HETEROSEXUALITY AND TITLE VII

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INTRODUCTION

Dawn Dawson was an outsider among outsiders.[1] A self-described gender-nonconforming lesbian woman,[2] Dawson worked as a hair assistant

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[1] *See* Dawson v. Bumble & Bumble (*Dawson II*), 398 F.3d 211 (2d Cir. 2005); Dawson v. Bumble & Bumble (*Dawson I*), 246 F. Supp. 2d 301 (S.D.N.Y. 2003).

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

Dawson brought a sex discrimination claim under Title VII,[10] alleging that she was both fired and harassed because of, among other things, her failure to conform to traditional gender stereotypes.[11] Ultimately, Dawson lost her lawsuit.[12] In rejecting her gender-stereotyping claim, the Second Circuit held that the alleged discriminatory comments were targeted not at Dawson's gender-nonconformity, but at her homosexuality.[13] And because

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

[3] *Id.* at 213.

[4] The district court described Bumble & Bumble as a "heterogeneous environment that strives for the avant garde and extols the unconventional . . . ." *Dawson I*, 246 F. Supp. 2d at 311. The court also noted that the salon's employees "embody many lifestyles and sexual preferences and reflect varying physical appearances, overall looks, and different manners of hair dress and clothing." *Id.* at 310. While Dawson worked at the salon, her coworkers included numerous lesbians and gay men, a bisexual, a female-to-male transsexual, and a pre-operative male-to-female transsexual who was transitioning on the job at the time of the relevant events. *See Dawson II*, 398 F.3d at 214.

[5] *Dawson II*, 398 F.3d at 215.

[6] *Id.*

[7] *Id.* According to Dawson, one coworker said to her, "You know, what you need, Dawn, you need to get fucked." *Dawson I*, 246 F. Supp. 2d at 307.

[8] *Dawson II*, 398 F.3d at 214.

[9] *Id.* at 215–16.

[10] Title VII of the Civil Rights Act of 1964 provides antidiscrimination protection in employment. *See* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

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

[12] *Id.* at 224–25.

[13] *See id.* at 217–20.

sexual orientation is not a protected trait under Title VII, the court held that Dawson had not stated an actionable discrimination claim.[14]

The lesson of Dawson's case is that an employee's sexual orientation can swallow up an otherwise actionable claim of sex discrimination. Even though Dawson's Title VII claims were based on her sex and her gender-nonconformity, the court concluded that Dawson was trying to "bootstrap" protection for sexual orientation into Title VII by framing discrimination targeted at her sexual orientation as a claim of discrimination based on her gender-nonconformity.[15] This has become a common story for lesbian and gay employees. Due to the absence of statutory protection for sexual orientation discrimination at the federal level,[16] lesbian and gay plaintiffs frequently lose their sex discrimination and gender-stereotyping claims because of their sexual orientation, with courts relying on reasoning similar to that used by the Second Circuit in Dawson's case.[17]

This Article offers a critique of these "bootstrapping" cases from a perspective that has been overlooked in employment discrimination law and scholarship. The focus of that critique is heterosexuality. In contrast to homosexuality[18] and, to a lesser extent, bisexuality[19]—both of which have been the subject of extensive scholarly attention—heterosexuality is largely

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[14] *See id.* at 217–18 ("Thus, to the extent that she is alleging discrimination based upon her lesbianism, Dawson cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class.").

[15] *See id.* at 218–20 ("[A] gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000))).

[16] All courts agree that Title VII's prohibition on discrimination "because of" sex does not cover cases involving discrimination targeted at a plaintiff's sexual orientation. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).

[17] *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062–65 (7th Cir. 2003); King v. Super Serv., Inc., 68 F. App'x 659, 660–64 (6th Cir. 2003); *Simonton*, 232 F.3d at 35; Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259–61 (1st Cir. 1999); Desantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 332 (9th Cir. 1974); Lynch v. Baylor Univ. Med. Ctr., No. Civ.A.3:05-CV-0931-P, 2006 WL 2456493, at *4–6 (N.D. Tex. Aug. 23, 2006); Mowery v. Escambia County Utils. Auth., No. 3:04CV382-RS-EMT, 2006 WL 327965, at *6–7 (N.D. Fla. Feb. 10, 2006); Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 447 (N.D.N.Y. 2002); Ianetti v. Putnam Invs., Inc., 183 F. Supp. 2d 415 (D. Mass. 2002).

[18] It is a daunting, if not impossible, task to document the breadth of academic work on homosexuality. Rather than attempt to do so here, it suffices to note that since Kinsey's work on sexuality, the academic study of homosexuality has flourished. *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

[19] *See, e.g.*, STEVEN ANGELIDES, A HISTORY OF BISEXUALITY (2001); MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE (1995); MARTIN S. WEINBERG ET AL., DUAL ATTRACTION: UNDERSTANDING BISEXUALITY (1994); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98 (1995); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

absent from scholarly discussions about sexuality. Yet the absence of heterosexuality from the scholarly literature is not surprising because, in our culture, heterosexuals are typically thought of as not having a sexual orientation. Instead, heterosexuality is merely the normative baseline against which all other sexual orientations are tested.[20] As such, heterosexuality tends to be missing altogether from discussions about sex and sexuality. This is especially true of legal discourse about sex and sexuality—courts rarely even acknowledge the existence of heterosexuality, let alone consider its legal implications.

In the realm of employment discrimination law in particular, courts hardly ever consider the way in which an employee's discrimination claim implicates heterosexuality.[21] This is the heart of the critique of bootstrapping cases presented in this Article. Because heterosexuality is invisible in our culture, courts often fail to recognize when an employee's discrimination claim implicates her heterosexuality. To amplify this claim, this Article offers a novel reading of the Supreme Court's groundbreaking decision in *Meritor Savings Bank v. Vinson*,[22] where the Court established that claims of hostile environment sexual harassment can constitute unlawful sex discrimination in violation of Title VII.[23] Specifically, this novel reading of *Meritor* demonstrates that even though plaintiff Mechelle Vinson's sexual harassment claim was based at least in part on her heterosexuality, the Court did not regard her sex discrimination claim as an attempt to bootstrap protection for sexual orientation into Title VII.

This reading of *Meritor* suggests that there is a double standard at work in employment discrimination cases. For lesbian and gay employees, sexual orientation is a burden because courts are primed to reject otherwise actionable discrimination claims on the theory that such claims are an attempt to bootstrap protection for sexual orientation into Title VII. However,

[20] This includes, of course, homosexuality and bisexuality, but also more marginalized sexual orientations. Here I am thinking about two sexual orientations in particular. The first is pansexuality. *See* Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. & MARY J. WOMEN & L. 297 (1999). The second is asexuality. *See* Mary Duenwald, *For Them, Just Saying No Is Easy*, N.Y. TIMES, June 9, 2005, at G1. For those who would argue that asexuality is less a sexual orientation than a sexual practice (or lack thereof), consider that some statutory provisions define sexual orientation as including asexuality. For instance, New York's Human Rights Law defines "sexual orientation" as "heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived." N.Y. EXEC. LAW § 292(27) (Consol. 2005). In framing heterosexuality as the normative baseline against which nonnormative sexual orientations are tested, I am borrowing from the work of Professor Jane Schacter. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994) ("Current civil rights laws are held out as the normative baseline against which the gay civil rights claim is tested . . . .").

[21] One area where heterosexuality appears in employment discrimination law is in the provision of domestic partnership benefits, particularly where courts refuse to provide domestic partnership benefits to different-sex couples. *See, e.g.*, Irizarry v. Bd. of Educ., 251 F.3d 604, 610–11 (7th Cir. 2001) (holding that the Chicago Public Schools could restrict domestic partnership benefits to same-sex couples).

[22] 477 U.S. 57 (1986).

[23] *Id.* at 64–67.

rather than being burdened by their sexual orientation in employment discrimination cases, heterosexual employees are not affected by theirs. Because heterosexuality is invisible in our culture, courts simply fail to recognize when an employee's discrimination claim implicates her heterosexuality. As a result, no court will ever conclude that a heterosexual employee is raising a sex discrimination claim as a means to bootstrap protection for sexual orientation into Title VII. Put simply, heterosexuals and homosexuals are not similarly situated under Title VII.

In general, this Article has two goals. First, it calls greater attention to heterosexuality. This Article attributes the invisibility of heterosexuality to what I call the "paradox of privilege."[24] The thrust of the paradox of privilege is that heterosexuality is at once everywhere and nowhere—everywhere because it is normative, yet nowhere because its normativity renders it invisible. One consequence of the paradox of privilege is that "sexual orientation" has become synonymous in our culture with "homosexuality," removing heterosexuality from discussion. To explore these ideas, I tap into an emerging field of literature often referred to as "critical heterosexual studies" (CHS).[25] CHS is part of a new generation of critical scholarship that focuses on insider identities, such as whiteness[26] and masculinity.[27] This Article not only contributes to the CHS literature, but also to the larger body of critical work on insider identities. In particular, this Article highlights the ways in which the cultural construction of heterosexuality informs the legal construction of heterosexuality in the realm of employment discrimination law.

In addition to providing a free-standing contribution to the current legal discussion of heterosexuality, this Article reveals a great deal about how employment discrimination law treats sexual minorities, most notably lesbians and gay men. In fact, the discussion that follows is as much about homosexuality as it is about heterosexuality. This is intentional. Perhaps the most exciting aspect of the CHS literature is that it pushes us to reconsider our cultural attitudes toward not only heterosexuality, but also homosexuality. Because heterosexuality is invisible in our culture, homosexuality tends

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[24] *See infra* Part II.B.2.

[25] I discuss CHS in greater detail later in this Article. *See infra* Part II. CHS is a recent addition to the critical scholarship on sex and sexuality. The seminal text in the field is a 1995 book by historian Jonathan Ned Katz. *See* JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY (1995).

[26] *See, e.g.*, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); WHITENESS: A CRITICAL READER (Mike Hill ed., 1997); WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM (Paula S. Rothenberg ed., 2002). In the legal literature, the foundational work on whiteness studies is Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[27] CONSTRUCTING MASCULINITY (Maurice Berger et al. eds., 1995); MICHAEL S. KIMMEL, THE GENDER OF DESIRE: ESSAYS ON MASCULINITY (2005); MASCULINITY STUDIES AND FEMINIST THEORY: NEW DIRECTIONS (Judith Kegan Gardiner ed., 2002); THE MASCULINITY STUDIES READER (Rachel Adams & David Savran eds., 2002); VICTOR J. SEIDLER, TRANSFORMING MASCULINITIES: MEN, CULTURES, BODIES, POWER, SEX, AND LOVE (2005).

to overshadow heterosexuality. CHS challenges this tendency. In doing so, CHS forces us to reexamine the relationship between heterosexuality and homosexuality. Thus, the second goal of this Article is to use heterosexuality as a lens through which we can reconsider the legal standing of lesbians and gay men in employment discrimination law.

This Article proceeds in three parts. Part I provides context for the remainder of the Article by situating the bootstrapping cases more broadly in Title VII caselaw and sketching the contours of Title VII's prohibition on discrimination "because of" sex. Significantly, courts have distinguished discrimination claims based on biological sex (i.e., femaleness and maleness) and gender-nonconformity (i.e., femininity and masculinity) from claims based on sexual orientation,[28] holding that the two former types of claims are actionable under Title VII, while the latter claims are not. This distinction undergirds the reasoning of the bootstrapping cases. In these cases, courts presume that lesbian and gay employees are bringing discrimination claims based on their gender-nonconformity as a means to steer courts away from rejecting their claims on the grounds that sexual orientation is not a protected trait under Title VII.

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

Part III carves out a new path for courts to follow when considering discrimination claims that implicate an employee's sexual orientation. This new approach urges courts to treat sexual orientation as a neutral trait for purposes of Title VII discrimination claims—in other words, it seeks to "reorient" Title VII. Under this new approach, an employee's sexual orientation should neither prevent an employee from bringing an otherwise action-

[28] I elaborate on the differences between these traits further below. *See infra* Part I (defining "sex," "gender," and "sexual orientation" for purposes of Title VII discrimination cases).

able discrimination claim nor make articulating such a claim easier. Sexual orientation should be irrelevant for purposes of Title VII discrimination claims. In this sense, an employee's sexual orientation is no different than any other trait that is not protected under Title VII.

