

# LAW & SEXUALITY

A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues

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## Social Cognition “At Work”: Schema Theory and Lesbian and Gay Identity in Title VII

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### I. INTRODUCTION: SOCIAL COGNITION AND SCHEMA THEORY

Take this short quiz:

According to the 2000 United States Census, married, opposite-sex couples aged 25-55 with children in the U.S. have an average of 2.0 children under 18 per household. On average, how many children under 18 do similarly aged same-sex couples have?

- A. 0.6
- B. 1.4
- C. 2.0
- D. 2.7

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The correct answer is C. 2.0.<sup>1</sup> Most people find that answer surprising. We ordinarily think of lesbians and gay men as predominantly childless, urban residents of cities like San Francisco, New York, Chicago, or Los Angeles or as inhabitants of the Northeastern or Pacific coast states. However, data from the 2000 census demonstrate that same-sex couples are located in virtually every county in each of the fifty states.<sup>2</sup> Moreover, many of the states with the highest proportion of same-sex couples raising children are not those with the highest concentrations of lesbian or gay couples; rather, they tend to be states in which all couples tend to have children.<sup>3</sup> Thus, like their heterosexual counterparts, lesbian or gay couples raising children may be attracted to locations with child-friendly amenities like good schools and parks, or where couples share similar values, rather than automatically locating near other gays and lesbians.<sup>4</sup> Our error is attributable to what we think we know about lesbians and gay men and the consequent distortion that occurs because of our beliefs.

This phenomenon is less puzzling than it first appears. Psychologists have demonstrated that our perceptions of the world are shaped by schemas, or sets of beliefs about people, events or situations that we use as guides in our interaction with those things.<sup>5</sup> Having a

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1. GARY J. GATES & JASON OST, *THE GAY & LESBIAN ATLAS 45* (2004) (citing analysis of 1% Public Use Microdata Sample (PUMS) of 2000 United States Census).

2. *Id.* at 24 (calculating that according to 2000 United States Census data, gays and lesbians live in 99% of all U.S. counties); ADAM P. ROMERO ET AL., *THE WILLIAMS INST., CENSUS SNAPSHOT: UNITED STATES 1* (2007), [http://www.law.ucla.edu/williamsinstitute/publications/US\\_CensusSnapshot.pdf](http://www.law.ucla.edu/williamsinstitute/publications/US_CensusSnapshot.pdf) (citing 2000 U.S. Census data that same-sex couples live in every county of every state in the United States).

3. GATES & OST, *supra* note 1, at 46-47. 27.5% of same sex couple households report children under eighteen living in the home compared to 36% of households in the United States reporting children under eighteen. *Id.* at 45. The state with the highest proportion of same-sex couples raising children is Mississippi (41%). *Id.* In comparison, Utah has 33%, New York 27%, and California, 26%. *Id.* at 75, 113, 129, 153. Alaska, Texas, and Louisiana rank fifth, sixth and tenth among all states in the U.S. in terms of numbers of same-sex couples raising children, although they only rate twenty-second, seventeenth, and twenty-third, respectively "in the overall concentration of same-sex couples in the population." *Id.* at 46. Each of those states ranks low in terms of lesbian- or gay-supportive legal climates.

4. GATES & OST, *supra* note 1, at 46-47.

5. *E.g.*, AARON BROWER & PAULA NURIUS, *SOCIAL COGNITION AND INDIVIDUAL CHANGE: CURRENT THEORY AND COUNSELING GUIDELINES* 14-15 (1993). There is an extensive psychology literature on schema theory. *See generally id.*; NANCY CANTOR & JOHN F. KIHLSSTROM, *PERSONALITY AND SOCIAL INTELLIGENCE* (1987); Marvin R. Goldfried & Clive Robins, *Self Schema, Cognitive Bias and the Processing of Therapeutic Experiences*, in 2 *ADVANCES IN COGNITIVE-BEHAVIORAL RESEARCH AND THERAPY* 33-39 (Philip C. Kendall ed., 1983); ELLEN J. LANGER, *MINDFULNESS* (1989); John Bransford et al., *Teaching Thinking and Problem Solving*, 41 *AM. PSYCHOLOGIST* 1078-89 (1986); Claudia E. Cohen, *Goals and Schemata in Person Perception: Making Sense from the Stream of Behavior*, in *PERSONALITY, COGNITION, AND SOCIAL INTERACTION* (Nancy Cantor & John F. Kihlstrom eds., 1981); John F. Kihlstrom &

schema about a person or thing enables us to know (or believe we know) a great deal about that person or thing in a shorthand fashion. Thus, we are able to treat that person or object in what we perceive to be an appropriate manner, that is, consistent with our schema.<sup>6</sup> For example, we may schematically assign furniture into separate groups, such as tables and chairs. When we categorize a new thing with one schema or the other, we know whether to sit in that object or to place our drink on it.<sup>7</sup>

Schemas are crucial to our ability to function in the world. If we had to constantly analyze each piece of information, event or situation anew, we would either be swamped by minutia or paralyzed into inactivity. Schemas, therefore, are one way to process the incessant stream of demands and inputs.<sup>8</sup> They permit us to understand others or new situations and to interact successfully with them after only brief encounters.

As applied to social situations, schemas tell us what is appropriate and how to act. For example, when we enter a restaurant, we call upon our “restaurant” schema to help us delineate our expectations or behavior. Thus, we know when to wait for a table, how to signal the waiter, where and how to pay the check, and so on. These schemas are

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Nancy Cantor, *Mental Representations of the Self*, in 17 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1-44 (Leonard Berkowitz ed., 1984); Peter Salovey & Jefferson A. Singer, *Cognitive Behavior Modification*, in *HELPING PEOPLE CHANGE: A TEXTBOOK OF METHODS* 372 (Frederick H. Confer & Arnold P. Goldstein eds., 4th ed. 1991); Karen Farchaus Stein, *Complexity of Self-Schema and Responses To Disconfirming Feedback*, in 18 *COGNITIVE THERAPY & RES.* 161, 161 (1994); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973) [hereinafter Tversky & Kahneman, *A Heuristic*]; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124-31 (1974) [hereinafter Tversky & Kahneman, *Judgment Under Uncertainty*].

Linda Hamilton Krieger has explored schema theory to reconceptualize mixed motive cases, burdens of proof and other aspects of antidiscrimination law. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995). Eric L. Muller has also used schema theory to contend that the prevailing schema of “Orientals” during World War II led to the Court’s decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943). See Eric L. Muller, *Hirabayashi: The Biggest Lie of the Greatest Generation* (U.N.C. Legal Studies Research Paper No. 1233682, Aug. 18, 2008), available at <http://ssrn.com/abstract=1233682>. Some legal commentators have employed relatively similar constructs without the same basis in empirical studies. See Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2123-24 (1991) (pre-understanding); Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511, 524-25 (1992) (same); Gerald P. Lopez, *Lay Lawyering*, 32 *UCLA L. REV.* 1, 3, 5 (1984) (stock story).

6. See BROWER & NURIUS, *supra* note 5.

7. See *id.* at 14.

8. See *id.* at 28.

socially or culturally based. As anyone who has traveled in foreign countries can recognize, American culture's restaurant schema is not necessarily useful or accurate as a guide to ordering coffee in a café in Rome<sup>9</sup> or figuring out how to leave a tip in Berlin.<sup>10</sup> Reasoning by analogy to our schemas is sometimes inapposite.

