g* No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975), *cert. denied*, 429 U.S. 897 (1976); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977) (noting that the position of the Equal Employment Opportunity Commission is that discrimination against transsexuals is not prohibited by existing law).

49. *See* Ulane v. E. Airlines, Inc., 742 F.2d at 1085-86 (enumerating unsuccessful attempts by members of Congress to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation"). Several courts have determined that discrimination on the basis of sexual preference is not prohibited by Title VII's prohibition of sex discrimination. *E.g.*, Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979). Legislation introduced in 1994, 1995, 1996, and 1999 also failed. Tiffany L. King, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1024 (2002). The latest version of this legislation was introduced in 2001. *See* Human Rights Campaign, *Congressional Legislation: Employment Non-Discrimination Act (ENDA)*, *available at* http://capwiz.com/hrc/issues/bills/?bill=46908 (last visited October 21, 2002).

50. *E.g.,* Ulane v. E. Airlines, Inc., 742 F.2d at 1086 (using Congress's rejection of attempts to broaden the scope of Title VII as evidence that it "had a narrow view of sex in mind when it passed the Civil Rights Act"); Sommers v. Budget Mktg., Inc., 667 F.2d at 750 ("The fact that the proposals were defeated indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation."); Holloway v. Arthur Anderson & Co., 566 F.2d at 662 (failure to add sexual orientation shows "that Congress had only the traditional notions of 'sex' in mind") (overruling recognized by Schwenk v. Hartford, 204 F.3d at 1201).

the basis of sex must not encompass discrimination on the basis of transsexualism.[51] This categorical denial of claims alleging discrimination based on transsexualism appears inconsistent with the broad remedial purposes of antidiscrimination legislation.[52]

In jurisdictions where employment discrimination statutes include sexual orientation as a prohibited basis for discrimination, courts have concluded that transsexualism is *not* a form of sexual orientation. In *Maffei v. Kolaeton Industry, Inc.*,[53] for example, the transsexual plaintiff argued that her claim was actionable due to the *inclusion* of sexual orientation in the New York City equivalent of Title VII.[54] The court rejected this theory, noting "[t]here is a clear distinction between homosexuals and transsexuals." [55] The court disagreed with the notion that the failure of Congress to include the term "sexual orientation"[56] in Title VII demonstrated its intent to exclude transsexuals.[57] In support of its determination, the court cited *Underwood v. Archer Management Services, Inc.*,[58] a case brought under the District of Columbia Human Rights Act,[59] in which the court held that transsexuality and homosexuality are distinct.[60] Similarly, in *Enriquez v. West Jersey Health Systems, Inc.*,[61] responding to plaintiff's claim that she had been discriminated against based on her sexual orientation, the court made a sharp distinction between transsexualism and sexual orientation.[62] "This portion of the statute," it declared, "refers to one's relations with others and not to his or her

51. *But see* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 48-49 (1995) (noting that a strict construction of the statute supports protection for transsexuals routinely appearing for work in women's attire, "if the skirts and dresses were of a sort the employer did not object to its female employees wearing"); RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 108 (1996) (arguing that since the word transsexual refers to one's sex, discrimination on this basis is sex discrimination); Jennifer Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 28 n.146 (2000) (quoting Commission des Droits de la Personne et des Droits de la Jeunesse v. Maison des Jeunes, Canada Province of Quebec, [1998] [Human Rights Tribunal File No. 500-53-00078-970, at 21] ("[I]t is not clear how discrimination based on transsexualism or on the process of transsexualism could be anything other than sex-based.")).

52. United Steelworkers of Am., 443 U.S. 193, 215 (1979) (Blackmun, J., concurring) (noting "the broad remedial purposes of Title VII").

53. 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

54. N. Y. CITY ADMIN. CODE § 8-107, 1(a) (West, WESTLAW through 2001).

55. Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d at 395.

56. The court's definition of "sexual orientation" was: "sexual preferences and practices, i.e., the sex of a person's sexual partner, with heterosexuals being persons sexually attracted to members of the opposite sex, homosexuals being those attracted to members of the same sex, and bisexuals attracted to both sexes." *Id.* at 393.

57. *Id.* at 395-96 ("Because Congress may have chosen not to include the term 'sexual orientation' in Title VII does not mean that it has considered and declined coverage to transsexuals.").

58. 857 F. Supp. 96 (D.D.C. 1994).

59. D.C. CODE ANN. §§ 1-2501 to 1-2557 (1992 & Supp. 1997).

60. Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. at 98 (noting incorrectly that "courts have firmly distinguished transsexuality from homosexuality").

61. 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

62. *Id.* at 372.

sexual identity . . . ."[63]

Perhaps aware that she could not bring a claim for discrimination based on her transsexualism,[64] Craig chose to sue Hudson for sex discrimination. While courts clearly stated that transsexuals may assert claims of discrimination based on their sex,[65] these courts typically define a preoperative transsexual's sex as her anatomical sex and a postoperative transsexual's sex as her chromosomal sex, effectively rendering gender identity or any "change" of sex irrelevant to a threshold determination of her sex and a lawsuit for sex discrimination by any transsexual an exercise in futility.[66] At the same time, these courts, apparently aware that few employers inspect the genitalia or chromosomal make-up of their employees at any point in the employment relationship, render the employers' perceptions of the employees' sex determinative.[67] This creates an incentive for employers who become aware of the transition after the claim is brought to assert that it was known or suspected that the employee was not the sex she claims to be. This is an effective obstacle against sex discrimination claims brought by transsexuals, since a transsexual is highly unlikely to sue for sex discrimination against males if her gender identity is female. The clear result of this quandary is that transsexuals cannot advance viable claims under antidiscrimination laws.

The most salient problem in the legal treatment of sex discrimination claims brought by transsexuals is the great inconsistency between the legal and medical determination of sex. While most in the medical establishment accept that sex determination requires consideration of a multiplicity of factors that enable place-

63. *Id.* at 371. *But see* EVANSTON, ILL., ORDINANCE 61-0-97 (1997), *available at* http://66.113.113.195.234/IL/Evanston/07005000000006000.htm (last visited Nov. 11, 2002) (defining sexual orientation in Human Rights Ordinance as encompassing both affectional relationships and gender identity); MINNEAPOLIS, MINN., MUNICIPAL CODE § 139.10, 139.20, *available at* http://fws.municode.com/CGI-BIN/OM_isapi.dll?infobase=11490.nfo&softpage=newtestTOCnonFrame (last visited Nov. 11, 2002) (prohibiting discrimination on the basis of affectional preference and including within the definition of affectional preference "having or projecting a self-image not associated with one's biological maleness or one's biological femaleness").

64. Transsexuals, in any event, identify as either male or female. *See* THOMAS LATHROP STEDMAN, STEDMAN'S MEDICAL DICTIONARY 1841 (27th ed. 2000) (defining transsexualism as "[t]he desire to change one's anatomic sexual characteristics to conform physically with one's perception of self as a member of the opposite sex").

65. *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977) ("[T]ranssexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII.") (overruling recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)); Cox v. Denny's, Inc., No. 98-1085-CIV-J-16B, 1999 WL 1317785, at *2 (M.D. Fla. Dec. 22, 1999).

66. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) ("We agree with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); Holloway v. Arthur Andersen & Co., 566 F.2d at 664 (Goodwin, J., dissenting) (overruling recognized by Schwenk v. Hartford, 204 F.3d at 1201). *See also* James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478, 481 (D. Kan. 1995) (granting summary judgment against an MTF who failed to allege discrimination against males).

67. *See, e.g.*, James v. Ranch Mart Hardware, Inc., 881 F. Supp. at 481 (granting summary judgment against an MTF who failed to allege discrimination against males); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa. 1993) (denying an MTF redress where the employer did not perceive the MTF to be female).

ment of sex along a continuum,[68] the legal establishment, by contrast, insists that sex is a simple matter of biology, anatomy, or chromosomes.[69] Where these criteria point to different sexes,[70] the court hearing the matter chooses whichever criterion will most damage the viability of a transsexual's sex discrimination claim.[71] By way of justification, courts claim that, in the interest of administrative efficiency and predictable outcomes, such a cut-and-dry approach to sex determination is necessary.[72] Ironically, however, this legal approach to sex determination is itself merely borrowed from medicine.[73] In essence, then, in such cases the judiciary is not disregarding or refuting medical authority, but is instead engaging in selective use of the criteria medicine deems relevant to the determination of sex.

Ulane provides an illustration of the quandary faced by transsexuals suing for sex discrimination. The Seventh Circuit ruled that Ulane had alleged the impossible: since her chromosomal patterns had not been and could not be surgically altered, and since sex reassignment surgery had failed to endow her with a uterus or ovaries,[74] there simply was no factual basis upon which to proceed with her claim that Eastern had discriminated against her because she was a woman.[75]

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68. *See* Erwin K. Koranyi, *Transsexuality Revisited*, 16 AUSTL. J. OF FORENSIC SCI. 34, 37 (1983) ("Sex of a person—a simple 'yes' or 'no' before—was broken down by Science to chromosomal sex, nuclear sex, hormonal sex, gonadal sex, and gender sex—to the dismay of courts, finding scientists in argument over as 'simple' a question as whether the subject is male or female."); Julia Epstein & Kristina Straub, *Introduction* to BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 1, 20 [hereinafter BODY GUARDS] (Julia Epstein & Kristina Straub eds., 1991) ("The notion of a 'natural' continuum along which sexual differentiation subtly occurs derives . . . from the earliest biomedical explanations in Western discourse."); Henry Finlay, *Legal Recognition of Transsexuals in Australia*, 12 J. CONTEMP. HEALTH L. & POL'Y 503, 517 (1996):

> It appears that the simplistic biblical dichotomy between the sexes may now, in the light of modern insights, have to give way to a bipolar model of human sexuality. Along the continuum linking the two archetypal extremes are the various intermediate "abnormalities" that diverge, in greater or lesser degree, from the norm.

Id.; Stefano Rodota, *General Presentation of Problems Related to Transsexualism*, *in* TRANSSEXUALISM, MEDICINE AND LAW, PROCEEDINGS OF THE XXIIIRD COLLOQUY ON EUROPEAN LAW, 17, 19 (1995); William A. W. Walters, *Transsexualism-Medical and Legal Aspects*, 16 AUSTL. J. OF FORENSIC SCI. 65, 65 (1983). "[T]he concept has developed of a spectrum of sexuality ranging from extreme masculinity on one hand to extreme femininity on the other." *Id.* "Seven variables are thought to be involved in determination of sexual identity, viz., chromosomal sex, gonadal sex, hormonal function, internal genital morphology, external genital morphology, assigned sex (rearing) and psychosexual differentiation." *Id.* at 69.

69. *E.g.,* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982) ("Plaintiff, for the purposes of Title VII, is male because she is an anatomical male. This fact is not disputed. As the Court accepts the biological fact as the basis for determining sex, the Court finds that entry of summary judgment is appropriate."); Ulane v. E. Airlines, Inc., 742 F.2d at 1083 nn.5-6, 1087.

70. BODY GUARDS, *supra* note 68, at 3 ("[B]iological sex is . . . labile, as its chromosomal, gonadal, and secondary determinants may contest with each other.").

71. Naturally, in cases of intersexed individuals, these criteria will not point to either male or female. In such individuals, sex remains ambiguous as an anatomical and a chromosomal matter. *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 281-92 (1999).

72. *See* Ulane v. E. Airlines, Inc., 742 F.2d at 1084.

73. *See id.* at 1083 n.6.

74. *See id.* at 1083 nn.5-6.

75. *Id.* at 1087.

