A "QUEER" BY ANY OTHER NAME: ADVOCATING A VICTIM-CENTERED APPROACH TO TITLE VII AND TITLE IX SAME-SEX SEXUAL HARASSMENT CLAIMS

This Note contends that the federal courts' current approach to same-sex sexual harassment is inherently flawed, because the majority of courts engage in an unnecessary inquiry into the motives of the harassers—an inquiry that courts do not employ when the harasser and victim are of the opposite sex. The courts must abandon this flawed approach and instead emphasize the conduct's effect on the victim.

The Introduction provides a brief review of Title VII and Title IX of the Civil Rights Act of 1964, and delineates the current boundaries of their protections. Section Two discusses *Price Waterhouse v. Hopkins*,[1] *Oncale v. Sundowner Offshore Services*,[2] and *Davis v. Monroe County Board of Education*.[3] The analysis of these cases shows how the Supreme Court has created a system that encourages federal courts to focus on the motive of same-sex sexual harassers rather than the effect the harassment has on the victims. The results have been contradictory and muddled at best. I then will further identify the classes of victims whom the Supreme Court has excluded by its articulation of the sexual harassment standards.

I then scrutinize several representative circuit court cases in which courts have denied Title VII and Title IX protections to the victims of same-sex sexual harassment. The discussion focuses on the courts' unduly narrow interpretations of *Price Waterhouse* and *Oncale* and the courts' erroneous reliance on the harassers' motives. I also argue that a focus on the victim is the correct standard by which to judge Title VII and Title IX claims.

INTRODUCTION: SEXUAL HARASSMENT UNDER TITLE VII AND TITLE IX

Over the past twenty years, the doctrine of sexual harassment has evolved to become an object of scorn, a point of contention and, for many, an important avenue for legal relief.[4] The doctrine, however, is less statutory interpretation than

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[1] 490 U.S. 228 (1989).

[2] 523 U.S. 75 (1998).

[3] 526 U.S. 629 (1999).

[4] *See, generally*, Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES, Oct. 13, 2002, at 52.

outright judicial activism.[5] The evolutions of Title VII and Title IX demonstrate, to some extent, Justice Scalia's observation that "statutory 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."[6]

A. Title VII

Title VII of the Civil Rights Act of 1964 provides that employers may not "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."[7] Opponents of the Civil Rights Act added the "sex" protection in a last-minute attempt to defeat the bill.[8] Congressional debate on the sex provision was sparse and evidence of legislative intent nonexistent.[9] In 1986, the Supreme Court construed Title VII to prohibit workplace sexual harassment, notwithstanding the lack of congressional guidance.[10] The Court reasoned that the statutory language evinced "a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[11]

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[5] Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 382, 387 (1996).

[6] *Oncale*, 523 U.S. at 79 (1998).

[7] 42 U.S.C. at § 2000e-2(a)(1) (2002).

[8] Nailah A. Jaffree, *Halfway Out of the Closet: Oncale's Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799, 801 (2002).

[9] *Id.*; 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, 149 (1997). While the Supreme Court has acknowledged this lack of legislative history, federal courts have continued to focus on the motivations of the legislature. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (acknowledging that courts "are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'"); *see also* Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (noting that "Congress has repeatedly rejected legislation that would have extended Tile VII to cover sexual orientation").

[10] *Meritor*, 477 U.S. at 57. Sexual harassment is conduct sufficiently pervasive and severe as to subjectively alter the conditions of the victim's employment and create an objectively abusive working environment. *Id.* at 67; Harris v. Forklift Sys. Inc., 517 U.S. 17, 21 (1993).

[11] *Id.* at 64. Courts initially found that the aggressor's sexual desire, rather than the victim's sex, drove the harassment. Locke, *supra* note 2 at 386-387 n. 16. In fact, courts denied sexual harassment claims on the bases that the disparate treatment resulted from the rebuffed sexual advances rather than discrimination, and that the same situation could have occurred had the victim and harasser each been of the other sex. *Id.* at 387; Anthony E. Varona & Jeffrey Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 72 (2000). In cases of male-on-female or female-on-male sexual harassment, this focus on the aggressor's intent has long since disappeared from the court's inquiry into the unwanted sexual conduct. In its place, courts employ the standard set forth in *Meritor* and

Three years later, in *Price Waterhouse v. Hopkins,* the Supreme Court crafted another cause of action under Title VII: sexual stereotyping.[12] Sexual stereotyping provided sexual harassment and discrimination victims with an alternative channel within Title VII's protections.[13] This cause of action has also become the only source of legal relief for homosexuals being harassed by heterosexual aggressors.

Justice Scalia's opinion in *Oncale* extended Title VII's protection against sexual harassment to victims of same-sex sexual harassment.[14] The opinion's focus on sexual desire as a necessary element of Title VII sexual harassment, however, encouraged lower courts to preclude same-sex sexual harassment claims when the aggressor was heterosexual. Many courts have emphasized that *Oncale* did not grant a Title VII cause of action on the basis of sexual orientation discrimination,[15] and have referred plaintiffs to the sexual stereotyping claim articulated in *Price Waterhouse.*[16] Yet, the judicial assumption that all victims of sexual harassment based on sexual orientation may recover under the sexual stereotyping claim reinforces societal stereotypes of homosexuals as gender inconsistent (i.e., effeminate males and masculine females) and leaves those homosexuals who do conform to society's *gender* stereotypes virtually without a rememdy, notwithstanding their sexual orientation.[17]

In same-sex sexual harassment cases, courts employ an inverse analysis based on assumptions about the characteristics attendant to homosexuality, or they preclude any recovery for a homosexual harassed by a heterosexual. For example, where a heterosexual man sexually harasses another man, either heterosexual or unadmittedly homosexual, with epithets such as "fag" or physical abuse centering on the genitals or anus, the court may assume that, since the harasser perceived the victim to be homosexual, the victim *a fortiori* demonstrates stereotypically effeminate behavior. Alternatively, a court could view the same fact pattern and conclude that, as the victim has not produced evidence that he was effeminate or failed to conform to gender norms (even in the case of openly gay homosexuals,

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Harris. Under this standard, plaintiffs suffering from sexual harassment at the hands of an aggressor of the opposite sex need simply to follow the delineated elements of a *prima facie* case: the plaintiff must show that she belongs to a protected class, that her employer (or a colleague) subjected her to unwanted sexual harassment based on her sex, that the harassment affected her employment (as defined in Title VII), and that theories of *respondeat superior* apply. Locke, *supra* note 5 at 390; *see also* Burlington v. Ellerth, 524 U.S. 742, 754 (1998). Thus, an inquiry into the harasser's intent has vanished in the context of opposite-sex sexual harassment claims; the courts now favor a focus on the victim and the conduct itself. However, as Section III will discuss, this inquiry into the harasser's motivations remains very much a part of same-sex sexual harassment claims.

[12] 490 U.S. 228 (1989).

[13] *Id.*

[14] 523 U.S. 75, 80 (1998).

[15] *See* discussion *infra*; *see also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999).

[16] *See, e.g.,* Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000).

[17] *See* discussion *infra.*

who *do* fail to conform to the societal expectation of heterosexuality), the harasser's anti-gay animus motivated his harassment (even in cases where there is no evidence of the victim's sexual orientation). And, carrying this concept to its logical, yet absurd, conclusion, a court may conclude that sexual harassment of a heterosexual by coworkers of the same sex is based on the harassers' *perception* of the victim's homosexuality, thus denying relief even to the quintessential *Oncale* plaintiff. In such cases, courts nearly invariably deny recovery because the harassment does not trigger Title VII's "because of. . .sex" requirement. Such varied treatment of same-sex sexual harassment leaves its victims with dubious judicial protection.