Traditional legal analogical reasoning follows a pattern called schema-matching.<sup>11</sup> We apply precedent to the circumstances before us when a prior case is consistent with our understanding of the current situation. We know when the situations are congruent when our schema of a new factual or legal pattern resonates with another. For example, if a judge recognizes new facts as characteristic of First Amendment incitement speech, she will know which constitutional standards to apply and which legal precedents to examine and what factual issues to address. Thus, a judge or legal scholar need not reanalyze each problem from scratch each time she encounters a new situation, but can rely on prior cases and doctrine. Of course, judges are aware that they are applying precedent to make decisions. However, the processes of decision-making are often obscure or misattributed.<sup>12</sup>

Additionally, our schemas may not always remain appropriate due to the way these models evolve. We extract and retain certain information because it is useful to us in organizing the world and consonant with our schema for that concept, and we reject information when it is not consistent or is no longer useful.<sup>13</sup> We liberally edit information to fit our schemas; and, because they are idiosyncratic, they are neither necessarily accurate nor consistent with others' schemas of the same things.

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9. See MARIO COSTANTINO & LAWRENCE GAMBELLO, *THE ITALIAN WAY: ASPECTS OF BEHAVIOR, ATTITUDES, AND CUSTOMS OF THE ITALIANS* 6 (1996) (describing the practice of first paying for the order, then presenting the receipt (*uno scontrino*) at the counter); RICK STEVES, *RICK STEVES' ITALY 2008*, at 23 (2007) (discussing payment first followed by handling receipt over to barista before placing order when the bar is busy).

10. See RICHARD LORD, *CULTURE SHOCK—GERMANY: A SURVIVAL GUIDE TO CUSTOMS AND ETIQUETTE* 186-87 (2008) (describing the custom of handing the tip directly to the server rather than leaving it on the table or including it on the credit card slip).

11. See *id.* at 14-15. For an interesting essay examining how historians' "plots" affect their narratives of environmental history by a process similar to schema theory, see William Cronon, *A Place For Stories: Nature, History and Narrative*, 78 *J. AM. HIST.* 1347, 1368-76 (1992) (describing the different histories of the Great Plains generated from the same historical evidence).

12. See JEROME FRANK, *LAW AND THE MODERN MIND* 148-55 (1930) (discussing that a judge may base her decisions on other inputs than pure legal doctrine); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 200-04 (1987) (discussing that critical legal studies often makes a similar point).

13. See BROWER & NURIUS, *supra* note 5, at 14-15.

We interact with people in a manner consistent with our social schemas. We quickly develop models that ascribe a range of characteristics to others corresponding to their skin color,<sup>14</sup> sex,<sup>15</sup> and other physical attributes.<sup>16</sup> It is unsurprising, therefore, that people have a schema for lesbians and gay men and for homosexuality. We can quickly identify some major characteristics of the popular schema about gay people:<sup>17</sup> (1) lesbians and gay men exhibit "cross-gender" or gender atypical behavior, which is traditionally associated with the opposite sex;<sup>18</sup> and (2) gay identity is solely about sexual behavior<sup>19</sup> and lesbians

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14. See Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY (Theodore M. Newcomb & Eugene L. Harley eds., 1947). There is an extensive legal literature about race and racial perceptions. See, e.g., Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. 1 (1991); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

15. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

This article distinguishes between "sex" and "gender." I use "sex" to refer to biological differences between men and women; I use "gender" to denote cultural or socially constructed characteristics associated with men or women. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting); see also Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 982 (1992). Thus, menstruation exemplifies a sex difference; the differing perception of a woman or a man in a dress illustrates a gender one.

16. See David Stipp & Alicia Hills Moore, *Mirror, Mirror On the Wall, Who's the Fairest of Them All?*, FORTUNE, Sept. 9, 1996, at 86, 87, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/1996/09/09/216627/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1996/09/09/216627/index.htm) (describing the conclusions of a 1990 University of Pittsburgh study finding that businessmen's average yearly salary rose \$1300.00 per inch of height—a six foot man made \$6500.00 more in salary than one who was five feet, seven inches, and other studies of the correlation between physical attractiveness and success).

17. See Fajer, *supra* note 5, at 514, 607.

Of course, many other aspects of the lesbian and gay male schema are not directly relevant to the legal doctrines discussed in this Article. For example, gay men are supposed to be more artistic, creative or stylish than nongay men. See, e.g., George F. Custen, *Strange Brew: Hollywood and the Fabrication of Homosexuality in Tea and Sympathy*, in QUEER REPRESENTATIONS, 119 n.9 (Martin Duberman ed., 1997) (discussing newspapers' accounts of Cole Porter being the interior decorator for his (and his wife's) apartment and his general sense of style as codedly identifying him as gay); *Ugly Betty: A Tree Grows in Guadalajara* (ABC television broadcast May 10, 2007) (portraying heterosexual fashion designer Tavares (actor Mykel Shannon Jenkins) pretending to be gay in order to succeed in the fashion business); *Cheers: Norm, Is That You?* (NBC television broadcast Dec. 8, 1988) (portraying a character pretending to be gay to obtain a job as an interior designer).

Lesbians are often seen as angry, overly serious, and hyper-vigilant about patriarchy. See Jennifer Vanasco, *Laughing with Us*, CHI. FREE PRESS, April 29, 2008, available at <http://www.indegayforum.org/news/show/31509.html> (discussing lesbian comedians and how lesbians were once thought to have no sense of humor, and retelling joke: "Q: How many lesbians does it take to change a lightbulb? A: That isn't funny?").

18. See *Frontline: Assault on Gay America* (PBS television broadcast Feb. 15, 2000), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/assault/interviews/kimmel.html>. In the broadcast, professor of sociology Michael Kimmel stated:

and gay men experience sexuality and sexual activity differently from heterosexuals. Homosexuality, according to the schema, is omnipresent, predatory, and uncontrollable. Sex is “completely divorced from love, long-term relationships, and family structure,”<sup>20</sup> all of which form part of the schema for heterosexuality.<sup>21</sup>

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To be gay inverts the gender order. In the public fantasy, in the homophobic mentality, to be gay is to be a man acting like a woman, or a woman acting like a man. One of the most common questions that straight people ask gay people is: “Which one of you is the boy, and which one of you is the girl?”

*Id.*; see also Frances Romero, *Guess Who’s Gay in Hip-Hop*, TIME, May 15, 2008, available at <http://www.time.com/time/arts/article/0,8599,1807080,00.html> (discussing with Terrance Dean, gay author of *Hiding in Hip Hop: On the Down Low in the Entertainment Industry—From Music to Hollywood*, being on the “down-low” and relating that black gay men have difficulty coming out within the African-American community, and linking gayness with effeminacy). See generally Fajer, *supra* note 5, at 607. Some empirical evidence exists that gay men and women possess certain interests and traits more common to the other sex. Richard A. Lippa, *The Gay-Straight Divide: What Are the Connections Between Sexual Orientation and Gender?*, AM. SEXUALITY MAG., Apr. 7, 2008, available at [http://nsrc.sfsu.edu/article/gay\\_straight\\_divide](http://nsrc.sfsu.edu/article/gay_straight_divide) (discussing personality trait research).

19. See SASHA LEWIS, SUNDAY’S WOMEN: A REPORT ON LESBIAN LIFE TODAY 11 (1979). Lewis argues:

Something that people don’t understand is that it’s not *who* you go to bed with that determines if you’re straight or gay. Sex has nothing to do with it. You can be celibate and gay. Identification as straight or gay is an emotional thing—do you primarily relate to women or to men in an intimate situation? . . . That was what was missing in my marriage. Sex was O.K. with him. What was missing was the emotional intensity. I was never in love with him or any other man. I didn’t know what “in love” meant until I had my first lesbian relationship.

*Id.* (emphasis added). Even nonsexual meetings of lesbian and gay men are assumed to be sexual. See *Gay Student Servs. v. Tex. A & M Univ.*, 737 F.2d 1317, 1323 (5th Cir. 1984) (describing expert testimony that sex likely followed any meeting of lesbian and gay male services organization); Press Release, Am. C.L. Union, Federal Judge Rules That Students Can’t Be Barred from Expressing Support for Gay People (May 13, 2008), available at <http://www.aclu.org/lgbt/youth/35265prs20080513.html> (reporting that a Florida high school principal testified he had banned students from wearing clothing and symbols supporting equal rights for gay people, and that he believed rainbows were “sexually suggestive” and would make students unable to study because “they’d be picturing gay sex acts in their mind[s]”). See generally Fajer, *supra* note 5, at 537-70 (discussing the “sex as lifestyle” assumption and lesbian and gay male counter-examples).