Whatever womanhood Ulane had adopted was, to the court, purely superficial. It saw Ulane as "a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."[76] Medical authority was, apparently, not to the contrary. "[S]ome in the medical profession," remarked the court, "conclude that hormone treatments and sex reassignment surgery can alter the evident makeup of an individual, but cannot change the individual's *innate* sex."[77] *Ulane's* chromosomal approach to sex discrimination inspired its famous declaration that "it is unlawful to discriminate against women because they are women and against men because they are men."[78] On these terms, June Craig's lawsuit was less than promising.

Other courts, embracing the reasoning of *Ulane*, were convinced that Title VII was meant to prohibit sex discrimination based only on the anatomical characteristics which divide organisms into males and females.[79] This restrictive vision of sex discrimination would seem not to prohibit gender stereotyping, which focuses more on secondary sex characteristics than it does on anatomy or, at the very least, recognizes that one's behavior may conflict with societal expectations of one's anatomical sex. Moreover, the focus on anatomy appears to be what prevents Title VII's sex discrimination provisions from being used to combat sexual orientation discrimination. [80] In *Sommers v. Iowa Civil Rights Commission*,[81] for example, the plaintiff's theory was that, "because the legislature prohibited discrimination based on 'sex,' rather than on 'male or female sex,' it left open the possibility of prohibiting discrimination against persons with attributes of both sexes."[82] The federal district court in *Sommers v. Budget Marketing, Inc*.[83] accused Sommers of engaging in semantic manipulation and granted the defendant summary judgment.[84]

Perhaps most critical to the survival of Craig's claim was information about what Hudson knew about her transsexualism when they terminated her employment. Courts have invariably rendered references to the public's perception of transsexual plaintiffs' sexual identities and past choices to undergo sex reassignment determinative of the outcome in discrimination cases. In dismissing Karen Ulane's claim, for example, the court made clear that her past could not be discarded, no matter what interventions had taken place, "even if one believes that a woman can be so easily created from what remains of a man . . . ."[85] In *Holloway*, the court noted that an official of the company believed Holloway "would be happier at a new job where her transsexualism would be unknown."[86] Ironically,

76. *Id.*
77. *Id.* at 1083 n.6 (emphasis added).
78. *Id.* at 1085.
79. *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind.") (overruling recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)).
80. *See id.*
81. 337 N.W.2d 470, 473-74 (Iowa 1983).
82. *Id.*
83. 667 F.2d 748 (8th Cir. 1982).
84. *Id.* at 749.
85. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984).
86. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977) (overruling recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)).

these factors explain why transsexuals bring discrimination suits to begin with; a transsexual who "passes" and whose past identity and choice to undergo reassignment are unknown is less likely to face sex discrimination targeting her appearance and behavior. Moreover, if she suffers disparate treatment because of her anatomical sex, the defense of transsexualism may never occur to the defendants. Transsexuals like Holloway who begin sex reassignment while employed or, like Ulane, whose past life as the opposite sex is known, by contrast, quickly discover that courts will allow defendants to use these factors to reframe the issues presented and, ultimately, to undermine their claims.[87] This judicial treatment of transsexuals' discrimination claims gives employers a powerful weapon against a transsexual plaintiff's ability to carry her burden of proof.

Craig was both like and unlike the cases where public perceptions and knowledge of pasts held sway. For one thing, Craig had begun sex reassignment *before* she started working at Hudson, and none of her coworkers appeared to have known Craig before she began her transition. Her appearance, then, did not change from the time she began work until she was terminated. Furthermore, the facts suggested she had always represented herself as female. The issue, then, became how she had been perceived by others—her coworkers certainly but, more important, Hudson. Hudson's story was that she had suspected for quite some time that Craig was an anatomical male and a transsexual and that when Craig asked for time off, Hudson knew instantly it was for the purpose of undergoing sex reassignment surgery.[88] Some of the facts supported this theory. Hudson testified, for example, that she had received reports from Craig's alarmed female coworkers that Craig was "standing up" when using the women's restroom. Other facts, however, seemed to contradict Hudson's version of the facts. In her deposition, for instance, Hudson betrayed her view that transsexuals, homosexuals, and transvestites were one and the same.[89] Although Hudson's advocates argued that her confusion was irrelevant, given that none of these classes of individuals is protected by Title VII, Craig's advocates insisted that Hudson's confusion called her account of Craig's discharge into question and that, moreover, her inconsistent use of masculine *and* feminine pronouns to refer to Craig cast doubt on her story of having suspected Craig was male all along. Craig's advocates emphasized these inconsistencies in Hudson's testimony, and also flagged the contradictions between Hudson's and Craig's stories. Craig and her medical expert both explained how Craig's chemical castration as a result of hormone therapy made it impossible for her to use the restroom standing up, and Craig described her being scrutinized in the restroom by women she suspected were lesbian.[90]

Over the last several years, some courts have taken transsexuals' discrimination claims seriously. Starting with *Maffei* in 1995 and continuing to the present, a

87. *See generally* Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); *see* Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa. 1993) (plaintiff hired as man began sex reassignment; court held plaintiff had no case unless employer considered her to be female); Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 471 (Iowa 1983) (plaintiff hired having already begun sex reassignment; discharged after being recognized by someone from her pre-sex-reassignment past).

88. Hudson Deposition, *supra* note 23, at 2 ("[I]t just clicked.").

89. *See id.* at 3.

90. Craig Deposition, *supra* note 9, at 2.

few courts have been willing to allow sex discrimination claims brought by transsexuals to go forward. In perhaps the most easily understood of these cases, *Miles v. New York University*,[91] a student brought a Title IX action against the university arising from incidents of sexual harassment by a male professor.[92] The plaintiff had been admitted to the university as a female, but, unbeknownst to all, she was a preoperative male-to-female transsexual undergoing hormone therapy to become a woman.[93] The court held that Title IX covers discriminatory conduct suffered by a biological male who was always perceived to be a female.[94] The court remarked, "There is no conceivable reason why such conduct should be rewarded with legal pardon just because . . . plaintiff was not a biological female."[95] The court further stated that Titles IX and VII are to be interpreted similarly; thus, the same standards apply to cases brought under either congressional Act.[96] *Miles* is certainly encouraging, but it, like so many Title VII cases, makes the employer's perceptions of the plaintiff's sex determinative and leaves unclear to what extent the plaintiff's gender identity is relevant.[97]

Employment discrimination proscriptions in both the state and city of New York,[98] which have been interpreted more broadly than Title VII,[99] comport in large measure with the common sense and liberal constructionist approaches of *Miles* and *Enriquez*, with the result that transsexuals have had greater success there in advancing their sex discrimination claims. Courts in New York have found the federal cases "unduly restrictive"[100] in light of the "'overwhelming medical evidence'"[101] that transsexuals become their psychological sex once sex reassignment is complete. Shifting the emphasis from the fact of reassignment to reassignment's results, an approach that would have resulted in an actionable sex discrimination claim for Karen Ulane, the court in *Maffei* entertained a postoperative female-to-male transsexual's (FTM) hostile work environment discrimination claim.[102] The court concluded that a postoperative transsexual assumes a different sex and can sue for sexual harassment in the same way that nontranssexuals can when ridiculed for their secondary sexual characteristics.[103]

In *Rentos v. Oce-Office Systems*,[104] another case brought under the New York and the New York City equivalents of Title VII, a preoperative MTF's employment was terminated after she advised her employer that she needed time off to undergo sex conversion surgery.[105] The court determined that Rentos had alleged a color-

91. 979 F. Supp. 248, 249 (S.D.N.Y. 1997).
92. *Id.*
93. *Id.* at 248.
94. *Id.* at 250.
95. *Id.* at 249.
96. *See id.* at 249-50.
97. *Cf.* Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa. 1993) (stating that an MTF could not bring a claim for discrimination on basis of being female unless the employer perceived the MTF to be female).
98. *See* N. Y. CITY ADMIN. CODE § 8-107(1) (1996). One court has remarked that the substitution of "gender" for "sex" in the ordinance suggests the two are distinct. Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 395 (N.Y. Sup. Ct. 1995).
99. Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d at 394-96.
100. *Id.* at 394.
101. *Id.* at 395.
102. *Id.* at 396.
103. *Id.*
104. No. CIV. 95-7908 LAP, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996).
105. *Id.* at *2.

able claim of sex discrimination under the state and city human rights laws.[106] The court noted that Rentos, in what could be termed a semantic coup, had assiduously tracked the language in *Maffei*, "quotation marks and all," in framing the issues of her claim.[107]

Cases applying state and municipal law have been even more encouraging. In *Enriquez v. West Jersey Health Systems*,[108] for example, the plaintiff Enriquez, a pediatrician in an outpatient clinic, began her gradual external transformation from male to female after her employment commenced.[109] Her superiors grew increasingly uncomfortable with this transformation and asked that she return to her previous appearance.[110] When she did not, she received a termination letter giving a different reason for her discharge.[111] The clinic informed some of Enriquez's patients that she had disappeared.[112] In response to Enriquez's suit charging, among other things, gender discrimination, the trial court granted summary judgment to the clinic.[113] The appellate court reversed the summary judgment as to the gender discrimination count.[114] After surveying federal and state law on the issue, the court stated its disagreement with the majority position expounded in *Ulane* and concluded that allowing transsexuals to bring claims of gender discrimination "is more closely connected to our own state's historic policy of liberally construing [antidiscrimination legislation]."[115] It made no sense to the court that New Jersey law would forbid sexuality discrimination and gender stereotyping but would exclude from protection those whose transsexualism compels them to change their anatomical sex.[116]

Although courts purport to welcome such claims if transsexuals allege discrimination on the basis of their anatomical sex prior to sex reassignment, preoperatives and postoperatives are, in the main, psychologically incapable of doing this.[117] The realm of nonliability thus created for employers is total: under *Dobre v. National Railroad Passenger Corp.*,[118] employers who hire transsexuals prior to sex reassignment can easily claim that the employees were perceived to be their anatomical sex;[119] under *Sommers*, in the case of postoperatives, the discov-

106. *See id.* at *1.
107. *Id.* at *9.
108. 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).
109. *Id.* at 368.
110. *Id.*
101. *Id.*
112. *Id.* at 369.
113. *Id.* at 370.
114. *See id.* at 373.
113. *Id.*
116. *Id.*
117. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 35 (1995) ("According to the traditional view, the sexed body—one's inside—is immutable, whereas gender identity—one's outside—is mutable. Yet for the transgendered person, the sexed body—one's outside—is regarded as mutable while one's gendered identity—one's inside—is experienced as immutable."). *But see* Karin T. v. Michael T., 484 N.Y.S.2d 780, 781 (N.Y. Fam. Ct. 1985) (FTM postoperative asserted his chromosomal sexual identity enabled him to disclaim responsibility for providing child support for his adopted children, since under the law he could not be the father of the children by virtue of being female).
118. 850 F. Supp. 284 (E.D. Pa. 1993).
119. *See id.* at 287.

ery of the fact of sex reassignment is enough to create dispositive perceptions on the part of employers that the employee is in fact a member of the opposite sex.[120] The result curiously not only requires plaintiffs to prove that they were perceived to be the sex upon the basis of which they claim discrimination, but rests as well on the assumption that discrimination never occurs unless the perpetrator actively perceives the person to be the sex she wishes to discriminate against.

