

NOTES

Schwenk and the Ambiguity in Federal "Sex" Discrimination Jurisprudence: Defining Sex Discrimination Dynamically under Title VII

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers against any individual employee "with respect to [his or her] compensation, terms, conditions, or privileges of employment, because of . . . sex."¹ Currently, uncertainties exist among the federal courts regarding the meaning of the words "because of . . . sex" in Title VII, especially in the context of sex discrimination claims brought by a transsexual or a homosexual plaintiff. Specifically, is discrimination based on one's "transsexuality" or "homosexuality" discrimination "because of sex" for purposes of Title VII?

Recent medical studies suggest that there are, in the United States, millions of these intersexed individuals,² whose biological factors determining sex³ are ambiguous. Transsexuals refer to these indi-

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1. 42 U.S.C. § 2000e-2(a) (1994), amended by 105 Stat. 1071.

2. See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCIENCES, Mar.-Apr. 1993, at 20, 21 (citing a study showing that as many as four percent of live births are of "intersexed" individuals).

3. The word "sex" as used in this Note denotes the biological factors associated with "man" or "woman." 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. 3, 21 (1995) (using the word sex as denoting "a physical attribute of humans: external genital anatomy"); see also Katherine M. Franke, *The Central Mistake of Sex Discrimina-*

viduals whose gender⁴ identity does not match their sex assigned at birth.⁵ Transsexuals feel trapped in a body of the wrong sex and seek release by way of sex reassignment surgery or sometimes even suicide.⁶ They do not view themselves as a transsexual because their self-identity is either male or female.⁷ With the exact causes of transsexualism being still in dispute,⁸ society often confuses transsexuals with homosexuals or transvestites. Homosexuals are those "sexually attracted to persons of the same sex,"⁹ and transvestites are those who occasionally dress in clothes of the opposite sex.¹⁰ Homosexuals and transvestites, unlike transsexuals, have no desire to change their anatomy.¹¹

Until the Ninth Circuit's decision in *Schwenk v. Hartford*¹² in February of 2000, the federal circuit courts addressing the issue of Title VII's applicability to transsexuals had consistently held that discrimination based on one's transsexual status is not actionable because the word "sex" in the Act refers only to "anatomical sex," not gender identity.¹³ Also, until recently, the federal circuits uniformly rejected

tion Law: The Disaggregation of Sex From Gender, 144 U. PA. L. REV. 1, 1-2 (1995) (describing the convention of using the word "sex" as "a product of nature").

4. The word "gender" as used in this Note denotes the socially-constructed masculine or feminine characteristics related to sex. See Valdes, *supra* note 3, at 21 (using the word gender as signifying "the social or cultural dimensions derived from and determined by sex"); see also Franke, *supra* note 3, at 1-2 (arguing that the disaggregation of sex as "a product of nature" from gender as "a function of culture" in sex discrimination law is "a central mistake of equality jurisprudence").

5. Julie A. Greenberg, *Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 289 (1999); see also Farmer v. Haas, 990 F.2d 319, 319-20 (7th Cir. 1993) (opinion of Posner, J.) ("A transsexual is a person who considers himself to be of the male gender although he has the female sexual organs, or, more commonly, . . . considers herself to be of the female gender but has the male sexual organs.").

6. Anita C. Barnes, Note, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 608-11 (1998) (citing the chairperson at Johns Hopkins Medical Institute, who addressed "the high incidence of suicide and self-mutilation among transsexuals"); see also Julie Deardorff, *Gender Conflicts Given Clear Place of Study*, CHI. TRIB., Mar. 22, 2001, at 1, available at 2001 WL 4054106 (noting that few transsexuals can afford sex reassignment surgery, which costs more than \$15,000). The cost of female-to-male surgery including removal and closing of vagina and construction of a penis can top \$100,000. E.g., Kim Folstad, *Man Who Became Woman Wants to Live as Man Again*, COX NEWS SERV., Mar. 10, 2001, Lifestyle, available at LEXIS, News, Cox News Service.

7. SUZANNE KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 121 (1978).

8. See Barnes, *supra* note 6, at 608-11 (noting the debate as to whether the origin of transsexualism is "psychological or physical").

9. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (7th Cir. 1984).

10. *Id.*

11. *Id.*

12. 204 F.3d 1187 (9th Cir. 2000).

13. See discussion *infra* Part II(A).

homosexual plaintiffs' Title VII sex discrimination claims by holding that discrimination based on one's "sexual orientation" is not discrimination "because of sex."¹⁴

The Ninth Circuit in *Schwenk* departed from the "anatomical sex" approach, declaring that the word "sex" in Title VII encompasses both biological sex and socially-constructed gender.¹⁵ The court combined the ban on "sex stereotyping" under the Supreme Court's decision in *Price Waterhouse v. Hopkins*¹⁶ with the recognition of male-on-male sex discrimination claims in another Supreme Court decision, *Oncale v. Sundowner Offshore Services, Inc.*,¹⁷ to conclude that discrimination based on one's failure to meet gender expectations is actionable under Title VII.¹⁸

The Ninth Circuit's decision created a split in authority with the Seventh Circuit, which continues to cite its "anatomical sex" rule with approval.¹⁹ Although the Ninth Circuit pronounced the expansive definition of sex in Title VII in the context of a transsexual plaintiff in *Schwenk*, which was followed in *Nichols v. Azteca Restaurant Enterprises, Inc.*,²⁰ a recent decision involving an effeminately-perceived male plaintiff, the court continues to invoke the rigid sex/sexual orientation dichotomy in rejecting homosexual plaintiffs' sex discrimination claims.²¹

The Ninth Circuit's "sex plus gender" approach in *Schwenk* is superior to the "anatomical sex" rule, whose underlying premises are flawed. The Seventh Circuit's continued adherence to such a rule is pure formalism and irreconcilable with *Price Waterhouse* and *Oncale*. Also, the Ninth Circuit's recent refusal to recognize sexual orientation discrimination as actionable sex stereotyping is inconsistent with, and a step backwards from, its dynamic reading of sex in *Schwenk*.

14. See discussion *infra* Part III.

15. 204 F.3d at 1202. While some scholars have treated this part of the *Schwenk* opinion as dicta, see, e.g., Taylor Flynn, *Transforming the Debate: Why We Need To Include Transgender Rights In The Struggles For Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 399 (2001), this Note treats it as a holding since it is part of the essential analytical foundations of the court's opinion. See discussion *infra* Part II(C). According to Judge Posner, a dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).

16. 490 U.S. 228 (1989).

17. 523 U.S. 75 (1998).

18. *Schwenk*, 204 F.3d at 1202.

19. See discussion *infra* Part III(E).

20. No. 99-35579, 2001 U.S. App. LEXIS 15899 (9th Cir. July 16, 2001).

21. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001).

Sex discrimination occurs primarily because of societal gender norms governing how a man or a woman should be.²² There is no theoretically satisfactory boundary between sex discrimination on the one hand and gender or sexual orientation discrimination on the other.²³ Such an unrealistic categorization will only lead to confusion and indeterminacy in law.

This Note examines a new development in federal Title VII sex discrimination jurisprudence specifically in the context of transsexual and homosexual plaintiffs, describing the courts' gradual shift away from formalism towards a more realistic approach in this area. Part II begins by examining the anatomical sex rule established by the three major pre-*Schwenk* decisions categorically rejecting transsexuals' Title VII claims. This section then considers the two subsequent Supreme Court decisions, *Price Waterhouse* and *Oncale*, and the Ninth Circuit's *Schwenk* opinion. Part II concludes that the *Schwenk* court correctly read *Price Waterhouse* and *Oncale* as mandating a departure from the anatomical sex approach.

Part III looks at the federal courts' confusing application of Title VII sex discrimination law to homosexual plaintiffs, arguing that the courts' use of the sex/sexual orientation dichotomy is unwise and inherently unworkable. Part IV analyzes and critiques the anatomical sex rule as a legal principle, and Part V examines the likelihood of success for future transsexual and homosexual Title VII sex discrimination plaintiffs. In the Conclusion, this Note argues that the courts should follow the Ninth Circuit's "sex plus gender" approach in *Schwenk* as being both consistent with *Price Waterhouse* and *Oncale* and superior to the anatomical sex rule. Finally, this Note contends that the courts should read Title VII dynamically to reach discrimination based on societal male/female binarism and heterosexual gender stereotypes.

II. WHAT DO WE MEAN BY DISCRIMINATION "BECAUSE OF SEX?"

A. *The Anatomical Sex Rule: Holloway; Sommers; and Ulane*

When a transsexual individual brings a sex discrimination claim under Title VII, federal courts confront the issue as to the meaning of

22. Franke, *supra* note 3, at 2 (arguing that "almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles").

23. See Valdes, *supra* note 3, at 12–16 (explaining how sex "conflates" with gender and sex and gender "conflate" with sexual orientation).

discrimination "because of sex."²⁴ Until the *Schwenk* decision, the Seventh, Eighth, and Ninth Circuits had categorically rejected transsexual plaintiffs' sex discrimination claims by defining the word "sex" narrowly to mean only one's biological or anatomical sex status as a man or a woman. The following cases are illustrative of the anatomical sex rule established by the three federal circuits.