20. Fajer, *supra* note 5, at 514; accord *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986). “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.” *Id.* at 191; cf. 142 CONG. REC. S9998 (daily ed. Sept. 6, 1996) (statement of Senator Don Nickles, R. Okla.) In the record, Sen. Nickles discusses the Employment Non-Discrimination Act (ENDA) which would have amended Title VII to add sexual orientation as a prohibited category:

In my days as an employer, I had a sales force. Sales people spend a lot of time together. They go on the road together. They travel together. They go to conventions together. They spend weeks together. What if an employer found out this person is a

The schema of lesbians and gay men used by some judges has prevented them from appropriately interpreting legal doctrine and precedent and has led to anomalous results.<sup>22</sup> Moreover, the relatively non-rigorous and unconscious manner in which we decide how to appropriately treat new persons or situations by comparing them to our existing schemas is a feature of both legal and nonlegal reasoning. This schema-matching mechanism has exacerbated the tendency toward inaccuracy and has distorted legal doctrine where lesbians and gay men are involved.

Some of the most jarring examples of inappropriate schema-matching in legal decisions have occurred under the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964,<sup>23</sup> specifically those cases involving same-sex sexual harassment. Significant commentary exists on same-sex sexual harassment.<sup>24</sup> This Article

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good salesman, has a good reputation, but he openly admits that he is bisexual. Now, that may be fine in some sales organizations but in some other sales organizations it will not be very popular. It will not be very popular. It will not be very popular with some of the spouses, maybe male and female. If an employer says, "Well, no, that person really will not fit into our organization. We do not think we should have promiscuous people in our sales team because of the time spent away from home, the time and travel, so I think as a policy we will not do that." You say, wait a minute, this bill does not protect that. Wait a minute, this bill protects homosexuals and bisexuals. The very definition of bisexual means you are promiscuous. You are having sex with males and females. Bisexuals are protected under this bill.

*Id.* Under Sen. Nickles's schema, there is no notion of fidelity, selectivity, or even self-control in bisexuality. A bisexual must have these sexual urges and act on them indiscriminately.

21. See Fajer, *supra* note 5, at 514.

22. See Lawrence, *supra* note 14 (discussing this phenomenon in the context of racial schemas); Williams, *supra* note 15 (discussing the way that cultural values limit and shape legal doctrines using gender).

23. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (1964) (codified at 42 U.S.C. § 2000(e) (2000)).

24. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155 (1999); Robert Brookins, *A Rose By Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441 (1998); Dale Carpenter, *Same Sex Sexual Harassment Under Title VII*, 37 S. TEX. L. REV. 699 (1996); Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105 (1995); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205 (2007); Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375 (1995); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U.L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1103095>; Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U.L. REV. 677 (1998); Ronald Turner, *Same-Sex Sexual Harassment:*

diverges from that commentary in that it does not seek to explain or revise that doctrine through theoretical or jurisprudential constructs. Rather it uses same-sex sexual harassment as one example of how law can employ the insights of social science, particularly cognitive schema models. The Article explores how social cognition theories inform and misinform judicial decisions and those of the participants in the cases.

Similarly, although the United States Supreme Court's brief opinion in *Oncale v. Sundowner Offshore Services, Inc.*<sup>25</sup> held that same-sex sexual harassment is actionable under Title VII,<sup>26</sup> neither that decision nor the lower court cases before or after it resolve the concerns of this Article. The Article does not comprehensively survey the landscape of same-sex sexual harassment decisions, nor does it provide a unified field theory<sup>27</sup> of sexual harassment. Instead, it focuses on selected cases decided both before<sup>28</sup> and after *Oncale* to illustrate how the schema of lesbians and gay men has affected judicial decision-making.

Consequently, Part II of the Article briefly touches upon basic Title VII doctrine on sexual harassment and the Court's *Oncale* opinion. However, the Article will quickly move on to show how the lesbian and gay male schema has influenced judicial analysis in the selected cases in Parts III and IV. When significant discussion of legal theories is necessary to understand the impact of schema on doctrine, that legal discussion will usually be reserved until required by the schema analysis.

Part III examines how the lesbian and gay male schema has sometimes helped courts make appropriate analogies to relevant precedent on desire-based sexual harassment and sometimes skewed judicial analysis. Schemas about lesbians and gay men are not always identical, nor do they always operate in a parallel manner.<sup>29</sup> However, those schemas share a common core of attributions and beliefs in sex discrimination cases that allows us to treat them similarly in this Article. Part IV explores the more subtle effects caused by the cross-gender

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*A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL'Y & L. 151 (1997).

25. 523 U.S. 75 (1998).

26. *Id.* at 82.

27. See Albert Einstein, *On the Generalized Theory of Gravitation*, 182 SCI. AM. CLXXXII 13, 13-17 (1950) (describing a unified field theory to generalize his theory of gravitation in order to unify and simplify the fundamental laws of physics, particularly gravitation and electromagnetism).

28. See *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Dillon v. Frank*, 58 Fair Empl. Prac. Cas. 90 (E.D. Mich. 1990); No. 90-2290, 1992 WL 5436 slip op. (6th Cir. Jan. 15, 1992); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

29. See *infra* notes 267-282 and accompanying text.

aspects of the lesbian and gay male schema. The gender atypicality facet of the schema has created significant problems for courts and for the individuals involved in those cases. Part IV also reveals the mechanism by which schemas provoke distortions. Finally, the Article concludes with a look at one empirical study in cognitive psychology of same-sex sexual harassment to confirm the insights gained by applying schema theory to the cases discussed and to sketch a judicial prescription for the future.

## II. *ONCALE* AND SAME-SEX SEXUAL HARASSMENT

Title VII prohibits sexual harassment in the workplace perpetrated by men against women,<sup>30</sup> by women against men,<sup>31</sup> and since the Supreme Court's 1998 *Oncale* decision, by either men or women against persons of their own sex.<sup>32</sup> Courts traditionally divide sexual harassment into two types: quid pro quo or hostile environment.<sup>33</sup> The former is a request for sexual favors, which is directly linked to an economic or other tangible benefit.<sup>34</sup> The latter describes a workplace where employees are subject to unwanted sexual attention or "discriminatory intimidation, ridicule, and insult" without a direct connection to employment benefits.<sup>35</sup> Although the elements for the two causes of action differ slightly,<sup>36</sup> the difference does not affect our analysis. Both can be based on subjecting members of one sex to conduct or behavior (and thus terms and conditions of employment) not applicable to members of the other sex.<sup>37</sup> Both are created by unwanted sexual advances, other verbal or physical activity of a sexual nature, or other harassing behaviors on the basis of sex.<sup>38</sup>

We can ignore that doctrinal distinction and, to see better how schemas affect sexual harassment cases, focus instead on examining the perpetrator's motivations in same-sex sexual harassment. Some incidences of sexual harassment appear motivated by attraction or desire for the harassment victim, others by hostility or antipathy toward him or

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30. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

31. See *Anderson v. S.U.N.Y. Health Sciences Ctr.*, 826 F. Supp. 625, 632 (N.D.N.Y. 1993) (permitting Title VII claim, but rejecting liability due to insufficient evidence).

32. *Oncale*, 523 U.S. at 82.

33. *Meritor*, 477 U.S. at 64-65.

34. See *id.* at 65.

35. *Id.*; see also *Harris*, 510 U.S. at 21.

36. *Prescott v. Indep. Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1549 (M.D. Ala. 1995).

37. *Meritor*, 477 U.S. at 64-65.

