What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians

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24 Thomas Jefferson Law Review 149 (2002)

WHAT DO SCALIA AND THOMAS REALLY THINK ABOUT SEX? TITLE VII AND GENDER NONCONFORMITY DISCRIMINATION: PROTECTION FOR TRANSSEXUALS, INTERSEXUALS, GAYS AND LESBIANS

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I. INTRODUCTION

The fastest growing area of employment discrimination complaints involves claims for sexual harassment.[1] Title VII of the Civil Rights Act of 1964 protects women from harassment if they are discriminated against because they are women. Similarly, men who are harassed because they are men can recover under Title VII.[2] It is unclear, however, whether transsexuals, intersexuals, gays and lesbians are entitled to similar protection if they are discriminated against based upon their gender nonconformity, sex nonconformity, or sexual orientation nonconformity. Until recently, the answer would have been clear: Title VII did not protect any of these individuals from discriminatory employment practices. Cases decided over the last few years, however, indicate that courts may be expanding Title VII coverage to protect these traditionally marginalized groups from discriminatory employment practices.

This paper discusses recent federal court decisions that may signal a trend toward protecting gender nonconformists, including, transsexuals, intersexuals, gays and lesbians, from discrimination. Part II explains how the terms "sex," "gender," and "sexual orientation" have been used by legal institutions and other disciplines. Part III provides a brief history of the development of sex discrimination jurisprudence under Title VII as traditionally applied in cases involving gays, lesbians, and transsexuals. Part IV discusses the recent cases that have defined

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1. Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily; New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1.

2. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (holding that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women).

"because of sex" more expansively. This paper concludes with a brief discussion of whether such an approach will be accepted by the Supreme Court when it is ultimately faced with this issue.

II. WHAT IS SEX?

Most legal institutions and scholars in other disciplines, such as medicine, sociology and psychology, use the term "sex" to denote one's status as a man or woman based upon biological factors. "Gender," on the other hand, usually is used to refer to the cultural and attitudinal qualities that are characteristic of a particular sex. Individuals with characteristics that are typically associated with men have a masculine gender, while individuals with characteristics that are typically associated with women have a feminine gender.[3]

Most anti-discrimination legislation utilizes the word "sex," yet courts, legislators, and administrative agencies often substitute the word "gender" for the word "sex" when they interpret these statutes.[4] Despite the different meanings of the terms "sex" and "gender," they are often used interchangeably.[5]

Almost all legislative acts that use the terms "sex" and "gender" implicitly presume that only two sexes/genders exist and that all people fit neatly into one of these two categories.[6] A

3. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (Scalia, J. dissenting). "The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male." *Id.* at 157 n.1 (Scalia, J., dissenting).

4. For example, in 1976, the EEOC amended its definition of "sex" for purposes of Title VII to include "a person's gender, an immutable characteristic with which a person is born." Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1169 (1991) (quoting EEOC Dec. No. 76-75, EEOC Dec. (CCH) p. 6495, at 4266 (Mar. 2, 1976)).

5. U.S. Supreme Court Justice Ruth Bader Ginsburg is in large part responsible for the interchangeable use of the words sex and gender in the law. According to Ginsburg, when she was an attorney representing sex discrimination clients, her secretary advised her to substitute the word "gender" for the word "sex" in her briefs because "the word sex, sex, sex is on every page. Don't you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don't you use the word 'gender'?" Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 10 (1995).

6. This binary paradigm presumes that men: (1) have XY chromosomes, a penis, testes, a prostate, androgens, deep voices, and more body hair; (2) are masculine; and (3) want to have sex with women. On the other hand, the presumption is that women: (1) have XX chromosomes, ovaries, a vagina, a uterus, fallopian tubes, a

binary sex/gender paradigm does not reflect reality. Instead, sex and gender range across a spectrum.