B. Title IX

The mandated structure of Title IX sexual harassment claims backs homosexual students into a similar judicially created corner. Title IX of the Educational Amendments of 1972 provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[18] In 1998, the Supreme Court held that Title IX supports a private cause of action against a school district for intentional discrimination (in this case sexual harassment by a teacher) if the school is aware of the conduct.[19]

One year later, in *Davis v. Monroe County Board of Education*, the Supreme Court extended this Title IX protection to victims of sexual harassment committed by student aggressors.[20] Through principles of analogy, federal courts have since applied Title VII Supreme Court doctrine to Title IX cases.[21] This application has resulted in at least one court's denying a homosexual student's Title IX same-sex sexual harassment claim because the aggressor was a heterosexual.[22] Instead, courts direct these students to pursue Title IX sexual stereotyping claims.[23] Therefore, as Section III will demonstrate, to ensure Title IX protection, homosexual victims of sexual harassment must either have the dubious fortune of their harassers being homosexual, or they themselves must significantly fail to conform to society's gender stereotypes.

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[18] 20 U.S.C. § 1681a (2003).

[19] Gebser v. Lago Vista Indep. Schl. Dist., 524 U.S. 274, 282, 288 (1989) (reasoning that, as Title IX does not explicitly define "educational program or activity" to comprise its agents (as Title VII defines "employer"), Congress did not intend to extend liability to constructive notice or vicarious liability).

[20] 526 U.S. 629 (1999).

[21] *See, e.g.*, Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000) (stating that "[because] the Supreme Court has found same sex harassment actionable under Title VII, and Title VII is an appropriate guide in construing Title IX claims, the Court finds that same sex harassment is a form of harassment actionable under Title IX").

[22] Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000). The court did allow the student to maintain a Title IX claim for sexual stereotyping. *Id.* at 1092.

[23] *See, e.g., id.* at 1093.

LEGAL MILESTONES? *PRICE WATERHOUSE, ONCALE* AND *DAVIS*

Sexual stereotyping in the workplace: Price Waterhouse v. Hopkins

Working as a senior manager for Price Waterhouse in 1982, Ann Hopkins became a candidate for partnership in the firm.[24] After the firm's partners deferred her candidacy for more than a year, Hopkins filed suit under Title VII, alleging sex discrimination.[25] Hopkins based her claim on written and oral statements made by the partners with reference to her candidacy. Although the partners highlighted Hopkins's successful two-million-dollar contract with the Department of State and noted that she functioned "virtually at the partner level," they deferred Hopkins's candidacy due to her perceived lack of interpersonal skills.[26]

This perception manifested itself through the partners' written comments about her personality. The partners variously indicated that Hopkins was "macho," needed a course in charm school, and overcompensated for being a woman.[27] One partner advised Hopkins that walking, talking and dressing more femininely, as well as wearing make-up and jewelry, would increase her chances of partnership.[28]

In its *Price Waterhouse* opinion, the Supreme Court held that a successful Title VII plaintiff must prove both that discrimination played a role in the employment decision, and, by a preponderance of the evidence, that the employer would have made a different decision in the absence of the discrimination.[29] The ensuing discussion of Title VII's "because of . . . sex" prohibition and its relation to gender norms, however, has played a far more significant role in American jurisprudence,[30] spawning conflicting interpretations and holdings in the lower federal courts.[31] In *Price Waterhouse*, the Court made something of an inferential leap by departing from Title VII's language and concluding that "*gender* must be irrelevant to employment decisions."[32] Further, "[in] the specific context of sex stereotyping, 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."[33] The Court concluded, "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out

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[24] *Price Waterhouse*, 490 U.S. at 231-232.

[25] *Id.* at 231-232

[26] *Id.* at 234-235.

[27] *Id.* at 235.

[28] *Id.*

[29] *Id.* at 237 (plurality opinion of Justice Brennan, in which Justices Marshall, Blackmun, and Stevens joined) (altering, though not overturning, the holding of the Court of Appeals).

[30] *See* Jaffree, *supra* note 8, at 805-807.

[31] The federal courts' inconsistencies in applying the *Price Waterhouse* opinion are addressed *infra*.

[32] *Price Waterhouse*, 490 U.S. at 240 (emphasis added).

[33] *Id.* at 250.

of this bind."[34]

Price Waterhouse marked an implicit judicial approval of allowing *gender*-based claims under the Title VII "because of... sex" prohibition.[35] Many scholars lauded the Court's decision as finally indicating an understanding of a fundamental sociological truth, previously unrecognized by the American judicial system.[36] Queer theorists and gender jurisprudence scholars had, for years, been discussing the crucial distinction between sex and gender. The sociological debate centered on whether the term "gender" encompassed more than the mere biological distinctions usually signaled by the term "sex."[37] Thus, "gender" would include the behaviors, attitudes, personality traits, and appearance norms associated with members of a biological sex.[38]

As noted, the *Price Waterhouse* opinion focused on often implicit requirements that women act like men in order to achieve in the workplace. By addressing this "impermissible catch 22," the Court acknowledged the difficulties women face in infiltrating a predominantly male workforce. This acknowledgement, however, came as a result of several inferential leaps. The Court assumed that Hopkins's failure to display the expected femininity sprang from her difficulty in assimilating to the male workplace, rather than her individual personality. This assumption further perpetuates the normative stereotype that women are feminine by default, and that any deviation from societal standards must have an external source. Thus, the Court's reprimand to Price Waterhouse came not because the partners discriminated against Hopkins due to her failure to conform to societal gender

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[34] *Id.* at 251.

[35] Varona & Monks, *supra* note 11 at 94-95.

[36] *Id* at 94..

[37] This debate was waged in literary critiques as well as legal journals. "[Gender] performs an invaluable function in analyzing how women and men are made rather than born; these processes cannot be understood in terms of sex and sexuality as attributes of the natural body." Ann Oakley, *A Brief History of Gender, in* WHO'S AFRAID OF FEMINISM? SEEING THROUGH THE BACKLASH 29, 29-30 (Ann Oakley & Juliet Mitchell eds., 1997). Oakley also notes that the term gender appeared in the psychological texts during the 1930s to describe "psychological attributes of people without linking these to physiological differences between men and women." *Id.* at 32. She recalls the genesis of the use of "gender" in its cultural sense in the 1970s as taking "cultural variability as its main difference from sex." *Id.* at 48. This distinction, though prevalent in the literary and sociological works of theorists such as Catharine MacKinnon, Simone de Beauvoir, Luce Irigaray, Judith Butler, Jeffrey Weeks, and psychoanalyst Michel Foucault, had long been ignored by the American judiciary. *See, e.g.*, Michel Foucault, *The History of Sexuality, reprinted in* LITERARY THEORY: AN ANTHOLOGY 683 (Julie Rivkin & Michael Ryan eds., 2000); Jeffrey Weeks, *Introduction to Guy Hocquengham's* Homosexual Desire, *reprinted in* LITERARY THEORY: AN ANTHOLOGY 692; Judith Butler, *Imitation and Gender Insubordination, reprinted in* LITERARY THEORY: AN ANTHOLOGY 722.

[38] OAKLEY, *supra* note 37 at 32; *see also* Patience W. Crozier, Book Review, *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth,* 21 B.C. THIRD WORLD L.J. 123, 125-126 (Winter 2001).

norms but because they denigrated the very traits they required for success.