The Ninth Circuit decision, *Holloway v. Arthur Andersen & Co.*,²⁵ involved a male-to-female transsexual plaintiff, Ramona Holloway.²⁶ Holloway started working for the defendant company Arthur Andersen in 1969 as Robert Holloway and started hormone treatments in February of 1974 in preparation for sex reassignment surgery.²⁷ In November of the same year, Holloway had her name changed on company records to Ramona.²⁸ Following these changes, on November 18, 1974, her employment was terminated.²⁹ Holloway sued the company under Title VII, alleging discrimination on the basis of her transsexuality.³⁰ The Ninth Circuit affirmed the district court's grant of the company's motion to dismiss for failure to state a claim, holding that discrimination "because she is a transsexual who chose to change her sex" is not discrimination "because of sex."³¹ The court declared that Congress intended the word "sex" to mean only the "traditional notions of sex," which, according to the court, did not embrace transsexuality.³²

The Eighth Circuit case, *Sommers v. Budget Marketing, Inc.*,³³ involved a self-described transsexual, Audra Sommers, who considered herself "a female with the anatomical body of a male."³⁴ Sommers was hired by the defendant company, Budget Marketing (Budget), on August 22, 1980, to do clerical work.³⁵ Two days later, Budget terminated her employment.³⁶ Sommers sued Budget under

24. See Franke, *supra* note 3, at 35. Professor Franke describes the two-part process the court pursues in determining the meaning of "discrimination because of . . . sex" in the context of a transsexual plaintiff: (1) identifying the wrong Title VII was intended to rectify (e.g., "discrimination against women [or men] because of their status as females [or males]") and (2) clarifying "what it means by female and male" (e.g., biological categorization). *Id.*

25. 566 F.2d 659 (9th Cir. 1977).

26. *Id.* at 659.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 661.

31. *Id.* at 664.

32. *Id.* at 662.

33. 667 F.2d 748 (8th Cir. 1982).

34. *Id.* at 749.

35. *Id.*

36. *Id.*

Title VII, alleging that the company fired her because of her sex.³⁷ The company countered that the termination was due to her misrepresentation of herself as an anatomical female in applying for the job.³⁸ Budget also alleged that its work environment was disrupted by other female employees' threats to quit if the company allowed Sommers to use the women's restroom.³⁹ The district court entered summary judgment for the company.⁴⁰ Upon appeal, Sommers argued for the expansion of Title VII's coverage to accommodate those "who are psychologically female, albeit biologically male."⁴¹ Nonetheless, the Eighth Circuit affirmed the summary judgment, holding that it is one's anatomy that determines "sex" within the meaning of Title VII.⁴²

In the Seventh Circuit case, *Ulane v. Eastern Airlines, Inc.*,⁴³ the plaintiff pilot, a male-to-female transsexual, was hired by the defendant Eastern Airlines in 1968 as Kenneth Ulane.⁴⁴ Ulane had "felt like a female" since early childhood.⁴⁵ In 1980, Kenneth-turned-Karen underwent sex reassignment surgery.⁴⁶ Ulane succeeded in having her birth certificate amended to reflect her self-identified female gender and also in having the FAA certify her for flight status as a female.⁴⁷ In 1981, Ulane was fired by Eastern Airlines, and she sued the company for sex discrimination under Title VII.⁴⁸ The district court entered judgment in favor of Ulane after a bench trial, holding that the word "sex" in Title VII encompasses "sexual identity," thus awarding her reinstatement as a flying officer.⁴⁹ The Seventh Circuit, however, reversed, holding that the term "sex" in Title VII refers only to a "biological male or biological female."⁵⁰

37. *Id.*

38. *Id.* at 748.

39. *Id.* at 748-49.

40. *Id.* at 748.

41. *Id.* at 749.

42. *Id.* (holding that Audra, "for the purposes of Title VII, is male because she is an anatomical male").

43. 742 F.2d 1081 (7th Cir. 1984).

44. *Id.* at 1082.

45. *Id.* at 1083 (noting that Ulane was diagnosed as a transsexual in 1979).

46. *Id.*

47. *Id.*

48. *Id.* at 1082.

49. *Id.* at 1082-84.

50. *Id.* at 1087.

B. The Meaning of *Price Waterhouse* and *Oncale*

Two Supreme Court cases decided after *Holloway*, *Sommers*, and *Ulane* cast doubt on the viability of these decisions, signaling a new turn in federal sex discrimination law.

In *Price Waterhouse v. Hopkins*, a 1989 decision, the plaintiff, a female senior manager in the defendant accounting company, sued the company after she was denied partnership partly because she was "macho."⁵¹ She had been advised, if she wished to become a partner of the firm, to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁵²

Writing for the Court, Justice Brennan first set forth the critical inquiry: "whether gender was a factor" in the employment decision.⁵³ He then declared that employment decisions based on "sex stereotypes" are actionable under Title VII because "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."⁵⁴ The Court justified this "sex stereotyping" rule by treating the language of Title VII as dynamic, not static. Said the Court:

As for the legal relevance of sex stereotyping, *we are beyond the day* when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.⁵⁵

Nine years after *Price Waterhouse*, in 1998, the Court in *Oncale v. Sundowner Offshore Services, Inc.*⁵⁶ addressed the issue of whether male-on-male sexual harassment is actionable under Title VII.⁵⁷ Before *Oncale*, the federal circuits were divided as to whether Title VII applies to same-sex sexual harassment claims.⁵⁸ In that case, Joseph

51. 490 U.S. 228, 231–35 (1989).

52. *Id.* at 235.

53. *Id.* at 241. Throughout the opinion, the Court used the words "sex" and "gender" interchangeably.

54. *Id.* at 250.

55. *Id.* at 251 (emphasis added) (citation and internal quotation marks omitted).

56. 523 U.S. 75 (1998).

57. *Id.* at 76. A "sexual harassment" Title VII claim refers to a claim alleging an "abusive working environment" created by "sufficiently severe or pervasive" sexual harassment, which is actionable under Title VII as a form of sex discrimination. See *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

58. Some courts had held that male-on-male sex discrimination is never actionable under Title VII. E.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996). Other

Oncale, a male employee, sued his former employer and several employees under Title VII alleging sexual harassment.⁵⁹ Oncale alleged that he was subjected to physical sexual attacks by his male supervisors and co-workers.⁶⁰ He also alleged that he was called names "suggesting homosexuality."⁶¹ The district court granted the employer's summary judgment motion by holding that same-sex sex discrimination is not actionable under Title VII, and the Fifth Circuit affirmed.⁶²

A unanimous Court, in a decision written by Justice Scalia, reversed, holding that Title VII reaches same-sex, as well as male-on-female or female-on-male, sex discrimination.⁶³ In so holding, the Court reasoned that "[s]tatutory prohibitions often go beyond the principal evil to cover *reasonably comparable evils*, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁶⁴

While rejecting a per-se rule against same-sex sex discrimination claims, however, the Court emphasized the statutory "because of . . . sex" language as limiting the scope of actionable discrimination.⁶⁵ Specifically, the Court held that the critical inquiry is whether "*members of one sex* are exposed to disadvantageous terms or conditions of employment to which *members of the other sex* are not exposed."⁶⁶ This membership test suggests that there are only two memberships of sex: male and female.

Taken together, these two opinions expanded the scope of sex discrimination covered by Title VII in establishing at least the following: (1) that Title VII reaches sex stereotyping; (2) that the Act reaches not only those evils that Congress initially hoped to eliminate but also "reasonably comparable evils"; and (3) that these evils may change over time. The caveat is, of course, *Oncale's* "membership" language, which appears to delimit the scope of the Act. The question is whether the anatomical sex rule survived *Price Waterhouse* and *Oncale*.

courts had held that same-sex sexual discrimination claims are actionable only when the plaintiff could prove that the alleged harasser was homosexual. *E.g.*, *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996).

59. *Oncale*, 523 U.S. at 77.

60. *Id.*

61. *Id.* There is no mention in the opinion as to whether Oncale was homosexual.

62. *Id.*

63. *Id.* at 78.

64. *Id.* at 79 (emphasis added).

65. *Id.* at 80 (holding that Title VII is "directed only at discrimination because of sex").

66. *Id.* (emphasis added) (citation omitted).