"Male and female" occupy the two ends of the spectrum, while intersexuals, transsexuals, and gays/lesbians occupy a position somewhere between the traditional male and female poles.[7] These individuals could be viewed as "sex/gender nonconformists" because they do not fit society's traditional norms of sex, gender, and sexual orientation. Intersexuals are people who do not have congruent biological sex markers.[8] In other words, they have some biological sex characteristics that are typically associated with women and some biological sex characteristics that are typically associated with men.[9] Transsexuals have biological sex markers that appear congruent, but their gender self-identity does not conform with their biological sex indicators.[10] Gays and

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clitoris, estrogen and breasts; (2) are feminine; and (3) want to have sex with men. In reality, millions of persons have a combination of biological aspects, some of which are traditionally associated with men and some of which are traditionally associated with women. Furthermore, those with congruent biological sex features may have a gender, gender identity or sexual orientation that does not comport with their biological sex features.

7. *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZONA LAW REV. 265, 275 (1999) for a detailed discussion of intersexuality and transsexuality.

8. The exact incidence of intersexuality is unknown. John Money, a professor at Johns Hopkins University and noted expert in the area of intersexuality, estimates that the number of intersexed persons may be as high as four percent. *See* Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.-Apr. 1993, at 20, 21. Anne Fausto-Sterling studied the medical literature between 1955 and 1977 and concluded that the frequency of intersexuality may be as high as two percent of live births. At a minimum, intersexuals constitute at least one-tenth of one percent to one percent of the population. Even if the figure is as low as one-tenth of one percent, that makes intersexuality as common as the well-known conditions of cystic fibrosis and Down's Syndrome. *See* ALICE D. DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX, 43 (1998).

9. *See* Greenberg, *supra* note 7, at 278-83, for a through discussion of intersex conditions.

10. The exact incidence of transsexualism is uncertain. Some estimates indicate that between 3000 to 6000 adults have undergone hormonal and surgical "sex changes" in the United States. Another 30,000 to 60,000 consider themselves candidates. Some estimates indicate that about 10,000 transsexuals currently live in the United States. *See* DAVID W. MEYERS, THE HUMAN BODY AND THE LAW 221 (2d ed., 1990). Transsexualism is not necessarily related to sexual orientation. Some transsexuals identify themselves as gays or lesbians while others identify themselves as heterosexuals. In other words, a male-to-female transsexual who has undergone surgery to acquire female genitalia may still prefer to have sex with another female, and a female-to-male transsexual may still prefer to have sex with another male. In one reported case, a married couple decided they were both in the wrong bodies, and they both had sex-change operations. They remained married and reversed

lesbians have congruent biological sex factors and a gender self-identity that conforms to their biology, but they do not fit stereotypical norms of how men and women should behave. Specifically, they do not meet heterosexual norms because they prefer to engage in sexual acts with someone of the "same sex." Furthermore, some gays and lesbians do not meet stereotypical norms of masculine and feminine conduct.

Although these gender/sex nonconformists have historically been subjected disproportionately to violent hate crimes and discriminatory employment actions and decisions, the law has traditionally failed to protect them adequately. The next part of this talk explores why courts find that discriminatory acts directed against intersexuals, transsexuals, and gays/lesbians are not considered sex discrimination under Title VII.

III. TITLE VII AND DISCRIMINATION "BECAUSE OF SEX"

Title VII of the Civil Rights Act of 1964 provides that "[i]t shall be an unlawful employment practice for an employer. . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of . . . sex . . ."[11] The term "sex" is never defined in Title VII, nor is it clarified in the legislative history.[12] This deficiency has caused the courts to struggle over how to interpret the term. Gays and

roles. The husband became the wife, and the wife became the husband. *See* ROBERT POOL, EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES 137 (1994).

11. 42 U.S.C. §2000e-2(a)(1). Numerous state statutes and city regulations also prohibit employment discrimination because of sex. A number of state and local ordinances specifically protect gays, lesbians and transsexuals from discriminatory employment practices. *See* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & LAW 37, 45-58 (2000) for a discussion of this legislation.