The equal application of the *Price Waterhouse* opinion, however, was dubious at best. The Court's assumptions in *Price Waterhouse* effectively narrowed the case's holding. Under the opinion's specific reasoning and policy discussion, a male plaintiff, harassed for being effeminate, would be unable to recover for sexual stereotyping because he does not face the same "impermissible catch 22" as Hopkins did: masculinity has always been a ubiquitous trait within the male-dominated workforce, so a man cannot claim that his effeminacy stems from an attempt to assimilate. Further, by failing to articulate the specific traits that comprise gender stereotypes, the Supreme Court has allowed circuit courts effectively to read sexuality or sexual orientation out of the sexual stereotyping cause of action, despite society's clear expectation of what Adrienne Rich has dubbed "compulsory heterosexuality."[39] Undoubtedly, gender norms include heterosexuality, specifically the expectation that women be sexually attracted to men and that men be sexually attracted to women.[40] The Supreme Court's failure to articulate a standard sufficiently broad to encompass the sex stereotypes perpetrated against effeminate men has left lower federal courts to decide the issue, and the results are inconsistent at best.[41] Further, by not indicating the degree or quality of conduct that comprises sexual stereotyping, the Court provided little explicit protection for effeminate lesbians or masculine gay men, whose only nonconformity to heterosexual gender stereotypes lies in their sexual orientation.

Same-sex sexual harassment: Oncale v. Sundowner Offshore Services

Sundowner Offshore Services employed Joseph Oncale from August to November of 1991.[42] In October 1991, Joseph Oncale worked as a roustabout on the eight-man crew of an oil platform in the Gulf of Mexico.[43] Oncale's crew included coworkers Danny Pippen and Brandon Johnson,[44] and his supervisor, John Lyons.[45] Lyons, Pippen, and Johnson repeatedly subjected Oncale to and humiliating, sex-related actions.[46] For example, Oncale alleged that Pippen and Johnson restrained him while Lyons placed his penis on Oncale's neck on one occasion and on his arm on another occasion.[47] Pippen and Lyons also threatened

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[39] *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5.4 SIGNS: J. OF WOMEN CULTURE & SOC'Y 631-660 (1980).

[40] *See* Masako Kanazawa, *Schwenk and the Ambiguity in Federal Discrimination Jurisprudence: Defining Sex Discrimination Dynamically Under Title VII*, 25 SEATTLE U. L. REV. 255, 267 (2001); *see also* COZIER, *supra* note 38, at 125-126.

[41] *See* discussion *infra*.

[42] Oncale v. Sundowner Offshore Services ("Oncale I"), 83 F.3d 118, 118 (5th Cir. 1996), *overruled in* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) ("Oncale").

[43] *Oncale*, 523 U.S. at 77.

[44] *Id.*

[45] *Oncale I*, 83 F.3d at 118.

[46] *Oncale*, 523 U.S. at 77.

[47] *Oncale I*, 83 F.3d at 118.

to rape Oncale.[48] Further, on an occasion when Oncale was showering, Lyons used force to insert a bar of soap into Oncale's anus while Pippen restrained him.[49] Oncale complained to his employer's personnel office, yet his complaints yielded no remedial action.[50] Eventually, Oncale left Sundowner Offshore Services and requested that his pink slip indicate that he left because of sexual harassment and verbal abuse.[51]

Justice Scalia's sparse opinion in *Oncale* achieved the dubious success of punctuating that which was left unsaid. Roughly one sixth the length of the *Price Waterhouse* opinion,[52] *Oncale*'s six pages answered only the single question before the Court (in its narrowest possible incarnation): whether Title VII "necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."[53] As Section III will demonstrate, Scalia's implicit refusal to broaden the opinion's purview has left federal courts with little guidance on when Title VII bars same-sex sexual harassment.

In addressing *Oncale*, Justice Scalia notably only a vague account of the facts of the case.[54] He carefully worded the opinion to make a detailed recitation of the facts unnecessary. More notable is the fact that Scalia's refusal to recount the harassment Oncale suffered allowed Scalia to circumvent any appraisal of the harassers' behavior. If Scalia had crafted a thorough narrative of the events leading to this lawsuit, a judgment upon whether the alleged behavior would create a viable Title VII sexual harassment claim would have been in order. However, Scalia's refusal to present the details of Oncale's harassment relieved the Court of any need to make a statement of law broad enough to address the facts of the case.

Justice Scalia prefaced his analysis by recalling the Court's previous rejection of the presumption that employers will not discriminate against members of their own race.[55] "'[I]t would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.'"[56] Scalia continued by drawing from another past decision, *Johnson v. Transportation Agency,* in which a male employee claimed that his employer had discriminated against him on the basis of sex by preferring females for promotion.[57] Although the Court ultimately rejected the claim on other grounds, it stated that it "did not

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[48] *Id.*

[49] *Oncale I*, 83 F.3d at 118-119.

[50] *Oncale*, 523 U.S. at 77.

[51] *Id.*

[52] *See, generally*, *Price Waterhouse*, 490 U.S. 228.

[53] *Oncale*, 523 U.S. at 78.

[54] *Id.* at 77 (stating only that "[on] several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen, and Johnson," and that "Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape").

[55] *Oncale*, 523 U.S. at 78 (*citing* Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

[56] *Id.* (*quoting Castaneda*, 430 U.S. at 499).

[57] *Id.* (*citing* Johnson, 480 U.S. 616 (1987)).

consider it significant that the supervisor who made the decision was also a man. . . . If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[58]

Justice Scalia, in *Oncale*, expressed ostensible bewilderment at federal courts' "variety of stances" on same-sex hostile work environment sexual harassment claims.[59] However, the decision gave these cases no further treatment, declaring

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[58] *Oncale*, 523 U.S. at 78-79.

[59] *Id.* at 80. Scalia stated,

Courts have little trouble with [this] principle in cases like *Johnson*, where an employee claims to have been passed over for a job or promotion. But when the issue arises in the context of a "hostile environment" sexual harassment claim, the state and federal *courts have taken a bewildering variety of stances*. Some, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims are never cognizable under Title VII. . . .Other decisions say that claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire).. . .Still others suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations. [emphasis added]

Among the cases Scalia mentions was the 1997, Seventh Circuit case, *Doe v. City of Belleville, Ill.*, 119 F.3d 563. In 1992, the City of Belleville hired brothers J. and H. Doe to cut weeds and grass in the municipal cemetery. *Id.* at 566. To differentiate between the brothers, their male coworkers dubbed J. "fat boy" and dubbed H., who wore an earring, "fag" or "queer." *Id.* The Does' coworkers subjected H. to verbal abuse, constantly urging him to "go back to San Francisco with the rest of the queers," asking him whether he was "a boy or a girl," and threatening to take H. "out to the woods" and "get [him] up the ass." *Id.* at 567. One coworker told H., "I'm going to finally find out if you are a guy or a girl," and grabbed H. by the testicles. *Doe*, 119 F.3d at 567. H. testified that following this incident, he came to believe that this coworker was actually willing and able to take him out to the woods and sexually assault him. *Id.* The Does filed suit against Belleville, claiming they had been sexually harassed and constructively discharged in violation of Title VII. *Id.* The district court granted summary judgment to the City, noting that the Plaintiffs were both white, heterosexual males who worked in an all-male environment. *Id.* at 568. The district court held that the comments and actions taken did not discriminate against the plaintiffs because they were male, but merely implied that they were homosexual. Title VII, the district court averred, does not afford protection from this type of behavior. *Doe*, 119 F.3d at 568. The Seventh Circuit reversed this holding, stating that "H. Doe is entitled to a trial on his Title VII . . . claims of sexual harassment." *Id.* 568. The court recognized that "[on] any given work day, H. was faced with the prospect of having his gender questioned. . . . If H. were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment." *Id.*

The court also addressed the question of whether the plaintiff must demonstrate that his harasser was homosexual. The court observed, "it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against 'because of' her sex." *Id.* at 574. This conclusion becomes more difficult, stated the court, when the harasser and victim are of the same sex. *Id.* Ultimately, however, the Seventh Circuit decided the issue on an implicitly victim-centered standard:

only that "[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[60]

Justice Scalia's negative statement of the law and his refusal categorically *to allow* same-sex sexual harassment claims otherwise meeting the hostile work environment criteria under Title VII have rendered the state of this law open to interpretation and confusion.[61] As Section III of this note demonstrates, many federal courts have debated whether *Oncale*'s enumeration of three specific avenues to Title VII's protections (discrimination due to animus against the presence of members of one sex in the workplace; sexual harassment based on sex; and sexual stereotyping) is exhaustive.