As I have stated in a previous article:

> Perhaps the best, and as yet untested approach to these types of claims, then, would be to advance transsexuals' discrimination claims upon two theories, one for discrimination based on one sex, and another for discrimination based on the other sex. The judiciary, though, already gifted with an impressive track record of beating back transsexuals' claims of employment discrimination via a discourse scripted with semantic manipulation, may well already be endowed with the rhetorical wherewithal to continue its campaign of exclusion in response to this new strategy.[121]

These enlightened approaches to discrimination against transsexuals were not applicable to Craig's case. Following federal precedents, the trial court granted summary judgment in favor of Hudson Airtool & Compressor Co., concluding both that as a matter of law transsexuals have no claim for sex discrimination under Title VII and that even if they did, the facts alleged by Craig revealed no genuine issues of material fact for trial.[122] The trial court based this second conclusion on four factual findings. First, the trial court found that Craig was a man who, "while employed at Hudson, insisted on wearing women's clothing to work, claimed to be married to another man, and insisted on using the women's restroom."[123] Second, the trial court found that "[t]he contrast between plaintiff's sex and his behavior made other workers at Hudson uncomfortable and created a volatile and explosive atmosphere in the workplace."[124] Third, the trial court found that Craig's "deep voice, masculine mannerisms and unfeminine gait confirmed to Hudson that [Craig] was either a transsexual or a homosexual transvestite."[125] Fourth, the trial court found that "Hudson Airtool & Compressor Co.'s policy is not to employ homosexuals or transsexuals."[126] In its memorandum of law, the trial court remarked, "Plaintiff's lifestyle choices are his own; however, employers are not required by law to countenance flagrant homosexuality, transsexuality and transvestism in the workplace."[127]

C. The Lessons of Advocacy

Students' reaction to the *Craig* case was predictably mixed. I had admittedly—and in retrospect intentionally—violated a central tenet of legal writing pedagogy

120. Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1981).

121. *Naming*, *supra* note 2, at 324.

122. Findings of Fact, Conclusions of Law, Order for Judgment and Memorandum in Craig v. Hudson Airtool & Compressor Co. (C.D. Ill. Mar. 6, 1998) (97 Cir. 3384) [hereinafter Findings] (fictional document created by author for classroom use) (on file with Maine Law Review).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

by writing an unbalanced problem. My goal in doing so was to inspire students to think creatively in designing new approaches to legal problems. But in this too I had failed. The students representing Hudson were only too pleased to rely unquestioningly upon the arsenal of appellate precedents opposed to any claim of discrimination Craig might bring. The students representing Craig, in contrast, *were* inspired to think creatively about Craig's dilemma and, with some prompting, used the nascent gender stereotyping theory of sex discrimination on her behalf. The stark contrast in their approaches to advocacy reflected the classic dilemma of what posture a court should assume when responding to any legal problem—one hewing unerringly to stare decisis at all costs or one allowing the law some elasticity to respond to public policies that shift in response to unforeseen problems.[128]

Mid-semester, Craig's advocates faced an unexpected—and an unwelcomed—challenge. Just after the students began work on the appellate brief, the Supreme Court, in the wake of its decision in *Oncale v. Sundowner Offshore Services, Inc.*,[129] vacated and remanded the Seventh Circuit's decision in *Doe v. City of Belleville*,[130] in which the plaintiffs had successfully marshaled *Price Waterhouse v. Hopkins*[131] to convince the court that they had suffered sex discrimination by means of gender stereotyping.[132] The mood among advocates for Craig was understandably dour at this turn of events, given the paucity of other precedent in support of Craig's claim. Just as has occurred recently in the courts,[133] there was much debate about the effect of the vacation in light of *Oncale*[134] on *Doe*'s reasoning. Many students chose to continue to rely on *Doe*, concluding that the Supreme Court vacated the decision to disapprove of the Seventh Circuit's sex per se approach to causation (to which *Oncale* specifically refers)[135] and not to disapprove of the gender stereotyping theory of discrimination which *Oncale* ignores. Other students, mindful of the legal meaning of vacation,[136] chose to abandon references to *Doe* and to present

128. This tension is one of the most basic aspects of the law first-year students learn about in their legal methods courses. For an example of the tension, see *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), *reprinted in* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 19-23 (5th ed. 2002).

129. 523 U.S. 75 (1998).

130. 119 F.3d 563 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998).

131. 490 U.S. 228 (1988).

132. *See* Doe v. City of Belleville, 119 F.3d at 596-97.

133. *See* discussion *supra* Part II.B.

134. City of Belleville v. Doe, 523 U.S. 1001 (1998), *vacating and remanding* 119 F.3d 563 (7th Cir. 1997).

135. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("Still others suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations.") (citing Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997)).

136. "To vacate is '[t]o render an act void; as, to vacate an entry of record, or a judgment.'" Walter v. Gunter, 788 A.2d 609, 614 n.8 (Md. 2002) (quoting BLACK'S LAW DICTIONARY 1388 (5th ed. 1979)). "'Vacate' . . . means 'to render inoperative; deprive of validity; void; annul.' An order to vacate only wipes the slate clean, leaving the next outcome uncertain, absent other direction." NLRB v. Goodless Bros. Elec. Co., 285 F.3d 102, 110 (1st Cir. 2002) (quoting RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2100 (2d. ed. 1997). "To vacate something is to destroy it, to eliminate it, to render it a nullity. . . . Vacation . . . is a remedy usually employed when some error or accident makes the continued existence of [an] order undesirable." Meekins v. Dept. of Insts., Soc. & Rehab. Servs., 554 P.2d 872, 875 (Okla. Ct. App. 1976). "A judgment which is vacated is destroyed in its entirety upon the entry of the order that the judgment be vacated . . . ." Krummel v. Hintz, 222 S.W.2d 574, 578 (Mo. Ct. App. 1949).

Price Waterhouse alone as authoritative—and binding—precedent in support of a gender stereotyping theory of sex discrimination. Many of Craig's advocates believed their case, built of necessity upon a Supreme Court decision never before applied in a case brought by a transsexual and upon a lower court decision not applying Title VII,[137] was slim indeed. But the facts of the case made a strong effort appear worthwhile. After all, it was not at all clear what Blanche knew about Craig's gender prior to the commencement of the lawsuit. When she hired Craig, she was looking for a "girl" for the assembly line, and she objected to Craig's unfeminine attire in the same way she objected to her sister Jane's similar attire.[138] According to this theory of the case, there appeared to have been no time when Blanche believed Craig to be other than female. Furthermore, even if a court believed that the alleged restroom incidents were dispositive, summary judgment was still inappropriate because Blanche's testimony on that point was directly refuted by Craig's. Finally, if Blanche believed Craig was a masculine female all along, *Miles* suggested Craig's lawsuit was viable, and *Price* suggested she could prevail on a gender stereotyping theory.

Naturally, Hudson was fully prepared to rebut these characterizations of the facts. Blanche had initially believed Craig to be female but had gradually reached the conclusion that she was a transsexual. It was not until Craig asked for time off that "it just clicked" that Craig was somehow deviant.[139] The competing accounts of Craig's employment at Hudson made summary judgment seem less than appropriate.[140] Nonetheless, Hudson held a well grounded hope that the court hearing Craig's appeal would simply apply the appellate precedents disallowing all employment discrimination claims brought by transsexuals and affirm the judgment below.

III. GENDER STEREOTYPING

The *Craig* case left unanswered the question of whether the gender stereotyping theory of sex discrimination could bolster the discrimination claims of transsexuals. The theory had its genesis in the lower courts[141] and was recognized by the Supreme Court before reaching "its most mature stage"[142] in *Price Waterhouse*.[143] The theory then lay dormant for several years. Most surprisingly, effeminate men discovered they were foreclosed from invoking the theory, since courts invariably equated their effeminacy with homosexuality and reiterated that Title VII does not proscribe sexual orientation discrimination.[144] A case decided

137. *See* Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

138. *Id.*

139. Hudson Deposition, *supra* note 23, at 2.

140. *See* Catherine J. Lanctot, *The Plain Meaning of* Oncale*,* 7 WM. & MARY BILL RTS. J. 913, 931 (1999); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 710 n.180 (2000).

141. *See, e.g.,* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971); Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976).

142. Franke, *infra* note 148, at 169.

143. *See id.* at 166 n.9 (citing decisions); *see also id.* at 169.

144. *See, e.g.,* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated insofar as inconsistent with* Price Waterhouse v. Hopkins; Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

in 1997 by the Seventh Circuit, *Doe v. City of Belleville*,[145] validated a claim of gender stereoptyping brought by a gender atypical male but was swiftly vacated by the Supreme Court just after its decision in *Oncale v. Sundowner Offshore Services, Inc*.[146] An examination of the circumstances under which *Doe* was vacated and a close reading of the language of *Oncale* sheds light both on the continuing viability of gender stereotyping claims in general and on their usefulness to transgender plaintiffs in particular.

A. Vacating Doe

The discussion of gender stereotyping in the appellate briefs in the *Craig* case raises the questions, first, how it functions as a theory of sex discrimination and, second, how availing it could be to transsexual or transgendered employees discriminated against at work.[147] Considering the theory, one advocate for Hudson wrote:

> Even if gender stereotyping were [a] . . . theory under which to file a discrimination suit, it would not be applicable in the present fact situation. In Craig's case, Craig was not discriminated against for failing to fit the stereotype of her sex. Craig perceived herself to be female and acted accordingly. . . . From Craig's standpoint, she did not fail to act according to her sex because she considered herself to be female. From the perspective of Hudson, Craig was fired because she was a biological male who wanted to undergo sex reassignment surgery. When looked at from either perspective, gender stereotyping does not play any role.[148]

In *Doe*, coworkers subjected brothers H. and J. Doe to verbal abuse and threats of rape.[149] H., who wore an earring, received the brunt of the abuse, which prima-

145. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded by* 523 U.S. 1001 (1998).

146. 523 U.S. 75 (1998).

147. Gender identity is "the usually unshakable conviction of being male or female." Richard Green, M.D., *Childhood Cross-Gender Identification*, *in* TRANSSEXUALISM AND SEX REASSIGNMENT 23, 26 (Richard Green, M.D. & John Money, Ph.D. eds., 1969). Gender expression is the outward manifestation of gender identity. GENDER EDUCATION & ADVOCACY INC., GENDER VARIANCE: A PRIMER (2001), *available at* http://www.gender.org/resources/dge/gea01004.pdf (last visited Oct. 21, 2002). "Transgendered" is a term meant to include all "individuals whose gendered self-presentation (evidenced through dress, mannerisms, and even physiology) does not correspond to the behaviors habitually associated with the members of their biological sex." VIVIANE K. NAMASTE, INVISIBLE LIVES: THE ERASURE OF TRANSSEXUAL AND TRANSGENDERED PEOPLE 1 (2000). Not all transgendered individuals are transsexual. Transsexuals are individuals who wish to conform their bodies to their gender identity and, by way of transition, take hormones or submit to surgery to do so. Some transgendered individuals, though, live as the opposite gender but do not take hormones or have surgery. GENDER EDUCATION & ADVOCACY INC., *supra*.

148. Brief for Appellee at 15, Craig v. Hudson Airtool & Compressor Co. (7th Cir. 1988) (No. 98 Civ. 584) (fictional document created by author for classroom use) (on file with Maine Law Review). It is doubtful that if Hudson believed Craig to be a male who dressed too masculinely, Craig could have prevailed on a gender stereotyping theory, for this would constitute neither reward for conforming to unfounded stereotypes nor punishment for failing to conform to them. *See* Katherine M. Franke, Amicus Curiae *Brief of NOW Legal Defense and Education Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal in the United States Court of Appeals for the First Circuit* Lucas Rosa v. Park West Bank & Trust Co. *on Appeal from the United States District Court for the District of Massachusetts*, 7 MICH. J. GENDER & L. 163, 168 (2001); *but see* Kristine W. Holt, Comment, *Reevaluating* Holloway*: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 301 (1997) (implying a too feminine Hopkins would certainly have a claim).