I. CONTEXT

I begin by defining a few key terms—"sex," "gender," and "sexual orientation."[29] For purposes of this Article, "sex" refers to physical and biological traits, that is, a person's maleness or femaleness.[30] The most familiar of these traits, of course, is sexual genitalia.[31] By contrast, "gender" refers to cultural expressions of masculinity and femininity.[32] A person's sex and gender need not correspond with one another; for example, some men are more feminine than they are masculine[33] and some women are more masculine than feminine.[34] "Sexual orientation" denotes a person's sexual attractions and desires, that is, whether a person is sexually attracted to members of the same, different, or both sexes.[35] Sex, gender, and sexual orientation are interconnected. What is more important for purposes of this Article, however, is that despite this interconnectedness, courts are often forced to draw fairly strict lines between them. After all, sex and gender are traits protected by Title VII, while sexual orientation is not.

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[29] For a detailed discussion of the relationship between sex, gender, and sexual orientation, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

[30] *See* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 164 (1996) ("'[S]ex' denotes the physical attributes of bodies, specifically the external genitalia.").

[31] *See id.*; *cf.* Julie A. Greenberg, *Defining Male and Female: Intersexuality Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999) (discussing the difficulties involved when courts attempt to define sex based solely on biological attributes).

[32] *See* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 379 (1999) ("The term 'gender' here refers to the social construction of differences between women and men and ideas of 'femininity' and 'masculinity'—the excess cultural baggage associated with biological sex."). This understanding of gender is so widely accepted that it has made its way into the law. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word 'gender' has acquired the new and useful connotation of 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 to male.").

[33] *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 (1995) (discussing the position of effeminate men in sex discrimination law).

[34] *See* JUDITH HALBERSTAM, FEMALE MASCULINITY (1998).

[35] *See* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1286 (2006) ("[S]exual orientation is the 'direction of one's sexual interests towards members of the same, opposite, or both sexes,' and it seems that this definition is widely accepted." (quoting the *American Heritage Dictionary*)).

A. Protected Traits

In order to articulate a discrimination claim under Title VII, plaintiffs must satisfy a causation requirement set forth by the statute.[36] The relevant statutory provision for purposes of this Article is Title VII's prohibition on sex discrimination.[37] In order to state an actionable sex discrimination claim, a plaintiff must prove discrimination "because of" sex and not "because of" some other characteristic that is not protected by Title VII, such as eye color or whether she is a Chicago Cubs fan.[38] While this requirement is easy to meet in some cases,[39] in others it is hard to pinpoint whether the alleged discriminatory conduct is targeted at a plaintiff's sex and not at some other unprotected trait. As discussed below, this is especially true in cases involving lesbian and gay employees—like Dawn Dawson—because it is difficult to convince a court that the discrimination at issue was based on sex or gender and not sexual orientation.

Courts have reacted unfavorably to these claims in large part because of the legislative history surrounding the passage of the Civil Rights Act.[40] In its original formulation, Title VII did not include a provision banning sex discrimination because the primary purpose of the bill was to put an end to race discrimination.[41] Only days before the House of Representatives was set to vote on the bill that would become the Civil Rights Act, Representative Howard Smith, the chairman of the House Rules Committee and a staunch opponent of the Civil Rights Act, offered an amendment adding "sex" to the list of impermissible bases for employment discrimination.[42] As an opponent of the bill, Smith's goal was not to broaden the scope of the bill, but to kill it.[43] His strategy failed and the final version of Title VII passed with the sex provision included.

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[36] *See* 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's *race, color, religion, sex,* or *national origin.*" (emphasis added)).

[37] *See id.*

[38] *See* David S. Schwartz, *When Is Sex Because of Sex: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

[39] *See, e.g.*, EEOC v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994). There, the employer said: "[T]he only people you will be seeing running the lines will be men; there will be no more women hired." *Id.* at 896.

[40] For a comprehensive treatment of the history of the Civil Rights Act, see CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

[41] *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) ("The major concern of Congress at the time the Act was promulgated was race discrimination.").

[42] *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 11, 14 (3d ed. 2001).

[43] *See* Barnes v. Costle, 561 F.2d 983, 986–87 (D.C. Cir. 1977) (noting that Representative Smith proposed the amendment as "a last-minute attempt to block the bill"); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc) (stating that Representative Smith "opposed the

Because Smith introduced the amendment toward the end of the legislative process, there is no substantive legislative history defining the scope and meaning of the sex provision. Even though a number of scholars have offered compelling accounts of the history of Title VII's sex amendment that challenge the view that the amendment was nothing more than an attempt to derail the legislation,[44] courts have largely ignored these accounts in favor of the traditional view.[45] As a result, lacking legislative guidance about the meaning and scope of the sex provision of Title VII, courts have tended to interpret it narrowly.[46]

1. Sex.—Title VII protects against discrimination on the basis of sex.[47] As the Supreme Court has made clear, this protection covers both male and female employees.[48] In order to bring a sex discrimination claim, employees must prove that they were discriminated against because of their maleness or femaleness—that is, in their capacity as men and women—and not because of some other trait. For instance, say a female employee is

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Civil Rights Act, and was accused by some of wishing to sabotage its passage by his proposal of the 'sex' amendment"); *see also* WHALEN & WHALEN, *supra* note 40, at 115–17 (describing Representative Smith's strategy in proposing the "killer" amendment).

[44] *See* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997) (arguing that the sex amendment was the product of complex political struggles involving racial politics and the strands of the women's rights movement); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–25 (1995) (situating the sex amendment in the larger political history for sex equality).

[45] *See* Franke, *supra* note 44, at 15 ("[M]any judges faced with interpreting the meaning and scope of the sex discrimination protections contained in Title VII believed that they were writing on a blank slate.").

[46] *See, e.g.*, Gen. Elec. v. Gilbert, 429 U.S. 125, 145–146 (1976) (holding that Title VII's sex provision does not protect against discrimination on the basis of pregnancy). Responding to *Gilbert*, Congress passed the Pregnancy Discrimination Act of 1978, which amended Title VII to protect against discrimination because of pregnancy. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)). There are other examples where courts have interpreted "sex" narrowly. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084–87 (7th Cir. 1984) (relying on the lack of legislative history to conclude that the sex provision does not forbid discrimination targeted at transsexuality); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (noting that judicial interpretation of the sex provision is hindered by the absence of legislative history). *But see, e.g.*, Smith v. Salem, 378 F.3d 566, 572 (6th Cir. 2004) (holding that transgender plaintiff can bring an actionable sex discrimination claim); Centola v. Potter, 183 F. Supp. 2d 403, 409 (D. Mass. 2002) (holding that a gay plaintiff could bring an actionable discrimination claim based on his gender-nonconformity).

[47] Of course, "sex" is actually in the text of the statute. *See* 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, *sex*, or national origin." (emphasis added)).

[48] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (noting that Title VII prohibition on sex discrimination protects men as well as women); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (same).

fired for persistent absenteeism. Although Title VII prohibits discrimination on the basis of sex, this employee would not automatically be able to raise an actionable sex discrimination claim just because she is a woman. Rather, she must establish a nexus between the adverse employment action—the firing—and her status as a woman. One way the employee may do this is by providing evidence of situations where similarly situated male employees were not fired for being absent. In order to state an actionable claim for sex discrimination under Title VII, employees must establish that the discrimination was "because of" sex. Throughout this Article, these sex-based claims are referred to as sex *simpliciter* claims.

2. Gender.—Title VII's prohibition on sex discrimination extends beyond biological sex to protect against discrimination that is targeted at an employee's gender. The Supreme Court first recognized the prohibition on gender discrimination in 1989, in *Price Waterhouse v. Hopkins*.[49] In *Price Waterhouse*, Ann Hopkins was denied partnership at her consulting firm despite having quite a successful work record.[50] The partners' primary reason for denying Hopkins partnership was that they thought she lacked the necessary interpersonal skills.[51] In their reviews, some of the partners at the firm said that Hopkins was at times abrasive and overly aggressive and that she did not always treat the staff with respect.[52] There were, however, undertones of sex discrimination in some of the reviews of Hopkins's personality.[53] For instance, one partner described her as "macho"; another partner said that she "overcompensated for being a woman"; and a third suggested that she "take a course at charm school."[54] The most telling statement, though, came from the partner who was tasked with informing Hopkins of the firm's decision not to promote her to partner. He suggested that in order to improve her chances for partnership, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[55]

Ruling in favor of Hopkins, the Supreme Court held that such gender-stereotyping is evidence of sex discrimination.[56] According to the Court, "an employer who acts on the basis of a belief that a woman cannot be ag-

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[49] 490 U.S. 228 (1989).

[50] *Id.* at 233–34 (describing Hopkins's many successes at the firm); *id.* at 233–35 (describing Hopkins's failed attempt at making partner). For a detailed discussion of Hopkins's time at Price Waterhouse, see ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996).

[51] *See Price Waterhouse*, 490 U.S. at 234–35 ("Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her 'interpersonal skills.'").

[52] *Id.*

[53] *See id.* at 235 ("There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman.").

[54] *Id.*

[55] *Id.*

[56] *See id.* at 250.

gressive, or that she must not be, has acted on the basis of gender."[57] The Court went on to say that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[58] The thrust of the Court's holding in *Price Waterhouse* is that an employer cannot discriminate against employees for failing to conform to stereotypical expectations of how men and women are supposed to look and behave. Thus, the gender-stereotyping claim is anchored to Title VII's prohibition on discrimination "because of" sex.

To articulate such a gender-stereotyping claim, plaintiffs need to establish that they were discriminated against because they expressed a gender that is stereotypically inconsistent with their sex.[59] There are two parts to this claim. The first is what I call the plaintiff's "anchor gender." A person's anchor gender is the gender commonly associated with the person's sex.[60] Thus, a man's anchor gender is masculinity and a woman's is femininity. The second component is what I call "expressive gender," which refers to the gender the plaintiff actually expressed in the workplace.[61] Gender-stereotyping, as announced in *Price Waterhouse*, occurs when anchor gender and expressive gender are not the same. For instance, consider the facts in Ann Hopkins's case. Hopkins was a woman and so her anchor gender was femininity. Hopkins's expressive gender, however, was masculinity—her coworkers saw her as macho and overly aggressive and they encouraged her to downplay her masculinity and highlight her femininity.[62] Because the partners reacted to the discrepancy between Hopkins's anchor gender (femininity) and her expressive gender (masculinity), they discriminated against her because of her sex.[63]

The gender-stereotyping theory is likewise available to male employees.[64] For a male employee to articulate such a claim, he must show that he was discriminated against because he failed to conform to stereotypical expectations of manhood.[65] The gender-stereotyping theory does not, how-

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[57] *Id.*

[58] *Id.* at 251.

[59] I outline this way of understanding *Price Waterhouse* in some detail in an earlier work. *See* Zachary A. Kramer, Note, *The "Ultimate" Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 483–89.

[60] *Id.* at 484.

[61] *See id.* at 484–85.

[62] *See Price Waterhouse*, 490 U.S. at 235.

[63] *Id.* at 237.

[64] *See* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotypical expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citing *Price Waterhouse*, 490 U.S. at 250–51)).

[65] *See* Case, *supra* note 33, at 46–57 (discussing cases involving effeminate men).

ever, capture discrimination based on gender identity. Although transgender employees can raise gender-stereotyping claims under Title VII,[66] they must do so in their capacity as gender-nonconforming men and women, and not as transgender persons. For instance, in *Smith v. City of Salem, Ohio*,[67] Jimmie Smith, a firefighter in Ohio, was fired shortly after he began the process of transitioning from male to female.[68] Smith brought a sex discrimination claim, which the Sixth Circuit sustained on the basis of the gender-stereotyping theory.[69] In ruling for Smith, the court noted that *Price Waterhouse* had "eviscerated" earlier cases that had held that Title VII does not protect against discrimination based on transsexuality.[70] According to the court, "Sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior."[71] The court went on to say that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where a victim has suffered discrimination because of his or her gender non-conformity."[72] In other words, Smith articulated a cognizable sex discrimination claim based on the gender-stereotyping theory not because he was transgender, but because he was a man whose feminine gender expression did not correspond with stereotypical expectations of his sex.[73]

B. Sexual Orientation

Unlike sex and gender, sexual orientation is not a protected trait under Title VII.[74] As a result, employees cannot articulate what I call a sexual orientation *simpliciter* claim under Title VII. This should not, however, bar employees from bringing what I call intersectional discrimination claims—discrimination cases where an employee's sex or gender-nonconformity

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[66] *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

[67] 378 F.3d 566 (6th Cir. 2004).