38. *Id.* at 65.

her.<sup>39</sup> Thus, requests for sexual favors, dates and similar physical advances would fall into the desire-based sexual harassment category.<sup>40</sup> Sexual innuendoes, taunts, unwanted sexual attention, or other conduct of a sexual nature that is so “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment’”<sup>41</sup> and which fill the workplace with “discriminatory intimidation, ridicule, and insult”<sup>42</sup> constitute hostility-based sexual harassment.<sup>43</sup>

Courts do not always appropriately employ the distinction between desire- and hostility-based sexual harassment.<sup>44</sup> Nor have courts traditionally required plaintiffs to show motive, and this paper does not suggest that they should do so. However, motivation does serve as an

39. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). This division is not meant to suggest that the two categories are mutually exclusive, or that sexual advances ostensibly motivated by desire cannot evidence hostility towards women in the workplace. See, e.g., CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 209-10 (1979).

40. See *Meritor*, 477 U.S. at 57.

41. *Id.* at 67 (alteration in original) (quoting *Hensen v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

42. *Id.* at 65.

43. *Id.* Classic antifemale, hostility-based sexual harassment can take many forms. One form is conduct not having an explicitly sexual content, such as unwanted physical contact of a sexual nature (e.g., groping, rubbing, intentional bumping, or staring). See *Agugliaro v. Brooks Bros., Inc.*, 927 F. Supp. 741 (S.D.N.Y. 1996). Another form of hostility-based sexual harassment comes in the form of insults, ridicule, and other verbal abuse referring to gender, such as “bitch” or “slut.” *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 998, 1000 (10th Cir. 1996); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 883 (D. Minn. 1993). A third form is sex-based refusal to cooperate or hard-timing, such as not trading shifts or not sharing workload. See *Andrews v. Philadelphia*, 895 F.2d 1469, 1473-75 (3d Cir. 1990); *Porta v. Rollins Envtl. Servs., Inc.*, 654 F. Supp. 1275, 1279 (D.N.J. 1987). Naturally, these types of behaviors are neither exhaustive nor mutually exclusive. See *Andrews*, 895 F.2d at 1472-75 (directing lower court to consider evidence of sexual comments and innuendo, pornography, destruction of office equipment, and hiding of files in determining whether work environment was hostile and offensive to women); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988). Unwanted touching and verbal harassment evidence the view that women are sexual playthings first and employees or coworkers second. See LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 14-15 (1978); JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 19 (1990) (discussing the identification of women with sex). Comments to a female bookkeeper like, “[w]hore, what is the amount??” or, “all the girls are whores and all they’re good for is . . . fucking” are blatant illustrations of the denigration of women because of sex. *EEOC v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 36 (W.D.N.Y. 1994); see also BUTLER, *supra*, at 19; FARLEY, *supra*, at 14-15; MACKINNON, *supra* note 39, at 209-10. This treatment of women signals to them that they are not equals in the workplace with men. See MACKINNON, *supra* note 39, at 235. Thus, it is related to hard-timing or nonsexual disparate treatment of female workers.

44. See *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1266 (10th Cir. 2005); *Pedroza v. Cintas Corp.*, No. 2, 397 F.3d 1063, 1070-71 (8th Cir. 2005); *EEOC v. Turkey Hill Dairy, Inc.*, 2007 U.S. Dist. LEXIS 61597, at \*9-10 (E.D. Pa. 2007). But see *Tietgen v. Brown’s Westminster Motors, Inc.*, 921 F. Supp. 1495, 1500-01 (E.D. Va. 1996) (demonstrating incorrect differentiation by the court).

analytical tool to understand how the lesbian and gay male schema affects same-sex sexual harassment cases.

Before *Oncale* and despite significant experience with opposite-sex sexual harassment,<sup>45</sup> the lower federal courts splintered badly on the question of whether same-sex sexual harassment was encompassed under the sex discrimination provisions of Title VII. Many judges refused to equate same-sex sexual harassment with opposite-sex harassment.<sup>46</sup> When a man harassed a woman, Title VII applied; when he harassed another man, it did not.<sup>47</sup> Additionally, although courts recognized a Title VII cause of action against an employer when it required conformity to traditional gender behavior for women,<sup>48</sup> often they did not permit an equivalent suit by an effeminate or a nontraditionally masculine man.<sup>49</sup> As the Supreme Court stated in reviewing this “bewildering variety of stances,”<sup>50</sup> some cases “held that same-sex sexual harassment claims are never cognizable,”<sup>51</sup> others that such claims are only appropriate “if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire),”<sup>52</sup> and other courts found that sexual workplace harassment was “always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.”<sup>53</sup>

Against that background, in 1998 the Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*, holding that same-sex sexual harassment falls within Title VII.<sup>54</sup> Plaintiff Joseph Oncale was employed as a roustabout on an eight-man, all male oil platform crew. On several occasions, Oncale was forcibly subjected to sexually degrading and humiliating actions by his supervisors and coworkers,<sup>55</sup> including sodomy with a bar of soap in the showers,<sup>56</sup> restraint by

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45. See Axam & Zalesne, *supra* note 24, at 177-205, for a good discussion of the various theories and decisions prior to *Oncale*.

46. See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994); *Goluszek v. Smith*, 697 F. Supp. 1452, 1452, 1456 (N.D. Ill. 1988).

47. See *Garcia*, 28 F.3d at 451-52.

48. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

49. See *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

50. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

51. *Id.* (citing *Goluszek*, 697 F. Supp. at 1452).

52. *Id.* at 79 (citing *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996)).

53. *Id.* (citing *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998)).

54. *Id.*

55. *Id.* at 77.

56. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

coworkers subjecting him to physical contact with another man's penis,<sup>57</sup> and threats of rape.<sup>58</sup> In a brief, unanimous opinion penned by Justice Scalia, the Supreme Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."<sup>59</sup> In *Oncale*, the Court also outlined three situations in which a victim of same-sex sexual harassment could show gender discrimination: (1) when the harasser was homosexual and thus motivated by sexual desire; (2) when the harasser used sex-specific and derogatory terms so as to make clear that he or she was motivated by general hostility to persons of that sex in the workplace; and (3) where there was direct comparative evidence that the sexes were treated differently at work.<sup>60</sup> Contrary to what some judicial opinions have stated, the Court's list of situations was illustrative and not exhaustive.<sup>61</sup> *Oncale* itself illustrated that point. It described neither homosexual desire, nor general hostility towards males in the workplace, nor any direct comparison with female workers' treatment.<sup>62</sup> Finally, in *Oncale*, the Court explained that prior case law requiring a severe or pervasive hostile environment mandated a distinction between "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation [and] discriminatory conditions of employment."<sup>63</sup>

A decade after *Oncale*, courts have continued to struggle with the Supreme Court's guidance on same-sex sexual harassment. In particular and most relevant to this Article, lower courts have had a difficult time distinguishing between gender discrimination and sexual orientation

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57. *Id.* The Supreme Court coyly elided the details of *Oncale*'s treatment "in the interest of both brevity and dignity." *Oncale*, 523 U.S. at 77. Because *Oncale* was on certiorari from the Fifth Circuit, which had held same-sex sexual harassment never actionable, the precise facts were irrelevant. *See id.*

58. 523 U.S. at 77.

59. *Id.* at 79.

60. *Id.* at 80-81.

61. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 n.4 (8th Cir. 1999); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999). *Contra Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714-15 (E.D. Tex. 2000).

62. *See Oncale*, 523 U.S. at 75.

63. *Id.* at 81 (quotation marks omitted).

discrimination.<sup>64</sup> This distinction is crucial because Title VII covers the former but not the latter.<sup>65</sup>

After *Oncale*, in cases motivated by sexual desire, judges are more easily able to analogize homosexual attraction to heterosexual desire and find actionable conduct. However, in hostility cases where the perpetrators are heterosexual, courts often confuse gender and sexual orientation discrimination—particularly in single-sex workplaces where disparate treatment based on sex is difficult for plaintiffs to prove. This difficulty is compounded when victims of sexual harassment are gay or perceived to be gay. Too often the fact that a case involves lesbians or gay men causes an inability to see beyond that particular issue. This myopia is one of the distortions that the schema of lesbians and gay men brings to judicial analysis; cases that are alike are often decided differently when they involve lesbians and gay men. Schema theory allows us to see why these cases are disparately handled, as well as to reveal the cognition mechanisms at work behind those decisions.