This issue subsequently arose in *Schwenk*, albeit in the context of a now-invalidated statute, the Gender Motivated Violence Act (GMVA).⁶⁷

C. *Schwenk: A Departure from the Anatomical Sex Rule*

In a unanimous decision by a three-judge panel, the Ninth Circuit in *Schwenk v. Hartford* declared that the *Holloway* line of cases had effectively been “overruled” by the “logic and language” of *Price Waterhouse* and *Oncale*.⁶⁸ The facts of *Schwenk* are as follows. Douglas (Crystal) Schwenk was a self-identified pre-operative male-to-female transsexual, who claimed to have been “psychologically female” since the age of twelve.⁶⁹ Known as “Crystal Marie,” Schwenk “[had] shoulder-length hair, [was] extremely soft-spoken, [cried] easily, and [used] make-up and other female grooming products when possible.”⁷⁰

Schwenk was incarcerated in 1993 in Washington’s all-male penitentiary, where the defendant Robert Mitchell worked as a prison guard.⁷¹ Upon her arrival, Schwenk told Mitchell about her intention to have sex reassignment surgery as well as the fact that she was a transsexual.⁷² From that time forward, Mitchell allegedly subjected Schwenk to a series of “sexual advances and harassment,” which led to a “sexual assault.”⁷³

Subsequently, Schwenk sued Mitchell and other prison officials for, inter alia, a violation of the GMVA, alleging attempted rape by Mitchell.⁷⁴ The Act prohibited “gender-motivated violence,” that is, “crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”⁷⁵ The district court denied Mitchell’s summary judgment motion on Schwenk’s GMVA claim, and Mitchell appealed, asserting,

67. Gender Motivated Violence Act, 42 U.S.C. § 13981 (1994). The Supreme Court held that neither the Commerce Clause nor the Fourteenth Amendment gave Congress authority to enact this section. See *United States v. Morrison*, 529 U.S. 598 (2000).

68. *Schwenk*, 204 F.3d at 1201.

69. *Id.* at 1193.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* Schwenk alleged that Mitchell began his sexual harassment with “winking, performing explicit actions imitating oral sex, making obscene and threatening comments, watching [Schwenk] in the shower while ‘grinding’ his hand on his crotch area, and repeatedly demanding that [Schwenk] engage in sexual acts with him.” *Id.*

74. See *id.* at 1192.

75. 42 U.S.C. § 13981(c); *Schwenk*, 204 F.3d at 1198.

inter alia, that Schwenk failed to state a claim under the GMVA because the Act did not cover transsexuals.⁷⁶

First, the Ninth Circuit held that proof of gender motivation under the GMVA proceeds in the same way as proof of sex discrimination under Title VII.⁷⁷ The court then rejected Mitchell's argument that male-on-male sexual attack is not "gender-motivated" within the meaning of the Act, concluding that its reading of the GMVA as proscribing male-on-male sexual violence is consistent with the *Oncale* proposition that male-on-male sex discrimination is actionable under Title VII.⁷⁸

The court next considered Mitchell's argument that Schwenk's GMVA claim lacked merit because Schwenk alleged only that Mitchell's sexual violence occurred because of her transsexuality, which was not an element of gender.⁷⁹ Thus, the court confronted the issue of the meaning of gender in the GMVA, which, the court concluded, was synonymous with the meaning of sex in Title VII. The court had to decide whether the anatomical sex rule under its *Holloway* decision was still good law after *Price Waterhouse* and *Oncale*.

The Ninth Circuit refused to follow its *Holloway* precedent. It declared that both the GMVA and Title VII prohibit "discrimination based on gender as well as sex."⁸⁰ The court held that, under *Price Waterhouse*, Title VII prohibits "discrimination because one fails to act in the way expected of a man or woman."⁸¹ The court proclaimed the ground-breaking rule that the word "sex" in Title VII "encompasses both *sex*—that is, the biological differences between men and women—and *gender*."⁸² With that holding, *Holloway* was invalidated.

In applying this principle, the court found sufficient evidence to conclude that "Mitchell's actions were motivated, at least in part, by Schwenk's gender," that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor."⁸³

Schwenk's interpretation of *Price Waterhouse* as extending Title VII's reach to gender discrimination is sound. Discrimination in the form of sex stereotypes is discrimination based on gender, that is, one's socially-expected masculine or feminine characteristics. Trans-

76. 204 F.3d at 1199.

77. *Id.* at 1200-01 (citing S. REP. NO. 103-138, at 53 (1993); S. REP. NO. 102-197, pt. III.C.4.c., at 50 (1991)).

78. *Id.* at 1199-1200.

79. *Id.* at 1200.

80. *Id.*

81. *Id.*

82. *Id.* (emphasis added).

83. *Id.* at 1202 (noting that Mitchell's demands for sex began after his discovery of Schwenk's transsexuality and escalated as he saw Schwenk's femininity).

sexuals are often victims of sex stereotypes; they are discriminated against because of their perceived failure to conform to their male or female sex status. After all, discrimination against a female because of her "macho" personality is hardly distinguishable from discrimination against a male-to-female transsexual because of her assumption of "femininity." Also, from a policy perspective, the goal of Title VII, which is "to drive employers to *focus on qualifications* rather than on . . . sex"⁸⁴ favors the *Schwenk* approach. Sex discrimination exists because of the normative values attached to sex by society.⁸⁵ Proscribing discrimination that is based on one's transsexuality, or gender identity, would further the Title VII goal by closing a loophole in the sex discrimination law.

Schwenk is the first case to re-evaluate the anatomical sex rule after *Price Waterhouse* and *Oncale* in the context of transsexuals. *Schwenk* is also the first case to expressly declare that *Price Waterhouse* overruled the *Holloway* line of cases. Since *Schwenk*, one district court has commented on the issue of Title VII's applicability to transsexuals, dismissing a female-to-male transsexual plaintiff's sex discrimination claim on other grounds while noting the uncertainty as to whether the *Price Waterhouse* sex stereotyping rule applies to transsexuals.⁸⁶ Also, more recently, a court in New Jersey, after discussing federal case law including *Price Waterhouse* and *Schwenk*, held that sex discrimination under the state's Law Against Discrimination "includes gender discrimination so as to protect [the male-to-female transsexual] plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman."⁸⁷

In the following section, this Note addresses the federal circuits' inconsistent application of Title VII sex discrimination law to homosexual plaintiffs after *Price Waterhouse* and *Oncale*. The success of homosexual plaintiffs in seeking redress for sex discrimination under Title VII, like that of their transsexual counterparts, depends on how courts interpret the words "because of sex." Under the anatomical sex regime, the word "sex" encompasses neither transsexuality nor homosexuality (sexual orientation).⁸⁸ The question is how *Price Waterhouse* and *Oncale* undermine a categorical rejection of homosexual plaintiffs' Title VII claims for discrimination based on sexual orientation.

84. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (emphasis added).

85. Franke, *supra* note 3, at 2.

86. *Broadus v. State Farm Ins. Co.*, No. 98-4254, 2000 U.S. Dist. LEXIS 19919, at *11-14 (W.D. Mo. Oct. 11, 2000).

87. *Enriquez v. West Jersey Health Sys.*, Nos. A-2017-99T5, A-5581-99T5, 2001 N.J. Super. LEXIS 283, at *2-21 (N.J. Super. Ct. App. Div. July 3, 2001).

88. *E.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984).

The First and Second Circuits appear to have departed from the anatomical sex rule by suggesting that *Price Waterhouse's* sex stereotyping rule provides homosexual plaintiffs with another theory in which to plead sex discrimination under Title VII while the Seventh Circuit continues to cite *Ulane* with approval.⁸⁹ At the same time, these three circuits, as well as the Ninth Circuit, invariably reject homosexual plaintiffs' "sexual orientation" discrimination claims.⁹⁰ The Eighth Circuit, however, recently rejected a rigid application of the sex/sexual orientation categorization.⁹¹

III. THE MEANING OF "SEX" IN THE HOMOSEXUAL CONTEXT

A. First Circuit: *Higgins v. New Balance Athletic Shoe, Inc.*⁹²

Before *Schwenk*, the First Circuit in *Higgins v. New Balance Athletic Shoe, Inc.* had suggested that discrimination based on the failure to meet stereotyped expectations of femininity and masculinity is actionable under *Price Waterhouse* in the context of a homosexual Title VII plaintiff.⁹³ *Higgins* involved a male homosexual plaintiff, Robert Higgins, who sued his former employer for, inter alia, sexual harassment under Title VII.⁹⁴ Higgins alleged that he was subjected to discriminatory remarks and actions by his supervisor and co-workers because of his homosexuality.⁹⁵ The district court granted the defendant's summary judgment motion, holding that Higgins failed to allege discrimination "because of sex,"⁹⁶ and the First Circuit affirmed.⁹⁷

Relying on *Price Waterhouse* and *Oncale*, the First Circuit held that "a man can ground a claim on evidence that other men discriminated against him *because he did not meet stereotyped expectations of masculinity*."⁹⁸ The court, however, dismissed Higgins's sex stereotyping argument because he neither argued such a theory nor mentioned the *Price Waterhouse* decision at the lower court level.⁹⁹

89. See discussion *infra* Part III.

90. See discussion *infra* Part III.

91. See discussion *infra* Part III.

92. 194 F.3d 252 (1st Cir. 1999).

93. *Id.* at 261 n.4.

94. *Id.* at 256.

95. *Id.*

96. *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 75-76 (D. Me. 1998).

97. 194 F.3d at 261.

98. *Id.* at 261 n.4 (emphasis added).

99. *Id.* at 258-59.

While recognizing the sex stereotyping rule under *Price Waterhouse* and the viability of male-on-male sex discrimination claims under *Oncale*, the court categorically rejected Higgins's sexual orientation discrimination claim as falling outside the scope of Title VII. The court quoted the *Oncale* "sex membership" test as delineating the statutory "because of sex" requirement.¹⁰⁰ The court went on to hold that it is "settled law" that "as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."¹⁰¹

Does this approach make sense? According to the opinion, a homosexual male may seek redress under Title VII for stereotypes implying his perceived "femininity" but not for stereotypes connoting his "homosexuality." Isn't having a sexual partner who is of a different sex one of the societal gender norms? If a person is discriminated against because of his or her having a sexual partner of the same sex, it necessarily follows that he or she is discriminated against because of his or her failure to conform to gender-based social expectations.