[68] *See id.* at 568–69 (describing the circumstances surrounding Smith's termination from the fire department). Technically, Smith was fired for insubordination. After Smith informed his supervisors that he had been diagnosed with Gender Identity Disorder (GID), he began to adopt a more feminine appearance in the workplace. In response, the department devised a plan whereby Smith would have to submit to extensive psychological examination. Shortly after Smith hired an attorney, the department suspended him for a twenty-four hour shift due to an alleged violation of a department policy. *See id.*

[69] *See id.* at 571–75.

[70] *See id.* at 573.

[71] *Id.* at 575.

[72] *Id.*

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

[74] *See* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2177–78 (2007) (noting that sexual orientation is not a protected trait under Title VII); Anthony Varona & Jeffrey Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employer Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 69 (2000) (same).

cannot be separated from the employee's sexual orientation. The following subsections discuss both of these types of claims in turn.

1. Sexual Orientation Simpliciter *Claims.*—A sexual orientation *simpliciter* claim arises when an employee suffers discrimination solely on account of his or her sexual orientation.[75] As the law currently stands, sexual orientation *simpliciter* claims are not actionable under Title VII. This is true regardless of whether the claim is based on homosexuality, heterosexuality, or bisexuality. For instance, in *DeSantis v. Pacific Telephone & Telegraph Co.*,[76] Robert DeSantis, a gay man, alleged that the defendant refused to hire him because of his homosexuality.[77] The court rejected DeSantis's claims on grounds that Title VII does not protect against discrimination because of sexual orientation.[78] Other sexual orientation *simpliciter* claims based on heterosexuality or bisexuality have been rejected similarly.[79]

Since the 1970s, Congress has regularly considered bills that would expand federal law to cover discrimination claims based on sexual orientation discrimination.[80] The current version of this proposed legislation is the Employment Non-Discrimination Act (ENDA).[81] ENDA would provide a cause of action for intentional discrimination claims targeted at an employee's sexual orientation,[82] which it defines as "homosexuality, heterosexuality, or bisexuality."[83] If enacted, ENDA would substantially alter the landscape of employment discrimination law for all employees who face discrimination because of their sexual orientation. Until then, even though federal law does not currently protect against discrimination based on sexual orientation, employees can still bring discrimination claims under state

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[75] *See* William B. Rubenstein, Williams Inst., UCLA School of Law, Presentation at the 2002 Appellate Justices Institute: Is Sexual Orientation Discrimination (Just) Sex Discrimination? (Apr. 25, 2002), *available at* http://www.law.ucla.edu/williamsinstitute/programs/Rubenstein4-25-02.html (providing the employer policy "We don't hire lesbians here" as an example of sexual orientation discrimination *simpliciter*).

[76] 608 F.2d 327 (9th Cir. 1979).

[77] *Id.* at 328.

[78] *Id.* at 329–30.

[79] For cases involving heterosexual plaintiffs who bring discrimination claims under Title VII, see Medina v. Income Support Div., 413 F.3d 1131 (10th Cir. 2005); La Day v. Catalyst Tech., Inc., 302 F.3d 474 (5th Cir. 2002); Rivera v. City of New York, 392 F. Supp. 2d 644 (S.D.N.Y. 2005); Miller v. Vesta, Inc., 946 F. Supp. 697 (E.D. Wis. 1996).

[80] For a detailed account of this history, see Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149–87 (John D'Emilio et al. eds., 2000).

[81] Employment Non-Discrimination Act, H.R. 2015, 110th Cong. (2007).

[82] Under the current version of the ENDA, "intentional" discrimination is limited to disparate treatment claims. If the bill is enacted, plaintiffs will not be able to bring disparate impact claims based on sexual orientation. *See id.* § 4(g) ("Only disparate treatment claims may be brought under this Act.").

[83] *See id.* § 3(a)(9).

antidiscrimination laws.[84] Indeed, antidiscrimination laws in twenty states and the District of Columbia prohibit discrimination based on sexual orientation.[85] As a result, employees in these states can do under state antidiscrimination law what currently cannot be done under federal law—they can bring actionable sexual orientation *simpliciter* claims.

2. *Intersectional Claims.*—An intersectional claim is one based on the intersection of at least two or more overlapping identity traits.[86] For instance, imagine a discrimination case involving an Asian American woman.[87] Even if her employer is not hostile toward Asian American men and white women, the employer may still harbor negative stereotypes about Asian American women in particular.[88] An intersectional sexual orientation claim is one that involves the intersection of an employee's sexual orientation and at least one other identity trait, such as race, sex, or even gender. Dawn Dawson's gender-stereotyping claim is an example of an intersectional claim. Although Dawson's claim was ostensibly based on her gender-nonconformity, her claim was also based on her sexual orientation.[89] After all, the court ultimately concluded that Dawson's sexual orientation was so integral to her gender-stereotyping claim that it effectively overwhelmed the claim.[90]

Indeed, the gender-stereotyping theory is perhaps the best example of an intersectional claim because, by definition, it is based on the interplay of

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[84] For an empirical analysis of the effectiveness of state antidiscrimination protections for sexual orientation, see William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65 (2001).

[85] *See* CAL. GOV'T CODE § 12,920 (West 2005); COLO. REV. STAT. § 24-34-402(1)(a) (2007); CONN. GEN. STAT. ANN. § 46a-81c(1) (West 2004); D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2008); HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2004); 775 ILL. COMP. STAT. ANN. 5/1-102A (West Supp. 2008); IOWA CODE ANN. § 216.6(1)(a) (West Supp. 2008); ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (Supp. 2007); MD. ANN. CODE art. 49B, § 16(a)(1) (2003); MASS. ANN. LAWS ch. 151B, § 4(1) (LexisNexis 2008); MINN. STAT. ANN. § 363A.08 (West 2004); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2006); N.H. REV. STAT. ANN. § 354-A:7 (LexisNexis Supp. 2007); N.J. STAT. ANN. § 10:5-4 (West 2002); N.M. STAT. § 28-1-7 (2008); N.Y. EXEC. LAW § 296 (McKinney 2002); OR. REV. STAT. § 659A.030 (2007); R.I. GEN. LAWS § 28-5-7 (2003); VT. STAT. ANN. tit. 21, § 495(a) (2003); WASH. REV. CODE ANN. § 49.60.180 (West 2008); WIS. STAT. ANN. § 111.36(d) (West 2002).

[86] My use of the phrase "intersectional" taps into the expansive intersectionality literature sparked by the work of Kimberlé Crenshaw. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

[87] *See, e.g.*, Lam v. Univ. of Haw., 40 F.3d 1551 (9th Cir. 1994) (involving an employment discrimination claim by a woman of Vietnamese descent based on race, sex, and national origin).

[88] *Id.* at 1561–62; *see also* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 709 (2001) (discussing the court's implicit acceptance of the intersectional claim at issue in *Lam*).

[89] Dawson v. Bumble & Bumble, 398 F.3d 211, 215 (2d Cir. 2005) (describing how Dawson's coworkers said that she needed to have sex *with a man* and that she wore her sexuality like a costume).

[90] *See id.* at 217–20.

an employee's sex and gender. For instance, consider again Ann Hopkins, the first plaintiff to take advantage of a gender-stereotyping theory of sex discrimination.[91] The thrust of Hopkins's claim was that she was discriminated against as a woman because she failed to conform to stereotypical notions of how a woman should look and behave in the workplace.[92] Underlying this claim is the idea that Hopkins suffered discrimination not because she was a woman or because she was a gender-nonconformist, but because she was *both* a woman and a gender-nonconformist—in other words, she was a gender-nonconforming woman. Dawson's gender-stereotyping claim involves adding yet another layer of intersectionality—that of sexual orientation. The thrust of Dawson's claim was not that she was discriminated against because she was a woman, or a gender-nonconformist, or a lesbian. Rather, Dawson's argument was that she was discriminated against because she was a gender-nonconforming *lesbian* woman.

C. Bootstrapping

As discussed above, the court in Dawson's case ultimately rejected her gender-stereotyping claim on grounds that it was an attempt to bootstrap protection for sexual orientation into Title VII.[93] The accusation embedded in this conclusion is that Dawson's gender-stereotyping claim was nothing more than a kind of litigation sleight of hand, attempting to create statutory protection where no such protection exists. Dawson's case is not an isolated occurrence in this regard. Courts have regularly treated gender-stereotyping claims brought by lesbian and gay employees as if they are sexual orientation *simpliciter* claims in disguise.[94] And because sexual orientation *simplicter* claims are not actionable under Title VII, these courts have rejected these gender-stereotyping claims accordingly.

In bootstrapping cases, lesbian and gay plaintiffs lose their gender-stereotyping claims because their sexual orientation—their homosexuality—is what sociologists call a "marked" identity trait.[95] In his extensive writings on the social aspects of gay identity,[96] sociologist Wayne Brekhus notes that because homosexuality is stigmatized, people are hyperaware of it.[97] Brekhus contrasts this perception of homosexuality with that of hetero-

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[91] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[92] *See id.* at 250–51.

[93] *See Dawson*, 398 F.3d at 221–23.

[94] *See supra* note 17.

[95] *See* WAYNE H. BREKHUS, PEACOCKS, CHAMELEONS, AND CENTAURS 11 (2001) (discussing "gayness" as a master status).

[96] *See id.*; *see also* Wayne H. Brekhus, *Social Marking and the Mental Coloring of Identity: Sexual Identity Construction and Maintenance in the United States*, 11 SOC. F. 497 (1996); Wayne H. Brekhus, *A Sociology of the Unmarked: Redirecting Our Focus*, 16 SOC. THEORY 34 (1998).

[97] *See* BREKHUS, *supra* note 95, at 11–14.

sexuality, an unmarked identity trait that "remains unarticulated and taken for granted."[98] For lesbian and gay employees, their sexual orientation tends to overshadow their sex and gender. Once employees are marked as being lesbian or gay, courts view their gender-stereotyping claims through the lens of homosexuality. Indeed, that homosexuality is a marked identity trait no doubt explains why several commentators, writing together in a practitioners' guide to representing lesbian and gay plaintiffs in employment discrimination cases, offer the following advice: "When bringing a gender stereotyping claim under Title VII, it is almost never a good idea to affirmatively plead or introduce evidence of a plaintiff's [homosexuality.] It does not help the case and can seriously damage it."[99] A plaintiff's homosexuality can seriously damage her gender-stereotyping claim precisely because homosexuality is, in the words of renowned sociologist Erving Goffman, a "spoiled identity."[100] In such a bootstrapping case, a plaintiff's homosexuality spoils what may be an otherwise actionable discrimination claim based on the plaintiff's failure to conform to stereotypical gender expectations.

II. HETEROSEXUALITY AND TITLE VII

What is particularly troubling about the reasoning underlying the bootstrapping cases introduced above is that no court would ever rule the same way in a case brought by a heterosexual employee. Even in a case where a heterosexual employee raises a sex discrimination claim that directly implicates her sexual orientation, the court will not acknowledge that heterosexuality is integral to the sex discrimination claim, let alone reject the claim because of it.

As an example, the following section presents a case study of the Supreme Court's landmark decision in *Meritor Savings Bank v. Vinson*,[101] in which the Court established that sexual harassment is an unlawful form of sex discrimination under Title VII.[102] *Meritor* is a useful point of departure

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[98] *Id.* at 14.

[99] Justin M. Swartz et al., *Nine Tips for Representing LGBT Employees in Discrimination Cases*, 759 PRACTICING L. INST.: LITIG. 95, 103 (2007). The guide goes on to say that introducing evidence of a plaintiff's sexual orientation—by which they mean homosexuality—can be fatal to a plaintiff's claim. *Id.* This advice comes from a section of the guide titled "Don't Plead It Unless You Need It," with the "it" being a client's homosexuality.