149. 119 F.3d 563, 566-67 (7th Cir. 1997), *vacated and remanded by* 523 U.S. 1001 (1998).

rily focused on his gender and sexual orientation.[150] He was called a "fag" and a "queer" by his coworkers, and was asked whether he was a man or a woman.[151] One of H.'s coworkers repeatedly threatened to rape him, and was encouraged to do so by other coworkers.[152] This same coworker eventually cornered H. and placed his hand on H.'s genitals to confirm that H. was male.[153] The district court ruled in favor of the defendants, concluding that the Does suffered sexual orientation discrimination, not sex discrimination.[154] The court also implied that the conduct suffered by the Does was nonsexual, since the Does testified that they were never sexually propositioned.[155]

Reversing, the Seventh Circuit made two important points regarding proof in sexual harassment cases. First, the court declared conduct of a sexual nature directed at the plaintiff to be per se because of the plaintiff's sex.[156] Second, the court validated the use of facts showing gender stereotyping to support a claim of sex discrimination brought by a gender-atypical male.[157] The court cited *Price Waterhouse v. Hopkins* as authority for its reasoning[158] and expressed disagreement with the decisions of other courts that have ruled that men discriminated against for exhibiting nonconforming gender traits have no claim of sex discrimination under Title VII.[159] In so doing, the court aligned itself with the very few courts that have allowed such claims to go forward.[160] The court was less specific

150. *Id.*

151. *Id.*

152. *Id.* at 567.

153. *Id.* The facts of *Doe* are the basis of a sexual harassment hypothetical in MICHAEL J. ZIMMER & CHARLES A. SULLIVAN, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 582 (5th ed. 2000).

154. Doe v. City of Belleville, 119 F.3d at 567-68.

155. *Id.*

156. *Id.* at 568-69, 576-77, 580 (characterizing the charged conduct as sexual in nature and focused on H.'s gender).

157. *See id.* at 568-69; *see also id.* at 581 (asserting that a man is sexually harassed when his masculinity is called into question by coworkers and finding support for the Does' claim in the fact that H. Doe was harassed for not conforming to male standards).

158. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (finding that stereotyped remarks may evidence gender discrimination). Jennifer Levi has characterized *Price Waterhouse* as establishing "the legal principle that sex stereotyping is an impermissible form of sex discrimination." Jennifer Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 22-23 (2000).

159. *See* Doe v. City of Belleville, 119 F.3d at 582 (distinguishing Rathert v. Village of Peotone, 903 F.2d 510 (7th Cir. 1989)); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), *abrogated insofar as inconsistent with* Price Waterhouse v. Hopkins; Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001).

160. *See, e.g.*, Blake v. Grede Foundries, Inc., No. 96-1322-JTM, 1997 WL 157126, at *5 (D. Kan. Mar. 20, 1997) (ruling that same-sex harassment is actionable when it takes the form of remarks implying that a man working in a traditionally female position is homosexual); Lindahl v. Air France, 930 F.2d 1434, 1439 (9th Cir. 1991) (noting that "sex stereotyping can be evidence of sex discrimination"); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976) (noting that, although Congress did want to eliminate discrimination based on sexual stereotypes, it also wished to forbid any discrimination based on sex); Zalewski v. Overlook Hosp., 692 A.2d 131, 134 (N.J. Super. Ct. Law Div. 1996) (finding that a same-sex harassment claim based on gender stereotyping was cognizable).

with regard to distinguishing between actionable harassment and innocuous, if repugnant, horseplay, concluding merely that distinguishing between the two was a matter of "common sense."[161] This assessment anticipated the Supreme Court's adoption of a similar "common sense" standard in *Oncale v. Sundowner Offshore Services, Inc*.[162]

The Seventh Circuit's decision in *Doe* was a significant departure from prior decisions on same-sex sexual harassment in two primary respects. First, the Seventh Circuit did not require consideration of whether similar treatment by the harasser of the opposite sex would constitute sexual harassment.[163] Second, the court refused to tie same-sex sexual harassment claims to the harasser's sexual attraction to the victim.[164] *Doe*, in contrast to prior decisions, posited that unwelcome sexual conduct in the workplace is deeply humiliating and is proscribed for the simple reason that it is tied in some way to gender.[165] The court asserted that, where sexual harassment is of an explicitly sexual nature, the male plaintiff need not offer proof that his gender motivated the harasser and that a similarly situated female worker would not have been harassed.[166] In seeking to define the ambit of proscribed sexual conduct, the court included invasions of sexual privacy and remarks related to gender, even if such conduct did not constitute an overt sexual advance.[167] *Doe* ventured further than any other decision in analyzing fully the various concerns raised by same-sex cases, and it offered the most controversial analytical paradigm of these cases to date.[168] In this regard, it was a landmark ruling with far-reaching implications for Title VII jurisprudence. It is thus not surprising that the Supreme Court, after granting certiorari in this case,[169] vacated the decision and remanded it to the Seventh Circuit for reconsideration in light of *Oncale*.[170] For its part, *Oncale* confirmed that same-sex sexual harassment is cognizable as sex discrimination and described three methods of proving sex discrimination: (1) sexual advances; (2) animus; or (3) comparative evidence show-

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Scholars agree with this theory of sex discrimination. *See, e.g.,* Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian?,"* 8 HASTINGS WOMEN'S L.J. 1, 22 (1997); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188, 232; Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992); Valdes, *infra* note 252, at 23-25; Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 169-70 (1996); Ronald Turner, *Same-Sex Sexual Harassment: A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL'Y & L. 151, 195 (1997) (arguing that Title VII should "prohibit misconduct directed at males or females who are harassed because, in the eyes of some, they are not sufficiently 'masculine' or 'feminine'"). For citations to other academic articles, see *Doe v. City of Belleville*, 119 F.3d at 593 n.27.

161. Doe v. City of Belleville, 119 F.3d at 591.

162. 523 U.S. 75, 80-81 (1998).

163. Doe v. City of Belleville, 119 F.3d at 574.

164. *Id.* at 591.

165. *See id.* at 574.

166. *Id.* at 575.

167. *See id.*

168. One commentator has described *Doe* as, in his opinion, "the most sophisticated and well-reasoned sexual harassment decision to date." David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1725 (2002).

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

170. *See id., vacating* 119 F.3d 563 (7th Cir. 1997).

ing differential treatment.[171] Notably, *Oncale* did not mention gender stereotyping as a way of showing sex discrimination. The vacation of *Doe* and the decision in *Oncale* raise questions regarding the extent to which the Supreme Court considers instances of sex stereotyping to be a proper basis for claims of sex discrimination in employment.[172]

B. Resurrecting Doe

There is at least some sense that, in failing to mention the gender stereotyping theory of sex discrimination in *Oncale*, the Supreme Court was not disapproving of it.[173] Several lower courts have reached the conclusion that *Oncale*'s list of ways to prove sex discrimination was not meant to be exclusive and that the Supreme Court's vacation of *Doe* was merely meant to express disapproval of *Doe*'s sex per se rule and not disapproval of the gender stereotyping theory itself.[174] In the courts of appeals, *Doe* appears to be alive and well, at least on the question of sex stereotyping.[175] In *Bibby v. Philadelphia Coca-Cola Bottling Co.*,[176] the Third Circuit commented that *Doe*'s flaw was not its expansion of the sex stereotyping theory to include gender nonconforming males but its insistence that the causation proxy of a sexual harassment claim can be satisfied merely by showing that "the harassment has explicit sexual overtones."[177] It concluded this from *Oncale*'s "requirement that all sexual harassment plaintiffs must prove that the harassment was discrimination because of sex"[178] and *Oncale*'s vacation and remand of *Doe* "'for further consideration in light of [this requirement].'"[179] The *Bibby* court felt that the Supreme Court's vacation of *Doe* said nothing about *Doe's* gender-stereotyping holding because the Supreme Court had not explicitly "turn[ed] its back on

171. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78-82 (1998).

172. Linda Greenhouse, *Supreme Court Roundup*; *Same-Sex Harassment Issue Furrows Court Brow*, N.Y. TIMES, Mar. 10, 1998, at A14 (suggesting disposition of *Doe* indicates that "not all the Justices were completely comfortable with allowing a same-sex harassment case to proceed far beyond the cryptic boundaries of [*Oncale*]"); Schwartz, *supra* note 168, at 1742-43.

173. *See* Schwartz, *supra* note 168, at 1725.

174. *See*, *e.g.*, Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("[W]e discern nothing in [*Oncale*] indicating that the examples it provided were meant to be exhaustive rather than instructive."); Bianchi v. City of Philadelphia, 183 F. Supp. 2d 726, 735 (E.D. Pa. 2002); Jones v. Pac. Rail Servs., No. 00 C 5776, 2001 WL 127645, at *2 (N.D. Ill. Feb. 14, 2001) ("We see nothing . . . in the Court's decision to vacate and remand *Doe* . . . to indicate that the [gender stereotyping] rationale is no longer viable."); Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) ("This court finds that the reasoning in *Doe* is not inconsistent with *Oncale* and therefore *Doe* remains viable."), *aff'd on other grounds*, 231 F.3d 1080 (7th Cir. 2000).

175. *See*, *e.g.*, EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 n.6 (6th Cir. 2001).

176. 260 F.3d 257 (2001).

177. *Id.* at 261 (quoting Doe v. City of Belleville, 119 F.3d at 567 (7th Cir. 1997)); *see also* Holman v. Indiana, 24 F. Supp. 2d 909, 914 n.3 (N.D. Ind. 1998) (characterizing *Doe*'s holding that harassment imbued with sexual overtones itself satisfies the question of causation as "questionable" in light of *Oncale*). Before *Oncale* was handed down, the court in *Wilcox v. Dome Railway Services*, 987 F. Supp. 682 (S.D. Ill. 1997), pointed to the difference between *Doe* and *Johnson v. Hondo*, 125 F.3d 408 (7th Cir. 1997): "[W]hile *Doe* indicates that harassment so imbued with sexual overtones is likely based on the gender of the victim, *Johnson* restricts such an expansive interpretation and makes a distinction between sexual harassment and mere hostile aggression." Wilcox v. Dome Ry. Servs., 987 F. Supp. at 688.

178. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d at 263 n.5.

177. *Id.* (quoting City of Belleville v. Doe, 523 U.S. 1001 (1998)).

Price Waterhouse."[180] From this, the *Bibby* court concluded that where "the harasser [acts] to punish the victim's noncompliance with gender stereotypes," the victim has an actionable claim of sexual harassment.[181] Unfortunately, none of this was of any help to Bibby, for the facts he alleged—being called a sissy, a faggot, and taking it up the ass[182]—supported only a claim of sexual orientation discrimination instead of one based on his failure "to comply with societal stereotypes of how men ought to appear or behave."[183] The slippage in this reasoning is patent. Certainly if Bibby was accused of being a sissy (read, effeminate) and having anal intercourse, these factors go a long way toward supporting a claim that he defies (or is perceived as defying) societal expectations of his gender.[184] The court nonetheless reached the conclusion that no reasonable finder of fact could so conclude in the case at hand,[185] but confirmed that gays and lesbians could bring, and win, gender stereotyping claims.[186]

The court was unclear whether the primary problem with Bibby's case was that "[h]is claim was, pure and simple, that he was discriminated against based on his sexual orientation"[187] or whether "[n]o reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man;"[188] in short, whether the flaw in Bibby's case was one of pleading or one of proof. It is true that Bibby's initial complaint, filed with the Philadelphia Human Rights Commission, was for sexual orientation discrimination.[189] However, when filing his complaint in federal district court, Bibby amended his complaint and alleged sexual harassment in violation of Title VII.[190] The court nonetheless concluded that both Bibby's claim *and* the evidence were deficient.[191]

Similarly, in *Nichols v. Azteca Restaurant Enterprises, Inc.*,[192] plaintiff alleged sex discrimination based on his having been verbally harassed for being