12. The legislative history of Title VII indicates that the original drafters never contemplated prohibiting sex discrimination. Various commentators have presented different versions of how sex was added to Title VII. According to popular lore, Representative Howard Smith of Virginia, one of the major opponents of the bill, proposed the addition of sex to guarantee the bill's defeat. Another version of events indicates that Smith was asked to make the motion to add sex to the legislation because of his support of the Equal Rights Amendment. Under this version of the events, Smith proposed the addition of sex because he believed in equal rights for women. If the addition of sex resulted in the bill's defeat, Smith would still be satisfied with the result because he opposed the type of regulation of private business that Title VII imposed. *See* Katherine M. Franke, *The Central Mistake of Sex*

lesbians who have been discriminated against because of their sexual orientation have brought a number of Title VII actions. Similarly, transsexuals who have been discriminated against because of their transsexuality have filed Title VII claims. Until recently, courts consistently denied recovery to both of these groups.

Courts dismissed sex discrimination causes of action brought by gays and lesbians because the courts refused to interpret the word "sex" to include "sexual orientation."[13] In addition, on numerous occasions, Congress considered and failed to pass the Employment Nondiscrimination Act (ENDA) which would have prohibited sexual orientation discrimination.[14] Courts have held that Congress's failure to pass ENDA means that Congress did not intend gays and lesbians to receive Title VII protection.

Similarly, courts dismissed cases in which transsexuals brought Title VII actions because courts refused to interpret the word "sex" to include transsexuals.[15] According to the courts, "sex" in Title VII refers to "traditional notions of sex"[16] and only covers discrimination based upon one's status as a male or female.[17] Courts held that discrimination based upon one's status

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Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 23-24 (1995).

13. *See, e.g.*, Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-332 (9th Cir. 1979); Higgins v. New Balance, 194 F.3d 252, 259 (1st Cir. 1999); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000).

14. *See* Employment Nondiscrimination Act of 1996, S.2056, 104th Cong. (1996); Employment Nondiscrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Nondiscrimination Act of 1994, H.R. 4636, 103rd Cong. (1994).

15. *See* Greenberg, *supra* note 7, at 317-325, for a thorough discussion of the employment discrimination cases involving transsexuals. No reported Title VII cases have involved discrimination against intersexed persons. In the one reported employment discrimination case involving an intersexual, the plaintiff maintained that she had been fired when her employer learned that she had undergone surgery to "correct" her hermaphroditic condition. The court held that the Pennsylvania Human Relations Act (which was similar to Title VII) did not protect the plaintiff because the act was intended to achieve equality between men and women and was not intended to protect intersexuals who undergo gender corrective surgery. Wood v. C.G. Studios, 660 F. Supp. 176, 177 (E.D. Pa. 1987).

16. *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

17. *See, e.g.*, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085-1087 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

as a transsexual was not "sex" discrimination, but rather "change of sex" discrimination and thus not covered under Title VII.[18]

IV. RECENT DEVELOPMENTS IN TITLE VII SEX DISCRIMINATION JURISPRUDENCE

A. *THE SUPREME COURT OPENS THE DOOR TO SEX AND GENDER NONCONFORMISTS IN HOPKINS* AND *ONCALE*

In 1988, in *Price Waterhouse v. Hopkins*,[19] the Supreme Court recognized that a woman who suffers an adverse employment decision based upon her failure to conform to gender stereotypes of femininity can state a cause of action under Title VII. When Ann Hopkins was considered for and denied partnership at Price Waterhouse, one partner criticized her for being too "macho" and another partner stated that she "overcompensated for being a woman."[20] She was also advised to take "a course at charm school" and was criticized for using profanity because a lady should not use foul language. One partner delivered the "coup de grace" when he advised Ms. Hopkins to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[21] In granting relief to Ms. Hopkins, the Court held that Congress enacted Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[22]