[100] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). In *Stigma*, Goffman documents how outsiders manage "spoiled" identity traits—such as a physical or mental disability, imprisonment, or homosexuality—in response to social pressures to conform to social expectations of normality, in terms of appearance, behavior, and health. My use of "spoiled identity" is meant to track Goffman's use of the term.

[101] 477 U.S. 57 (1986).

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

for a critique of the bootstrapping cases for two reasons. First, *Meritor* is well known—in terms of the Court's legal conclusions as well as its description of the facts—so most readers will be somewhat familiar with the case.[103] Second, the new reading of *Meritor* presented below provides an ideal lens through which to reconsider the reasoning underlying the bootstrapping cases.

This discussion also reaches beyond *Meritor* to consider more broadly the ways in which heterosexuality is constructed in employment discrimination law generally. In doing so, it taps into the emerging scholarly literature of critical heterosexual studies (CHS).[104] According to sociologist Chrys Ingraham, a leading scholar in the study of heterosexuality, CHS seeks to "interrogate the meanings and practices associated with straightness—the historical, social, political, cultural, and economic dominance of institutionalized heterosexuality."[105] As another scholar has noted, CHS calls on related fields like feminism and queer theory "to focus more closely and comprehensively on the relationship between heterosexuality and heteronormativity with an eye to improving the quality and moral stature of heterosexuality."[106]

As a methodological approach, CHS is especially valuable because it serves a dual purpose: it provides new insight into an identity that is quite often overlooked, but also presents heterosexuality as a lens through which to reconsider homosexuality. As a subject of study in and of itself, heterosexuality has largely been overlooked and taken for granted in employment discrimination law and scholarship. The following discussion fills that gap by exposing some of the ways in which heterosexuality is constructed in employment discrimination law. At the same time, the discussion of heterosexuality in this Article serves as a vehicle to reassess the ways in which courts have conceptualized homosexuality, in particular as it relates to traits like sex and gender-nonconformity.

The study of *Meritor* proceeds in two parts. Section A lays out the factual circumstances that gave rise to Vinson's sexual harassment suit. Included in this section is a brief discussion of the Court's conclusion that the

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[103] That the law and facts of *Meritor* are deeply engrained in sexual harassment law is clear. After all, as the Supreme Court's first sexual harassment case, *Meritor* laid the foundation of sexual harassment law. *See* Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL'Y 125, 127 (2007) ("[*Meritor* was the] first sexual harassment case that the Supreme Court assessed . . . .").

[104] *See, e.g.*, STEVI JACKSON, HETEROSEXUALITY IN QUESTION (1999); KATZ, *supra* note 25; THEORISING HETEROSEXUALITY: TELLING IT STRAIGHT (Diane Richardson ed., 1996); THINKING STRAIGHT: THE POWER, THE PROMISE, AND THE PARADOX OF HETEROSEXUALITY (Chrys Ingraham ed., 2005); Chrys Ingraham, *The Heterosexual Imaginary: Feminist Sociology and Theories of Gender*, 12 SOC. THEORY 203 (1994).

[105] Chrys Ingraham, *Introduction: Thinking Straight*, *in* THINKING STRAIGHT, *supra* note 104, at 1, 11.

[106] Jose Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN'S L.J. 1, 29 (2006).

discrimination faced by Vinson was "because of" sex. Section B demonstrates that Vinson was not discriminated against solely because she was a woman, but because she was a *heterosexual* woman. Even though the Court did not characterize it as such, Vinson's sex discrimination claim was really an intersectional claim based on the intersection of her sex *and* her sexual orientation.

A. Because of Sex

Mechelle Vinson was nineteen years-old when she met Sidney Taylor, a branch manager for the Capital City Federal Savings and Loan Association, in a parking lot in Washington, D.C.[107] They began talking and, when Taylor learned that she was looking for work, he encouraged Vinson to apply for a job at his bank.[108] Days later, Vinson began working at the bank as a teller-trainee.[109] Initially, Taylor was something of a father figure to Vinson, expressing concern about her general well-being, taking her out for meals, and helping her out financially so she could rent an apartment.[110] The nature of their relationship changed, however, after Vinson completed her probationary training period. One night during dinner, Taylor suggested that they go to a nearby motel to have sex.[111] When Vinson declined his offer, Taylor tried to convince her that she owed it to him because he got her the job at the bank.[112] Even though she continued to resist his advances throughout dinner, Vinson accompanied Taylor to the motel after the meal and had sex with him.[113] She explained later that she had sex with Taylor only because she did not want to lose her job.[114]

After their first sexual encounter, Taylor's behavior at work changed considerably. No longer the father figure he had once been to Vinson, Taylor frequently made sexual demands upon Vinson while at the bank. Taylor forced Vinson to have sex with him some forty or fifty times in the bank, both during and after banking hours, in various rooms in the bank, including the bank vault.[115] He fondled her and made lewd comments in front of coworkers and customers.[116] He followed Vinson into the bathroom and

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[107] AUGUSTUS B. COCHRAN III, SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE 58 (2004).

[108] *Id.*

[109] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986).

[110] *See* COCHRAN, *supra* note 107, at 58.

[111] *See id.*; *see also* Vinson v. Taylor (*Taylor I*), No. 78-1793, 1980 WL 100, at *1 (D.D.C. Feb. 26, 1980).

[112] *See* Vinson v. Taylor (*Taylor II*), 753 F.2d 141, 143 (D.C. Cir. 1985); *Taylor I*, 1980 WL 100, at *1.

[113] *Meritor*, 477 U.S. at 60.

[114] *Id.*

[115] *See Taylor I*, 1980 WL 100, at *1.

[116] *See id.*

exposed himself to her.[117] He even raped her on several occasions—once so brutally that she sought medical care.[118] This harassment lasted for nearly three years; it did not stop until Vinson began a steady relationship with another man.[119]

During her tenure at the bank, Vinson was promoted from teller to head teller and then to assistant branch manager.[120] In that capacity, Vinson reported directly to Taylor.[121] Both Vinson and Taylor agreed that Vinson's promotions were based solely on merit and were not the result of special treatment because of her relationship with Taylor.[122] Vinson stopped reporting to work, however, when a series of work disputes resulted in Taylor threatening her life.[123] At that time, she notified Taylor that she was taking an indefinite sick leave.[124] Two months later, on the same day that Vinson sent a letter informing the bank of her decision to resign from her position as assistant branch manager,[125] the bank terminated Vinson for excessive absenteeism.[126]

Vinson brought a Title VII claim against Taylor and the bank, alleging that Taylor harassed her because of her sex.[127] Prior to Vinson's case, most sexual harassment plaintiffs brought suit under a quid pro quo theory, whereby an employer conditions a job benefit in exchange for sexual favors.[128] The quid pro quo theory was not a good fit for Vinson's harassment claim because Vinson earned her promotions on merit alone and Taylor never threatened to punish her if she refused to have sex with him. There was, however, an emerging theory of harassment percolating in the lower courts around the same time Vinson was bringing her lawsuit.[129] Inspired by the work of feminist attorneys such as Catharine MacKinnon,[130] this

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[117] *See Meritor*, 477 U.S. at 60.

[118] *See Taylor I*, 1980 WL 100, at *1.

[119] *See Meritor*, 477 U.S. at 60.

[120] *See id.* at 59–60.

[121] *Id.* at 59.

[122] *See id.* at 60.

[123] *See* COCHRAN, *supra* note 107, at 59.

[124] *See id.*

[125] *See id.* at 59–60.

[126] *See Meritor*, 477 U.S. at 60.

[127] *See* Vinson v. Taylor, No. 78-1793, 1980 WL 100, at *1 (D.D.C. Feb. 26, 1980).

[128] *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) ("[S]he became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. . . . Thus gender cannot be eliminated from the formulation which [the plaintiff] advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII.").

[129] *See, e.g.*, Katz v. Doyle, 709 F.2d 251, 254–56 (4th Cir. 1983); Henson v. Dundee, 682 F.2d 897, 901–04 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 942–43 (D.C. Cir. 1981); Ferguson v. E.I. Dupont de Nemours & Co., 560 F. Supp. 1172, 1196–99 (D. Del. 1983).

[130] *See, e.g.*, CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

emerging theory posited that a claim of "hostile environment" sexual harassment is likewise actionable under Title VII even though it does not involve an adverse employment action, such as being fired or demoted. According to this theory, Title VII prohibits such hostile environment harassment because it affects the terms and conditions of employment.[131]

In Vinson's case, in a groundbreaking decision, the Supreme Court established that sexual harassment is an illegal form of sex discrimination under Title VII.[132] Relying heavily on EEOC Guidelines that recognized both quid pro quo and hostile environment claims,[133] the Court held that Title VII affords employees the right to work in an environment free from sexual harassment.[134] As for Vinson, the Court had no trouble concluding that the harassment she suffered amounted to a violation of Title VII. According to the Court, "[Vinson's] allegations in this case—which include[d] not only pervasive harassment but also criminal conduct of the most serious nature—were plainly sufficient to state a claim for 'hostile environment' sexual harassment."[135] And regarding the causation requirement, the Court concluded that Taylor's harassment was targeted at Vinson's sex. According to the Court, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[136]

B. Because of Sex and Sexual Orientation

The Court was no doubt correct in concluding that Vinson was discriminated against because of her sex. Indeed, Taylor targeted Vinson in her capacity as a woman. Yet the Court's causation analysis overlooks an important part of Vinson's story. Taylor did not harass Vinson just because she was a woman; he harassed her in her capacity as a *heterosexual* woman. In other words, Vinson was discriminated against not just because of her sex, but because of her sex *and* her sexual orientation. Vinson's sexual harassment claim was not, as the Court would have it, a sex *simpliciter* claim, but rather an intersectional claim based on the intersection of her sex and her sexual orientation.

In order to show that Vinson was discriminated against in her capacity as a *heterosexual* woman, it is first necessary to establish Vinson's heterosexuality.[137] I set out to do so in this section by focusing first on the rela-

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[131] *See Bundy*, 641 F.2d at 943–48 (discussing Professor MacKinnon's work).

[132] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–67 (1986).

[133] *See id.* at 65 (citing Sexual Harassment, 29 C.F.R. § 1604.11 (1985)).

[134] *Id.* at 66.

[135] *Id.* at 67.

[136] *Id.* at 64 (alteration in original).

[137] I will take it as a given that Vinson was in fact a woman, as there is nothing in the case that indicates any reason to question Vinson's sex or gender identity. This, of course, is in no way meant to sug-

tional nature of sexual orientation, highlighting that there are two heterosexualities involved in Vinson's case—Taylor's actual heterosexuality and Vinson's perceived heterosexuality. This section then discusses the process by which the Court erased Vinson's heterosexuality, rendering it invisible for purposes of her sexual harassment claim. I suggest that this process results from the paradox of privilege.

1. Two Heterosexualities.—Heterosexuality is nowhere to be seen on the face of the Court's opinion in *Meritor*. The Court makes no mention of sexual orientation, let alone heterosexuality. Yet there are two heterosexualities very much on display in Vinson's case—Taylor's actual heterosexuality and Vinson's perceived heterosexuality. Although Taylor's heterosexuality is not articulated—he did not explicitly assert a heterosexual status or "come out" as straight[138]—we can infer his heterosexuality from his conduct.[139] From the facts available to us about Taylor, we can infer his heterosexuality from his sexual conduct as recounted by Vinson, such as his persistent sexual advances toward Vinson and other female employees at the bank; from the sexually tinged comments he directed at female employees; and from his physical acts of sexualized violence directed at a woman. Moreover, there were no allegations that Taylor either subjected the male employees at the bank to such a sexually charged work environment or that he tried to engage in a sexual relationship with any male employees at the bank.

As for Vinson, although there is no evidence that she self-identified as heterosexual, we can likewise infer her heterosexuality from the steady relationship with another man that effectively ended her "relationship" with Taylor, from the fact that she eventually married another man, and from her sexual encounters with Taylor that she would characterize as consensual.[140]

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gest that it is always easy to determine a person's sex. *See, e.g.*, Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

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

[139] For a discussion of the status/conflict divide in the construction of sexual identity, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).

[140] Augustus Cochran explains that Vinson originally sought out legal counsel not because of her difficulties at work but because she wanted a divorce from her husband. According to Cochran:

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

COCHRAN, *supra* note 107, at 60.