Extending Title IX to Peer Sexual Harassment: Davis v. Monroe County School District

In 1992, fifth-grader LaShonda Davis began to experience sexual harassment from a male classmate.[62] The harassment included both verbal abuse and unwanted

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One may reasonably infer from the evidence before us that H. Doe was harassed 'because of' his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards.

Id. at 575. Thus, the standard espoused by the Seventh Circuit was that, in cases where the harassment is sexually explicit in nature, a showing of the harasser's sexual orientation is unnecessary for recovery. *Id.* at 575-580. This standard, with a focus on the victim's experience of harassment rather than the harasser's intent (at least in instances where the harassment is sexual in nature) presents a more workable standard for victims of same-sex sexual harassment: it precludes the necessity to launch a difficult and intrusive inquiry into the harasser's sexuality and intentions. However, Scalia implicitly rejected the *Doe* court's approach by stating,

We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.. . .[The plaintiff] must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination*. . .because of . . . sex.'

Oncale, 523 U.S. at 81 (quoting 42 U.S.C. § 2000e-2(a)) (emphasis in original).

Despite this, Justice Scalia may not have completely obliterated the *Doe* court's standard: by casting the standard as not automatic when "the *words* used have sexual content or connotations," Scalia left the embedded possibility for any conduct rising above mere words to automatically trigger Title VII's protection against hostile work environment sexual harassment. *Oncale,* 523 U.S. at 80. (emphasis added). The Supreme Court vacated the judgment in *Doe* and remanded the case for further consideration "in light of *Oncale*." *Id.*. The case settled, however, before the Seventh Circuit had the opportunity to revisit its decision.

[60] *Oncale*, 523 U.S. at 79.

[61] *See* discussion *infra*.

[62] *Davis*, 526 U.S. at 633.

touching.[63] Despite the school's knowledge of the incidents, officials took no remedial actions.[64] In response, Davis's mother filed a Title IX action, prompting the Court to articulate the standard for student-on-student sexual harassment as a derivative of its *Meritor* standard: student victims must establish that the sexual harassment is so "severe, pervasive, and objectively offensive, and that [it] so undermines and detracts from the victims' education" that the students are effectively denied equal access to educational opportunities.[65] Although the Court noted that "schools are unlike the adult workplace and . . . children may regularly interact in a manner that would be unacceptable among adults," it did so by citing to the requirement articulated in *Oncale* that "[w]hether *gender-oriented* conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships'. . . ."[66]

Read in light of the Court's implication that schoolchildren must have a heightened tolerance for harassing conduct (in comparison to adults in the workplace), the Court's use of the term "*gender*-oriented" is not insignificant. Justice O'Connor, writing for the five-Justice majority, eschewed the intentional vagaries of Scalia's *Oncale* opinion. Not once in the *Oncale* opinion did Scalia stray from the "because of . . . sex" standard; the word "gender" does not appear anywhere in the text.[67] Without explanation, O'Connor shifted the focus from "sex" to "gender." As a result, *Davis* may, in a practical sense, limit even more drastically the possibility of reprieve for the victim of same-sex, student-on-student sexual harassment.

The distinction between sex and gender, so important to *Price Waterhouse*, may limit recovery in Title IX sexual harassment cases because it precludes claims based on the use of "sex" in its nonbinary sense. For example, in *Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit allowed a Title VII suit on the basis that the plaintiff endured same-sex physical conduct "of a sexual nature."[68] Specifically, the court allowed the claim because the harassers targeted the sexual parts of the plaintiff's anatomy.[69] The *Davis* opinion's use of the term "gender" does not comport with the Ninth Circuit's departure from the binary sense of the term "sex." Thus, *Davis* likely precludes the broad reading of Title IX that Rene received in his Title VII action.

However, by shifting Title IX's focus from "sex" to the arguably broader "gender," the Court may have implicitly incorporated *Price Waterhouse* into Title IX. The term "gender" includes those social norms imposed upon or viewed as

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[63] *Id.* The classmate, G.F., attempted to touch Davis's breasts and genital area, and told her he wanted to "get in bed" with her. *Id.*

[64] *Id.* at 634.

[65] *Id.* at 653; *see also Meritor*, 477 U.S. at 67.

[66] *Davis*, 526 U.S. at 651 (citing *Oncale*, 523 U.S. at 82) (emphasis added).

[67] *See Oncale*, 523 U.S. 75.

[68] 305 F.3d 1061, 1064 (9th Cir. 2002).

[69] *Id.* (noting that "Rene's tormentors did not grab his elbow or poke their fingers in his eye"; rather, "[t]hey grabbed his crotch and poked their fingers in his anus").

attendant to the individual sexes.[70] Specifically, *Davis* may allow Title IX plaintiffs to file claims of sexual stereotyping based upon explicit precedent language, rather than merely by analogy to Title VII's *Price Waterhouse* standard. Unfortunately, as the Supreme Court has refused to articulate its intentions precisely with regard to who may recover under *Davis*, federal courts have and will interpret the language in contrary and counterintuitive ways.[71]

One can easily discern that, when ultimately faced with a Title IX claim of same-sex peer sexual harassment, the current Court will be highly reluctant to articulate an affirmative standard that accepts Title IX claims based upon same-sex sexual harassment. The Court has created a narrow standard (and some may argue, much narrower than was warranted by the *Davis* facts) of Title IX peer sexual harassment liability. More likely than not, the Court will draw from the exclusionary language of the *Davis* majority opinion, as well as the policy concerns advocated by the dissent, and preclude recovery to the harassment victim. Thus, the Court will likely affirmatively adopt an indulgent attitude toward "*simple acts* of teasing and name-calling," regardless of the effect upon the victim's educational experience.[72] Accordingly, victims of same-sex peer sexual harassment will have to import the dubious "sexual stereotyping" theory to Title IX claims.

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[70] Addressing the interconnection between societal norms and expectations of gender performance, Jeffrey Weeks explains, "The cultural conceptions of male and female . . . constitute within each culture a gender system . . . that correlates sex to cultural contents according to social values. . . . [A] sex-gender system is always intimately interconnected with political and economic factors in each society." WEEKS, *supra* note 37 at 716.

[71] *See* discussion *infra* Section III. The *Davis* dissent, written by Justice Kennedy and joined by Justices Rehnquist, Scalia, and Thomas, focuses not on the majority's inferential leap from the vague *Oncale* standard (requiring full consideration of adherent circumstances), but on what the minority deemed to be an overly onerous burden on the schools. *Davis*, 523 U.S. at 655-687 (Kennedy, Scalia & Thomas, J.J., and Rehnquist, C.J., dissenting). In fact, the dissent states:

Analogies to Title VII are inapposite, because schools are not workplaces and children are not adults. . . . A teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.

Id. at 675. The dissent also bemoaned the "flood of liability" that would surely result from the majority's standard of school liability. *Id.* at 680. Consequently, either by default or design, Scalia presented no opposition to the considerable narrowing of his *Oncale* standard in the academic setting relative to its application in the workplace.

[72] *Id.* at 653 (emphasis added).