By accepting the *Price Waterhouse* sex stereotyping rule, however, the First Circuit, in effect, departed from the anatomical sex rule. While recognizing gender discrimination as covered by Title VII, the First Circuit failed to recognize that discrimination based on sexual orientation is gender discrimination.

B. Second Circuit: *Simonton v. Runyon*¹⁰²

The Second Circuit decision, *Simonton v. Runyon*, reflects the court's uncertainty as to the applicability of the *Price Waterhouse* sex stereotyping rule to homosexual sexual harassment plaintiffs. In that case, a homosexual male postal worker, Dwayne Simonton, sued his employer under Title VII for sex discrimination, alleging that his co-workers repeatedly harassed him with such comments as "go fuck yourself, fag," "suck my dick," "so you like it up the ass?", and "fucking faggot."¹⁰³ Simonton's allegations also included notes posted in the employees' bathroom associating his name with that of a celebrity with AIDS, pornographic pictures posted in his work area, male dolls placed in his car, as well as copies of *Playgirl* magazine sent to his home.¹⁰⁴ The district court dismissed Simonton's claim as a non-

100. *Id.*

101. *Id.* at 259.

102. 232 F.3d 33 (2d Cir. 2000).

103. *Id.* at 34-35.

104. *Id.*

actionable sexual orientation discrimination claim, and the Second Circuit affirmed.¹⁰⁵

First, the Second Circuit followed the First Circuit's suit in drawing a line between discrimination based on "sex" and discrimination based on "sexual activity regardless of gender," holding that only the former is actionable under Title VII.¹⁰⁶ Relying on *Oncale*, the court held that the word "sex" in Title VII refers only to "membership in a class delineated by gender."¹⁰⁷ Under this membership test, Simonton's claim failed because sexual orientation is not a gender-delineated construct in the court's opinion.¹⁰⁸

Second, while noting the interpretation of *Price Waterhouse* given by *Schwenk* and *Higgins*, the Second Circuit did not reach the merits of the issue as to whether "gender discrimination" or "discrimination based on a failure to conform to gender norms" is cognizable under Title VII.¹⁰⁹ The court cautioned that the *Price Waterhouse* sex stereotyping rule would not "bootstrap" sexual orientation claims into Title VII because "not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."¹¹⁰ The court refused to consider the issue, finding "no basis in the record to surmise" that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.¹¹¹

The Second Circuit appears to accept the First and Ninth Circuits' reading of *Price Waterhouse* as proscribing gender discrimination. While the court refused to reach the issue, it did find Simonton's sex stereotyping argument, while insufficiently pled, "more substantial" than his other arguments.¹¹² Also, the court used the word "gender" in invoking *Oncale*'s membership test when, in fact, Justice Scalia in writing the *Oncale* opinion never used the word "gender."¹¹³ At the same time, however, the Second Circuit categorically rejects sexual orientation discrimination claims.

105. *Id.* at 34.

106. *Id.* at 36.

107. *Id.*

108. *Id.*

109. *Id.* at 37-38.

110. *Id.* at 38.

111. *Id.*

112. *Id.* at 37.

113. It is highly likely that Justice Scalia, in writing the opinion, was aware of the different meanings attached to the words "sex" and "gender." Indeed, he had, in the past, noted "the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to sexes" that the word "gender" has acquired. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

Simonton represents the Second Circuit's recognition of the broad sweep of *Price Waterhouse* and the court's fear, at the same time, of opening the floodgate to homosexual plaintiffs' sexual harassment claims alleging sex stereotyping. But, is such a concern legitimate or even necessary? Recognizing otherwise valid sexual orientation discrimination claims¹¹⁴ will decrease, not increase, the number of such claims in the long run by deterring discriminatory behaviors against homosexual individuals in the workplace. The court's refusal to consider *Simonton*'s sex stereotyping argument is indefensible, especially given the facts indicating discrimination with the use of stereotypes connoting femininity: dolls and *Playgirl* magazine.¹¹⁵

C. Ninth Circuit: *Rene v. MGM Grand Hotel, Inc.*¹¹⁶

One year after the *Schwenk* decision, which recognized gender non-conformity discrimination as actionable under Title VII, the Ninth Circuit in *Rene v. MGM Grand Hotel, Inc.* held that sexual orientation discrimination falls outside the scope of the Act. In that case, Medina Rene, a homosexual male, sued MGM Grand Hotel (MGM) under Title VII for sexual harassment.¹¹⁷ Rene alleged that, in an all-male working environment at MGM, he had been "grabbed in the crotch and poked in the anus on numerous occasions"; "caressed, hugged, whistled and blown kisses at"; and "called 'sweetheart' and 'Muneca.'"¹¹⁸ Despite the finding that the alleged harassment was "so objectively offensive that it created a hostile work environment,"¹¹⁹ the district court granted MGM's summary judgment motion because the alleged discrimination was predicated on his homosexuality, and the Ninth Circuit affirmed.¹²⁰

114. Beyond the "because of sex" threshold, homosexual sexual harassment plaintiffs must also establish conduct that is "severe or pervasive enough to create an objectively hostile or abusive work environment" to recover. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (citation omitted).

115. *Simonton* later stated that he "doesn't grasp the distinction between sexual-orientation discrimination and the evolving theory of bias based on nonconformity with 'gender norms.'" Jess Bravin, *Courts Open Alternate Route to Extend Job-Bias Laws to Homosexuals*, WALL ST. J., Sep. 22, 2000, at B1, available at 2000 WL-WSJ 26610639.

116. 243 F.3d 1206 (9th Cir. 2001).

117. *Id.* at 1207.

118. *Id.* The word "Muneca" means "doll" in Spanish. *Id.* at 1207 n.2.

119. *Id.* at 1208.

120. *Id.* at 1207. The court emphasized Rene's own statement that he was harassed "because he was gay." *Id.* at 1210. However, Judge Nelson in dissent argued that "[t]he subjective belief of the victim of sexual harassment that there is a non-sex-related reason for the harassment is immaterial." *Id.* at 1211 (Nelson, J., dissenting).

While recognizing that the word sex in Title VII "refers to gender,"¹²¹ the Ninth Circuit followed the "eloquent words of the First Circuit" in *Higgins* that "Title VII does not proscribe harassment simply because of sexual orientation" no matter how noxious it may be.¹²² In so holding, the Ninth Circuit declared that its pre-*Price Waterhouse* and *Oncale* precedent, *DeSantis v. Telephone & Telegraph Co.*,¹²³ in which the court held that sexual orientation discrimination is not actionable under Title VII, is still good law.¹²⁴ Also, while noting that the facts of the case are similar to those in *Oncale*, the court simply held that *Oncale* did not establish that the harassment alleged in that case was actionable under Title VII but merely stands for a rejection of the per-se rule against same-sex sexual harassment claims.¹²⁵ The Ninth Circuit never mentioned *Price Waterhouse* or *Schwenk* throughout the opinion.¹²⁶

The *Rene* decision is inconsistent with the logic and language of *Price Waterhouse* and *Oncale* as articulated in *Schwenk*. Seven months before the *Rene* decision, the Ninth Circuit had suggested, in the context of immigration-asylum law, that the notions of gender and sexual orientation are connected in comprising one's core identity. In *Hernandez-Montiel v. INS*,¹²⁷ a case involving a homosexual and effeminately-perceived male plaintiff in Mexico, the Ninth Circuit held that "sexual orientation" as well as "sexual identity" are immutable and "so fundamental to one's identity that a person should not be required to abandon them," concluding that the plaintiff was entitled to asylum as belonging to a "particular social group" protected under the Immigration and Nationality Act.¹²⁸ In so holding, the court noted that "gay men with female sexual identities" are discriminated against because they are "perceived to assume the stereotypical 'female,' i.e., passive, role in gay relationships."¹²⁹

Also, in *Nichols v. Azteca Restaurant Enterprises, Inc.*,¹³⁰ a recent case involving, inter alia, a Title VII sexual harassment claim brought

121. *Id.* at 1209.

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

123. 608 F.2d 327, 329-30 (9th Cir. 1979).

124. *Rene*, 243 F.3d at 1209.

125. *Id.* at 1208. This statement ignores the fact that the *Oncale* Court did remand the case to the lower court. Indeed, "[i]f the facts did . . . not potentially support a case of sex discrimination, there would have been no basis for a remand" *Id.* at 1211 (Nelson, J., dissenting).

126. *Rene*, in his briefs to the Ninth Circuit, did not mention *Price Waterhouse* or *Schwenk*. See Appellant's Opening and Reply Briefs, *Rene* (No. 98-16924).

127. 225 F.3d 1084 (9th Cir. 2000).

128. *Id.* at 1093.

129. *Id.* at 1094.