For purposes of this Article, however, Vinson's actual sexual orientation is less important than Taylor's assumptions about her sexual orientation. A fair reading of the facts of the case suggest that Taylor's drive to have sex with Vinson was motivated, at least in part, by a fantasy of reciprocity. In other words, insofar as Taylor's harassing conduct was motivated by his heterosexual desire, it mattered that Vinson was heterosexual, or at the very least that she was not a lesbian. Indeed, his assumptions about Vinson's sexuality help to explain why Taylor pursued a sexual relationship with Vinson. Thus, to the extent that Taylor's conduct was motivated by his heterosexual desire, Vinson's heterosexuality was a but-for cause of the harassment.

One reason why sexual orientation is different than other identity traits like race or sex is that sexual orientation is relational.[141] Recall my definition of sexual orientation above: sexual orientation denotes a person's sexual attractions and desires. Embedded in this definition is the idea that a person's sexual orientation is defined in relation to others.[142] Professor Mary Anne Case captures this idea when, in a discussion about the relational nature of homosexuality, she quotes the adage, "It takes two women to make a lesbian."[143] Something very similar can be said of heterosexuality: it takes a man and a woman to make a heterosexual. In Vinson's case in particular, Taylor's heterosexuality was tied to his expectations about Vinson's sexuality. While it is possible that Vinson was not in fact heterosexual, what matters for purposes of this Article is that Taylor's desire to have sex with Vinson stemmed at least in part from his assumption that Vinson was heterosexual.

Viewed in this light, even though the Court in *Meritor* never discussed it, heterosexuality is laced throughout the Court's opinion. We see heterosexuality on display every time Taylor propositions Vinson for sex. We see it in Vinson and Taylor's repeated sexual encounters. We see it in every sexual comment Taylor makes. And we see it in every sexual touching. Vinson's heterosexuality—whether actual or perceived—is at the heart of her sexual harassment claim. Yet the Court rendered Vinson's heterosexuality invisible by only focusing on the elements of her discrimination claim that pertain to her sex. The doctrinal consequences of this move are considerable. By ignoring the ways in which Vinson's sex discrimination claim was also based on her experience as a heterosexual woman, the Court effectively transformed Vinson's intersectional claim into a sex *simpliciter*

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[141] *See* Jon W. Davidson, *Winning Marriage Equality: Lessons from Court*, 17 YALE J.L. & FEMINISM 297, 297–98 (2005). It is worth pointing out that this is only one way of conceptualizing sexual orientation. *See* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER 267 (Carol S. Vance ed., 1984) (arguing for a more dynamic understanding of sexuality and sexual orientation that transcends the relational model of sexual orientation).

[142] *See* Davidson, *supra* note 141, at 297–98; *see also* Lau, *supra* note 35, at 1286.

[143] *See* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1650 (1993).

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

2. The Paradox of Privilege.—If Vinson was discriminated against on the basis of the intersection of her sex *and* her sexual orientation, why did the Court treat her harassment claim as if it were a sex *simpliciter* discrimination claim? This Article contends that the Court failed to appreciate the extent to which Vinson was discriminated against on account of her sexual orientation because heterosexuality is culturally invisible. The Court could not address the elements of Vinson's claim that dealt with her heterosexuality because the Court did not even see her as having a sexual orientation. As a result, although it was an integral part of her harassment claim, Vinson's heterosexuality was swallowed up by her sex.

This subsection argues that the invisibility of heterosexuality is the result of what I call the paradox of privilege.[144] The thrust of the paradox of privilege is that heterosexuality is at once everywhere and nowhere.[145] To understand why this is the case, consider first the nature of sexual orientation. In general, sexual orientation is an invisible trait because it cannot be observed by the naked eye.[146] This is yet another reason why sexual orientation is different than other identity traits like race and sex that are, in most cases, noticeable by casual observation.[147] As it is not noticeable, we are forced to make assumptions about people's sexual orientations. And because homosexuality is stigmatized in our culture, the baseline assumption is that a person is heterosexual—we presume that all people are heterosexual until proven otherwise.[148] In a groundbreaking work that laid the foundation for CHS, poet and social critic Adrienne Rich called this a system of "compulsory heterosexuality."[149] Within a system of compulsory heterosexuality, lesbians and gay men must assert a gay identity—or "come

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[144] Scholars have used the term "paradox of privilege" in other contexts. *See, e.g.*, KIRBY MOSS, THE COLOR OF CLASS: POOR WHITES AND THE PARADOX OF PRIVILEGE (2003).

[145] I owe the idea here to the work of Professor Michael Selmi. *See* Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 LA. L. REV. 1035, 1035 (2006) ("At the turn of the twenty-first century, privacy has become the law's chameleon, seemingly everywhere and nowhere at the same time.").

[146] *See* William N. Eskridge, *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1746 (2001) ("[S]exual orientation, unlike race and sex, is perceived to be invisible.").

[147] Indeed, the primary reason why courts subject sexual orientation classifications to a lower level of scrutiny under the Equal Protection Clause than racial or sex classifications is because sexual orientation is an invisible trait. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 876–79 (2002) (discussing how visibility explains why race and sex classifications are subjected to a more searching scrutiny than sexual orientation classifications).

[148] This is often referred to as a "heterosexual presumption." *See* Jonathon D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1135 n.103 (2006); Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1635 (2004).

[149] *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

out"—in order to make their sexual orientation visible. Heterosexuals, by contrast, are privileged by compulsory heterosexuality in that they never have to come out as—but are simply presumed to be—heterosexuals.[150]

This is where the paradox of privilege comes into play. Consider first the "everywhere" prong. One of the most important insights to come out of feminism, queer theory, and CHS is that heterosexuality is embedded in the fabric of our culture; it is everywhere we look and a part of nearly everything we do.[151] At the same time, however, the pervasiveness of heterosexuality also works to render it invisible—the "nowhere" prong of the paradox of privilege. Heterosexuality has ceased to exist apart from our culture due to its ubiquity. To see an example of this in action, think of a same-sex couple's wedding announcement in the newspaper.[152] Looking at the couple's picture, the first thing most people see is that they are a *gay* couple. By posing together in a picture, the couple effectively puts their homosexuality on display.[153] Now think of a similar announcement for a different-sex couple. Looking at this couple's picture, most people may see bride and groom, or husband and wife, or perhaps just a man and woman. Though people see many things in this second picture, they simply do not see the couple's heterosexuality.

The paradox of privilege also can be seen in the way people talk about sexual orientation. Heterosexuals are not thought of as having a sexual orientation; the term "sexual orientation" tends to be used as if it were a synonym for "homosexuality." For instance, consider two examples, both of which come from my own experiences. The first is an exercise I use in my Law & Sexuality seminar.[154] Toward the beginning of the semester, I ask my students to play a kind of word association game. I ask them, "What comes to mind when you think about 'sexual orientation?'" Their answers

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[150] Of course, straight people occasionally do have to assert a heterosexual identity. There is a surprisingly rich literature on the politics of straight people "coming out" as straight. *See, e.g.*, IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 97–107 (2005) (discussing whether and when straight allies should engage in identity "ambiguation"); Carbado, *supra* note 138, at 114–16 (discussing the politics of when heterosexuals "come out" as straight).

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

[152] In 2002, the *New York Times* began publishing reports of same-sex commitment ceremonies and other celebrations when same-sex couples enter into formal, registered relationships. *See Times Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 8, 2002, at A30.

[153] This would also be true of an interracial couple. For instance, imagine a wedding announcement of a marriage between a black woman and a white man. By posing together in the picture, this couple is effectively announcing their status as an interracial couple, because the first thing we notice when we see their picture is that the man and woman are not of the same race.

[154] It goes without saying that I am not offering the results of this classroom exercise as an empirical claim to prove my thesis.

are always the same: the first things they think of are same-sex marriage, the "Don't Ask, Don't Tell" policy, and the AIDS epidemic.

The second example comes from my work at the Williams Institute, an academic think tank at the UCLA School of Law.[155] On its website, the Institute describes its work as follows: "The Williams Institute advances *sexual orientation law and public policy* through rigorous, independent research and scholarship, and disseminates it to judges, legislators, policymakers, media and the public."[156] In terms of its actual work product, the institute does not study legal and policy issues relating to sexual orientation generally so much as it studies legal and policy issues relating to lesbians and gay men. This is a good example of how "sexual orientation" is used as a synonym for "homosexuality." In short, the language society uses is reflective of its tendency not to think of heterosexuals as having a sexual orientation.

Heterosexuality is not unique in this regard. Indeed, a similar process takes place in the context of race. Much like heterosexuals being seen as not having a sexual orientation, white people tend to be seen as not having a race. This is because privilege functions to obscure whiteness.[157] As Professors Stephanie Wildman and Adrienne Davis have written, "[w]hites do not look at the world through a filter of racial awareness, even though whites are, of course, a race."[158] The power to ignore race, according to Wildman and Davis, is the privilege of whiteness.[159] Indeed, as Professor Barbara Flagg has noted, "[t]he most striking characteristic of whites' consciousness of whiteness is that most of the time [they] don't have any."[160]

C. The Double Standard

Looking back to *Meritor*, the paradox of privilege worked to render Mechelle Vinson's heterosexuality invisible. Much like the different-sex couple in the wedding announcement, Vinson's heterosexuality was hiding in plain view.[161] But because neither the Court nor the attorneys were look-

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[155] For information on the Williams Institute, see Williams Institute, http://www.law.ucla.edu/williamsinstitute/home.html (last visited Nov. 23, 2008).

[156] Williams Institute, About Us, http://www.law.ucla.edu/williamsinstitute//about/index.html (last visited Nov. 23, 2008) (emphasis added).

[157] For a systematic account of white privilege, see PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES (1998) (detailing instances of white privilege).

[158] Stephanie M. Wildman with Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 897 (1995).

[159] *See id.*

[160] Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

[161] I owe my use of the phrase "hiding in plain view" to my former colleague Josh Silverstein. *See* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13 (2006).

ing for it, they simply did not see it and could treat Vinson's sexual harassment claim as if it were a sex *simpliciter* discrimination claim. This is in stark contrast to how the court in Dawson's case dealt with her sexual orientation. There, the court was so fixated on Dawson's homosexuality that it rejected her gender-stereotyping claim as nothing more than an attempt to bootstrap protection for sexual orientation into Title VII.[162]

This is a double standard. Homosexuality is such a stigmatized trait in our culture that courts are primed to reject discrimination claims brought by lesbians and gay men even when their claims are based on protected traits like sex or gender. This puts lesbian and gay plaintiffs at a disadvantage compared to heterosexual plaintiffs, whose ability to bring actionable sex discrimination and gender-stereotyping claims is unaffected by their sexual orientation. In short, the invisibility of heterosexuality has seeped into employment discrimination jurisprudence, creating a doctrinal privilege for heterosexual employees in the sense that they do not risk losing their discrimination claims because of their sexual orientation.

D. Refining the Double Standard

Having identified this double standard, this section refines its contours by considering two issues. The first is whether the double standard extends to cases involving same-sex sexual harassment,[163] and in particular, whether lesbian and gay employees' homosexuality can actually help them prove that they suffered discrimination "because of" sex in such cases. The second issue concerns whether lesbian and gay employees will have greater success under Title VII by adopting a different theory of discrimination—which I refer to as the "ultimate gender stereotype"—suggesting that discrimination targeted at an employee's homosexuality is unlawful sex discrimination because it is rooted in stereotypes about how women and men are supposed to look and act.

1. Considering Same-Sex Sexual Harassment.—In *Oncale v. Sundowner Offshore Services*,[164] the Supreme Court held that same-sex sexual harassment claims are actionable under Title VII, provided the plaintiff is able to prove that the harassment was "because of" sex.[165] The Court went

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[162] *See* Dawson v. Bumble & Bumble, 398 F.3d 211, 218–20 (2d Cir. 2005).

[163] Employment discrimination scholars have amassed a vast body of scholarship on same-sex sexual harassment. *See, e.g.*, Clare Diefenbach, *Same-Sex Sexual Harassment After* Oncale*: Meeting the "Because of . . . Sex" Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42 (2007); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677 (1998).

[164] 523 U.S. 75 (1998).