180. *Id.*
181. *Id.* at 264.
182. *Id.* at 260.
183. *Id.* at 264. The court, in an aside, remarked that, in any event, what happened to Bibby was probably not sufficiently severe or pervasive to amount to sexual harassment. *Id.* at 264 n.6.
184. *See* Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) ("We do not think that, simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation."); Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) ("Co-workers speculated on Spearman's sexual orientation based upon their perception of him as a man, and not on any comment by Spearman himself on his sexual orientation."), *aff'd on other grounds*, 231 F.3d 1080 (7th Cir. 2000); Doe v. City of Belleville, 119 F.3d at 593 ("[I]t is not at all uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets."), *vacated and remanded by* 523 U.S. 1001 (1998); *id.* at 594 ("[W]e cannot just declare that a case is about sexual orientation, rather than sex, simply because homophobia has reared its head along with sexism.").
185. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d at 264.
186. *Id.* at 265.
187. *Id.* at 264.
188. *Id.*
189. *Id.* at 260.
190. *Id.*
191. *Id.* at 265.
192. 256 F.3d 864 (9th Cir. 2001).

effeminate.[193] The harassment consisted of coworkers referring to Sanchez as "she," insulting him for walking and carrying service items effeminately, and calling him a faggot and a female whore.[194] The trial judge ruled in favor of Azteca, concluding that Sanchez had not suffered a hostile environment and indeed had produced no evidence that he was harassed because of his sex.[195] The Ninth Circuit disagreed.[196] It determined that Sanchez's work environment was objectively and subjectively hostile because of sex.[197] On this last point, the court determined that an allegation of sex stereotyping was as cognizable for male plaintiffs as it was for the female plaintiff in *Price Waterhouse v. Hopkins*.[198] The court cited *Oncale*, *Schwenk v. Hartford*,[199] and *Higgins v. New Balance Athletic Shoe, Inc*.[200] in support.[201] Ignoring the fact that Sanchez had been called a faggot, a factor which has prompted other courts to characterize the alleged discrimination as based on sexual orientation, the court concluded that much of the harassment Sanchez suffered "reflected a belief that Sanchez did not act as a man should act."[202] The court limited its holding by stating it did not intend to imply that "reasonable regulations that require male and female employees to conform to different dress and grooming standards" were to be considered violative of Title VII.[203]

In a follow-up to *Nichols*, the Ninth Circuit considered the case of an openly gay man who alleged sexual harassment against his supervisor and coworkers.[204] Like Sanchez in *Nichols*, Medina Rene, a butler at a hotel, was called names suggesting his effeminacy.[205] In addition, coworkers frequently touched Rene in a sexual manner and made him look at pictures of men having sex.[206] In his deposition, Rene admitted he believed the conduct occurred because he is gay.[207] The district court's assessment was that Rene had made a claim of sexual orientation discrimination, not sex discrimination, and granted summary judgment in favor of the hotel.[208] Rene's initial appeal to the Ninth Circuit was unavailing. The court reasoned that Rene's reliance on *Oncale* was misplaced, since, although the facts of *Oncale* were similar to Rene's, the *Oncale* court had held only that same-sex sexual harassment is actionable, not that the facts of *Oncale* were themselves ac-

193. *Id*. at 869.
194. *Id*. at 870.
195. *Id*. at 871.
196. *Id*. at 872.
197. *Id*. at 872-75.
198. *Id*. at 874. *See also* Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131, 133 (D. Mass. 2001); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 n.4 (1st Cir. 1999).
199. 204 F.3d 1187 (9th Cir. 2000).
200. 194 F.3d 252 (1st Cir. 1999).
201. Nichols v. Azteca Rest. Enters., 256 F.3d at 872-74.
202. *Id*. at 874. This reasoning inspired the court to abrogate *DeSantis v. Pacific Telephone & Telegraph Co*. insofar as that decision is inconsistent with *Price Waterhouse v. Hopkins*. *Id*. at 875.
203. *Id*. at 875 n.7.
204. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc).
205. *Id*. at 1064.
206. *Id*.
207. *Id*.
208. *Id*.

tionable.[209] Moreover, the *Oncale* court did not hold that sexual orientation discrimination is a form of sex discrimination.[210] Judge Dorothy Nelson, dissenting, remarked that Rene's subjective belief about the cause of the harassment was irrelevant and that sexual assaults targeting only one sex should permit an inference of sex discrimination in the same-sex context just as they do in the mixed-sex context: "Enforcing Title VII in the mixed-gender context does not involve determining which pleasure center in the attackers' brains was stimulated by the attacks, nor should it in this case."[211]

The Ninth Circuit reversed the summary judgment upon a rehearing en banc. Its reasoning was that "grabbing, poking, rubbing or mouthing areas of the body linked to sexuality . . . is inescapably 'because of sex'"[212] and that the conduct alleged by Rene, as in *Oncale*, was objectively severe and pervasive enough to constitute a hostile environment.[213] The court was emphatic that the success of sexual harassment claims brought by women because of offensive touching of their genitalia, buttocks, or breasts never turned on the sexual orientation of the victim and could see no reason why sexual orientation should not likewise be irrelevant for a male victim.[214] In his concurrence, Judge Harry Pregerson argued that the gender stereotyping theory of sex discrimination supported reversal. Pregerson stated that gender stereotyping of a man occurs where coworkers perceive "him to be not enough like a man and too much like a woman"[215] and noted that such treatment often takes place in all-male workplaces where gender norms are policed and those who transgress such norms harassed.[216] Invoking *Price Waterhouse*, *Oncale*, and *Nichols*, Pregerson emphasized that "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman'" constituted actionable gender stereotyping.[217]

The gender stereotyping theory did not fare as well in *Spearman v. Ford Motor Co*.[218] In this sexual harassment case brought by a gay man whose homosexuality was suspected by his coworkers,[219] the plaintiff alleged several incidents of name-calling culminating in his being likened to drag entertainer Ru Paul in graffiti declaring he was a "fag" and had AIDS.[220] The district court held that the allegations supported an inference that the harassment had been because of Spearman's sex but granted Ford summary judgment nonetheless, since the ha-

209. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1208 (9th Cir. 2001), *rev'd*, 305 F.3d 1061 (9th Cir. 2002) (en banc).

210. *Id*. at 1209.

211. *Id*. at 1212 (Nelson, J., dissenting).

212. Rene v. MGM Grand Hotel, Inc., 305 F.3d at 1066 (citing Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), *vacated and remanded by* 523 U.S. 1001 (1998)).

213. *Id*. at 1065, 1068. Although the court relied on *Doe v. City of Belleville*, it referred to *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), for the proposition that unwelcome physical conduct of a sexual nature is actionable sexual harassment where it is severe and pervasive enough "to alter the conditions of the victim's employment and create an abusive working environment." *Id*. at 1065, 1068.

214. *Id*. at 1066.

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

216. *Id*. at 1069 n.3 (Pregerson, J., concurring).

217 *Id*. at 1068 (Pregerson, J., concurring).

218. 231 F.3d 1080 (7th Cir. 2000).

219. *Id*. at 1082–83.

220. *Id*. at 1083.

rassment was not of the requisite severity or pervasiveness.[221] The district court noted in particular that

> Spearman appears to have been singled out because of the way he projected his gender, or how his gender was perceived by his co-workers. Co-workers speculated on [his] sexual orientation based upon their perception of him as a man, and not on any comment by Spearman himself of his sexual orientation.[222]

The Seventh Circuit affirmed the decision, but disagreed that Spearman had adequately supported an inference of gender stereotyping. The court thought it plain that the name-calling and comparison to a drag queen made no statement about Spearman's gender but were instead the products of coworkers' suspicion about Spearman's sexual orientation and of their concern that he desired them sexually. Nothing about the record, it seemed, supported Spearman's claim of sex discrimination.[223] A subsequent decision from the Eastern District of Wisconsin has interpreted the Seventh Circuit's decision in *Spearman* as rejecting the position that coworkers commit gender stereotyping when they speculate about another employee's sexual orientation.[224]

As these cases indicate, the gender stereotyping theory of sex discrimination is not one that courts are ready fully to embrace. *Price Waterhouse*, notwithstanding the development of the theory of gender stereotyping has been stymied by the judiciary's perception that by giving gender stereotyping claims life in the male-on-male harassment context, the door will be thrown wide to coverage for sexual orientation discrimination under Title VII.[225] There is some justification for this concern as, in fact, it *is* difficult to distinguish sexual orientation discrimination from gender stereotyping.[226] If a male employee is harassed for desiring other males or for being effeminate, this is every bit as much about how his coworkers feel he should be fulfilling his role as a male in society as it is about anxiety that they may be the objects of his affection.[227] This point has been made many times by able scholars; its relevance here is in attempting to understand how, fourteen years after *Price Waterhouse*, there is still as a practical matter no uniform judicial acceptance of gender stereotyping as a means of proving sex discrimination.

C. Rereading Oncale

Judicial ambivalence about gender stereotyping claims may be born of concern about the direction *Price Waterhouse* seemed to want to take the law of sex

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221. Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999).

222. *Id.*

223. Spearman v. Ford Motor Co., 231 F.3d at 1085, 1086, 1087.

224. *See* Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 878 (E.D. Wis. 2002).

225. *See*, *e.g.*, Bianchi v. City of Philadelphia, 183 F. Supp. 2d 726, 736–37 (E.D. Pa. 2002); *but see* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) ("This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.").

226. *See* Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) ("[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear."); Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 878, 890 (E.D. Wis. 2002); Doe v. City of Belleville, 119 F.3d 563, 593, 593 n.27 (7th Cir. 1996) (noting that sex discrimination and homophobic epithets "often go hand in hand"), *vacated and remanded by* 523 U.S. 1001 (1998).

227. *See*, *e.g.*, Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) (reversing dismissal of complaint where plaintiff alleged "harassment including rumors that falsely labeled him as homosexual in an effort to debase his masculinity").

discrimination and the direction *Oncale did* take it. Before *Oncale* was handed down, there was some optimism that a Supreme Court decision recognizing same-sex sexual harassment claims would inspire coherence and consistency in sexual harassment jurisprudence and that it might even serve as a springboard for judicial and legislative efforts to include sexual orientation as a prohibited basis for discrimination in the workplace.[228] My own position was that same-sex sexual harassment claims would be a vehicle for outlawing sexual orientation discrimination by revealing to the heterosexual majority that heterosexuality is not a characteristic protected by Title VII[229] and would thus inspire broad support for passage of the Employment Non-Discrimination Act.[230] I also believed that recognition of these claims would emphasize the need to prohibit gender stereotyping and sexual orientation discrimination in the workplace.[231] Now, five years later, I see ample evidence that my optimism was unwarranted.

What struck me most about *Oncale* was its "cryptic message about when same-sex sexual harassment is actionable."[232] The decision left many questions unanswered despite the magnitude of disagreement in the lower courts over how same-sex claims should be evaluated.[233] Though cryptic, the message of *Oncale* was simple: the plain language of Title VII prohibits same-sex sexual harassment but does not require the workplace to be androgynous or asexual. Furthermore, common sense is the standard by which to distinguish prohibited conduct from mere intersexual flirtation and same-sex horseplay. Despite its simplicity, the decision contained language unusual for a Supreme Court opinion. First, neither the word androgyny nor the word intersexual had ever before appeared in a Supreme Court decision. Second, before *Oncale*, the Supreme Court had used the word asexual only to refer to reproduction by plants.[234]

There may be little significance to the chosen words beyond the obvious. They may simply mean that sexual expression and differentiation between employees based on gender need not be effaced entirely from the workplace in order to make it compliant with Title VII. After all, it is true that only twenty to twenty-five years ago, the circuit courts of appeals had rejected sexual harassment as a theory of sex discrimination based on their assessment that employers would be able to escape liability only by employing asexual workers.[235] "Asexuality," then, may simply be borrowed from and meant to address the concern in those cases. But the unique context of same-sexual harassment litigation belies this notion. Same-sex harassment of asexual and androgynous employees has resulted in litigation that has

228. *See* Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 733-42 (1998).