A BEWILDERING VARIETY OF STANCES

A. The Aftermath of Oncale *and* Price Waterhouse*: A War of Absolutes*

1. The First Circuit: *Higgins v. New Balance Athletic Shoe, Inc.*[73]

The First Circuit began its recitation of the facts of this case by stating that, during plaintiff Robert Higgins's tenure at the New Balance shoe factory, his coworkers repeatedly harassed him, "[a]pparently due to his homosexuality."[74] Higgins's coworkers verbally abused him and mocked him, by speaking in high-pitched voices and gesturing with stereotypically effeminate mannerisms.[75] Higgins also experienced physical abuse, but it was not overtly sexual in nature.[76]

The court's analysis began with the determination that Higgins "toiled in a wretchedly hostile environment."[77] Despite the court's determination that harassment because of sexual orientation "is a noxious practice, deserving of censure and opprobrium," the First Circuit ultimately affirmed the district court's summary judgment for New Balance.[78] "[W]e are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[79]

The First Circuit's initial assumption that Higgins's harassment was "[a]pparently due to his homosexuality" epitomizes the difficulties facing homosexual Title VII complainants: given the opportunity, courts will presume that any harassment is motivated by the victim's sexual orientation. Because so many federal courts operate on the presumption of heterosexuality, homosexual plaintiffs must overcome the judicially held belief that individuals are heterosexual by default, and that no heterosexual could operate out of sexual desire for another individual of the same sex. As the plaintiff in the Third Circuit's *Bibby v.*

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[73] 194 F.3d 252 (1st Cir. 1999).

[74] *Id.* at 257.

[75] *Id.* Coworkers also placed a sign on his desk, reading "Blow Jobs 25 cents." *Id.* at 257, n.1. Others told Higgins they did not want to be near him because they feared getting AIDS. *Higgins*, 194 F.3d 257, n.1.

[76] *Id.* The physical abuse included snapping rubber bands, pouring condiments on Higgins, pouring hot cement on him, and grabbing him from behind in the lavatory to shake him violently. *Id.*

[77] *Id.* at 258.

[78] *Id.* at 259.

[79] *Higgins*, 194 F.3d at 259. The court also dismissed Higgins's claims of harassment based on "sex plus" and sexual stereotyping, concluding that he had not pled sufficient facts for these theories of recovery. *Id.* The crux of Higgins's "sex plus" theory was that New Balance discriminated against men, and *only* men, who possessed a specific quality: homosexuality. *Id.* Higgins based this theory on *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). *Id.*

Philadelphia Coca Cola Bottling Co. argued,[80] such a judicial predisposition places an additional burden on gay and lesbian Title VII plaintiffs. A victim-centered focus to Title VII complaints would eliminate this burden in its entirety, requiring inquiry only into the conduct itself and its effect on the victim.[81]

2. The Second Circuit: *Simonton v. Runyon*[82]

Dwayne Simonton, an openly gay man, worked for the U.S. Postal Service for twelve years.[83] His coworkers subjected him to repeated verbal taunts of a graphic sexual nature.[84] His coworkers placed male dolls in his vehicle, sent copies of *Playgirl* magazine to his home, and taped pornographic photographs to his work area.[85] In court, Simonton contended that he had a Title VII cause of action for sexual harassment on the basis of sexual orientation.[86] In the alternative, he claimed sex discrimination and sexual stereotyping.[87]

Relying on the First Circuit's opinion in *Higgins*, the Second Circuit quickly separated the case's moral issues from the matter of statutory construction, and stated, "[w]hen interpreting a statute, the role of a court is limited to discerning and adhering to legislative meaning."[88] The court stated that "well-settled" law in the Second Circuit and "in all others" held sexual harassment or discrimination based upon sexual orientation to be outside the parameters of Title VII.[89] The court sidestepped the lack of legislative history behind Title VII's "because of . . . sex" provision by addressing Congress's rejection of several bills that would have affirmatively extended Title VII's protection to people based upon sexual

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[80] *See infra*, text accompanying notes 102 – 108.

[81] *See* Stephen J. Nathans, *Twelve Years After Price Waterhouse and Still No Success for 'Hopkins in Drag': The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713 (2001). Regarding the inability of male victims of gender stereotyping to recover in so many Title VII cases, Nathan poses the hypothesis that "this anomalous result may be attributed to one or more of three factors: 1) the tendency of courts to mistake male-gender stereotyping for sexual orientation discrimination; 2) the Supreme Court's decision in [*Oncale*]; and 3) insufficient pleading by the plaintiffs." *Id.* at 728.

[82] 232 F.3d 33 (2d Cir. 2000).

[83] *Id.* at 34.

[84] *Id.* at 35.

[85] *Id.* On the walls of the employee restrooms, Simonton's coworkers also posted notes containing Simonton's name and the names of celebrities who had died of AIDS. *Simonton*, 232 F.3d at 35.

[86] *Id.* at 34.

[87] *Id.* at 36, 37.

[88] *Id.* at 35. Notably, the court made no mention of the well-settled Supreme Court doctrine that remedial statutes must be construed liberally so as to achieve their broadest purpose. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

[89] *Simonton*, 232 F.3d at 35.

orientation.[90] The court further reiterated its established standard that the term "sex" in Title VII refers only to sex in its binary sense, "and not to sexual affiliation . . . ."[91]

The Second Circuit further refused to revisit its case history in light of *Oncale*: "*Oncale* did not suggest . . . that male harassment of other males always violates Title VII. *Oncale* emphasized that every victim of such harassment must show that he was harassed *because he was male.*"[92] However, the court failed to support its conclusion that Simonton's coworkers *did not* harass him "because he was male." Specifically, the court ignored the gender-specific terms with which Simonton was assaulted: his coworkers likely would not have used the term "fucking faggot," for example, to disparage a woman, whether hetero- or homosexual.[93] Thus, the court's focus on Simonton's sexual orientation appears to have blinded it to the specific nature of the alleged conduct.[94]

The Second Circuit's *Simonton* opinion thus refuses Title VII protection to openly gay men claiming sexual harassment by male coworkers. The court's emphasis on the "because he was a male" standard implicitly assures success to those plaintiffs in Simonton's position who are able to demonstrate that their harassers are homosexual. However, such evidence of harassers' sexuality is difficult to procure, and should an individual's sexuality becomes an issue of material fact, it is easy to envision a new strain of sexual McCarthyism infiltrating Title VII sexual harassment claims.

The *Simonton* opinion invites further conjecture into whether the plaintiff would have prevailed had he hidden his homosexuality from the court. The court's unwillingness to analyze the facts critically without reference to Simonton's sexuality evinces an inability to look beyond the terminology of the harassment to the effect on its victim. Lastly, the court's focus on biological gender creates the untenable proposition that had Simonton's harassers been female, and exposed him

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[90] *Id.*

[91] *Id.* at 36.

[92] *Id.* (emphasis in original). There is arguable error here with the Court's change in the standard articulated in the *Oncale* opinion (and a deviation from the statutory language) as "because of . . . sex."

[93] *See id.* at 35.

[94] The court also quickly disposed of Simonton's sexual stereotyping claim, concluding that Simonton had not sufficiently pled his argument. *Id.*, 232 F.3d at 37. "We express no opinion as to how this issue would be decided in a future case in which it is squarely presented and sufficiently pled." *Id.* The court did caution, however, that Simonton's theory of sexual stereotyping "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Id.* at 38.

In dismissing Simonton's sexual stereotyping claim upon failure to plead sufficient facts, the court again neglected to adequately analyze the facts of the case. *Id.* Aside from the obvious gender stereotype that men are sexually attracted to women, the court ignored the evidence suggesting discrimination on the basis of perceived femininity, specifically the dolls and the *Playgirl* magazines. KANAZAWA, *supra* note 40, at 269.

to precisely the same sexual conduct, he may have had a viable claim under Title VII. How a court can maintain such a quixotic position is indeed perplexing, given that in all the foregoing hypothetical situations, the *effect* on the victim is the same.