130. No. 99-35579, 2001 U.S. App. LEXIS 15899 (9th Cir. July 16, 2001).

by Antonio Sanchez, an effeminately-perceived male, the Ninth Circuit, relying on *Price Waterhouse* and citing *Schwenk*, held that the alleged verbal abuse reflecting "a belief that Sanchez did not act as a man should act" is actionable under Title VII.¹³¹ There, Sanchez, an employee of the defendant restaurant was called such names as a "fag-got" and a "fucking female whore" and was mocked for walking and carrying his serving tray "like a woman."¹³² He was also referred to as "she" and "her."¹³³ In holding that the "because of sex" requirement is met under the facts of the case, the court declared that the holding in *DeSantis* that discrimination because of effeminacy is not actionable under Title VII must lose as it "conflicts with *Price Waterhouse*."¹³⁴

On the court's rationale in *Schwenk*, *Hernandez-Montiel*, and *Nichols*, it appears that at least effeminately-perceived male (or masculine-appearing female) homosexual plaintiffs are protected under Title VII. However, whether effeminately-perceived (or masculine-appearing) or otherwise, homosexual individuals suffer gender discrimination when they are discriminated against based on their sexual orientation; to the extent that one's sexual orientation is deemed based on his or her sex status in conjunction with the sex status of his or her partners, sexual orientation is necessarily gender-based.¹³⁵ The *Rene* decision is inconsistent with the dynamic definition of the word sex in Title VII as pronounced in *Price Waterhouse*, which the Ninth Circuit properly followed in *Schwenk* and *Nichols*.¹³⁶

D. Eighth Circuit: *Schmedding v. Tnemec Co.*¹³⁷

The Eighth Circuit's decision in *Schmedding v. Tnemec Co.* illustrates the court's recognition of the impracticality of the sex/sexual

131. *Id.* at *15-18. Similarly, the First Circuit has held that under the Equal Credit Opportunity Act (ECOA), a biological male plaintiff who is dressed in "traditionally feminine attire" may seek redress under the *Price Waterhouse* sex stereotyping rule for discrimination based on the perception that his "attire did not accord with his male gender." *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214-16 (1st Cir. 2000) (relying on Title VII case law in interpreting the ECOA).

132. *Nichols*, 2001 U.S. App. LEXIS 15899, at *3.

133. *Id.*

134. *Id.* at *17-18 (citing *DeSantis v. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979)).

135. Valdes, *supra* note 3, at 25-16.

136. Indeed, the *DeSantis* court, in holding that "discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism (*Holloway*), does not fall within the purview of Title VII," expressly relied on *Holloway* and its restrictive definition of "sex" in the Act. See *DeSantis*, 608 F.2d at 331-32. As *Holloway* is no longer good law after *Price Waterhouse*, see discussion *supra* II(C), the *Rene* court's reliance on *DeSantis* for the proposition that discrimination because of homosexuality is not actionable is on shaky ground, at best.

137. 187 F.3d 862 (8th Cir. 1999).

orientation dichotomy. In *Schmedding*, Nicholas Schmedding sued his employer, Tnemec, alleging, inter alia, sexual harassment under Title VII.¹³⁸ The facts alleged were very similar to those alleged in *Oncale* and *Rene*; Schmedding alleged that his co-workers taunted him for being a homosexual, spread rumors about his perceived sexual orientation, and subjected him to other harassment such as patting him on the buttocks and asking him to perform sexual acts.¹³⁹

Despite Schmedding's argument that his alleged harassers' motivation was to "debase his masculinity" and not to attack his perceived homosexuality, the district court granted Tnemec's motion to dismiss by categorizing Schmedding's claim as a sexual orientation discrimination claim.¹⁴⁰ Upon Schmedding's appeal, the Eighth Circuit remanded the case for further consideration in light of *Oncale*.¹⁴¹ However, the district court, again, granted Tnemec's renewed motion to dismiss on the same ground.¹⁴²

Upon Schmedding's further appeal, the Eighth Circuit held that Schmedding alleged sufficient facts to support his sexual harassment claim under Title VII, reversing the trial court's dismissal.¹⁴³ The court emphasized that the sexual harassment claim alleged by the plaintiff in *Oncale* also included an allegation that he had been taunted as being a homosexual.¹⁴⁴ The court held that mere inclusion in Schmedding's claim of some "epithets connoting homosexuality" does not "transform" his claim from one alleging sexual harassment to another alleging harassment based on sexual orientation.¹⁴⁵

The Eighth Circuit, while not recognizing that sexual orientation discrimination is actionable under Title VII,¹⁴⁶ refused to pursue a rigid sex/sexual orientation categorization. Schmedding alleged in his complaint that he was called names such as "homo" and "jerk off."¹⁴⁷ How can the court determine in a principled manner whether such "epithets" were used to attack Schmedding's "homosexuality" or to

138. *Id.* at 863.

139. *Id.* at 865.

140. *Id.* at 863.

141. *Id.* at 864.

142. *Id.*

143. *Id.* at 865.

144. *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998)).

145. *Id.*

146. The court remanded the case to the district court "with instructions that plaintiff be allowed to amend his complaint and proceed with the case." *Id.* at 865. In other words, Schmedding could seek redress under Title VII upon deleting certain "epithets connoting homosexuality" in his complaint. *Id.*

147. *Id.*

debase his "masculinity?" Such a classification, even if possible, is hardly meaningful in light of Title VII's statutory purpose.

*E. Seventh Circuit: Spearman v. Ford Motor Co.*¹⁴⁸

The Seventh Circuit still adheres to the anatomical sex rule and *Ulane*. In *Spearman v. Ford Motor Co.*, Edison Spearman, a homosexual male, sued his employer, Ford Motor Company (Ford), under Title VII, alleging, inter alia, sexual harassment.¹⁴⁹ While working at Ford's stamping plant as a "blanket operator," Spearman was harassed by his co-workers with phrases such as "selfish bitch," "gay ass," "f - [Spearman's] gay faggot ass up," "[y]ou f -ing jack-off," and "pussy-ass."¹⁵⁰ Spearman was also offended by graffiti: one on the bulletin board stating "AIDS kills faggots dead . . . RuPaul, RuSpearman" and another outside a portable toilet stating "Ed Sperman [sic] is a fag and has AIDS" and "Edison Sperman [sic] is gay."¹⁵¹

The district court found sufficient evidence to conclude that Spearman was harassed because of his sex, noting that he "appears to have been singled out because of the way he projected his gender, or how his gender was perceived by his co-workers."¹⁵² However, while the court granted Ford's summary judgment motion against Spearman's sexual harassment claim on other grounds,¹⁵³ the Seventh Circuit affirmed the summary judgment on the ground that Spearman was not harassed because of his sex: he was harassed not because he was a man but because he was gay.¹⁵⁴ Quoting *Ulane*, the court invoked the anatomical sex rule, holding that the word "sex" means only "biological male or biological female" and not "one's sexuality or sexual orientation."¹⁵⁵

Spearman, relying on *Price Waterhouse*, argued that his harassers were motivated by "sex stereotypes" due to Spearman's perceived failure to conform to the "masculine" environment at the Ford plant.¹⁵⁶ Specifically, he argued that his harassers engaged in sex stereotyping in using the word "bitch," which is usually associated with a woman,

148. 231 F.3d 1080 (7th Cir. 2000).

149. *Id.* at 1082.

150. *Id.* at 1082-83.

151. *Id.* at 1083 (alteration in original). RuPaul is a "black, male drag queen and entertainer." *Id.* at 1083 n.2.

152. *Spearman v. Ford Motor Co.*, No. 98-C0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999).

153. *Id.* (holding that Spearman failed to show that the harassment was severe or pervasive enough to cause a hostile work environment).

154. 231 F.3d at 1085-86.

155. *Id.* at 1084, quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

156. *Id.* at 1085.

as well as in associating Spearman with a drag queen (RuPaul).¹⁵⁷ However, the court held that *Price Waterhouse* was inapplicable because Spearman's co-workers used stereotypical statements to "express their hostility to [Spearman's] perceived homosexuality" and "not to harass him because he is a man."¹⁵⁸ The court simply stated that the word "bitch," according to another utility worker at Ford, meant not only a "woman" but also a "faggot."¹⁵⁹ The court held that the graffiti depicting Spearman as "gay," a "fag," and a drag queen confirmed Ford workers' hostility to Spearman's "sexual orientation, and not to his sex."¹⁶⁰

The Seventh Circuit's adherence to the anatomical sex rule is irreconcilable with the First and Ninth Circuits' interpretation of *Price Waterhouse* in *Higgins* and *Schwenk*. The Seventh Circuit reads *Price Waterhouse* to hold that Title VII reaches sex stereotyping that is strictly based on one's anatomical male/female status. This reading of *Price Waterhouse*, however, simply misses the point. As articulated by the Ninth Circuit in *Schwenk*, the sex stereotyping rule effectively renders gender-based discrimination actionable under Title VII. Under *Price Waterhouse*, Spearman clearly alleged gender discrimination: he suffered stereotypes attached to homosexuals, who fail to conform to socially-constructed "heterosexual" gender norms. Indeed, there is no meaningful distinction between the stereotypes attached to the words "macho" (when applied to a woman) and "faggot" (when applied to a man). Both words represent society's negative treatment towards those who fail to meet gender roles perceived by society as congruous with one's anatomical sex.¹⁶¹

Also, the Seventh Circuit's reliance on *Oncale* for the proposition that the "because of sex" statutory language operates to bar sexual orientation discrimination claims¹⁶² is unwarranted. While emphasizing the language, the *Oncale* Court did not say that sexual orientation discrimination can never fall within the "entire spectrum of disparate treatment of men and women in employment."¹⁶³ Indeed, Justice

157. *Id.* at 1085–86.

158. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

159. *Id.* at 1086.

160. *Id.*

161. See Valdes, *supra* note 3, at 12–16 (arguing that the words "queer," "sissy," "dyke," and "tomboy" carry a "common sting" precisely because "sex," "gender," and "sexual orientation" conflate to "forcibly homogenize human personalities, including sexualities"). Professor Valdes explains that because "sex" conflates with "gender" and both "sex" and "gender" conflate with "sexual orientation," any sexual orientation discrimination is "literally, effectively, and unavoidably" sex discrimination. *Id.*

162. See *Spearman*, 231 F.3d at 1085.

163. 523 U.S. at 78 (citation omitted).

Scalia refrained from categorically rejecting the same-sex sex discrimination claims even though such discrimination was "assuredly not the principal evil Congress was concerned with when it enacted Title VII."¹⁶⁴ *Price Waterhouse* and *Oncale*, read together, do not support a per se rejection of a Title VII claim for discrimination based on one's homosexual or transsexual status.

In the following section, this Note critiques the Seventh Circuit's continued adherence to the anatomical sex rule, arguing that such a rule is not only unwarranted under *Price Waterhouse* and *Oncale* but also unjustifiable as a legal principle.

IV. THE ANATOMICAL SEX RULE IS UNJUSTIFIABLE.

As discussed, the sex-means-only-anatomical-sex rule as followed in cases like *Holloway*, *Sommers*, and *Ulane* operated to categorically exclude transsexuals as a class from Title VII's protection. The exclusion of transsexuals was justified with the following line of reasoning: (1) that the plain meaning of the word "sex" is nothing more than the biological male/female dichotomy;¹⁶⁵ (2) that Congress intended the word "sex" to be interpreted consistently with the traditional notions of sex, which are based on individuals' anatomical sex;¹⁶⁶ (3) that one's biological facts include "chromosomes, internal and external genitalia, hormones, and gonads";¹⁶⁷ and (4) that transsexualism is a psychological, not biological, phenomenon.¹⁶⁸ Thus held, transsexuals should be excluded from Title VII's protection as a class.¹⁶⁹

This reasoning, however, is flawed because it is premised upon faulty assumptions. First, the notion that the plain meaning of the word "sex" is nothing more than one's biological facts ignores the changing societal practices treating transsexuals in accordance with their self-described gender. Second, Title VII's legislative history does not show what Congress intended the word "sex" to mean. Finally, recent medical studies suggest that transsexualism is a biological phenomenon.

164. *Id.* at 79.

165. *E.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

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

167. *E.g.*, *Ulane*, 742 F.2d at 1083 n.6.

168. *Id.* at 1083 n.3 ("Transsexualism is a condition that exists when a physiologically normal person (i.e., not a hermaphrodite—a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex.").

169. *Id.* at 1085.

A. *Is the Plain Meaning of the Word "Sex" Only Anatomical?*

In giving the word "sex" its plain meaning, the *Holloway* line of cases held that the "because of sex" language of Title VII operates to exclude transsexuals from the scope of Title VII. According to the maxim of textual analysis, the words of Title VII, to the extent that they are not otherwise defined, "should be given their ordinary, common meaning."¹⁷⁰ Justice Thomas's short statement in his concurrence in *Oncale*, while not joined by any other Justices, illustrates the view that the scope of Title VII is delineated by the plain meaning of the language "because of . . . sex."¹⁷¹

The plain meaning of the word "sex" in Title VII was held to be defined by "the traditional notions of sex," which was, in turn, held to be based on one's anatomical factors.¹⁷² For example, the *Holloway* court cited the definition of "sex" given by Webster's Seventh New Collegiate Dictionary as "traditional definition based on anatomical characteristics"; the dictionary defines sex as (1) "two [male or female] divisions of organisms" or (2) "the sum of the . . . peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females."¹⁷³

In *Holloway*, the Ninth Circuit distinguished a born female who is discriminated against because she is a woman (protected by Title VII) from a male-to-female transsexual who is discriminated against "because she is a transsexual who chose to change her sex" (unprotected).¹⁷⁴ Is there any meaningful reason why the court should draw a line between a "born female [and a female who] was born ambiguous and chose to become female?"¹⁷⁵ Isn't the fact that *Holloway* was a "purported female" on the day she was fired enough to survive a motion to dismiss?¹⁷⁶

In accordance with *Holloway*, the Seventh Circuit in *Ulane* emphasized that "an individual's sex" is not synonymous with "an individual's sexual identity disorder or discontent with the sex into which they were born."¹⁷⁷ According to the court, "[t]he words of Title VII

170. *Holloway*, 566 F.2d at 662.

171. *Oncale*, 523 U.S. at 82 (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'").

172. *E.g.*, *Holloway*, 566 F.2d at 662.

173. *Id.* at 662 n.4. The definition also includes "sexually motivated phenomena or behavior" and "sexual intercourse." *Id.*

174. *Id.* at 664.

175. *Id.* at 664-65 (Goodwin, J., dissenting) (criticizing the majority's formalistic interpretation of Title VII).

176. *See id.* (Goodwin, J., dissenting).

177. *Ulane*, 742 F.2d at 1085.

do not outlaw discrimination against a person who has a sexual identity disorder.”¹⁷⁸ But, is our definition of what it means to be a man or a woman just “a cut-and-dried matter of chromosomes” ?¹⁷⁹ Shouldn’t our gender identity count?

This plain meaning analysis is flawed because no satisfactory explanation is given as to why the ordinary, common meaning of sex is anatomical sex. First, courts ignore the fact that the concepts of sex and gender are so closely intertwined that most people use these words interchangeably. For example, Webster’s definition of gender includes “1: SEX.”¹⁸⁰ Indeed, some courts have used these words interchangeably in their opinions.¹⁸¹

Second, the facts in most cases involving transsexuals suggest that society in fact accepts them in accordance with their self-identified sex. For example, Karen Ulane, a male-to-female transsexual, was successful in amending her birth-certificate as well as her FAA certification to comport with her self-identified female gender, and the trial court in *Ulane* did find that “society . . . considers Ulane to be female.”¹⁸² Ramona Holloway changed her first name from Robert to Ramona on her employment records.¹⁸³ Also, each of the male-to-female transsexual plaintiffs in *Holloway*, *Sommers*, *Ulane*, and *Schwenk* were referred to as “she” in the corresponding opinions. It may be that the change in the societal understanding of what it means to be a man or a woman has simply outpaced judicial as well as legislative cognizance.

Further, underlying this plain meaning analysis is the notion of the absolute binarism of sex, according to which there are only two sexes: men and women.¹⁸⁴ Such a view ignores the existence of millions of intersexed individuals who have ambiguous sex-determining factors such as genes or chromosomes (XX or XY), gonads (testes or

178. *Id.* (emphasis added).

179. *Id.* at 1084 (noting the district court judge’s finding that the word “sex” in Title VII encompasses a “psychological question” including individual’s self-perception as well as the society’s perception of the individual).

180. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 510 (1983).

181. See, e.g., *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993) (holding that Title VII proscribes discrimination “because of . . . gender”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989) (using the words “sex” and “gender” interchangeably).

182. *Ulane*, 742 F.2d at 1083, 1087.

183. *Holloway*, 566 F.2d at 661.

184. See *Ulane*, 742 F.2d at 1085 (holding that Title VII’s provision proscribing sex discrimination “means that it is lawful to discriminate against women because they are women and against men because they are men”).

ovaries), morphology (sex organs), hormones (androgens or estrogens), and phenotypes (existence of facial and chest hair, etc.).¹⁸⁵

The reality is that sex and gender exist in a spectrum where male and female represent the two ends of the poles.¹⁸⁶ It is the birth attendant who determines the sex designation on the birth certificate,¹⁸⁷ and those with ambiguous external genitalia (e.g., genetic XX females with abnormally large clitoris or genetic XY males with abnormally small penis) are turned into two binary sexes based in part on gender-role stereotypes: the capacity for a penis to penetrate a female's vagina regardless of reproductive capacity and the female reproductive capability regardless of the appearance of external genitalia.¹⁸⁸ Thus, the notion of sex as a binary model is a product of our culture, and sex discrimination occurs because of our normative values attached to a man and a woman.¹⁸⁹

In short, the anatomical sex rule cannot be justified based upon the plain meaning of the word "sex" (1) because of the growing societal recognition of individuals' self gender-identity as a sex-determining factor and (2) because of the reality that there is no purely "biological" male-female distinction.