Ten years later, in *Oncale v. Sundowner Offshore Services, Inc.*,[23] the Court resolved a split among the circuit courts when it held that same-sex sexual harassment is actionable under Title VII. Joseph Oncale, a roustabout, was forcibly subjected to sex-related, humiliating actions by male colleagues and supervisors. He was also physically assaulted in a sexual manner and threatened with rape. He eventually quit his job because he feared that he would be raped or forced to have sex. In the unanimous opinion written by Justice Scalia, and in Justice Thomas's one sentence concurrence, the Court emphasized that

18. *Holloway*, 566 F.2d at 664.
19. 490 U.S. 228 (1989).
20. *Id.* at 235.
21. *Id.*
22. *Id.* at 251.
23. 523 U.S. 75 (1998).

Title VII requires that the harassment be "because of sex."[24] The Court held that the "because of sex" requirement can be satisfied in heterosexual male-female sexual harassment situations because the conduct typically involves explicit or implicit proposals of sexual activity that are not likely to be made to someone of the same sex. Similarly, in a case involving explicit or implicit sexual overtures by a gay or lesbian defendant toward someone of the same sex, the same inference can be drawn. The court stated further, however, that the harassing conduct need not be motivated by sexual desire to satisfy Title VII and that plaintiffs can prove that the harassment was "because of sex" by a number of evidentiary routes.[25] The court did not explicitly state how Joseph Oncale could prove his case, but held that courts should use "common sense" to determine whether the harassment was "because of sex."[26]

The Supreme Court allowed Ann Hopkins and Joseph Oncale to state causes of action under Title VII because they both failed to conform to gender stereotypes. Ann Hopkins was denied partnership because she failed to meet gender norms of feminity, while Joseph Oncale was harassed because he failed to conform to masculine norms. Although the Supreme Court held that both plaintiffs could state a cause of action under Title VII, neither case mentions the plaintiff's sexual orientation. Thus, the court was willing to allow recovery to persons who may have been lesbian or gay because the discriminatory treatment appeared to be based upon "gender" discrimination rather than "sexual orientation" discrimination.

B. SOME FEDERAL CIRCUIT AND DISTRICT COURTS OPEN THE DOOR WIDER TO SEX AND GENDER NONCONFORMISTS

Since the decisions in *Oncale* and *Hopkins*, a number of federal courts still dismiss Title VII actions brought by gays and lesbians.[27] Whenever plaintiffs allege that they were harassed

24. *Id.* at 81-82.
25. *Id.* at 81.
26. *Id.* at 82.
27. *See, e.g.*, Dandan v. Radisson Hotel Lisle, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000); Mims v. Carrier Corp., 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000); Higgins v. New Balance, 194 F.3d 252, 259 (1st Cir. 1999); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1207 (9th Cir. 2001); Hamner v. St. Vincent Hospital and Health Care Center, Inc., 224 F.3d 701, 704 (7th Cir. 2000).

because of their sexual orientation, these courts have ruled that the discriminatory acts are not covered under Title VII. If, however, plaintiffs allege that they were discriminated against because they failed to conform to gender norms of masculinity and femininity, some courts have allowed the cause of action to proceed to trial.

A few courts have indicated a willingness to apply the gender nonconformity theory to gay and lesbian plaintiffs, but have held that the facts in the cases before them did not support the theory or that the theory was not pled properly at the lower court.[28] Other courts have allowed Title VII actions by gays and lesbians because the plaintiffs properly alleged facts that would support discrimination based upon gender nonconformity.[29] In other words, these courts have accepted plaintiffs' claims that they were harassed because of their failure to conform to masculine and feminine norms, rather than because of their sexual orientation.