### III. THE SCHEMA OF LESBIAN AND GAY IDENTITY AS SEXUAL BEHAVIOR/DESIRE-BASED SEXUAL HARASSMENT

As *Oncale* noted in dicta, same-sex sexual harassment where the perpetrator is gay or lesbian is discrimination on the basis of sex parallel to opposite-sex sexual harassment by nongay persons.<sup>66</sup> A heterosexual male supervisor who demands sexual favors from a female because he is attracted to her does so because only members of her sex have the potential to be found sexually appealing to him. Accordingly, but for her

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64. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1075-76 (9th Cir. 2002) (en banc) (Hug, J., dissenting); *Bibby*, 260 F.3d at 257; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.* 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

65. Some members of Congress have periodically sought to amend Title VII to include employment protections on the basis of sexual orientation. Most recent efforts include the Employment Non-Discrimination Act (ENDA). However, to date those efforts have been unsuccessful and have languished in Congress since civil rights protections for sexual orientation were first introduced in 1974. See *Divisive ENDA Fight Dominated Year in Gay News: Debate over Trans Inclusions Prompted Protests*, WASH. BLADE (Wash., D.C.), Dec. 28, 2007, available at <http://www.washblade.com/2007/12-28/news/national/11795.cfm>; David M. Herszenhorn, *House Backs Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A1 (discussing the most recent iteration of ENDA passed by the House of Representatives).

66. *Oncale*, 523 U.S. at 80.

sex, she would not be treated differently.<sup>67</sup> Both before<sup>68</sup> and after *Oncale*, courts have had the least amount of trouble seeing that same-sex desire-based sexual harassment is also actionable under Title VII.<sup>69</sup> Because same-sex desire-based sexual harassment most closely resembles the prototype of cross-sex sexual harassment, it is unsurprising that courts are able to incorporate unwanted homosexual attention into Title VII cases.<sup>70</sup>

The lesbian and gay male schema may actually reinforce this congruence in a limited set of circumstances, such as when a gay supervisor harasses a nongay employee. One aspect of the lesbian and gay male schema is the predatory, lustful, or purely sexual nature of homosexual liaisons that do not reflect loving, long-term relationships.<sup>71</sup> Plaintiffs' attorneys in these cases have been known to capitalize on this schema to enlist the judge's antipathy towards gay people and to provoke sympathy for the victims of same-sex sexual harassment.<sup>72</sup> Proof of the unwelcome nature of the advances is unnecessary; no heterosexual plaintiff would have encouraged or desired this unnatural attention.

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67. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1999) (Ginsburg, J., concurring) ("The critical issue . . . 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.").

68. See *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102-04 (M.D. Tenn. 1995) (discussing *Meritor* and reasoning by analogy to it); *Marrero-Rivera v. Dep't of Justice*, 800 F. Supp. 1024, 1027 (D.P.R. 1992); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983).

69. See *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1264 (10th Cir. 2005); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002); *EEOC v. Harbert-Yeargin, Inc.*, 2001 FED App. 0335P at 41-42 (6th Cir.); *Bibby*, 260 F.3d at 264; *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010 (7th Cir. 1999).

Even in same-sex situations, the line between these two categories can be murky. See *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 231 (S.D. Ga. 1995). In *McCoy*, Robin McCoy, a white female, alleged that Marjorie Ivey, an African-American female coworker, rubbed her breasts against her, rubbed McCoy between her legs, and forced her tongue down McCoy's throat, which according to the court indicated sexual attraction. *Id.* at 231. However, there was also evidence that Ivey and another coworker called McCoy "stupid poor white trash" or "stupid poor white bitch" and stated that they would make plaintiff quit, as they had made other "white bitches." *Id.* These comments would seem to show both racial and sexual animosity. The court properly decided that the plaintiff demonstrated hostile environment sexual harassment and did not inquire into motive. *Id.* at 232.

70. See *Walden Book Co.*, 885 F. Supp. at 1102-04; *McCoy*, 878 F. Supp. at 232; *Prescott v. Indep. Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995).

71. See Todd Brower, "A Stranger to Its Laws: Homosexuality, Schemas and the Lessons and Limits of Reasoning by Analogy," 38 SANTA CLARA L. REV. 65, 78-83 (1997); see also 142 CONG. REC. H7441, H7444 (daily ed. July 11, 1996). In a statement by Representative Tom Coburn, R. Okla., on the proposed Defense of Marriage Act, Coburn said, "What [my constituents] believe is that homosexuality is immoral, that it is based on perversion, that it is based on lust." *Id.*

72. See Dale Carpenter, *Same Sex Sexual Harassment Under Title VII*, 37 S. TEX. L. REV. 699, 705 n.26 (1996).

One early example is *Yeary v. Goodwill Industries-Knoxville, Inc.* in 1997.<sup>73</sup> Shortly after Terry Yeary was hired by Goodwill, his male coworker, Robert Lee, asked Yeary on a date. The court stated that “it was very well known among employees and higher level management that Mr. Lee was a homosexual and was notorious for harassing male employees of Goodwill.”<sup>74</sup> Yeary was subjected to sexual remarks about nudity and masturbation, and asked whether “[h]e had ever seen ‘12 inches’ or if [he] had ever had ‘12 inches.’”<sup>75</sup> Lee also touched Yeary sexually and pinned him against the wall of Lee’s office while whispering obscene comments about Yeary’s physical appearance.<sup>76</sup> Although decided before *Oncale*, the United States Court of Appeals for the Sixth Circuit easily found that Title VII prohibited this conduct:<sup>77</sup>

It is not necessary for this court to decide today whether same-sex sexual harassment can be actionable *only* when the harasser is a homosexual; all that is necessary for us to observe is that when a male sexually propositions another male *because of sexual attraction*, there can be little question that the behavior is a form of harassment that occurs *because* the propositioned male is a male—that is, “because of . . . sex.”<sup>78</sup>

In 2001, a different Sixth Circuit panel split on whether a hostility-based male-on-male harassment claim was proper.<sup>79</sup> However, in reviewing *Yeary* and *Oncale*, all of those judges agreed that “predatory homosexual conduct [would] ground a Title VII claim.”<sup>80</sup> Note the word “predatory.” The *EEOC* opinion uses that term three times, twice explicitly with reference to sexual harassment by gay people against nongay persons.<sup>81</sup> This linking of homosexuality and predation resonates with the lesbian

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73. 1997 FED App. 0072P (6th Cir.).

74. *Id.* at 444.

75. *Id.* (alterations in original).

76. *Id.*

77. *Id.* at 447.

78. *Id.* at 448.

79. *EEOC v. Harbert-Yeargin, Inc.*, 2001 FED App. 0335P (6th Cir.).

80. *Id.* at 519 (Guy, J., concurring in part, dissenting in part).