B. Did Congress Intend the Word "Sex" to be Construed Narrowly?

There is no evidence that Congress intended the word "sex" in Title VII to mean "biological male or biological female" and not "sexuality or sexual orientation" in enacting the Act.¹⁹⁰ The total lack of legislative history addressing the meaning of sex under Title VII as well as the fact that the word "sex" was added as a floor amendment without debate just one day before the House's approval of Title VII¹⁹¹ were used by *Holloway* and *Ulane* to support the courts' conclu-

185. See Greenberg, *supra* note 5, at 283 (citing JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES (2d ed. 1994)).

186. Fausto-Sterling, *supra* note 2, at 21.

187. Greenberg, *supra* note 5, at 271.

188. Alice Domurat Dreger, "Ambiguous Sex"—or Ambivalent Medicine? *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CENTER REP. 24, 27–28 (1998).

189. Greenberg, *supra* note 5, at 272 (arguing that sex is "a social construct rather than a biological fact"); Franke, *supra* note 3, at 5 (arguing that "differences between men and women are grounded not in biology, but in gender normativity").

190. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); see also *Bibby v. Philadelphia Coca Cola Bottling Co.*, 85 F. Supp. 2d 509, 516 (E.D. Pa. 2000) ("It seems clear from the context of the statute that Congress intended the word 'sex' in Title VII to refer to biological distinctions rather than to sexual activity or consciousness of sex.").

191. See Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967).

sion that "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."¹⁹² Also, these courts held that occasional failed attempts by some members of Congress to amend Title VII to prohibit discrimination based on "affectional or sexual orientation" was strong evidence that Congress intended the word "sex" in Title VII to be given "a narrow, traditional interpretation," which excludes not only homosexuals but also transsexuals.¹⁹³ Moreover, Congress's continued silence on Title VII in the face of the judicial interpretation precluding transsexuals' recovery under Title VII was treated as a proxy for proof that Congress intended to keep transsexuals out of the scope of Title VII.¹⁹⁴

This legislative history analysis is unsatisfying in that the courts cannot identify the *exact* legislative intent with respect to the meaning of sex in Title VII. When there is no clear legislative history on point, how can the courts decide that Congress intended the word "sex" to mean only "the traditional notions of sex," which are based on one's biological facts? There is nothing to suggest that Congress meant the word "sex" to be interpreted according to what it initially contemplated the word to mean. On the contrary, it is more sensible to conclude that, by using a general term, without specific definition, Congress intended the judiciary to interpret the word liberally in such a manner consistent with the underlying statutory purpose.

For example, in *Price Waterhouse*, Justice Brennan read the language of Title VII in a dynamic, not a static, way. Brennan read the text of Title VII liberally in such a manner as to effectuate the underlying policy behind the Act, which is "to drive employers to focus on qualifications rather than on race, religion, sex, or national origin."¹⁹⁵ Applying this policy in light of its "present societal, political, and legal context,"¹⁹⁶ he concluded that Title VII reaches sex stereotyping, which is no longer acceptable in today's society.¹⁹⁷

192. *Ulane*, 742 F.2d at 1085.

193. *Id.* at 1085-86.

194. *See id.* at 1086.

195. *Price Waterhouse*, 490 U.S. at 243. One federal district court has said:

In our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length, and other superficial features. . . . [I]n adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.

Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972).

196. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). Professor Eskridge argues that "the legal and constitutional context of the statute may change" with time. *Id.* at 1480. He argues for statutory interpretation which entails consideration of "not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society." *Id.*

197. *See Price Waterhouse*, 490 U.S. at 251.

Brennan's reading of Title VII is consistent with the dynamic statutory reading as defined by Professor William Eskridge in his article *Dynamic Statutory Interpretation* published two years before the *Price Waterhouse* decision.¹⁹⁸ According to Professor Eskridge, Congress's failure to define sex discrimination in Title VII calls for "judicial creativity" given that Congress "has set forth general policy and has left courts substantial freedom to adapt the general language to changed circumstances."¹⁹⁹ He states, "Title VII is, in that sense, a common law statute."²⁰⁰

Schwenk followed this dynamic reading of Title VII. In *Schwenk*, the Ninth Circuit considered the Congressional codification of *Price Waterhouse's* "gender-motivating-factor" test in 1991²⁰¹ as an implicit Congressional endorsement of the dynamic reading of Title VII.²⁰² The court then concluded that "Congress, in drafting the GMVA, was aware of the interpretation given by the pre-*Price Waterhouse* federal courts to the terms 'sex' and 'gender' under Title VII and acted intentionally to incorporate the broader concept of 'gender.'"²⁰³

In its 1991 Amendments to Title VII, Congress specifically looked at the *Price Waterhouse* decision yet left intact the sex stereotyping rule while overruling some other aspects of the opinion.²⁰⁴ The fact that Congress did not elect to limit the potentially broad reach of the sex stereotyping rule suggests Congress's implicit approval of the Court's dynamic reading of Title VII. Indeed, Congress's failure to amend Title VII to specifically cover transsexual and homosexual individuals is insufficient evidence, at best, to demonstrate Congressional intent to specifically exclude these individuals from the Act's protection. Given Congress's implicit approval of the sex stereotyping rule, there is no reason why the courts should not apply the rule in a principled manner to all individual plaintiffs.

198. Eskridge, *supra* note 196, at 1517.

199. *Id.*

200. *Id.*

201. Civil Rights Act of 1991, Pub. L. No. 102-166 § 107(a), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m) (1994)) (providing that a plaintiff can establish a prima facie case by showing that sex was a motivating factor even when other factors also motivated the practice).

202. See *Schwenk*, 204 F.3d at 1201.

203. *Id.* at 1201 n.12.

204. 42 U.S.C. § 2000e-2(m) (1994); see also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 n.3 (1st Cir. 1999) (noting that Congress did not overrule the *Price Waterhouse* sex stereotyping rule while overruling that part of the opinion in which the Court held that the defendant can avoid liability for intentional discrimination if it can show that the same action would have occurred regardless of its discriminatory motive).

Schwenk combined the dynamic reading of Title VII in *Price Waterhouse* with *Oncale*'s reasoning in rejecting the per-se rule against male-on-male sexual harassment claims to conclude that categorical exclusion of transsexuals from Title VII's protection is no longer viable. While discrimination based on one's transsexual status is not the "principal evil" that Title VII was enacted to combat, it is a "reasonably comparable evil" given the statutory purpose to encourage employers to make employment decisions based on one's merits rather than on one's sex or gender.

Further, there is a statutory maxim that "remedial legislation should be construed broadly to effectuate its purpose."²⁰⁵ The Ninth Circuit in *Schwenk* considered that broad interpretation of the word "gender" in GMVA, and, thus, "sex" in Title VII, was "particularly appropriate given the remedial [statutory] purposes."²⁰⁶ By giving a narrow definition of sex, the *Holloway* line of cases actually frustrates the legislative purpose.

There is concern about the judiciary's acting like a super-legislature in broadly reading Title VII to accommodate the rights of transsexuals or homosexuals without express authorization by Congress.²⁰⁷ However, it is the judiciary's duty "to say what the law is."²⁰⁸ When Congress uses a general term without a specific definition, the courts should read the language in a manner consistent with the underlying statutory purpose in light of the current societal, political, and legal context.²⁰⁹

C. Is Transsexualism a Purely Psychological Phenomenon?

Lastly, the anatomical sex rule should not be used to exclude transsexuals when there is no consensus in the medical profession as to

205. *Schwenk*, 204 F.3d at 1201 n.12 (citation omitted). *But see* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) (noting, but ignoring, the maxim).

206. 204 F.3d at 1201 n.12 (citation omitted).

207. *See, e.g., Ulane*, 742 F.2d at 1086 (citation omitted) (holding that for the court "to hold that Title VII protects transsexuals would take [the court] out of the realm of interpreting and reviewing and into the realm of legislating").

208. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

209. The democratic process in our representative government will not be undermined by dynamic reading of Title VII given the "incremental, precedent-oriented nature of the judicial process and the availability of statutory correction of judicial errors." *Eskridge, supra* note 196, at 1524.

the exact causes of transsexualism. Indeed, how can courts conclude that a male-to-female transsexual plaintiff is a biological male?²¹⁰

Contrary to the notion that transsexuals choose to change their assigned sex for their purely psychological problems, recent medical studies suggest that gender identity is, indeed, biologically based and immutable.²¹¹ The following well-known "John/Joan" case study²¹² is a good example.

A genetically male boy, John, had his penis accidentally ablated during circumcision.²¹³ When he was eight months old, John was turned into a girl by surgical reconstruction of the genitals and was raised as a girl (Joan) without knowledge of this history.²¹⁴ However, John-turned-Joan always considered himself as male despite the fact that Joan was very good looking as a girl; Joan often tried to stand to urinate despite the absence of a penis.²¹⁵ Resisting an estrogen hormone medication, Joan chose to become a boy again by way of surgery and hormone treatments when he learned of his medical history at the age fourteen.²¹⁶ According to now-John, "[a]ll of a sudden, everything clicked" when his father told him of the history "in a tearful episode" after Joan's prodding.²¹⁷ John is now living as a male and a husband to a woman with adopted children.²¹⁸

This story suggests a link between one's gender-identity and "biological" sex and refutes the notion that gender-identity is determined by "nurture," not "nature."²¹⁹ Recent studies at Johns Hopkins

210. See RICHARD A. POSNER, *SEX AND REASON* 1 (1992) (describing his "belated discovery that judges know next to nothing about sex and sexuality beyond their own personal experience, which is limited, perhaps more so than average").