Some courts are even willing to expand the gender nonconformity theory and apply it to gays and lesbians who fail to conform to gender norms primarily because they are sexually attracted to people of the same sex rather than the opposite sex.[30] For example, in *Heller v. Columbia Edgewater Country Club*,[31] the plaintiff, a lesbian employee, suffered from a number of discriminatory actions. The court was willing to conclude that the plaintiff was harassed and discharged because she was attracted to and dated other woman, and the harasser believed that women should only be attracted to and date only men.[32] Al-

28. *See, e.g.* Martin v. N.Y. State Dept of Correctional Services 115 F. Supp. 2d 307, 313 (N.D. N.Y. 2000); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000); Spearman v. Ford, 231 F.3d 1080, 1085 (7th Cir. 2000); Ianetta v. Putnam Investments, 183 F. Supp. 2d 415, 423 (D. Mass. 2002); Bibby v. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001); Bianchi v. City of Philadelphia, 183 F. Supp. 2d 726, 735 (E.D. Pa. 2002).

29. *See, e.g.,* Price v. Dolphin, 2000 WL 1789962 (E.D. La. Dec. 5, 2000); Sambroski v. West Valley Nuclear Services, 2000 WL 743987 (W.D. N.Y. Jun. 8, 2000); Schmedding v. Tnemec, 187 F.3d 862 (8th Cir. 1999); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002).

30. If a court is willing to allow a plaintiff to state a gender nonconformity cause of action under Title VII solely because he is discriminated against because of his desire to have sex with someone of the same sex, rather than the opposite sex, it is equivalent to allowing a Title VII action to be based on sexual orientation discrimination.

31. 195 F. Supp. 2d 1212 (D. Or. 2002).

32. *Id.* at 1223.

though the court mentioned other comments relating to the plaintiff's lack of femininity, it appears that the court may have been willing to expand Title VII coverage to protect gays and lesbians solely because they are attracted to people who are the same sex.[33]

The recently reported Title VII actions have not involved discrimination against transsexual employees. Transsexuals have achieved similar success, however, in cases involving other statutes that mirror the Title VII prohibition against sex discrimination. For example, the Ninth Circuit Court of Appeals has held that a gay male with a female gender identity is entitled to asylum.[34] Similarly, the Ninth Circuit has held that a male-to-female transsexual inmate harassed by a prison guard can state a cause of action under the Gender Motivated Violence Act.[35] Finally, the First Circuit has held that a male dressed in typical female attire who was denied a loan could state a cause of action under the Equal Credit Opportunity Act.[36]

V. CONCLUSION

The Supreme Court opened the Title VII door to gender nonconformists in its *Price Waterhouse* and *Oncale* decisions.[37] A number of federal circuit and district courts have opened the door more widely to transsexuals, gays, and lesbians as long as they are able to phrase their claims in terms of gender nonconformity discrimination.

Whether the door will remain open or be slammed shut when the Supreme Court eventually grants certiorari in one of these cases is questionable. The *Oncale* opinion was so brief, and the theory that justified the holding was so undeveloped that it is impossible to determine exactly what Justices Scalia and Thomas meant in their insistence that the discrimination must be "because of sex."

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33. *Id.*

34. Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1099 (9th Cir. 2000).

35. Schwenk v. Hartford, 204 F.3d 1187, 1203 (9th Cir. 2000).

36. Rosa v. Park West Bank and Trust Co., 214 F.3d 213, 216 (1st Cir. 2000).

37. Professor Kathryn Abrams wrote about Oncale: "the opinion throws the door open to an entirely new-and heretofore almost entirely marginalized-group of claimants." Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke,* 83 CORNELL L. REV. 1257, 1258-59 (1998).

Some of the language in Scalia's opinion could be used to support a gender nonconformity theory. Even though Congress clearly did not envision male-on-male harassment when it adopted Title VII, Justice Scalia stated in the *Oncale* opinion that Title VII should cover male-on-male harassment because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[38] Therefore, it is possible that the Court would allow a gender nonconformity theory to be used by gays, lesbians and transsexuals.