81. *Id.* at 519-20, 522 (“The court [in *Yeary*] decided that the majority of circuits would allow *predatory homosexual* conduct to ground a Title VII claim.” (emphasis added)). “Mr. Oncale quit his job because he thought he ‘would be raped or forced to have sex.’ The harasser was a *homosexual*. Because this was the fact, it was easy to conclude the harasser would not have been *predatory* toward females.” *Id.* at 522 (emphasis added) (discussing the Supreme Court’s decision in *Oncale*). “[Title VII] also protects, in certain circumstances, workers from *predatory* conduct carried out by persons who are of the same sex as the person being ‘discriminated’ against.” *Id.* at 520 (emphasis added).

and gay male schema of recruitment of nongay persons into the “gay lifestyle.”<sup>82</sup>

The gay recruitment schema is a one-way ratchet. Most frequently, same-sex sexual harassment has been actionable when the harasser is homosexual and the victim heterosexual, not the reverse, and not when both are homosexual or both heterosexual. *Pritchett v. Sizeler Real Estate Management Co.* helps decipher this pattern.<sup>83</sup> In *Pritchett*, a lesbian supervisor sexually harassed a female employee.<sup>84</sup> The United States District Court for the Eastern District of Louisiana rejected then-existing United States Court of Appeals for the Fifth Circuit precedent denying recovery for same-sex sexual harassment so that the District Court could protect heterosexuals from homosexual sexual predations:<sup>85</sup>

[The Fifth Circuit’s decisions denying coverage] notwithstanding, it seems discriminatory that a supervisor should be exempt from a Title VII sexual harassment claim solely because of that supervisor’s sexual orientation. To deny a claim of same gender sexual harassment allows a homosexual supervisor to sexually harass his or her subordinates either on a *quid pro quo* basis or by creating a hostile work environment, when a heterosexual supervisor may be sued under Title VII for similar conduct. Although it is clear that Title VII does not protect a homosexual who is discriminated against based on his or her sexual orientation, here it is not the homosexual who seeks to be protected. To conclude that same gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws that govern the workplace conduct of heterosexuals.<sup>86</sup>

Several aspects of the court’s opinion are noteworthy. First, the court’s reasoning cited above is consistent with the skewed effect of the lesbian and gay male schema. The judge jumped immediately from the notion that had a gay plaintiff been involved, the case would have been barred because Title VII does not cover sexual orientation discrimination.<sup>87</sup> That conclusion is erroneous; the desire-based discrimination would still have been based on sex, not sexual orientation. Homosexuality is no more the

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82. *Accord* Aumiller v. Univ. of Del., 434 F. Supp. 1273, 1285 (D. Del. 1977) (discussing the termination of a professor/advisor to a campus gay organization for “advocacy of the homosexual lifestyle for the undergraduate” as a violation of the First Amendment); see Jon Carroll, Column, S.F. CHRON., June 24, 2005, at E18 (discussing gay pride day and antigay groups’ beliefs); Andrew Heller, *Yikes, Folks, Did We Grow Up Straight?*, FLINT J. (Mich.), Feb. 2, 2005, at D1 (discussing attacks by the Reverend James Dodson, commentator from the group Focus on the Family, on cartoon characters as encouraging gay behavior and acceptance).

83. Civ. A. No. 93-2351, 1995 WL 241855 (E.D. La. Apr. 25, 1995).

84. *Id.* at \*1-2.

85. *See id.* at \*2.

86. *Id.*

87. *See id.*

foundation for a same-sex, desire-based sexual harassment suit than heterosexuality is the basis of an opposite-sex sexual harassment cause of action.<sup>88</sup> In both cases, the harasser's sexual orientation is only relevant to explain why the harasser targeted a particular sex.<sup>89</sup> But for their sex, the victims would not have been the objects of unwanted attention.

Second, we can hear an echo of some anti-gay rights campaigners' "no special rights" rhetoric in the court's concern about providing an exemption for homosexuals.<sup>90</sup> Although Title VII could now cover same-sex sexual harassment, this judge believed the holding merely closed a loophole that homosexuals could have exploited.<sup>91</sup> A common judicial schema in these cases is that gay people seek to exploit doctrinal loopholes to gain unfair advantage and that judges must vigilantly police that cheating.<sup>92</sup> That schema is especially clear because the court clarified that it was only protecting heterosexuals by this holding, not homosexuals.<sup>93</sup>

This last point can only be true if one of three erroneous assumptions is valid: (1) Title VII simply treats gay and lesbian plaintiffs differently from nongay plaintiffs; (2) gay people only engage in same-sex sexual harassment against heterosexuals and not against other gay individuals; or (3) when gay people harass other gay people, it is not actionable sexual harassment equivalent to that suffered by nongay victims.

The language of Title VII does not support the first assumption. Title VII ought not to be applied differently based on the claimants' sexuality. Of course, Title VII prohibits discrimination based on sex but not sexual orientation.<sup>94</sup> Heterosexual plaintiffs alleging sexual orientation discrimination under Title VII should have their claims

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88. *But see* Kramer, *supra* note 24 (arguing that cross-sex sexual harassment scenario is based both on sex and sexual orientation).

89. *See supra* note 67 and accompanying text.

90. *See* Pamela Coukos, *Civil Rights and Special Wrongs—The Amendment 2 Litigation*, 29 HARV. C.R.-C.L. L. REV. 581, 582, 584 (1994); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285, 292 (1994).

91. *See Pritchett*, 1995 WL 241855, at \*2.

92. *See, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 2006 FED App. 0252P at 5-6 (6th Cir.), *cert. denied*, 127 S. Ct. 2910 (2007); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005); *infra* note 401 and accompanying text.

93. *Pritchett*, 1995 WL 241855, at \*2.

94. *See* *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1070 (9th Cir. 2002) (Graber, J., concurring); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d at 264; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

dismissed like those of their lesbian and gay coworkers.<sup>95</sup> If this point is not obvious to courts, it is because schemas distort their reading of precedent. Our schema for “sexual orientation” typically includes lesbians, gay men, and bisexuals; however, we often forget that heterosexuals also have a sexual orientation.<sup>96</sup> Accordingly, we tend to see sexual orientation protections in civil rights statutes as protecting gay men, lesbians or bisexuals, but not heterosexuals.<sup>97</sup> Nevertheless, those regulations also protect nongay persons from discrimination.<sup>98</sup>

In a parallel manner, because Title VII does not apply to sexual orientation discrimination, it must bar such claims by anyone—lesbian, gay, bisexual, or heterosexual. In *Medina v. Income Support Division, New Mexico*, the court dismissed the claim of Rebecca Medina, a heterosexual woman, who alleged that her lesbian supervisor, Debie Baca, subjected Medina to a hostile work environment because of Medina’s heterosexuality.<sup>99</sup> In *Medina*, the United States Court of Appeals for the Tenth Circuit stated, “We construe Ms. Medina’s argument as alleging she was discriminated against because she is a heterosexual. Title VII’s protections, however, do not extend to harassment due to a person’s sexuality.”<sup>100</sup> The Tenth Circuit properly refused to differentiate doctrinally between heterosexual sexual

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95. See *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1133 (10th Cir. 2005); *cf.* *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1172, 1175-76 (D. Nev. 1995) (discussing a situation where plaintiffs claimed they suffered sexual harassment *as males* because of the workplace discussions and pictures of gay sexual activity; the court restated their claim as one based on sexual orientation not covered by Title VII and rejected it).

96. See Kramer, *supra* note 24, at 29-30.

97. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Justice Scalia describes Colorado’s constitutional Amendment 2 as merely banning special rights for gay people and returning Colorado law to neutrality. *Id.* at 638-39. Nevertheless, Scalia misstates the effect of the Colorado law. Each of the city ordinances affected by the amendment and the state Executive Order barred sexual orientation discrimination. *Id.* at 623-24, 626-27 (quoting *Evans v. Romer (Evans J)*, 854 P.2d 1270, 1284-85 (Colo. 1993). Amendment 2 “prohibited antidiscrimination provisions based on homosexual, lesbian, or bisexual orientation” only. COLO. CONST. art. II, § 30b. “Thus, heterosexuals, as heterosexuals, would have remained protected against sexual orientation discrimination under these ordinances; gay people would not have been protected.” Brower, *supra* note 71, at 87-88.

98. See Susan Ferriss & Erin McCormick, *When a Kiss Isn’t Just a Kiss: Castro Bar Tosses Straight Smoochers*, S.F. EXAMINER, Mar. 9, 1997, at A1 (describing how the San Francisco Human Rights Commission ordered a gay bar to change its antiheterosexual kissing policy to comply with sexual orientation discrimination prohibitions); *Straights Complain of Intolerance by Gays in Provincetown*, PROVIDENCE J. (R.I.), July 27, 2006, at A9, (reporting antiheterosexual comments made in a gay-friendly municipality).