The aftermath of *Simonton* has been more restrictive than the Second Circuit's opinion necessitates. In September, 2002, the district court for the Northern District of New York denied a same-sex sexual harassment claim because the harassment was because of sexual orientation rather than because of sex.[95] The court, faced with nearly identical facts to those in *Simonton v. Runyon*,[96] found that "[t]he torment endured by [the plaintiff], as reprehensible as it is, relates to his sexual orientation. The name-calling,[97] the lewd conduct[98] and the posting of profane pictures and graffiti[99] *are all of a sexual, not gender, nature.*"[100]

Beyond this opinion's unnecessary narrowing of the already restrictive *Simonton* standard, this court erred in two ways: First, the categorization of the conduct as of a "sexual, not gender, nature" may impermissibly restrict recovery in opposite-sex sexual harassment claims. If a woman were in Martin's position and the court had precluded recovery because the harassment was "sexual, not gender" in nature, such a result would surely shock the conscience and run counter to congressional intent. Yet, this standard prevails. Second, were the court to apply this reasoning *only* in same-sex sexual harassment claims—allowing broader categorization of the

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[95] Martin v. N.Y. State Dept. of Corr. Svcs., 224 F. Supp. 2d 434, 447 (N.D.N.Y. 2002).

[96] *Id.* at 446.

[97] Martin alleged that his coworkers used sexual epithets such as "pervert," "fucking faggot," "fudge-packer," and "gay bastard." *Id.* at 441.

[98] On one occasion, a co-worker bared his chest, grabbed his nipple and asked Martin, "Hey Martine, like what you see?" *Id.*

[99] Martin's coworkers left sexually explicit pictures in his work area and written statements and pictures on the restroom walls, yard booths, his time card, and his interoffice mail. *Id.*

[100] *Martin*, 224 F. Supp. 2d at 447 (emphasis and footnotes added). *See also*, Nicholas Hua, *Same-Sex Sexual Harassment Unter Title VII: The Line of Demarcation Between Sex and Sexual Orientation Discrimination*, 43 SANTA CLARA L. REV. 249, 282-283 (internal footnotes omitted):

A person who is targeted because of his sexual orientation is also targeted as a man who does not measure up to the standards of being a masculine heterosexual. . .Just because a hostile work environment is the result of homosexual slurs does not mean that the anti-gay expression is strictly confined to sexual orientation, devoid of any gender motivation.

* * *

Since male virility is frequently equated with masculinity, the failure of a man to engage romantically with women may signal to coworkers that the celibate man is not 'man enough' and/or is homosexual. Because same-sex sexual harassment could be provoked by either of these inferences, the interconnectedness of sex and sexual orientation is implicated as a result of society's perception of an inadequate man.

Operating within Hua's conception of same-sex sexual harassment, the *Martin* court's differentiation between conduct of a sexual and a gender nature is not only illogical but irrelevant to the reality of sexual harassment faced by victims perceived by their harassers as homosexual.

conduct in opposite-sex cases—a host of Equal Protection issues would necessarily be raised.[101]

3. The Third Circuit: *Bibby v. Philadelphia Coca Cola Bottling Co.*[102]

In 2001, the Third Circuit affirmed the district court's grant of summary judgment against Coca Cola employee John J. Bibby.[103] Bibby, an openly gay man, alleged several incidents of harassment by coworkers, but only one of these was tinged with sexual content.[104] What is most notable is that the Third Circuit

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[101] A Fifth Circuit case, *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474 (5th Cir. 2002), provided substantial guidance for the Second Circuit's mandated inquiry into the harasser's sexuality. The Fifth Circuit articulated "two types of evidence that are likely to be especially 'credible' proof that the harasser may be a homosexual": evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff, rather than merely to humiliate him, and proof that the harasser made same-sex sexual advances to others. *Id.* at 480. Relying on this standard, the District Court for the Southern District of New York in *Moran v. Fashion Institute of Technology*, granted summary judgment on the basis that the plaintiff had not shown there was a "genuine issue of material fact that [the harasser's] behavior toward [the plaintiff] was motivated by sexual desire." 2002 WL 31288272, at *5 (S.D.N.Y. Oct. 7, 2002). Plaintiff presented evidence that

> presented facts demonstrating that [the harasser] paid a lot of attention to him, stood close to him, touched his arm or shoulder for a minute or less, talked to him about co-workers, and stared at him. Based on his life experiences in social situations, Moran *felt* that [the harasser's] actions toward him were sexual, and that [he] was therefore homosexual.

Id. The Court, however, deemed Plaintiff's evidence insufficient.

Finally, in *Sales v. YM & YMHA of Washington Heights and Inwood*, the Southern District of New York again applied this standard the harasser's sexuality. 2003 WL 164276 (S.D.N.Y. Jan. 22, 2003). The court found that the harasser's comments about the plaintiff's appearance and his desirability as a husband created a reasonable inference that the harasser was homosexual and possessed sexual desire for the plaintiff. *Id.* at *2, 6 (noting that the harasser gave the plaintiff many compliments about his good looks, attempted to embrace him, told the plaintiff about dreams the harasser had had about him, and said, "I can cook for you and you could be my husband"; the court ultimately dismissed the case on other grounds). Not only does this requirement place an additional burden on the same-sex sexual harassment victim and perpetuate the societal stereotype that one is heterosexual until proven homosexual, but it drastically shifts the focus from the conduct itself and its effect on the victim. Whatever the harasser's motivations in a same-sex sexual harassment situation, the effect on the victim is the same—and precluding recovery in cases where the victim cannot produce credible proof of his harasser's sexuality certainly convolutes the concept of remedial legislation.

[102] 260 F.3d 257 (3d Cir. 2001), *cert. denied* 534 U.S. 1155 (2002).

[103] *Id.* at 259.

[104] *Id.* at 260. Bibby alleged that on January 22, 1995, a coworker physically assaulted him in a non-sexual manner. *Id.* at 259. The altercation became sexual in content, however, when the two exchanged angry words, and the coworker repeatedly shouted to Bibby that "everyone knows you're gay as a three-dollar bill," "everybody knows you're a faggot," and everybody knows you take it up the ass." *Bibby*, 260 F.3d at 259-260.

rejected Bibby's claim that the district court's finding placed a special burden on gay and lesbian plaintiffs.[105]

The district court ultimately found that Bibby's coworkers had harassed him on the basis of his sexual orientation rather than his sex.[106] Bibby's "special burden" claim, however, demonstrates a unique perspective on the federal courts' insistence upon an intent-based inquiry into same-sex sexual harassment claims. Bibby claimed that the district court's finding placed a "special burden on gay and lesbian plaintiffs alleging same-sex sexual harassment because they would be required to prove that harassment was not motivated by their sexual orientation."[107] The Third Circuit rebutted Bibby's assertion, stating,

Bibby is wrong. Whatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex. Once such a showing has been made, the sexual orientation of the plaintiff is irrelevant.[108]

The Third Circuit is wrong. Though the facts as Bibby alleged them may not have risen to the requisite elements of a hostile work environment claim, the proper focus should have been the conduct the victim experienced, rather than the motivation of the harassers. In this case, the conduct would not have triggered Title VII's protections—not because Bibby's harassers were motivated by his sexual orientation, but because the conduct was not sufficiently pervasive or severe to create a hostile work environment. Shifting the focus from the conduct to the harasser's intent impermissibly burdens gay and lesbian plaintiffs, as Bibby argued. Courts consistently presume individuals to be heterosexual unless proven otherwise. Operating within this narrow understanding of sexuality, courts will necessarily assume that same-sex sexual harassment is motivated by homosexual animus rather than sexual desire. Thus, gay and lesbian plaintiffs face the

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[105] Also notable is the Third Circuit's eager dismissal of Bibby's claim that his employer and co-workers perceived him as having AIDS. The court describes the plaintiff as experiencing "some medical difficulties, including weight loss, breathing problems, and vomiting blood." *Id.* at 259. The court noted in a *footnote* to the list of Bibby's symptoms that, "[w]hile Bibby claimed that he was perceived by his employer and his co-workers as having HIV/AIDS, he did not bring a claim for discrimination on the basis of perceived disability under the Americans with Disabilities Act." *Id.* at n. 1. In doing so, the Third Circuit egregiously erred in refusing to even address the merits of Bibby's claim that harassment based on the perception of HIV/AIDS could be harassment based on sex. Had Bibby been a female with precisely the same symptoms (and for that matter, had Bibby been a *lesbian*), his coworkers would surely have been unlikely to reach such an assumption.