229. *See*, *e.g.*, Miller v. Vesta, Inc., 946 F. Supp. 697, 712 (E.D. Wis. 1996) (holding that heterosexuality is not a protected characteristic under Title VII); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1175 n.6 (D. Nev. 1995).

230. Storrow, *supra* note 228, at 734-35.

231. *Id.* at 735-36.

232. *Id.* at 678.

233. *Id.* at 742.

234. *See* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 181 (1995); Diamond v. Chakrabarty, 447 U.S. 303, 306 (1980).

235. *See, e.g.,* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975), *vacated by* 562 F.2d 55 (9th Cir. 1977).

engendered the most disagreement among courts on the question of what conduct supports an actionable claim of same-sex sexual harassment. In *Goluszek v. Smith*,[236] for example, factory worker Anthony Goluszek was repeatedly questioned about being unmarried, was urged to have sex with women, and was accused of being gay.[237] He sued for sexual harassment but lost because the court believed sexual harassment of the sort Congress intended to outlaw could occur in the all-male factory where Goluszek worked.[238] There are other cases of this type—even cases that reject *Goluszek*'s unorthodox analytical model—where courts, while admitting that attacks on sexuality are potentially the most degrading and dehumanizing of all harassing acts, ultimately conclude that the claims in these cases are deficient because the conduct alleged was motivated by personality conflicts, the injury was aggravated by the plaintiff's hypersensitivity, the alleged perpetrator's behavior was mere horseplay, or the claims themselves in essence alleged discrimination based on the victim's known or perceived sexual orientation. In *McWilliams v. Fairfax County Board of Supervisors*,[239] Mark McWilliams, a cognitively disabled male, was subjected by his coworkers to teasing, questions about his sexual activities, requests to masturbate him, and physical assaults involving placing a broomstick to his anus and fondling him to the point of erection.[240] Forced to his knees on one occasion, McWilliams was blindfolded and made to "fellate" a harasser's finger.[241] The Fourth Circuit held that sexual behavior between heterosexuals of the same sex is never actionable under Title VII.[242] In dicta, the court suggested that same-sex sexual harassment is actionable where the perpetrator's homosexuality or sexual attraction toward the victim can be proven.[243]

Oncale's cryptic message makes it impossible to tell whether the Supreme Court would have decided *Goluszek* and *McWilliams* differently. The Court may be correct that a workplace made up solely of asexual employees may be devoid of sexual harassment. But its use of the term "asexuality" in a manner never before encountered in Supreme Court jurisprudence likely conveys more than the obvious. On the level of implication, this reference arguably captures and includes within its ambit a host of sex discrimination cases involving plaintiffs who, like Goluszek and McWilliams, are perceived to be sexually immature, sexually inexperienced, less than masculine, weak, effeminate, and so on. At the level of implication, this reference attempts to convey to courts who will hear such cases in the future that such claims are unworthy of Title VII protection.

In addition, "androgyny" and "intersexual" are likely not-so-subtle references, first, to the earring-wearing male plaintiff in *Doe* and, second, to transgender plaintiffs in general. If so, *Oncale* conveys the message that not all gender nonconforming employees will be protected from gender stereotyping. Instead of explicitly disapproving of the broad gender stereotyping theory in *Doe*, though, the Supreme Court chose to vacate that decision and to leave to the lower courts the task

236. 697 F. Supp. 1452 (N.D. Ill. 1988).
237. *Id*.
238. *Id*.
239. 72 F.3d 1191 (4th Cir. 1996).
240. *Id*. at 1193.
241. *Id*.
242. *Id*. at 1196.
243. *Id*. at 1195 n.4.

of determining how gender stereotyping claims should be evaluated. In this way, the Supreme Court has retained the right to limit, even severely, the scope of such claims should it choose to grant review in a future case.

If philosopher Michel Foucault is correct in his account of the history of sexuality, "androgyny" is also a reference to homosexuals, who were unknown as such until individuals engaging in homosexual sexual practices were defined in the nineteenth century not only as possessing irrepressible sex drives but also as harboring "a kind of interior androgyny."[244] The Supreme Court's first use of the word "androgyny," coupled with its vacation of a case brought by an androgynous plaintiff, makes a potent statement to the lower courts that they should not allow recovery in cases where the plaintiff is or is perceived to be gender nonconforming. The point is underscored by the host of cases in which homosexual plaintiffs already find they cannot recover because, no matter the combination of facts, they are very nearly always assumed to have been victims of sexual orientation discrimination.

The references to asexuality and androgyny[245] in *Oncale* are not inadvertent. They function not only to describe a genderless and a sexless workplace but to describe a group of individuals with alternative sexualities and sensibilities whose claims of sexual harassment the law is not prepared to recognize. As such, *Oncale* operates on two opposing levels. The decision is on the one hand a victory that opens the door to claims of same-sex sexual harassment and potentially leads toward an expanded recognition of sex discrimination to include sexual orientation discrimination. In view of the circumstances under which it was decided and the language used in the opinion, however, *Oncale* on the other hand is also a precedent that could easily be used in the future to frustrate claims of sex discrimination brought by gay and lesbian and gender nonconforming plaintiffs.

D. Gender Typing in Stereo

Having resurrected *Doe*, the federal courts are currently in the throes of deciding who may bring claims of gender stereotyping and what evidence will support them. These deliberations are reminiscent of the period pre-*Oncale* when the courts were attempting to determine what set of facts would substantiate a same-sex sexual harassment claim.[246] Some of the questions that arose then were: (1) must the perpetrator be gay;[247] (2) must there be an imbalance of power in the workplace;[248] and (3) what conduct amounts to same-sex harassment instead of mere same-sex horseplay?[249] The current concerns about gender stereotyping claims are similar: (1) can the victim be gay;[250] and (2) what conduct amounts to illegal sex discrimi-

244. MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 43 (Robert Hurley trans. 1978).
245. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).
246. *See generally* Storrow, *supra* note 228, at 695-715.
247. *Id.* at 696 n.94 (citing decisions).
248. *Id.* at 698, 698 n.104.
249. *Id.* at 699 n.108 (citing decisions).
250. *See* Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at **5-6 (N.D. Ill. Sept. 9, 1999), *aff'd on other grounds*, 231 F.3d 1080 (7th Cir. 2000); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063, 1066 (9th Cir. 2002) (noting the irrelevance of the sexual orientation of the victim); Doe v. City of Belleville, 119 F.3d 563, 593, 594 (7th Cir. 1997) ("[W]e cannot just declare that a case is about sexual orientation, rather than sex, simply because homophobia has reared its head along with sexism."), *vacated and remanded by* 523 U.S. 1001 (1998).

nation as opposed to permissible sexual orientation discrimination?[251] Distinguishing between the two is difficult in part due to the equation of gender atypicality with minority sexual orientation.[252] Also reminiscent of the period pre-*Oncale* debate is the concern currently expressed by lower courts that they not validate gender stereotyping claims in such a way that claims of sexual orientation discrimination thereby achieve viability. Concern that the distinction be made with great precision is based on the adamant assertions of many courts—including *Ulane*—that Title VII does not prohibit discrimination on the basis of sexual orientation.[253] Convinced as they are that Congress is opposed to protection against sexual orientation discrimination in the workplace, most courts are still not prepared to admit or to draw inferences, as scholars have urged, that sexual orienta-

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251. Courts acknowledge the difficult line-drawing required in distinguishing between gender stereotyping and sexual orientation discrimination. Doe v. City of Belleville, 119 F.3d at 593, 593 n.27 (noting that sex discrimination and homophobic epithets "often go hand in hand"); *see* Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) ("[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear."); Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 878, 890 (E.D. Wis. 2002).

252. *See* STEPHEN O. MURRAY, AMERICAN GAY 20, 250-51 (1996) (describing society's equation of homosexuality and effeminacy); Case, *supra* note 51, at 54 (arguing that "discrimination against the effeminate man may be overdetermined, and effeminacy conflated with gayness"); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 122 (1995); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated insofar as inconsistent with* Price Waterhouse v. Hopkins; Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

253. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984) (enumerating unsuccessful attempts by members of Congress to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation"). In *Holloway*, the court used a similar rationale to conclude that sex, as it is used in Title VII, is not synonymous with gender. *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-62 (overruling recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)). *See also* Ulane v. E. Airlines, Inc., 742 F.2d at 1086 (using Congress's rejection of attempts to broaden the scope of Title VII as evidence that it "had a narrow view of sex in mind when it passed the Civil Rights Act"); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("[T]he fact that the proposals were defeated indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation."); Holloway v. Arthur Andersen & Co., 566 F.2d at 662 (failure to add sexual orientation shows "that Congress had only the traditional notions of 'sex' in mind") (overruling recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)); Ulane v. E. Airlines, Inc., 742 F.2d at 1087 ("We agree with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); *id*. at 1085; Holloway v. Arthur Andersen & Co., 566 F.2d at 662-63; Rene v. MGM Grand Hotel, Inc., 305 F.3d at 1076 n.3 (Hug, J., dissenting) (noting four failed attempts to pass the Employment Non-Discrimination Act); Doe v. City of Belleville, 119 F.3d at 592.

Twelve states—California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin—outlaw discrimination based on sexual orientation. Catherine M. Brennan, *Banning Discrimination on the Basis of Sexual Orientation*, MD. B. J., June 2002, at 50.

tion discrimination *is* gender stereotyping and thus constitutes sex discrimination.[254]

In their struggle to distinguish between sex discrimination and sexual orientation discrimination, courts have reached the conclusion that as long as the alleged facts include some instances suggesting gender stereotyping alone, without any suggestion of sexual orientation discrimination, the claim may proceed on a theory of mixed motives.[255] Thus, alleging solely that the plaintiff was called "fag" or "dyke" would *not* support a gender stereotyping claim without other allegations that, for example, a male plaintiff was called "femme boy," "princess," or "girl" or that a female plaintiff was said to "wear the pants" or to be excessively "macho," each of the allegations in this latter group suggesting gender stereotyping alone, untainted by any sense of having been motivated by sexual orientation discrimination.[256] This approach narrows the scope of actionable gender stereotyping. It

254. Arriola, *supra* note 160, at 22 (stating that discrimination on the basis of gender nonconformism is sex discrimination); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) (reasoning that discrimination against a man, but not against a woman, for dating a man is sex discrimination); Valdes, *supra* note 252, 23-25 (suggesting that, if Title VII sex and gender discrimination proscriptions were applied consistently, discrimination on the basis of sexual orientation would be prohibited); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1183-84, 1186 (1991) (reasoning that consistent Title VII analysis by courts would prohibit sexual orientation discrimination, which is essentially discrimination based on sex stereotyping); Valdes, *supra* note 160, at 169-70.

District courts within the First and Ninth Circuit accept this reasoning. *See, e.g.,* Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, 'real men don't date men.'"); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (commenting that harassing a female employee for not conforming to the stereotype "that a woman should be attracted to and date only men" could support a sex discrimination claim). Courts within the Seventh Circuit appear undecided as to whether this analysis comports with Title VII. *See, e.g.,* Doe v. City of Belleville, 119 F.3d at 581 (recognizing sex discrimination in harassment based on failure "to meet his coworkers' idea of how men are to appear and behave"); *id.* at 593 n.27 ("[A] homophobic epithet like 'fag' . . . may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation."); *but see, e.g.,* Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at *6 n.4 (N.D. Ill. Sept. 9, 1999) (commenting that "continuous comments by a harasser to a plaintiff, such as 'fag,' 'dyke,' 'queer,'" would be prohibited by Title VII but that facts failed to meet severity and pervasiveness standard required of sexual harassment claims), *aff'd on other grounds*, 231 F.3d 1080 (7th Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d at 1086 (concluding that "the graffiti that specifically stated that Spearman [was] 'gay,' a 'fag,' and compared him to a drag queen confirm[ed] that some of his co-workers were hostile to his sexual orientation, and not to his sex"); *see generally* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbian and Gay Men*, 46 U. MIAMI L. REV. 511, 617-33 (1992) (arguing that sexual orientation harassment is indistinguishable from gender-based sexual harassment, for it is plainly sexual in nature, and it is based on gender stereotypes).