[165] *Id.* at 79. In so holding, the Court resolved a circuit split. Previously some lower courts had held that same-sex sexual harassment claims are never actionable under Title VII. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir. 1996). Other courts took the position that an employee can only bring a same-sex sexual harassment claim if there is evidence that the harasser is homosexual. *See, e.g.*, Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 144 (4th Cir. 1996); McWil-

on to explain that one way an employee can prove that harassment was discriminatory is by providing evidence that the harasser is homosexual. Analogizing to different-sex sexual harassment cases, the Court explained that "[c]ourts and juries have found the inference of discrimination easy to draw in most male-to-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex."[166] According to the Court, an employee in a same-sex sexual harassment case can likewise prove that harassment was "because of" sex if there is evidence that the harasser is gay, because the assumption is that the harasser would not have made the proposals to someone of a different sex.[167]

With this backdrop in mind, some may argue that there is in fact no double standard at work in same-sex sexual harassment cases. The argument proceeds like this: if Vinson's heterosexuality helped her establish that her sexual harassment was "because of" sex, then presumably a lesbian or gay employee's homosexuality would do the same in a same-sex sexual harassment case. For instance, imagine a case where an openly gay supervisor makes excessive sexual advances at an openly gay subordinate employee. In assessing the employee's harassment claim, a court might very well take into account the employee's homosexuality in concluding that the supervisor was harassing the employee "because of" his sex, just as the Court accounted for Vinson's heterosexuality in *Meritor*. In this sense, the employee's homosexuality would not spoil an otherwise actionable claim, as it would in the bootstrapping context. Rather, the employee's homosexuality could help the employee establish that he was harassed "because of" his sex.

While there is considerable force to this argument, courts are still likely to reject same-sex sexual harassment claims brought by lesbian and gay employees because of the paradox of privilege. The thrust of the paradox of privilege is that heterosexuality is invisible in our culture because of its normativity, while homosexuality is regarded as deviant in our culture because it departs from the heterosexual norm. As we saw in *Meritor*, even though the harassment suffered by Vinson was based in part on her heterosexuality, the Court was able to focus exclusively on Vinson's sex because the paradox of privilege concealed her heterosexuality.[168] For lesbian and gay employees, by contrast, courts simply cannot see past their homosexuality because it stands out against the heterosexual norm. While an em-

liams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 n.5 (4th Cir. 1996). And at least one circuit court had held that sexual harassment that is sexual in nature is always actionable as sexual harassment under Title VII, regardless of the harasser's and victim's sex. *See* Doe v. Belleville, 119 F.3d 563, 574 (7th Cir. 1997).

[166] *Oncale*, 523 U.S. at 80.

[167] *See id.*

[168] *See supra* notes 138, 144–160 and accompanying text.

ployee's homosexuality should in theory help the employee satisfy the causation analysis in a same-sex sexual harassment in theory, a court may nevertheless separate the employee's homosexuality from the employee's sex and gender-nonconformity. And if a court does this, the employee will lose his or her discrimination claim on the ground that sexual orientation is not protected under Title VII.

2. The "Ultimate Gender Stereotype".—In the bootstrapping cases, courts reject lesbian and gay employees' discrimination claims by disaggregating an employee's sexual orientation from the employee's sex and gender-nonconformity.[169] One could argue, however, that there is a better way for courts to understand the relationship between an employee's sex, gender, and sexual orientation. In an earlier work, I argued that the gender-stereotyping theory is capable of capturing discrimination targeted at an employee's homosexuality.[170] For instance, a stereotypical "real" man—that is to say, a masculine man—is expected to be sexually attracted to women.[171] Gay men deviate from this gender expectation because they are sexually attracted to men.[172] Lesbians also deviate from this stereotypical gender expectation because they do not invite sexual attraction from men.[173] In this sense, lesbians and gay men are gender-nonconformists in that they deviate from the "ultimate gender stereotype."[174]

For all its potential value, a significant weakness of the ultimate gender stereotype theory is that most courts are simply not comfortable approaching homosexuality in this way. According to my research, only two federal district courts have concluded that discrimination targeted at an employee's homosexuality is itself a kind of gender stereotyping.[175] In these cases—one involving a gay man and the other a lesbian woman—the courts concluded that an employer who discriminates against an employee "because of" the employee's homosexuality is effectively discriminating against the employee for failing to conform to the stereotypical expectations of how a "real" man or woman is supposed to behave.[176] In both cases, the employ-

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[169] *See* Case, *supra* note 33, at 57–61.

[170] *See* Kramer, *supra* note 59, at 489–92. Other scholars have likewise argued that there is a significant connection between sexual orientation discrimination and gender and sex discrimination. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992).

[171] *See* Law, *supra* note 170, at 196 ("Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction.").

[172] *See id.*

[173] *See id.*

[174] Kramer, *supra* note 59, at 489–92.

[175] *See* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

[176] *See Heller*, 195 F. Supp. 2d at 1224; *Centola*, 183 F. Supp. 2d at 410.

ees' homosexuality did not prevent them from stating actionable gender-stereotyping claims.[177]

Even if these cases offer a more theoretically satisfying approach to the relationship between an employee's gender and sexual orientation,[178] it is unlikely that many other courts will sign on to this reasoning. The more likely outcome is that courts will continue to draw a strict line between employees' sex and gender, on the one hand, and sexual orientation, on the other. Indeed, employees who try to base their gender-stereotyping claims on the ultimate gender stereotype will almost certainly lose their claims on grounds that they are trying to bootstrap protection for sexual orientation into Title VII. Thus, the ultimate gender stereotype theory currently does not provide an alternative path for lesbian and gay employees to raise actionable discrimination claims under Title VII. What we need instead is a completely new approach to dealing with sexual orientation under Title VII.

III. RE-ORIENTING TITLE VII

The *Meritor* case study is useful as a means to identify the ways in which employment discrimination law privileges heterosexuality. This is not to say, however, that the *Meritor* Court's analysis provides the best possible approach for addressing intersectional discrimination claims that are based in part on an employee's sexual orientation. *Meritor* implies that an employee's sexual orientation should not swallow up an otherwise actionable sex discrimination claim. The problem with *Meritor*, however, is that the Court only reached this conclusion because Vinson was a heterosexual and, as such, her sexual orientation was invisible. Had she been a lesbian, the Court probably would have approached Vinson's case more in line with the bootstrapping cases, most likely concluding that Vinson's sexual orientation swallowed up her sexual harassment claim. For the *Meritor* Court to have offered a real alternative to the bootstrapping cases, the Court would have had to acknowledge Vinson's heterosexuality and still ruled as it did.

This Part first proposes an alternative approach to intersectional discrimination claims that are based in part on an employee's sexual orientation. This approach borrows from both the *Meritor* Court's implicit conclusion and that of the bootstrapping cases. Although neither is satisfactory on its own, combining aspects of each creates an alternative analytical framework that provides a more satisfying method for dealing with intersectional discrimination claims that are based in part on an employee's sexual orientation. After laying out this new approach, two examples show how it fits into existing employment discrimination jurisprudence. The first example involves a case where an openly gay man was harassed on the ba-

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[177] *See Heller*, 195 F. Supp. 2d at 1224; *Centola*, 183 F. Supp. 2d at 410.

[178] *See* Kramer, *supra* note 59, at 495–97 (arguing that the "ultimate gender stereotype" is a more satisfying way of explaining discrimination targeted at once at an employee's homosexuality and gender-nonconformity).

sis of his gender-nonconformity.[179] The second example involves discrimination cases brought by transgender employees.[180] Although formulated in the context of intersectional claims that are based in part on sexual orientation, this proposed approach is nevertheless applicable to cases involving transgender employees. The Part concludes by responding to three potential critiques to the re-oriented approach.

A. A New Approach

How, then, should courts approach intersectional discrimination claims that are based in part on an employee's sexual orientation? The answer combines strands from the bootstrapping cases and from the *Meritor* Court's treatment—or lack of treatment—of Vinson's heterosexuality. The result is a new approach to conceptualizing sexual orientation under Title VII. This new approach re-orients Title VII.

1. Acknowledging Orientation.—The fundamental flaw of the bootstrapping cases is their fixation on homosexuality. Dawson's case is a prime example. Early in its discussion of Dawson's gender-stereotyping claim, the court acknowledged that it is especially hard for courts to evaluate gender-stereotyping claims brought by "an avowedly homosexual plaintiff" because gender norms "blur into ideas about heterosexuality and homosexuality."[181] That the court focused on "avowedly homosexual" employees is telling, as "avowedly" is just another way of saying employees who are "out" at work about their homosexuality.[182] Presumably, the court's point in isolating openly gay employees was to set up its conclusion that Dawson was using her gender-stereotyping claim to try to bootstrap protection for sexual orientation into Title VII, a point the court addressed in the very next sentence.[183] By highlighting Dawson's homosexuality, the

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[179] *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc).

[180] In this Article, I use "transgender" as an umbrella term that encompasses any person whose gender identity or expression is nonnormative, including transsexuals, cross-dressers, or people who identify as genderqueer. For a far more comprehensive discussion of who falls within this transgender umbrella, see Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979).

[181] Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005).

[182] There is a rich literature on the costs and benefits of "coming out" at work. *See, e.g.*, Nancy E. Day & Patricia Schoenrade, *Staying in the Closet Versus Coming Out: Relationships Between Communication About Sexual Orientation and Work Attitudes*, 50 PERSONNEL PSYCH. 147 (1997) (finding that being "out" may reduce employees' anxiety at work); Allen L. Ellis & Ellen D.B. Riggle, *The Relation of Job Satisfaction and Degree of Openness About One's Sexual Orientation for Lesbians and Gay Men*, 30 J. HOMOSEXUALITY 75 (1995) (finding that employees who are "out" report greater levels of satisfaction with their coworkers).

[183] *See Dawson*, 398 F.3d at 218 ("Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000))). The court also cited a treatise for the following proposition: "It is not uncommon for plaintiffs to fall short in their Title VII pursuits because courts find their arguments to be sexual orientation (or other unprotected) allegations masquerading as

court effectively reframed Dawson's discrimination claim, transforming it from a potentially legitimate gender-stereotyping claim into a sexual orientation discrimination claim.[184] As a result, Dawson lost her gender-stereotyping claim the moment the court identified her as a lesbian.[185] As noted earlier, this is the reason why commentators advise attorneys representing lesbian and gay employees to keep their clients' homosexuality out of their employment discrimination cases.[186]

Yet there is at least some value in the court's acknowledgment of Dawson's homosexuality even though it ultimately proved fatal to her claim. There was no way Dawson could have concealed her homosexuality from the court because she was "out" about her lesbianism to her coworkers.[187] Nor should we expect her to. The advice that lesbian and gay employees should try to deemphasize their homosexuality is especially troubling to the extent that it encourages lesbian and gay employees to conceal rather than acknowledge their homosexuality in the workplace.[188] After all, a rich literature documents the benefits for lesbian and gay employees of disclosing their homosexuality to their employers and coworkers.[189] Of course, employees who are open to their coworkers about their homosexuality expose themselves to the possibility of being discriminated against because of their sexual orientation. Yet encouraging employees to "stay in the closet" in the workplace is not the solution to this dilemma. Employment discrimination law should not have to encourage lesbian and gay employees to conceal their homosexuality in order to maintain their chances of articulating an actionable gender-stereotyping claim.

In this sense, the bootstrapping cases offer a more satisfying approach to dealing with an employee's sexual orientation. At the very least, the positive side of the court's decision in Dawson's case is that it acknowl-

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gender stereotyping claims." *Id.* (quoting 10 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 168.10[1] (2d ed. 2003)).

[184] *See* Yoshino, *supra* note 147, at 811–38 (discussing how lesbians and gays pass as straight).

[185] *But see* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1222–24 (D. Or. 2002) (concluding that gender norms encompass notions of sexual orientation); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (same).

[186] *See supra* note 99 and accompanying text; *see also, e.g.*, Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) ("Courts tend to mistake gender stereotyping for discrimination based on sexual orientation. Due to the fact that Title VII does not prohibit workplace discrimination on the basis of sexual orientation, gay plaintiffs bringing claims under Title VII should emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality." (footnotes omitted)).