[106] *Id.* at 260. This determination, as the cases discussed in this note demonstrate, is fairly standard in same-sex sexual harassment claims. Though this note takes the position that the proper focus is on the conduct itself and its effect on the victim (and that the district court's holding is thus erroneous), Bibby's allegations of merely one incident of sexually tinged behavior and verbal harassment does not rise to the requisite level of pervasiveness and severity.

[107] *Id.* at 261.

[108] *Id.* at 265.

additional burden of overcoming the inference that harassment was because of sexual orientation rather than sex. Bibby's argument perceptively identifies one of the primary negative consequences of courts' focus on harassers' motivations in same-sex sexual harassment claims.

4. Confusion reigns: the contrary decisions of the Ninth Circuit

Several Ninth Circuit and district court cases in the past two years have left the state of same-sex sexual harassment claims, under both Title VII and Title IX, in flux. In the Northern District of California, in *Ray v. Antioch Unified School District*, the court allowed a Title IX suit on the basis of same-sex sexual harassment, despite a lack of evidence that the harasser was motivated by sexual desire.[109] On a fact pattern by now familiar to courts in same-sex sexual harassment claims under Title IX, the district court found that the plaintiff was harassed on the basis of sex:

[A]ccepting Plaintiff's allegations as true, Plaintiff was targeted by his classmates due to his perceived sexual status as a homosexual, and was harassed based on those perceptions. Thus, although Plaintiff's complaint makes no specific characterization of the harassing conduct as "sexual" in nature, it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff's sexuality, i.e. that Plaintiff was harassed *on the basis of sex*.[110]

Thus, the court properly focused on the harassment as experienced by the victim. However, in order to reach this conclusion, the court had to present an interpretation of the "because of . . . sex" requirement that is directly at odds with the majority of federal courts. An articulated, victim-centered standard would eliminate the need to contort the language and meaning of the statute in this way.[111]

Two Ninth Circuit cases render the standard for same-sex sexual harassment increasingly contradictory and irresolute. In March, 2001, a three-judge Ninth Circuit panel filed its decision in *Rene v. MGM Grand Hotel, Inc.*[112] The panel affirmed the District Court of Nevada's grant of summary judgment to the defendant on the basis that Title VII does not prohibit discrimination on the basis of

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[109] *Ray*, 107 F. Supp. 2d 1165.

[110] *Id.* at 1170 (emphasis in original).

[111] In another district court case from the Ninth Circuit, *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001), the court allowed a high-school-aged, same-sex sexual harassment victim's equal protection claim against his school district. The district court rejected the defendant's claim that the student's only avenue to relief was Title IX, and permitted Henkle to proceed on the theory that the school district violated his constitutional rights to equal protection on the basis of his sexual orientation. *Id.* at 1074. The school district ultimately settled the case for $451,000 and agreed to institute a policy allowing students to be open about their sexual orientation. Kenneth Reich, *Nevada School District Settles Gay Harassment Suit*, L.A. TIMES, Aug. 28, 2002, at A17. Because this case settled before reaching the Ninth Circuit, predicting the ultimate disposition is difficult.

[112] 243 F.3d 1206 (9th Cir. 2001), *rev'd and remanded by* 305 F.3d 1061 (9th Cir. 2002) (en banc).

sexual orientation.[113] The circuit court reiterated the three identified avenues to Title VII's protections as articulated by *Oncale*: evidence that the harasser was motivated by sexual desire, evidence that the harasser was hostile to the presence of an entire gender in the workplace, and comparative evidence of how the harasser treated the two sexes in the workplace.[114] The circuit court ignored the obvious gender-related content of the sexual comments and treatment endured by Rene: his coworkers grabbed him in the crotch and poked him in the anus, hugged, kissed, and blew kisses at him, and called him "sweetheart" and "muñeca" (Spanish for "doll").[115]

Four months later, the Ninth Circuit issued a contrary decision in *Nichols v. Azteca Restaurant Enterprises,*[116] a case with striking similarities to *Rene*: the plaintiff, Sanchez, endured name-calling and insults. Co-workers referred to Sanchez, a man, in Spanish and English as *she* and *her*, and mocked him for walking "like a woman."[117] Co-workers often taunted Sanchez, using the English and Spanish words for, among other things, "faggot" and "fucking female whore."[118] In a bench trial, the district court found that Sanchez was not subjected to a hostile work environment, and that the harassment did not take place *because of sex.*[119] On appeal, the Ninth Circuit applied a detailed analysis to the "because of... sex" requirement and explicitly extended the *Price Waterhouse* sexual stereotyping claim to male Title VII claimants.[120] The Ninth Circuit concluded that "[at] its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act," and that the verbal abuse Sanchez endured "was closely linked to gender."[121] In coming to this conclusion, the Ninth Circuit made no reference to *Rene v. MGM Grand.*[122] By excluding the *Rene* court's reasoning from its determination, the *Nichols* court implicitly eschewed the *Rene* court's narrow categorization of the harassment endured by gay plaintiffs as necessarily based on sexual orientation.[123]

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[113] *Id.* at 1207.

[114] *Id.* at 1208-1209.

[115] *Id.* at 1207.

[116] 256 F.3d 864 (9th Cir. 2001). Co-plaintiffs in this case were Michelle Nichols, Antonio Sanchez, and Anna Christine Lizarraga. This appeal dealt only with the claims of Antonio Sanchez.

[117] *Id.* at 870.

[118] *Id.*

[119] *Id.* at 871.

[120] *Id.* at 874.

[121] *Nichols*, 256 F.3d at 874.

[122] Though both case were decided by the Ninth Circuit, each was heard by different three-judge panels. Circuit judges Hug, Nelson and McKeown filed the opinion in *Rene v. MGM Grand*, and judges Reinhardt, Wardlaw and Gould issued *Nichols v. Azteca Restaurant Ent.*

[123] Perhaps bolstered by the *Nichols* decision, Rene petitioned the Ninth Circuit for an en banc rehearing of his case. 255 F.3d 1069 (9th Cir. 2001) (granting rehearing en banc). In September 2002, the divided Ninth Circuit held that Rene's allegations gave rise to a

B. Shifting the focus: The effect on the victim as the appropriate litmus test

In 2000, Jesse Montgomery filed suit against his Minnesota school district, alleging discrimination based on gender and "perceived sexual orientation" in violation of Title IX and the Minnesota Human Rights Act.[124] Montgomery alleged that from the time he was in kindergarten until he was in the tenth grade, his classmates verbally and physically sexually harassed him.[125] In addressing the facts of the case, the district court notably stated, "many of [the taunts] appear to have been directed at plaintiff because of his perceived sexual orientation, including 'faggott' [sic], 'fag,' 'gay,' '*Jessica*,' '*girl*,' '*princess*,' 'fairy,' 'homo,' 'freak,' '*lesbian*,' '*femme boy*,' 'gay boy,' 'bitch,' 'queer,' 'pansy,' and '*queen*.'"[126] The court's immediate categorization of all these epithets, specifically those which evince the plaintiff's effeminacy (or failure to meet gender stereotypes) as based upon his "perceived" homosexuality demonstrates the judiciary's difficulty in separating sexual stereotyping claims from sexual orientation harassment claims. Indeed, one can infer that, had the terms italicized above been the only taunts Montgomery's classmates used, the issue of sexual orientation would not have derailed the court at all.