211. Chanika Pornphutkul et al., *Gender Self-Reassignment in an XY Adolescent Female Born With Ambiguous Genitalia*, *PEDIATRICS*, July, 2000, at 106, 135–37 ("Gender identification is a complex biological and psychological process."); see also Dearthoff, *supra* note 6 (quoting Dr. Randi Ettner, a University of Chicago Gender Board member, who said that transsexualism is a "birth condition, not a lifestyle choice" and that transsexuals "come into the world with this condition" with "no known cure").

212. Milton Diamond & H. Keith Sigmundson, *Sex Reassignment at Birth: Long-Term Review and Clinical Implications*, *ARCHIVES OF PEDIATRICS & ADOLESCENT MED.* 15 at 298–304 (1997). This story has been reported in various newspaper articles. See, e.g., Shari Roan, *The Basis of Sexual Identity: He Was a Boy, Became a Girl, and Then a Boy Again. His Case Helps Show the Brain's Role in Gender*, *L.A. TIMES*, Mar. 14, 1997, at E1, available at LEXIS, News, Los Angeles Times.

213. Milton Diamond & H. Keith Sigmundson, *supra* note 212, at 298–99.

214. *Id.* at 299.

215. *Id.* at 300.

216. *Id.*

217. *Id.*

218. *Id.* at 301.

219. Suzanne Miller, *When Sexual Development Goes Awry*, *WORLD AND I*, Sep. 1, 2000, at 148, available at 2000 WL 9051058 (stating that "gender identity results from a complex mix-

Children's Center buttress the gender-identity/biology link: two studies showed that prenatal exposure to normal male hormones alone dictated male gender identity in genetically male (XY) children born without a penis and raised as females.²²⁰ Given that, transsexualism, or gender-identity disorder, may be explained in terms of biology, not psychology.

Further, when the biological sex status of a transsexual plaintiff is medically ambiguous, placing the burden on the plaintiff to prove such a status would effectively preclude his or her recovery. Such a result is inconsistent with the remedial nature of the Act.

In sum, the invocation of the anatomical sex rule to exclude transsexuals from Title VII's protection as a class is wrong because the language of Title VII, the legislative history, and current medical understanding of transsexualism do not support such a rule. The Seventh Circuit's continued application of the anatomical sex rule is, thus, unwarranted and only represents the court's blind adherence to *Ulane*.

V. A GRADUAL YET PROMISING TREND

So far, this Note has shown that the Ninth Circuit's "sex plus gender" rule in *Schwenk* is superior to the Seventh Circuit's "anatomical sex" rule. This section examines the likelihood of success for future transsexual and homosexual Title VII sex discrimination plaintiffs in light of *Schwenk* and other Title VII cases interpreting *Price Waterhouse* and *Oncale*.

Under the Ninth Circuit's approach in *Schwenk*, transsexual plaintiffs will easily survive the "because of sex" statutory hurdle by showing that the discrimination was based on their perceived failure to meet societal expectations attached to their assigned sex. While this involves fact-intensive inquiries, such inquiry is not unique to transsexual plaintiffs.

Likewise, transsexual plaintiffs will be allowed to seek redress under Title VII for discrimination grounded on their transsexual status in the First, Second, and Eighth Circuits, which recognize gender discrimination as actionable under Title VII. While these circuits have yet to recognize the merits of "sexual orientation" discrimination claims under Title VII, transsexuals, who try to conform themselves

ture of factors, including genes, gonads (testes and ovaries), hormones, internal duct systems, external genitalia, and environmental influences").

220. JOHNS HOPKINS MEDICAL INSTITUTIONS OFFICE OF COMMUNICATIONS AND PUBLIC AFFAIRS, HOPKINS RESEARCH SHOWS NATURE, NOT NURTURE, DETERMINES GENDER (May 12, 2000), available at <http://hopkins.med.jhu.edu/press/2000/MAY/000512.htm>.

with the male/female gender binarism, will likely convince the courts that they are victims of gender discrimination.

The Seventh Circuit's continued adherence to *Ulane's* anatomical sex rule is dispiriting for transsexual plaintiffs. Rhetoric aside, however, the court's recognition in *Spearman of Price Waterhouse* as proscribing stereotypes associated with either a male or female sex status effectively doomed the application of the anatomical sex rule to transsexual plaintiffs. Transsexuals are usually discriminated against because they are perceived to be too masculine (or too feminine) for their assigned female (or male) sex status.

Unlike their transsexual counterparts, homosexual plaintiffs still face an uphill, albeit not impossible, battle in surviving a "because of sex" challenge. Among the federal circuits, the Eighth Circuit appears to be the most favorable to homosexual plaintiffs. The Eighth Circuit, in light of *Schmedding's* rejection of the rigid sex/sexual orientation categorization, will not dismiss their sex stereotyping claims even when the alleged stereotypes are those typically attached to homosexuality; homosexual plaintiffs will be allowed to proceed with their claims insofar as there is *some* basis for the court to find that such stereotypes were used to debase their masculinity or femininity.²²¹ It is unclear, however, whether the court, for such a finding, requires allegations of some form of physical sexual advance, which were present in both *Schmedding* and *Oncale*.²²² Such a requirement would unduly narrow the scope of actionable sexual harassment and is inconsistent with *Price Waterhouse*.

On the other hand, the First, Second, Seventh, and Ninth Circuits appear adamant in dismissing homosexual plaintiffs' sex discrimination claims as sexual orientation discrimination claims unless the plaintiffs somehow convince the courts that the alleged discrimination was *strictly* grounded on their assumption of either feminine or masculine characteristics, something that is contrary to the stereotypes attached to their sex.

As suggested by the Eighth Circuit in *Schmedding*, however, this sex/sexual orientation dichotomy is inherently unworkable, especially after *Price Waterhouse*. Courts should stop making mechanical and

221. One district court expressly followed *Schmedding*, holding that the student plaintiff stated a sex discrimination claim under Title IX even though his allegations included the use of epithets connoting homosexuality such as "fag" and "gay" besides the allegations of sexually-motivated conduct such as "grabbing his buttocks and inner thighs." *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1084, 1093 (D. Minn. 2000).

222. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 77 (involving allegations of physical sexual attack); *Schmedding*, 187 F.3d at 865 (involving allegations of patting Schmedding on the buttocks and asking him to perform sexual acts).

futile inquiries into what stereotypes are attached to masculinity or femininity on the one hand and what stereotypes are attached to sexual orientation on the other. Many words denote both masculinity or femininity and homosexuality. For example, as noted by the *Spearman* court, the word "bitch" can be associated with both a woman and a homosexual. Courts should instead look to the statutory purpose and ask what are the evils that Title VII was designed to rectify in proscribing "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."²²³

In sum, the current flux in federal sex discrimination jurisprudence as to the meaning of sex discrimination under Title VII reflects the federal courts' gradual shift away from formalism towards a more realistic approach in this area, following *Price Waterhouse* and *Oncale*. This trend is promising for transsexual and homosexual individuals confronting gender biases in the workplace. More importantly, the federal judiciary should recognize that its retreat to the categorical regime, for which there is no clear and coherent theoretical justification, would jeopardize society's trust and confidence in principled judicial adjudication of Title VII sex discrimination claims.

VI. CONCLUSION

The Ninth Circuit in *Schwenk* correctly applied the Supreme Court's decisions in *Price Waterhouse* and *Oncale* in interpreting the word "sex" in Title VII to encompass not only biological sex but also socially-constructed gender. *Schwenk* stands for a refreshing departure from the federal circuits' categorical rejection of sex discrimination claims brought by transsexuals. On the other hand, the federal courts' continued application of the sex/sexual orientation dichotomy in rejecting homosexual plaintiffs' sex discrimination claims is unwarranted and has led to the making of arbitrary decisions based on unprincipled rules of thumb.

Sex discrimination is gender discrimination; sex discrimination takes place because of the socially-constructed male/female classification. Transsexuals and homosexuals, who are often viewed as not conforming to the societal binary and heterosexual gender norms, deserve no less Title VII protection than that which is accorded to any other human beings.

223. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); see also *McVeigh v. Cohen*, 983 F. Supp. 215, 220 (D.D.C. 1998) (recognizing, in the context of the privacy interests of the plaintiff U.S. Navy officer under the statutory "Don't Ask, Don't Tell, Don't Pursue" policy, that "[i]t is self-evident that a person's sexual orientation does not affect that individual's performance in the workplace").

More than a decade ago, the Court read the language of Title VII as forward-looking and declared that “we are beyond the day” when discrimination against a female employee for her perceived “macho” personality could legally be tolerated.²²⁴ Living in the twenty-first century, we are past the day when discrimination based on one’s sexuality or sexual orientation could legally be sanctioned. Courts should hold that discrimination based on gender identity or sexual orientation is discrimination “because of sex” under Title VII.

224. *Price Waterhouse*, 490 U.S. at 251.