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

[188] For a classic study of how gay men negotiate their sexual orientation in the workplace, see JAMES D. WOODS WITH JAY H. LUCAS, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA (1994). For a similar study in the context of lesbian professionals, see Marny Hall, *Private Experiences in the Public Domain: Lesbians in Organizations*, *in* WOMEN'S STUDIES: ESSENTIAL READINGS 167 (Stevi Jackson et al. eds., 1993).

[189] *See supra* note 182.

edged her homosexuality. By contrast, the Court in *Meritor* never acknowledged that either Vinson or Taylor had a sexual orientation, as their heterosexuality was assumed. Thus, in cases where employees' sexual orientation is relevant to their discrimination claims, the first step in this new approach is that courts should acknowledge employees' sexual orientation, whether heterosexual, homosexual, or otherwise.

2. Neutralizing Sexual Orientation.—The second step in this approach holds that an employee's sexual orientation should not affect the employee's otherwise actionable discrimination claim. Sexual orientation should be a neutral trait for purposes of employment discrimination law; in other words, it should be irrelevant in employment discrimination cases.[190] This is the *Meritor* Court's contribution. The Court implied in *Meritor* that Vinson's heterosexuality did not affect her sex discrimination claim. Of course, the benefit of being heterosexual for Vinson meant that her sexual orientation blended into the background of her sexual harassment claim. Dawson, by contrast, was not so lucky, as her sexual orientation was anything but an irrelevant trait.

The thrust of the second step is that an employee's sexual orientation should neither benefit nor burden an employee when it comes to bringing an actionable discrimination claim. Vinson was not affected by her sexual orientation while Dawson was burdened by hers. Neither case is consistent with my re-oriented approach—*Meritor* does not satisfy the first prong because the Court did not acknowledge Vinson's heterosexuality, while *Dawson* fails under the second prong because the court did not treat Dawson's homosexuality as a neutral trait. By neutralizing sexual orientation, the proposed approach seeks to put heterosexuals on equal footing with lesbians and gay men in their ability to articulate actionable discrimination.[191]

B. The New Approach in Action

The two steps of this new approach work together to re-orient Title VII. Courts should be able to acknowledge an employee's sexual orientation without it influencing the outcome of the employee's case. This section considers two applications of this approach. The first deals with a case where an openly gay man was discriminated against because of his gender-nonconformity and sexual orientation. The second is an example of how the new approach can be extended beyond the realm of sexual orientation to cases involving transgender employees.

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

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

1. Sexual Orientation Is Irrelevant.—Medina Rene worked as a butler at the MGM Grand Hotel in Las Vegas.[192] He was exclusively assigned to the twenty-ninth floor of the hotel, which was reserved for high-profile and wealthy guests.[193] All of his fellow butlers on the twenty-ninth floor were men, as was his supervisor.[194] Some time after he was fired from the hotel, Rene brought a discrimination claim under Title VII, alleging that his coworkers and his supervisor subjected him to a hostile work environment on the basis of his sex.[195] According to Rene, his harassers whistled and blew kisses at him; called him "muñeca" (Spanish for "doll"); told him crude jokes and gave him sexually oriented "joke" gifts; and forced him to look at pictures of naked men having sex.[196] In addition, Rene alleged that on many occasions his harassers touched him in a sexual manner. According to Rene, they caressed and hugged him, they touched his body "like they would to a woman,"[197] and they grabbed him in the crotch and poked their fingers in his anus.[198]

Rene based his discrimination claim on his sex and his gender-nonconformity. In deposition testimony, however, Rene also explained that he believed the harassment occurred because he was gay.[199] And at another point in his deposition, Rene explained that one of his harassers was skinny and "not masculine like I am."[200] The district court granted MGM's motion for summary judgment, concluding that Rene could not maintain his sex discrimination claim because he was actually arguing that he was discriminated against because he was gay.[201] The Ninth Circuit Court of Appeals affirmed.[202] Upon a rehearing en banc, however, the full court reversed its earlier panel decision, concluding that Rene's sexual orientation was irrelevant for purposes of his sexual harassment claim.[203]

Before turning to the court's reasoning, it is helpful to situate Rene's case by noting three interrelated points. First, Rene was an openly gay man, in that he was "out" to his coworkers about his homosexuality.[204]

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192 *Rene*, 305 F.3d at 1064.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.* at 1077 (Hug, J., dissenting).

201 *Id.* at 1064, 1066 (plurality opinion).

202 Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001).

203 *Rene*, 305 F.3d at 1066.

204 Indeed, we learn of Rene's homosexuality early on in the court's opinion: "Medina Rene, an openly gay man, appeals from the district court's grant of summary judgment in favor of his employer MGM Grand Hotel in his Title VII action alleging sexual harassment by his male coworkers and supervisor." *Id.* at 1064.

Second, Rene's discrimination claim was an intersectional claim based on the intersection of his sex and his sexual orientation. Third, much like the reasoning underlying the bootstrapping cases, the lower court and Ninth Circuit panel in Rene's case isolated and elevated the part of his claim that related to his sexual orientation, the effect of which was to poison the viable elements of his discrimination claim.

In addressing Rene's sexual harassment claim, the en banc court concluded that Rene's case presented a "fairly straightforward sexual harassment claim."[205] Because Rene's harassers physically grabbed and touched him in a sexual manner, he was easily able to state what the court called "a sexual touching hostile work environment claim."[206] As for the legal effect of his homosexuality, the court concluded that Rene's sexual orientation "was simply irrelevant" to the question of whether he was discriminated against because of his sex.[207] Title VII, the court concluded, protects against such physical conduct of a sexual nature without regard to the victim's sexual orientation. In short, an employee's sexual orientation "neither provides nor precludes a cause of action."[208]

The court's reasoning in *Rene* is in line with the re-oriented approach to dealing with intersectional claims that are based in part on sexual orientation.[209] First, the court did not shy away from the fact that Rene was a gay man, thus satisfying the first step by acknowledging Rene's homosexuality. Having identified him as a gay man, the court then concluded that Rene's homosexuality should not preclude him from bringing an actionable sexual harassment claim. In essence, the court rejected the foundational premise of the bootstrapping cases—that an employee's homosexuality can swallow up an otherwise actionable sex discrimination claim. This is consistent with the second step of my approach.

What *Rene* and the re-oriented approach have in common is that both seek to transcend status. The Ninth Circuit transcended Rene's homosexual

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[205] *Id.* at 1068.

[206] *Id.* at 1066 ("The premise of a sexual touching hostile work environment claim is that the conditions of the work environment have been made hostile 'because of . . . sex.'").

[207] *See id.*

[208] *Id.* at 1063–64.

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

status by treating his sexual orientation as a neutral trait for purposes of Title VII. Rene's homosexuality was treated no differently than his eye color or his taste in music. His homosexuality neither gave rise to a cause of action nor prevented him from bringing a discrimination claim based on some other protected trait, such as his sex or his gender-nonconformity. This is a far cry from Dawson's case, where the court stalled at her status. As a result of its inability to see past her homosexuality, the court gave only passing attention to Dawson's gender-stereotyping claim. Under the proposed approach, however, the *Dawson* court would have had to deal directly with Dawson's gender-stereotyping claim. While this is not to say that Dawson would have necessarily won her claim under such circumstances, she would not have been burdened by her homosexuality, allowing the court to evaluate the merits of her gender-nonconformity claim.

And how would Vinson's sexual harassment claim fare under a re-oriented Title VII?[210] Vinson's case should come down the same way. The only significant difference would be that, under the first prong of the new approach, a court would have to acknowledge that heterosexuality is involved in the causation analysis. A court could do this simply by noting that Taylor, as a heterosexual man, was harassing Vinson because she was a *heterosexual* woman. As sexual orientation is a legally neutral trait under the new approach, a court could then focus exclusively on the sex discrimination side of Vinson's claim. Thus, there is no reason to think that Vinson would lose under a re-oriented Title VII.

2. Transcending Transgender Status.—A second example of the re-oriented approach in action involves discrimination cases brought by transgender employees. Indeed, we are witnessing an important moment in the legal recognition of gender identity.[211] For a long time, courts were quite suspicious of discrimination claims brought by transgender employees.[212] Historically, it was nearly impossible for these employees to bring actionable sex discrimination claims because courts assumed that they were bringing sex discrimination claims as means to bootstrap protection for gender identity into Title VII. For instance, in *Ulane v. Eastern Airlines*,[213] the plaintiff, a male-to-female transsexual, was fired from her job as a pilot for Eastern Airlines after she returned to work following sex reassignment surgery.[214] She brought a discrimination claim under Title VII based on her

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[210] I thank Professor Jason Solomon for helping me to think through the question of whether Vinson would lose under my new approach.

[211] *See* Ilona M. Turner, Comment, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 567–72, 577–84 (2007).

[212] *See, e.g.*, Ulane v. E. Airlines, 742 F.2d 1081,1086–87 (7th Cir. 1984) (concluding that Title VII's prohibition on "sex" discrimination does not cover discrimination based on gender identity); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977) (same).

[213] 742 F.2d 1081 (7th Cir. 1984).

[214] *Id.* at 1082–83.

sex and her transsexuality.[215] Though the trial court ruled in her favor, the Seventh Circuit reversed, concluding that Title VII's prohibition against discrimination "because of" sex does not encompass discrimination on the basis of transexuality.[216] Moreover, the court also concluded that Karen Ulane was not discriminated against on the basis of her sex,[217] thereby foreclosing relief under Title VII.[218]

In the last few years, however, courts have begun to address transgender cases from a different perspective.[219] The impetus for this change was the Supreme Court's decision in *Price Waterhouse*, where the Court recognized the gender-stereotyping theory of sex discrimination.[220] After *Price Waterhouse*, transgender employees began basing their claims not on their transgender status, but on their gender-nonconformity.[221] Consider three cases as examples of this emerging trend. As previously mentioned, in *Smith v. City of Salem, Ohio*,[222] Jimmie Smith, a firefighter in Salem, Ohio, was able to raise a gender-stereotyping claim against his former employer.[223] The second case came directly on the heels of *Smith*. In *Barnes v. Cincinnati*,[224] the Sixth Circuit ruled that Philecia Barnes, a police officer in Cincinnati, Ohio, could bring a gender-stereotyping claim against the police department for failing to promote her to the rank of sergeant.[225] As in

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[215] *Id.* at 1082.

[216] *Id.* at 1085–87. According to the court:

> Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline [on] behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

Id. at 1086.

[217] *Id.* at 1087.

[218] Commenting on *Ulane*, William Eskridge and Nan Hunter ask: "What could be a more logical example of 'sex discrimination' than firing a pilot because her sex as presented is not the same as the sex as the employer understood it?" They go on to suggest that "[t]his seems in many respects more of a core sex discrimination than the firing of a female pilot because the employer thinks that women do not fly as well as men." WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW: TEACHER'S MANUAL 193 (2d. ed. 2004) (on file with author).

[219] *See, e.g.*, Smith v. City of Salem, Ohio, 378 F.3d 566, 572–73 (6th Cir. 2004) (concluding that a transgender plaintiff can state an actionable gender-stereotyping claim); Barnes v. Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (reaffirming *Smith* on the same grounds); Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008) (concluding that discrimination against transsexuals is sex discrimination in a literal sense, which violates Title VII).

[220] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[221] *See* Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination Law*, 55 ME. L. REV. 117, 134–35 (2003) (noting that *Price Waterhouse* jumpstarted transgender litigation in the employment context).

[222] *See supra* notes 67–73 and accompanying text.

[223] *See Smith*, 378 F.3d 566.

[224] *See Barnes*, 401 F.3d 729.

[225] *Id.* at 737.