Montgomery further alleged extensive instances of physical abuse and harassment by his classmates, the majority of whom were male.[127] Much of this

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cognizable claim for sexual harassment. 305 F.3d 1061, 1065.

It is clear that Rene has alleged physical conduct that was so severe and pervasive as to constitute an objectively abusive working environment. It is equally clear that the conduct was "of a sexual nature." *Rene's tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus.*

Id. at 1065 (emphasis added). The court further noted that "[the] physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of . . . sex.' Whatever else those attacks may, or may not, have been 'because of' has no legal consequence." *Id.* at 1066. In so stating, the Ninth Circuit, like the district court in *Ray*, accepted an interpretation of the "because of . . . sex" requirement that was at odds with the interpretations of the majority of federal courts. Yet, the Ninth Circuit came to the right conclusion: the victim endured sexual harassment. Once the court ascertains the effect on the victim, the harasser's motivations were immaterial.

Also quite notable is that in coming to this conclusion, the Ninth Circuit relied on *Doe v. City of Belleville, supra* note 59, despite the Supreme Court's vacation of the opinion. The Ninth Circuit cited the Seventh Circuit's finding that, "we have difficulty imagining when harassment of this kind would *not* be, in some measure, 'because of' the harassee's sex-when one's genitals are grabbed, . . . it would seem to us impossible to delink the harassment from the gender of the individual harassed." *Rene*, 302 F.3d at 1066 (quoting *Doe*, 119 F.3d at 580). Despite this reliance on a dubious statement of law, the Supreme Court denied certiorari. *See* discussion *infra* Section IV.

[124] *Montgomery*, 109 F. Supp. 2d at 1083.

[125] *Id.*

[126] *Id.* at 1084 (emphasis added).

[127] *Id.* at 1084.

harassment, though violent, was nonsexual.[128] Montgomery did experience physical threats of a sexual nature, however, all perpetrated by male classmates.[129]

The court began its analysis by stating that "to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these claims are not actionable and must be dismissed."[130] The court next focused on the harassers' motives, focusing on their lack of sexual desire for the plaintiff. The harassers' conduct, the court observed, appeared to have been motivated by "hostility based upon his perceived sexual orientation."[131]

The court's discussion of the plaintiff's alternative claim of sexual stereotyping represents the awkward analysis courts must perform in order to navigate the dubious reach of same-sex sexual harassment standards. The court used as its starting point for the analysis the harassers' chosen epithets: it found that the use of "Jessica" to refer to the plaintiff indicated "a belief that he exhibited feminine characteristics."[132] Apparently accepting this indication as sufficient evidence that the plaintiff *did indeed* exhibit these characteristics, the court held that "a reasonable fact-finder could infer that [Montgomery] suffered harassment due to his failure to meet masculine stereotypes."[133] To support this inverse analysis, the court noted that the plaintiff's peers began harassing him as early as kindergarten and "[i]t is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference."[134]

The court found that *Davis*, *Price Waterhouse*, and *Oncale* necessarily combined to create a basis for Title IX claims of harassment based on failure to meet sexual stereotypes, despite the fact that the Supreme Court has never squarely addressed the issue.[135] Though the district court reached the same result it would have

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[128] *Id.* at 1084, 1084 n. 3 (noting that Montgomery alleged that, beginning in the sixth grade, students began to punch and kick him and knock him down on the playground; students super-glued Montgomery to his seat, pushed him down in the hallway in front of his family, smashed his calculator, threw his books on the floor, charged at him during gym class and sent him flying through the air, tripped him on the school bus, and threw objects such as crayons, paper, water and trash at him).

[129] *Montgomery*, 109 F. Supp. 2d at 1084-1085, 1085 n. 3. A classmate grabbed Montgomery's legs, inner thighs, chest and crotch; the same student grabbed his rear end on at least five or six occasions. *Id.* at 1084. A student asked to see him naked after gym class; another classmate grabbed his own genitals while squeezing Montgomery's rear end. *Id.* On several occasions, one classmate would stand behind Montgomery and grind his penis into Montgomery's backside; the same boy once threw him on the ground and pretended to rape him anally. *Id.* On another occasion, this student sat on Montgomery's lap and bounced, simulating intercourse with him while classmates looked on in laughter. *Montgomery*, 109 F. Supp. 2d at 1084-1085.

[130] *Id.* at 1090.

[131] *Id.*

[132] *Id.*

[133] *Montgomery*, 109 F. Supp. 2d at 1092.

[134] *Id.* at 1090.

[135] *Id.* at 1091-1092.

reached had it focused purely on the effect on the victim, the legal analysis is severely flawed. *Price Waterhouse* purported to prohibit employers from making assumptions about job qualifications based upon gender stereotypes. An analogous policy would certainly apply to Title IX if a teacher were, for example, assuming that female students could not perform higher math functions or successfully complete a woodshop class. However, it is difficult to see how same-sex simulated rape, such as what took place in *Montgomery*, has any direct connection to gender stereotypes as the *Price Waterhouse* court formulated them.

A victim-centered analysis of Title VII sexual harassment claims would reduce the circular logic employed by federal courts. Rather than extending the *Price Waterhouse* sexual stereotyping claim to illogically encompass physical assault, federal courts must instead place the emphasis on the conduct's effect on the victim. Federal courts must recognize that, to the victim of sexual harassment, the workplace is equally hostile whether the harasser be male or female, or of the same or opposite gender. Only such a standard will eliminate the inconsistency, the hypocrisy and the irrationality of the federal common law.

CONCLUSION

In 2002, the Supreme Court denied certiorari to *Bibby v. Philadelphia Coca Cola Bottling Co.* without opinion.[136] On March 24, 2003, the Court similarly denied certiorari to *MGM Grand Hotel v. Rene.*[137] By refusing to review these decisions—which had contrary results—the Court has condoned the piecemeal and divergent approaches taken by federal courts facing same-sex sexual harassment claims. This is irreconcilable with the standard for hostile work environment in cases of opposite-sex sexual harassment. The standard in those cases—sexual harassment that is so severe and pervasive as to alter the conditions of the victim's employment, both objectively and subjectively—focuses on the *conduct* (its objective severity and pervasiveness) and the *victim* (his or her subjective reaction to the conduct and the alteration of his or her working environment). This is where courts place the emphasis in opposite-sex sexual harassment cases; this is where the emphasis belongs in same-sex sexual harassment cases as well. Requiring a showing of the harasser's sexual desire, or a showing that the victim was inordinately effeminate, launches an intrusive and unnecessary inquiry into an individual's private life and sexuality—an inquiry that courts do not engage in when the harasser and victim are not of the same sex. This victim-centered focus will further prevent inquiry into the sexuality of harassers in Title IX cases, an inquiry complicated by issues of age and context.

Ultimately, as Justice Scalia stated, it is the provisions of our laws and not the concerns of our legislators by which we are governed.[138] In enacting Title VII and Title IX, Congress evinced intent to prohibit arbitrary discrimination in the two

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[136] 534 U.S. 1155 (2002).

[137] 538 U.S. 922, (2003).

[138] *See supra* note 3.

most important facets of American life: education and career. Thus, sexual harassment, *in any form*, necessarily strikes to the core of the desire to provide all Americans with equal opportunity to academic and gainful pursuits.

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