The future of the gender nonconformity theory appears uncertain, however, for a number of reasons:

- In other recent gender and sexual orientation cases, Scalia, Thomas and some other Justices allowed discrimination based upon gender stereotyping and sexual orientation;[39]
- The Supreme Court vacated the Seventh Circuit judgment in *City of Belleville v. Doe*,[40] which was based in part upon gender nonconformity discrimination;[41] and
- The Court failed to mention gender stereotyping in its *Oncale* opinion.

Justices Scalia and Thomas may rely on "plain meaning" and "common sense" and hold that sex discrimination as prohibited in Title VII does not protect sexual minorities, even if the complaint is phrased in terms of gender nonconformity. In other words, if the harassers maintain that they discriminated against the plaintiff because the plaintiff was gay, lesbian or transsexual,

38. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998).

39. *See, e.g.,* Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., Rehnquist J., Thomas, J. dissenting); United States v. Virginia, 518 U.S. 515 (1996) (Scalia, J. dissenting); Nguyen v. I.N.S., 533 U.S. 53 (2001).

40. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded,* 523 U.S. 1001 (1998). The Supreme Court vacated the judgment for further consideration in light of *Oncale*.

41. Some federal courts that allow recovery based upon gender nonconformity have interpreted the Supreme Court's remand of *Doe* as supportive of the gender nonconformity theory. The appellate court in *Doe* held that the plaintiffs suffered sex discrimination for two reasons: (1) the harassment involved specific sexual overtones; and (2) the harassment was due to plaintiffs' failure to meet stereotyped notions of masculinity. The Supreme Court's order to vacate and remand did not specify which of these two theories required a remand. A number of courts have decided that the Supreme Court remanded the case because the first justification directly contradicted *Oncale*. These courts have held, however, that the gender nonconformity theory as applied in *Doe* is still viable. *See, e.g.,* Jones v. Pacific Rail Services 2001 WL 127645 (N.D. Ill. Feb. 14, 2001); EEOC v. Trugreen Limited Partnership, 122 F. Supp. 2d 986, 993 (W.D. Wis. 1999).

the Supreme Court could hold that the discrimination was not "because of sex," but rather was because of the plaintiff's sexual orientation or desire to change sex.

Although it appears that sexual minorities may have won a few battles in the district and circuit courts, the war is far from over. The Supreme Court has not yet articulated a coherent theory of sexual harassment law that clearly protects all sexual minorities. Until it does, activists must continue to encourage Congress to adopt the Employment Nondiscrimination Act[42] and state and local legislatures to adopt gender nonconformity language in their antidiscrimination legislation. Similarly, scholars must continue to encourage the courts to adopt a coherent theory of sexual harassment law so that antidiscrimination statutes that prohibit sex discrimination based upon gender nonconformity protect all sexual minorities and not just male and female heterosexuals.[43]

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42. Employment Non-Discrimination Act of 2001, S. 1284, H.R. 2692, 107th Cong. (2001). This act as currently proposed bans discrimination based on sexual orientation. Therefore, it does not specifically protect transsexuals. For transsexuals to be covered, the proposed legislation would need to be amended.

43. A number of scholars, including Katherine Franke, Anita Bernstein, Vicki Schultz and Kathryn Abrams have written excellent articles supporting different theories of the wrong behind sexual harassment law. *See, e.g.,* Vicki Schultz, *Reconceptualizing Sexual Harassment,* 107 YALE. L.J. 1683 (1998); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment,* 83 CORNELL L. REV. 1169 (1998); Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke,* 83 CORNELL L. REV. 1257 (1998); Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect,* 83 CORNELL L. REV. 1231 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect,* 111 HARVARD L. REV. 4456 (1997); Katherine M. Franke, *What's Wrong with Sexual Harassment?,* 49 STANFORD L. REV. 691 (1997); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender,* 144 U. PA. L. REV. 1 (1995); Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams,* 83 CORNELL L. REV. 1245 (1998).