Smith, that Barnes was a pre-operative male-to-female transsexual did not prevent the court from considering her gender-stereotyping claim. Both *Smith* and *Barnes* involved gender-stereotyping claims brought by transgender employees, and in both cases the employees articulated actionable discrimination claims despite their transgender status.[226]

The third case is especially interesting because it is at once consistent and inconsistent with the path laid out in *Smith* and *Barnes*. In *Schroer v. Billington*,[227] the plaintiff, Diane Schroer, applied for and was offered a position as a terrorism research analyst with the Congressional Research Service (CRS).[228] At the time she applied for the position, Schroer, a pre-operative male-to-female transsexual, was already in the process of transitioning from male to female.[229] Shortly after receiving the offer, Shroer informed her soon-to-be supervisor that upon taking the position she would be presenting herself as a woman.[230] Up until then, CRS had only known Schroer as David John Schroer.[231] The following day, the supervisor called Schroer to let her know that "given [Schroer's] circumstances," she would not be a "good fit" at CRS, and accordingly withdrew the offer.[232]

Schroer brought a discrimination claim under Title VII, which the court ultimately sustained.[233] *Schroer* is consistent with *Smith* and *Barnes* because the court concluded that Schroer, a transgender employee, could raise an actionable discrimination claim under Title VII. It differs from these cases, however, in its reasoning as to why the discrimination faced by Schroer was based on her sex. According to the court, Schroer's discrimination claim was based not only on her gender-nonconformity, but also on her sex.[234] In particular, CRS withdrew the offer because of Schroer's intention to present herself as a woman.[235] In this respect, *Schroer* is significant because it carves out a new path for transgender employees to seek redress for employment discrimination under Title VII.[236] The thrust of this

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[226] Other courts have likewise allowed transgender employees to bring actionable gender-stereotyping claims. *See, e.g.*, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *2 (N.D. Ohio Nov. 9, 2001).

[227] 577 F. Supp. 2d 293 (D.D.C. 2008).

[228] *Id.* at 295.

[229] *Id.*

[230] *Id.* at 296.

[231] *Id.* at 295–96.

[232] *Id.* at 299.

[233] *Id.* at 308.

[234] *Id.* at 306–08.

[235] *Id.* at 307–08.

[236] To be clear, this is not meant to imply that all courts have fallen in line behind the *Smith*, *Barnes*, and *Schroer* courts. This is certainly not the case, as some courts continue to hold that transgender

claim is that discrimination targeted at a person's transgender status is discrimination "because of" sex in a literal sense.[237] In other words, the theory holds that the definition of "sex" under Title VII encompasses transgender status.

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

C. Concerns

This section responds to three potential critiques of the argument presented thus far. The first critique is that the new reading of *Meritor* opens the door for employers to defend against sexual harassment claims by arguing that they discriminated against employees because of those employees' sexual orientation. Embedded in this critique is a related concern, namely, that the re-oriented approach effectively transforms sexual orientation into a protected trait under Title VII. The second critique is that the new reading of *Meritor* will make it possible for heterosexual plaintiffs to bring reverse discrimination claims based on sex. The third critique argues that the new reading of *Meritor* relies on an outmoded theory of discriminatory causation—one in which discrimination turns on attraction and sexual desire.

1. The "Sexual Orientation Loophole".—One might argue that this reading of *Meritor* provides employers with a new defense to sexual harassment cases brought by heterosexual plaintiffs. Specifically, it enables employers to argue that they discriminated against a heterosexual employee because of that employee's sexual orientation. And because discrimination based on sexual orientation is not unlawful under Title VII, this means that my reading of *Meritor* may make it easier for employers to avoid liability in sexual harassment cases, which in turn would make it harder for heterosex-

employees cannot state an actionable sex discrimination claim under Title VII. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (holding that a male-to-female transsexual cannot maintain a sex discrimination claim under Title VII).

[237] *See Schroer*, 577 F. Supp. 2d at 308.

ual employees—in particular, heterosexual women—to win sexual harassment cases.

Initially, it should be noted that employers are already using this defense—indeed, with great success—in the bootstrapping cases. This defense is the product of what Professor Francisco Valdes calls the "sexual orientation loophole."[238] According to Valdes, because sexual orientation is not protected under Title VII, a loophole in employment discrimination law exists that "invites defendants and enables courts to shift the issues from sex and gender to sexual orientation."[239] In discussing the sexual orientation loophole, Valdes focuses exclusively on homosexuality. The thrust of the first critique is that this new reading of *Meritor* expands the sexual orientation loophole, thus enabling employers to use the defense not only against homosexual plaintiffs, as in the bootstrapping cases, but against heterosexual plaintiffs as well.

While this critique is perhaps true in isolation, the two-step re-oriented approach to Title VII closes the sexual orientation loophole entirely. Under the second step of this approach, employers cannot use an employee's sexual orientation as a means to defeat an otherwise actionable discrimination claim. However, this does not make sexual orientation a protected trait under Title VII. Two reasons illustrate why this is not the case. First, the re-oriented approach does not cover cases where employees bring sexual orientation *simpliciter* claims. For instance, it would not apply in a case where an employer refuses to hire lesbians and gay men.[240] For an employee to challenge this employment policy, the employee would have to do so under a state or local antidiscrimination law that prohibits discrimination on the basis of sexual orientation.

The second reason why the re-oriented approach does not effectively transform sexual orientation into a protected trait is that under its second step, employees must still prove that they suffered discrimination "because of" sex. The key here is that an employee must still prove the elements of a claim not based on sexual orientation. Thus, even if a court does not reject an employee's claim just because it is based at least in part on her sexual orientation, the employee must still prove that she was discriminated

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[238] Valdes, *supra* note 29, at 123–24, 146–47.

[239] *Id.* at 123.

[240] This would be an example of what Professor Kimberly Yuracko calls "ontological discrimination." Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 169–70 (2004). Professor Susan Sturm would classify this as an example of first, as opposed to second, generation discrimination. By contrast, second generation discrimination claims "involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups." Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001). In a recent paper, Professor Elizabeth Glazer notes that the move from first to second generation discrimination presents a problem for sexual minorities, who continue to suffer first generation harms. *See* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1419–25 (2008).

against on the basis of her sex. In other words, that sexual orientation is irrelevant for purposes of Title VII doctrine does not mean that the employee will automatically win her discrimination claim.

2. Reverse Discrimination.—A second possible consequence of this new reading of *Meritor* is that it may pave the way for heterosexual employees to bring reverse discrimination claims based on sex. For instance, consider the situation where a heterosexual male employee feels he is being discriminated against because of his heterosexuality. Imagine that the employee is a highly masculine male who exhibits many of the stereotypical trappings associated with male heterosexuality, such as being hairy and muscular, overtly masculine, excessively flirtatious with women, and outwardly homophobic toward his fellow gay employees. Say that this employee feels he is being discriminated against in the workplace because he is strongly heterosexual, perhaps in particular because of his outwardly homophobic behavior toward other employees. A possible consequence of my analysis is that this employee might assert a reverse discrimination claim under Title VII based on his sex. Just as heterosexuality was, at least in part, the trigger for sex-based discrimination in *Meritor*, so too could this employee argue that heterosexuality helps trigger a discrimination claim based on his sex.

Providing a remedy for such an employee is not the intent of this Article. Indeed, its primary goal is to expose the double standard that is being applied to employees depending on their sexual orientation and to carve out a new path for courts to follow in dealing with intersectional claims that are based in part on sexual orientation. That this Article may lay a foundation for such a reverse discrimination claim, however, is in no way fatal to this Article's goals. After all, one of the foundational points of this Article is that it is a mistake to assume that heterosexual employees do not face discrimination on the basis of their sexual orientation. Thus, it is quite possible that the arguments presented above pave the way, albeit inadvertently, for this heterosexual male employee to raise a reverse discrimination claim based on sex.

3. Attraction and Orientation.—Since the inception of sexual harassment law in the 1970s, lawyers and scholars have struggled with the question of why sexual harassment is "because of" sex.[241] The early sexual harassment cases understood sexual harassment in terms of sexual attraction and desire.[242] At that time, most sexual harassment cases involved the sce-

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[241] *See* MACKINNON, *supra* note 130, at 106–18 (outlining the two theories of sexual harassment as sex discrimination).

[242] *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated without op.*, 562 F.2d 55 (9th Cir. 1977). For a contemporaneous elaboration

nario where a male supervisor pressured a female subordinate into having sex with him. In these early cases, the courts concluded that the female employees were discriminated against "because of" sex in violation of Title VII because the male supervisors would not have made sexual advances toward similarly situated male employees. Thus, sexual attraction and desire were at the heart of the early sexual harassment cases.[243]

Over time, however, scholars have grown suspicious of this way of thinking about sexual harassment. In particular, a group of feminist scholars, whom Professor David Schwartz calls "second generation feminists,"[244] have challenged the attraction theory of sexual harassment on both descriptive and normative grounds.[245] In its place, these scholars have put forth an alternative theory of sexual harassment. For these scholars, sexual harassment is an unlawful form of sex discrimination because it is an expression of sex- and gender-based power dynamics in the workplace.[246] Today, the power-based paradigm is clearly the prevailing account of sexual harassment. As Professor Martin Katz notes, "Within the academy the attraction-based view is almost universally regarded as problematic at best, or backward and archaic at worst."[247]

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

Yet there are still good reasons not to reject this reading of *Meritor* solely because it is steeped in the attraction-based approach. The first is that even though the attraction-based view is almost unanimously disfa-

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of this theory, see Kerri Weisel, Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977).

[243] Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 112–20 (2004) (discussing how the early sexual harassment cases developed a causation theory based on attraction).

[244] Schwartz, *supra* note 38, at 1700.

[245] *See, e.g.*, Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

[246] For a good summary of the scholarship expressing this view, see Schwartz, *supra* note 38, at 1700–02. Like the attraction theory, the power theory of sexual harassment traces its origins back to the work of Catharine MacKinnon. *See* MACKINNON, *supra* note 130, at 116–18 (discussing a "sex inequality" theory of sex discrimination).

[247] Katz, *supra* note 243, at 102. Katz goes on to say that "[m]odern scholars either attack the attraction-based view, or they ignore it." *Id.* (citing the works of "second generation feminists").

vored by legal academics,[248] courts continue to conceptualize sexual harassment in terms of sexual desire and attraction.[249] For this reason alone, one should not reject the attraction paradigm altogether. Second, and perhaps more importantly for this Article, the new reading of *Meritor* suggests that, for purposes of sexual harassment law, sexual harassment based on attraction or desire might be linked in a particular way to a victim's sexual orientation. This was true in *Meritor* itself. There, Taylor's harassing behavior was no doubt based at least in part on his attraction to Vinson and his desire to have sex with her. As a heterosexual male, Taylor targeted Vinson in her capacity as a *heterosexual* woman. Therefore, his harassing conduct was targeted at her sex and her sexual orientation.

This is in no way meant to suggest that power and dominance played no role in Vinson's case. Indeed, they most certainly did. As her supervisor, Taylor used his position at the bank to pressure Vinson into engaging in a wide variety of sexual activity. Taylor actively sought to humiliate Vinson by exposing himself to her and following her into the bathroom at the bank, not to mention the fact that Taylor raped Vinson on more than one occasion, which is perhaps the clearest piece of evidence that Taylor's harassing behavior was based in part on gender-based power dynamics.[250] The point is simply that, in the realm of sexual harassment law, there may be a relationship between attraction and sexual orientation that warrants further scholarly attention. To that end, this new reading of *Meritor* can serve as a point of departure for further discussion of this relationship.

CONCLUSION

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

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[248] As far as I can tell, Professor Katz is the only member of the academy who has defended the attraction paradigm. *See* Katz, *supra* note 243. According to Katz, "[W]ithin the academy, the attraction-based view has fallen into extreme disfavor and the power-based view has achieved ascendance nearly to the point of orthodoxy." *Id.* at 102. In response to such near universal support for the power-based view, Professor Katz sets out in his paper to "challeng[e] the prevailing academic wisdom and defend[] attraction-based theory against its critics." *Id.* at 104. Importantly, Katz favors not displacing the power-based view, but rather supplementing it with the attraction-based view. *Id.* ("[T]he attraction-based view poses little threat to the compelling conceptual story told by the power-based theorists.").

[249] *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (noting that a plaintiff can rely on sexual attraction to show that the discrimination was "because of sex"); *see also* Katz, *supra* note 243, at 103 ("Outside of the academy, courts and practitioners continue to rely on the attraction-based view." (citing *Oncale*)).

[250] *Cf.* CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172–90 (1989) (discussing the power dynamics involved in rape).

discrimination claims that are based in part on sexual orientation. The premise of this approach is that sexual orientation is no different than any other unprotected trait under Title VII, as it nether creates nor precludes an actionable discrimination claim. By rendering sexual orientation irrelevant for purposes of Title VII, the re-oriented approach seeks to put heterosexual employees on equal footing with lesbian and gay employees regarding the legal implications of sexual orientation.

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