99. 413 F.3d 1131, 1133, 1135, 1138 (10th Cir. 2005). Medina actually claimed that Baca harassed her because of her failure to comport with gender stereotypes—specifically, that she was punished for not acting like a stereotypical female coworker who, according to Medina, was a lesbian. *Id.* at 1135.

100. *Id.*

orientation claims and homosexual ones. Thus, the first reading of the *Pritchett* court's statement cannot be true.

Further, the second alternative, that gay people do not ever harass other gay people, cannot factually be correct; gay on gay sexual harassment must occur.<sup>101</sup> The third possibility, that gay people harassing other gay people is not actionable sexual harassment equivalent to that suffered by nongay victims, seems inconceivable unless we consider the effects of the lesbian and gay male schema. That schema states that gay relations are purely uncontrolled, indiscriminate physical and sexual escapades.<sup>102</sup> Sexual advances by one homosexual towards another cannot constitute harassment. Actionable harassment requires that the sexual conduct be unwelcome.<sup>103</sup> And sexual attention cannot be unwelcome unless gay sexuality encompasses notions of selectivity and fidelity. Because the lesbian and gay male schema generally holds that it does not do so,<sup>104</sup> then gay or lesbian sexual conduct in the workplace is always desirable, reciprocated and not actionable. Accordingly, gay or lesbian victims do not require protection from attraction-based sexual harassment because it does not truly occur in the legal sense.

The issue of unwelcomeness has also bedeviled visibly sexually active female plaintiffs. In *Burns v. McGregor Electronic Industries, Inc.*, the owner of McGregor Electronic Industries, Paul Oslac, sexually harassed Lisa Ann Burns.<sup>105</sup> Nevertheless, the trial court found that the sexual harassment was not uninvited or offensive and, thus, not unwelcome, because the plaintiff had posed nude for a lewd national

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101. See *Woman Wins \$360,000 Bias Case; Verdict May Be First Where Boss, Employee Were Both Lesbians*, S.F. EXAMINER, July 4, 1997, at A7 (discussing a jury award in a California state lawsuit involving sexual harassment of a lesbian by another lesbian); see also *Johnson v. Cmty. Nursing Servs.*, 932 F. Supp. 269, 270 (D. Utah 1996) (concerning lesbian supervisor's alleged harassment of a bisexual female employee).

102. See *Brower*, *supra* note 71, at 77-90 (discussing the gay identity as sex aspect of the lesbian and gay male schema).

103. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

104. See *supra* notes 20, 71 and accompanying text.

105. 989 F.2d 959, 961 (8th Cir. 1993) (holding that a woman who had posed semi-nude for a magazine was disqualified from claiming sexual harassment); see also *Swentek v. USAIR, Inc.*, 830 F.2d 552, 556-57 (4th Cir. 1987) (holding that a woman who had engaged in sexually explicit behavior was not barred from claiming that sexual harassment was unwelcome); *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983) (same); *Cunningham v. Town of Ellicott*, 04 Civ. 301, 2007 U.S. Dist. LEXIS 24779, at \*8-9 (W.D.N.Y. Apr. 3, 2007) (holding that a female plaintiff's prior consensual sexual conduct with coworkers or others was not admissible); *Wilburn v. Fleet Fin. Group, Inc.*, 170 F. Supp. 2d 219, 235 (D. Conn. 2001) (holding that a female plaintiff's consensual sexually explicit computer chat room messages on her personal computer affected her credibility, but could not establish that the conduct was welcome as a matter of law).

magazine.<sup>106</sup> More specifically, the United States Court of Appeals for the Eighth Circuit stated:

The trial court made explicit findings that the conduct was not invited or solicited despite her posing naked for a magazine distributed nationally. The court believed, however, that because of her outside conduct, including her “interest in having her nude pictures appear in a magazine containing much lewd and crude sexually explicit material,” the uninvited sexual advances of her employer were not “in and of itself offensive to her.” The court explained that Burns “would not have been offended if someone she was attracted to did or said the same thing.”<sup>107</sup>

The Eighth Circuit rejected that reasoning and stated, “A person’s private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment.”<sup>108</sup> Nevertheless, Lisa Ann Burns’s prior behavior in posing for nude pictures in *Easyriders* magazine was relevant to the totality of the workplace events, said the Eighth Circuit—although it could not constitute a complete defense to her claim of a hostile sexual harassment environment at the workplace.<sup>109</sup>

This cross-reference to sexually themed behavior of female plaintiffs helps illustrate the mechanisms behind the lesbian and gay male schema of sex and indiscriminate sexual behavior. Heterosexual women need to be sexually active in what courts perceive to be unusual ways in order to trigger this distortion; gay people need only be gay. Only by reconceptualizing *Pritchett* through schema theory can we see how that court could believe its holding exclusively protected heterosexuals.

To demonstrate that I am not overstating this point, let us examine *Wrightson v. Pizza Hut of America*.<sup>110</sup> Even before *Oncale*, *Wrightson* allowed a Title VII claim by a nongay employee against his gay supervisor and coworkers to withstand a motion to dismiss for failure to state a cause of action.<sup>111</sup> Viewing the case as homosexual, desire-based sexual harassment, the court properly analogized gay male to male harassment to heterosexual male to female precedent. In its recitation of the facts, the court stated, “Wilson [a gay employee] called Wentzel [a nongay employee] at Wentzel’s home and asked him on a date, *even though Wilson was aware that Wentzel was heterosexual*.”<sup>112</sup> In context,

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106. See *Burns*, 989 F.2d at 962-63 (discussing and reversing the district court).

107. *Id.* at 963.

108. *Id.* at 963 n.4 (quoting *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

109. *Id.* at 964.

110. 99 F.3d 138 (4th Cir. 1996).

111. *Id.* at 143.

112. *Id.* at 140 (emphasis added).

we are to conclude from the italicized portion of the quote that Wilson's request was unwelcome and thus actionable harassment. Literally, however, it merely stated that Wilson's request was probably futile because Wentzel was not gay. This implies that had Wentzel been gay, Wilson's demand would have been neither futile nor unwelcome. Accordingly, there would have been no harassment.

Again, that conclusion is only possible if the schema of lesbians and gay men is that gay sex is indiscriminate and nonselective. Only then is sexual orientation relevant to unwelcomeness. We have no such schema about heterosexuality. A heterosexual man can still harass a heterosexual woman, even though she is sexually attracted to men—the question is unwelcomeness, not her sexual orientation.<sup>113</sup> Our schema about lesbians and gay men makes sexual orientation a relevant factor in determining unwelcomeness for them, but not for heterosexuals. Once again, cognitive process explains this incongruity. The schema equates a homosexual harasser-heterosexual victim scenario with unwelcomeness, while the contrary implied equation of shared gay sexual orientation with nonselectiveness is the reverse of this schema.

Cognitive psychologists recognize that the more accepted or common information is, the less value or salience it has.<sup>114</sup> Because we treat nongay sexual orientation as the neutral baseline against which everything else is measured,<sup>115</sup> it recedes from consciousness.<sup>116</sup> More specifically, we do not have a separate schema for heterosexuals; they are just "people" and not a group characterized by their sexual behavior.<sup>117</sup> Thus, the heterosexuality schema does not distract judges from looking for relevant evidence of unwelcomeness or for other legal issues. In

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113. See *Burns*, 989 F.2d at 962 (finding that the issue is the unwelcomeness of the conduct, not the sexual or other activities of the plaintiff).

114. See BROWER & NURIUS, *supra* note 5, at 88; Tversky & Kahneman, *Judgement Under Uncertainty*, *supra* note 5, at 1124-31.