255. Bianchi v. City of Philadelphia, 183 F. Supp. 2d 726, 736 (E.D. Pa. 2002); Doe v. City of Belleville, 119 F.3d at 594 ("The fact that one motive was permissible does not exonerate the employer from liability under Title VII . . . .").

256. Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d at 1224; *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989); Doe v. City of Belleville, 119 F.3d at 593 (noting in facts both homophobic epithets and "other remarks that implicate sex rather than sexual orientation").

would prevent, for example, a plaintiff whose effeminacy made other male workers afraid he desired them sexually from surviving the defendant's motion for summary judgment.[257]

This developing theory of gender stereotyping appears viable both for women like Ann Hopkins and for effeminate men.[258] It does not, however, look promising for transsexuals. Indeed, a court as late as the year 2000 made the statement that "[i]t is unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII."[259] This same court distinguished *Price Waterhouse* by noting that Ann Hopkins was not a transsexual.[260] Furthermore, the definition of gender stereotyping applied by courts in several cases is that the plaintiff has been stereotyped based on her gender.[261] This formulation would result in outcomes similar to *Ulane*, *Sommers*, and *Holloway*, since it does not call into question the holding in these cases that a transsexual's gender for sex discrimination purposes is always her biological sex.[262] There is at present no federal appellate precedent suggesting otherwise.

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257. Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 878, 894-95 (E.D. Wis. 2002) (discussing Spearman v. Ford Motor Co., 231 F.3d at 1085-86).

258. *See, e.g.,* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (agreeing that "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine"); Rene v. MGM Grand Hotel, Inc., 305 F.3d at 1069 (Pregerson, J., concurring) (characterizing gender stereotyping as perceiving a man to be not enough like a man and too much "like a woman"); Doe v. City of Belleville, 119 F.3d at 581:

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harrassed "because of" his sex.

259. Broadus v. State Farm Ins. Co., No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000).

260. *Id.* Another court has suggested that *Price Waterhouse*'s gender stereotyping theory should not be applicable to cases involving transgendered crossdressers because Hopkins "never pretended to be a man or adopted a masculine persona." Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3224, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002).

261. Doe v. City of Belleville, 119 F.3d at 581; Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); Centola v. Potter, 183 F. Supp. 2d 403, 408-09 (D. Mass. 2002) ("Sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions about an individual because of that person's gender, assumptions that may or may not be true."); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) (remarking that same-sex harassment may be proven through "evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); Holt, *supra* note 148, at 300 (characterizing *Price Waterhouse* as a case where a woman was discriminated against because she failed to exhibit the stereotypical characteristics expected of women).

262. Jennifer Levi expresses more certainty that gender stereotyping would help advance the claims of transgender plaintiffs: "[A] biological male plaintiff who transitions to become female (a transsexual woman) may state a claim of sex discrimination against her employer when she is treated adversely because the defendant prefers people to look 'stereotypically masculine' or 'stereotypically feminine.'" Levi, *supra* note 158, at 26-27. This suggests that courts have defined gender stereotyping as applicable where a plaintiff suffers adverse treatment in the workplace because he or she does not present a unified masculine or feminine image, no matter what his or her gender is. To date, however, courts have not advanced this broad theory of gender stereotyping but have instead applied the theory only to cases where the plaintiff's biological sex was unquestioned. Only a very recent and unreported trial-level decision has

For transgendered employees, those who do not seek anatomical alteration as transsexuals do but who, unlike Ann Hopkins, have a gender identity the opposite of their anatomical sex, this developing gender stereotyping theory may be a more promising avenue to relief. In *Rosa v. Park West Bank & Trust Co.*,[263] for example, a man dressed in traditionally feminine attire entered a bank for the purpose of applying for a loan.[264] Upon seeing Rosa's photo identification, which showed him dressed in traditionally masculine attire, the loan officer told him he could not apply for a loan unless he dressed in masculine clothing.[265] Rosa charged the bank with violating the Equal Credit Opportunity Act, but his suit was dismissed by the trial court.[266] That court felt that Rosa had not suffered sex discrimination but instead discrimination based upon attire or upon actual or perceived sexual orientation.[267] The First Circuit reversed and remanded, stating that the facts as alleged in the complaint could well support the theory that the bank turned Rosa away because he was a man who was—and in the bank's view should not have been—dressed in traditionally feminine attire.[268]

Jennifer Levi and Mary Bonauto of Gay and Lesbian Advocates and Defenders wrote the appellate brief in support of Rosa,[269] and Professor Katherine Franke wrote the brief for amici curiae NOW Legal Defense and Education Fund and Equal Rights Advocates.[270] Interestingly, in both briefs and in the First Circuit's opinion, Rosa is referred to as a man.[271] In their written reflections on the case, however, both Levi and Franke reveal that Rosa's gender identity is female, and they refer to Rosa as a woman.[272] This inconsistency may mean that a transgendered individual who does not desire anatomical alteration is comfortable alleging discrimination on the basis of her anatomical and chromosomal sex. The early cases appear to require this, and so perhaps it is simply a necessary legal strategy to

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applied the gender stereotyping theory in the way Levi defines it. *See infra* notes 311-18 and accompanying text (discussing Doe v. United Consumer Fin. Servs., No. 1:01 Civ. 1112 (N.D. Ohio Nov. 9, 2001)).

In the District of Columbia, plaintiffs may bring claims for discrimination based on personal appearance. *See* Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994) (finding that claim of postoperative MTF who "retain[ed] some masculine traits" is actionable under the District of Columbia Human Rights Act) (quoting plaintiff Underwood's Complaint); *see also* Case, *supra* note 51, at 49 (advancing the view that "sex-specific grooming standards violate Title VII").

263. 214 F.3d 213 (1st Cir. 2000).

264. *Id.* at 214.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 215.

269. The brief has been published at Jennifer L. Levi & Mary L. Bonauto, *Brief for the Plaintiff-Appellant Lucas Rosa in the United States Court of Appeals for the First Circuit* Lucas Rosa v. Park West Bank & Trust Company *on Appeal from the United States District Court for the District of Massachusetts*, 7 MICH. J. GENDER & L. 147 (2001).

270. Franke, *supra* note 148.

271. *See* Rosa v. Park W. Bank & Trust Co., 214 F.3d at 214-16; Levi & Bonauto, *supra* note 269, at 149-50, 152-57, 160-61; Franke, *supra* note 148, at 164, 169, 170, 176.

272. *See* Katherine M. Franke, Rosa v. Park West Bank: *Do Clothes Really Make the Man?* 7 MICH. J. GENDER & L. 143 *passim* (2001); Jennifer L. Levi, *Epilogue*, 7 MICH. J. GENDER & L. 179 *passim* (2001).

ensure a transgendered plaintiff survives her opponent's demurrer.[273] If so, the gender stereotyping theory appears to work perfectly well for this class of transgendered plaintiffs.

There are two very important concerns that need to be addressed before relying too heavily on this legal strategy, however. First, for many years, in referring to any transgendered plaintiff, courts and commentators have consistently used the pronouns associated with her gender identity.[274] The choice to do so is said to be because the plaintiff considers herself to be that gender, appears in public as someone of that gender,[275] and also refers to herself as that gender.[276] In general, this practice appears to be out of respect for transgendered plaintiffs.[277] As noted above, however, showing transgendered workers respect in this way has had little bearing on the outcome of their employment discrimination claims. Transgendered employees may have reached the point where playing along with what the legal system demands of them is a cost worth the redress they receive by doing so. And yet, on another level, playing along seems disturbingly retrogressive, substantiating the mistake about gender the law has made for so long in these cases. The ramifications of this strategy are unknown.[278] For some, the strategy presents a rare and valuable opportunity to expose the absurdity of the law's position on gender by showing how, in refusing to recognize a transsexual's gender identity, the law permits "same-sex" marriages.[279] The point is not particularly convincing.[280] Instead of helping to dismantle the absurdist legal approach to sex, the point about same-sex marriage has generated a chilling judicial backlash. Just last year, the Kansas Supreme Court strongly implied that transsexuals were devoid of gender and, under the definition of marriage in force in Kansas, were not entitled to marry at all.[281] Perhaps what the *Rosa* strategy will achieve for civil rights is worth the "collateral damage"[282] it causes along the way. Perhaps the strategy is "critical to paving the road to trans rights."[283] There certainly is no doubt that the strategy worked in *Rosa*, and perhaps that is enough for now.

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273. In *Naming*, *supra* note 2, I suggested a similar strategy. *See also supra* note 117 and accompanying text.

274. *See, e.g.,* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1082 n.2 (7th Cir. 1984) ("Since Ulane considers herself to be female, and appears in public as female, we will use feminine pronouns in referring to her."); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 748 (8th Cir. 1982) ("Inasmuch as Sommers refers to herself in the feminine gender, this court will likewise do so."); Holt, *supra* note 148, at 288 n.23.

275. *See* Ulane v. E. Airlines, Inc., 742 F.2d at 1082 n.2.

276. *See* Sommers v. Budget Mktg., Inc., 667 F.2d at 748; Goins v. West Group, 635 N.W.2d 717, 721 n.1 (Minn. 2001).

277. *See* Holt, *supra* note 148, at 288 n.23.

278. *See* Franke, *supra* note 148, at 145 (admitting, but not describing, reservations about the outcome of *Rosa*).

279. *See* Frye & Meiselman, *supra* note 15, at 1032 (relating story of how two women married in Houston after the Houston Court of Appeals declared void a marriage between a man and a postoperative male-to-female transsexual).

280. *See id*. at 1033 (admitting that these "same-sex" marriages are merely "same-sex-appearing").

281. *See* In re Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002) ("The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria.").

282. Franke, *supra* note 148, at 146.

283. Levi, *supra* note 158, at 6 n.7.

Another concern about the victory in *Rosa* is the easy distinction that can be made between the contexts involved in employment discrimination disputes and those triggering equal credit opportunity claims.[284] The hurdles to be cleared in any attempt to carry *Rosa* over to the employment context will without doubt be the rule permitting employers to establish reasonable dress codes that differentiate between male and female workers[285] and the near hysteria that surrounds the issue of what restroom a transgendered worker should use.[286] Recently, and despite the limited role a restroom plays in the working life of an employee, this latter issue has become a flashpoint around which transgendered employees' right to be free from discrimination stands or falls.[287] While practical suggestions of solutions to "the problem" abound,[288] employers' response to this issue varies and courts are still issuing opinions of remarkable insensitivity.[289] The recent case of *Goins v. West Group*[290] is an example. Julienne Goins was a valued employee of West Group who, two years before going to work for the legal publications giant, began presenting herself as a female.[291] When she eventually began work at West, she had not yet submitted to sex reassignment surgery.[292] Initially, Goins worked in West's Rochester, New York, facility but thereafter transferred to Minnesota.[293] Once there, some female employees at West voiced their concern that a man dressed as a woman was using the women's restroom.[294] In response, West's management told Goins to use only single-occupancy restrooms.[295] She refused, resigned in

284. *See* Levi & Bonauto, *supra* note 269, at 160 ("Even assuming, arguendo, that an employer might be able to justify a dress code according to business needs in the employment context, there can be no plausible justification for basing creditworthiness determinations upon a person's gendered appearance."); Franke, *supra* note 148, at 145 (recognizing that "an access to credit case presented a better factual situation in which to get a circuit court to affirm *Price Waterhouse* than did employment cases where the employer's desire to fire a man in a dress might intuitively, yet mistakenly, resonate with the court's notion of legitimate business necessity").

285. *See* Levi & Bonauto, *supra* note 269, at 160 ("[I]n those cases where courts have upheld even sex-specific dress codes, they have done so because the dress or appearance requirement, though sex discriminatory, can be justified by business justifications reasonably related to the job."); Levi, *supra* note 158, at 18-19.

286. *See* Levi, *supra* note 158, at 14-18.

287. Litigation involving this issue continues to proliferate. *See, e.g., Transsexual Sues over Rest Room Ban*, ADVOCATE.COM HEADLINES, Aug. 15, 2002, *at* http://www.advocate.com/new_news.asp?id=5825&sd=08/15/02 (on file with Maine Law Review).

288. *See* Frye, *supra* note 2, at 187-88 (articulating ways to address simultaneously the need of the transgendered employee for access to a restroom and the concerns of fellow employees); SHEILA KIRK, M.D. & MARTINE ROTHBLATT, J.D., MEDICAL, LEGAL & WORKPLACE ISSUES FOR THE TRANSSEXUAL: A GUIDE FOR SUCCESSFUL TRANSFORMATION 136, 143 (1995); JANIS WALWORTH, TRANSSEXUAL WORKERS: AN EMPLOYER'S GUIDE 83-86 (1998); JANIS WALWORTH, WORKING WITH A TRANSSEXUAL: A GUIDE FOR COWORKERS 35 (1999).

289. *See, e.g.,* Goins v. West Group, 635 N.W.2d 717, 717-26 (Minn. 2001) (reinstating summary judgment against transgender employee who claimed segregating restrooms according to biological gender violated broad prohibition of sexual orientation discrimination).

290. 635 N.W.2d 717 (Minn. 2001).

291. *Id.* at 721.

292. Goins v. West Group, 619 N.W.2d 424, 426 (Minn. Ct. App. 2000), *rev'd*, 635 N.W.2d 717 (Minn. 2001).

293. *See* Goins v. West Group, 635 N.W.2d at 721.

294. *Id.*

295. *Id.*

protest, and ultimately filed suit against West under the Minnesota Human Rights Act.[296]

In Minnesota, where Goins worked, state law prohibits discriminating against an employee for having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.[297] Thus, Goins's lawsuit was not burdened with the limitations of Title VII. Nonetheless, in the trial court, Goins was compelled to provide discovery relating to the form of her genitals. Based on this information, the court granted summary judgment for West.[298] The Court of Appeals reversed, stating the statute clearly protected Goins's use of the women's restroom.[299] The Supreme Court overturned this decision based on its view that, in maintaining restrooms segregated on the basis of biological gender, an employer does not commit gender identity discrimination.[300] This conclusory decision does not address in any meaningful way the impact of the restroom policy on Goins's statutory right not to be subjected to gender identity discrimination.[301] At most, it seems to suggest that Minnesota's broad antidiscrimination law might protect Goins against discrimination for *having* a nonconforming gender identity but not for *expressing* it. The force of the decision is to empty much of the substance from the powerful protection against gender identity discrimination passed by the Minnesota Legislature in 1993.

In an Eighth Circuit case decided after *Goins*, a teacher sued a Minnesota school district for both sexual harassment and religious discrimination on the ground that it allowed a transgendered teacher to use the women's faculty restroom.[302] Debra Davis had worked with school officials, parents, and psychologists to complete her transition from male to female.[303] The school district's legal counsel was of the opinion that the Minnesota Human Rights Act guaranteed Davis the right to use the women's faculty restroom.[304] Relying on *Goins*, the Minnesota Department of Human Rights stated that the Act "neither requires nor prohibits restroom designation according to self-image of gender or according to biological sex."[305] The district court granted summary judgment for the school district, and the Eighth Circuit affirmed based on its assessment that Davis's restroom use did not infect the working environment with "'discriminatory intimidation, ridicule,

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296. *Id*. at 720-21.

297. MINN. STAT. §§ 363.01(41)(a), 363.03(1)(2)(c) (2000) (prohibiting sexual orientation discrimination and defining sexual orientation as, in part, "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness").

298. *See* Goins v. West Group, 619 N.W.2d at 427.

299. *See id*. at 427-28.

300. *See* Goins v. West Group, 635 N.W.2d at 723, 725, 726.

301. The *Goins* decision echoes another equally perplexing decision interpreting the scope of "sexual orientation" under the Minnesota Human Rights Act. *See* Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL REV. L. & WOMEN'S STUD. 173, 209 (1996) (reporting, in a case brought by a woman a fertility clinic refused to inseminate because she was a lesbian, that the trial court granted summary judgment to the clinic, reasoning that the Minnesota Human Rights Act did not apply given Minnesota's policy not to condone homosexuality or same-sex marriage).

302. *See* Cruzan v. Special Sch. Dist., 294 F.3d 981, 982-83 (8th Cir. 2002).

303. *Id*. at 983.

304. *Id*.

305. *Id*.

and insult.'"[306] This was true in particular because Cruzan could elect to use other conveniently located restrooms.[307]

Goins and *Cruzan* appear to be opposite sides of the same coin. They in essence give an employer complete discretion to develop a restroom policy it feels is most in keeping with the climate of the workplace. It would seem, though, that employer discretion was something the Minnesota Human Rights Act was meant to curtail. The force of these decisions, then, is to empty much of the substance from the powerful protection against gender identity discrimination passed by the Minnesota legislature in 1993.

Jennifer Levi expresses optimism that gender stereotyping is a theory that can help advance the employment discrimination claims of even transsexual plaintiffs: "[A] biological male plaintiff who transitions to become female (a transsexual woman) may state a claim of sex discrimination against her employer when she is treated adversely because the defendant prefers people to look 'stereotypically masculine' or 'stereotypically feminine.'"[308] Levi's prescience is reflected in a recent case out of the Northern District of Ohio, *Doe v. United Consumer Financial Services*,[309] said to be the only case supporting a transgendered employee's right to sue for gender stereotyping.[310] As in *Goins*, the employer in this case claimed to have received a report from a concerned employee that a man dressed as a woman was using the women's restroom.[311] Management also knew that Doe's coworkers referred to her as Mrs. Doubtfire.[312] Doe is in fact a postoperative transsexual female.[313] Unlike in *Goins,* however, the employer claimed it could not ascertain Doe's gender just by looking at her.[314] After receiving the report, the employer took Doe aside and questioned her about her gender.[315] At that point, the employer asked Doe whether she had had or intended to have sex reassignment surgery.[316] When Doe objected to this line of questioning, she was sent home and later learned that her employment had been terminated.[317] Doe then sued for sex discrimination.[318] Her legal theory was that "United Consumer either viewed her as a man who dressed and behaved like a woman, or it considered her a woman who was insufficiently feminine."[319]

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306. *Id.* at 984 (citation omitted).

307. *Id.*

308. Levi, *supra* note 158, at 26-27.

309. No. 1:01 Civ. 1112 (N.D. Ohio Nov. 9, 2001) (unpublished) (on file with Maine Law Review).

310. Eric Resnick, *First TG Case Under 1964 Civil Rights Act Is Settled*, GAY PEOPLE'S CHRON. (July 12, 2002), *at* http://www.gaypeopleschronicle.com/stories02/02jul12.htm#story4 (on file with Maine Law Review).

311. Doe v. United Consumer Fin. Servs., No. 1:01 Civ. 1112, at 4.

312. *Id.* at 7.

313. *Id.* at 2.

314. *Id.* at 3.

315. *Id.* In response, Doe presented legal documents establishing her gender as female. *Id.*

316. *Id.*

317. *Id.* at 4.

318. *Id.* at 1.

319. *Id.* at 6. In *Naming*, I speculated, "Perhaps the best, and as yet untested approach to these types of claims, then, would be to advance transsexuals' discrimination claims upon two theories, one for discrimination based on one sex, and another for discrimination based on the other sex." *Naming*, *supra* note 2, at 324.

Although the facts of *Doe* mirror those of *Craig,* the outcome at the trial level was very different. In an unpublished decision ruling on the defendant's motion to dismiss, the court commented on the tension between *Ulane* and *Price Waterhouse* and held that Doe's claim survived the motion because "her termination may have been based, at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations."[320] In other words, remarked the court, United Consumer may not have discharged Doe had she been "'fully female' or 'fully male.'"[321] Though groundbreaking, *Doe* is an unpublished decision and the parties have since settled the dispute.[322] It is unclear what, if any, influence it will have on future discrimination lawsuits brought by transgendered plaintiffs.

IV. CONCLUSION

Responses to sex discrimination claims brought by transgendered individuals are evolving. In contrast to what are now thought to be outdated cases concerning transsexuals who ultimately were unsuccessful no matter how they framed their discrimination complaints, today's courts appear prepared to grapple more judiciously with the obvious point that "sex" in antidiscrimination legislation does not refer to an individual's anatomical sex but to characteristics commonly associated with that sex. This means that, for many individuals, whether transgendered or not, actionable workplace discrimination occurs when they suffer adverse treatment because their behavior challenges assumptions about what is appropriate for persons of the same anatomical sex. The Supreme Court has suggested that this kind of discrimination qualifies as sex discrimination but has refrained ever since from commenting directly on the reach of this theory of sex discrimination. Unexpected terminology in the *Oncale* decision and the Supreme Court's articulation of a common sense standard for actionable same-sex sexual harassment suggest that any expansion or wholesale embrace of a gender stereotyping theory of sex discrimination risks opening the door to sexual orientation discrimination protection, long declared not recognized by Title VII. In the future, lower courts may remain silent about the reach of the gender-stereotyping theory of sex discrimination because the ramifications of widespread acceptance of the theory may lead to the understanding that sexual orientation discrimination is sex discrimination.

In the abstract, sexual stereotyping or discrimination against gender nonconformity sounds like an ideal avenue toward ensuring that transgendered individuals receive redress for their workplace sex discrimination claims. But in its application, this theory poses the same proof-of-sex hurdles faced by the unsuccessful plaintiffs in *Ulane* and *Sommers* and would not be employed by those individuals who, though transgendered like Miles, do not strike employers as gender nonconforming and who, as a result, do not suffer discrimination on that basis. *Craig* is a powerful illustration of the limitations of this theory, as students working on both sides of the case eventually discovered. They realized that Hopkins's superiors at Price Waterhouse always considered Hopkins to be a woman but withheld her promotion because she, in their estimation, did not act like one. Although any

320. Doe v. United Consumer Fin. Servs., No. 1:01 Civ. 1112, at 7.
321. *Id*.
322. Resnick, *supra* note 310.

appellate court ruling in *Craig* should decide that there are genuine issues of material fact as to how Craig was perceived at work and, thus, as to why she was fired, there is ample appellate precedent to support a summary disposition of her case in favor of Hudson Air Tool & Compressor Co.

Restrooms have become a powerful symbol for the right of the transgendered members of our society to be allowed the very means to survive. The fear that transsexuals will wreak havoc in the workplace by making other employees uncomfortable in the restroom fuels a hysteria that greatly impedes any progress to be made in the area of equal employment opportunity for the transgendered. Lucas Rosa's success, when viewed in this light, was arguably related to the fact that he was a potential client, not an employee. Regular restroom use was thus not an issue under consideration in that equal credit opportunity case. Where the issue of restroom use is what causes the employee to file suit in the first instance, however, even where the law explicitly guards against discrimination against one's gender identity, transgendered employees are said to have no right to use the restroom most in accordance with their gender identity. Such an outcome in a very recent case where protection of transgendered workers is strong portends the worst for transgendered employees in other jurisdictions who have no hope of redress except under an expansive view of gender stereotyping. Though unpublished, the recent *Doe* decision from the Northern District of Ohio indicates that a different approach to transsexuals' discrimination claims is possible. The decision provides a glimmer of hope that the gender stereotyping theory of sex discrimination will at last afford transsexuals relief under Title VII.