115. See David Halperin, *Sex Before Sexuality: Pederasty, Politics and Power in Classical Athens*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 37-39 (Martin Bauml Duberman et al. eds., 1989) ("'Heterosexual' did not appear in English until preceded by, and perhaps in contradistinction to, 'homosexual.'").

116. See Brower, *supra* note 71, at 147-48 (discussing the awkwardness of the expression "openly nongay" and the implications of that awkwardness); Kramer, *supra* note 24, at 4-5, 33.

117. But see Kevin Courtney, *Man Overboard: The Straight Talk*, IRISH TIMES, Nov. 24, 2001, at 61 (using the term "breeder" in Ireland as an "affectionate term" by gay people for nongays); Rich Kane, *First Person: AOHELL, Can a Gay Man Find Love Online?*, O.C. WEEKLY (Orange County, Cal.), Apr. 4, 1997, at 8; Rob Morse, *We're Here, We're Having a Beer . . .*, S.F. EXAMINER, June 29, 1997, at A2; Edward Porter, *Nine Dead Gay Guys*, TIMES (U.K.), Sept. 21, 2003, at 12, (reviewing movie from the perspective of a "boring old Breeder"). These sources are all examples of gay people referring to heterosexuals as "breeders." The rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity.

contrast, the schema of homosexual identity carries with it certain assumptions and legal conclusions and leads to twisting of both facts and law.

A closer reading of *Wrightson* shows that some judges' distorted schemas of lesbians and gay men have led to a skewed reading of facts or a mistaken application of doctrine. Remember that the Fourth Circuit in *Wrightson* found Title VII liability resulted from simple desire-based same-sex sexual harassment where the perpetrators were gay but the victim was not. However, the facts of *Wrightson* are more complex than the court described.

*Wrightson* contained many allegations of egregious conduct. Gay male supervisors and other gay employees sexually propositioned Arthur Wrightson and two other heterosexual employees. They were subject to sexual innuendo and descriptions of gay sex and touched inappropriately.<sup>118</sup> But the court's analysis began with the wrong initial question: was the perpetrator gay?<sup>119</sup> The important first issue was causation, whether the harassment was because of sex. Only if harassment were desire-based and not hostility-based could the perpetrators' homosexuality provide the link to sex discrimination. Instead, the Fourth Circuit inquired about the harassers' sexuality, as though homosexuality alone were always an adequate substitute for causation.

Analyzing causation more appropriately, we must determine if the harassment was motivated by sexual desire or by hostility. Naturally if it were sexual desire, that attraction may motivate gay people to harass others of the same sex. In fact, *Wrightson* may be such a case. Nevertheless, gay people, like their heterosexual counterparts, may have any number of possible rationales for their actions—not all of them sexual or based in sexual desire. Nevertheless, the schema of lesbians and gay men as predatory or indiscriminate in their sexual behavior enabled the Fourth Circuit to ignore other relevant details and to make an inappropriate link between sexual orientation and causation.

The Fourth Circuit's insistence that the key allegation in same-sex sexual harassment was the perpetrator's homosexuality<sup>120</sup> led the court to downplay other potentially important data. The court noted, "After Pizza Hut hired a male employee, the homosexual employees attempted to

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118. See *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 139-41 (4th Cir. 1996).

119. See *id.* at 141.

120. *Id.* "Therefore, because a claim may lie under Title VII for same-sex hostile work environment sexual harassment where, as here, the individual charged with the discrimination is homosexual, the judgment of the district court is reversed." *Id.* at 144.

learn whether the new employee was homosexual or heterosexual. If the employee was heterosexual, then the homosexual employees began to pressure the employee into engaging in homosexual sex."<sup>121</sup> This fact is important, for it undermines Wrightson's claim of sex discrimination and may even turn it into sexual orientation discrimination (i.e., Wrightson was harassed because he was straight). The warping effect of the predatory sex schema of homosexuality caused the Fourth Circuit to ignore that fact's significance.

If gay male employees were not sexually harassed but Wrightson and other nongay male employees were, the reason for their selection appears to be sexual orientation and not sex.<sup>122</sup> If this were truly desire-based sexual harassment, why would the sole targets be nongay males? It is difficult to believe that heterosexual Pizza Hut employees were always more physically attractive than gay employees. Some empirical work has explored whether a difference exists between gay and nongay men's preferences for what they find attractive in men's bodies. Sexual orientation is not on that list.<sup>123</sup> If sexual attraction is not the true reason for their selection, then something else must explain the court's assumption regarding the selection of only heterosexual males. As in *Yeary* and *Pritchett*, the schema of predatory gay sex, where gay people recruit nongay persons into sexual activity, fills this void.<sup>124</sup> Homosexual predation is consistent with the court's decision that targeting only heterosexual males shows desire and not harassment based on sexual

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121. *Id.* at 139 (internal citations omitted).

122. When Pizza Hut made this argument, the court responded by stating that, on a motion to dismiss, Wrightson's claims were sufficient. *See id.* at 144. Wrightson stated that he was discriminated against because he was male, that his harassers were homosexuals, and that other harassed employees were also male. *See id.* at 143.

123. *See* Viren Swami & Martin J. Tovee, *The Muscular Male: A Comparison of the Physical Attractiveness Preferences of Gay and Heterosexual Men*, 7 INT'L J. MEN'S HEALTH 59 (2008).

124. *See, e.g.*, Rick Bickmore, Letter to the Editor, *Gays Don't Recruit Others*, DESERET NEWS (Salt Lake City, Utah), Dec. 3, 1997, at A50 ("This [recruitment by gay people of heterosexuals] is by no means the general rule, and as much as we may joke about winning toaster ovens, I don't know any gay people who try to recruit heterosexuals into the gay community."); Sandra Crockett & Chris Kaltenbach, *Ellen's Night Out; TV: While Many Turn Out To Celebrate the Much-Hyped Event, Others Pledge Financial Consequences for Sponsors of the ABC Show*, BALTIMORE SUN, May 1, 1997, at 1E (describing a scene in which "Laura Dern, playing the episode's love interest, countered Ellen's accusation that she was trying to recruit gays by lamenting, 'Just one more [heterosexual person turned gay by Dern] and I would have gotten that toaster oven'"); Ernie Freda, *Washington in Brief*, ATLANTA J. & CONST., Oct. 12, 1995, at 6B (discussing the views of Rep. Newt Gingrich, R. Ga., that school programs dealing with gays and lesbians may be thinly veiled efforts to recruit new homosexuals); B.G. Gregg, *Group Says Gay Students Need Affirmation at School. Teacher: Goal Is Education, Not Recruitment*, CINCINNATI ENQUIRER, Dec. 22, 1996, at B4.

orientation. And of course if it is homosexual sexual attraction, Wrightson suffered cognizable sex-based discrimination under Title VII; if it is harassment stemming from gay employees singling out heterosexual employees for hostile treatment, it is sexual orientation discrimination not covered by Title VII.<sup>125</sup>

Because judges measure same-sex sexual harassment claims against a flawed prototype, they make commensurately flawed analogies and decisions. The terms of the prototype or schema used dictate the resulting categorization or use of analogy.<sup>126</sup> We interpret the welter of ambiguous or contradictory information in a manner that makes sense to us, whether or not it is accurate.<sup>127</sup> Thus, once we activate a schema, marginally consistent information is shaped to supplement and strengthen the presumed innate personal characteristics dictated by the schema. We stop looking for alternative or more appropriate evidence or causes.<sup>128</sup> We tend to find explanations or precedent in line with our schemas, in part because they are the only ones for which we are looking.<sup>129</sup> Our schemas act as filters through which we view events, and this is how information is interpreted and utilized.<sup>130</sup> As this Article previously discussed, the Fourth Circuit's rather selective reading of the facts in *Wrightson v. Pizza Hut of America* evidences these aspects of schema theory.

In fact, the Fourth Circuit's equation of the gay perpetrators' sexual orientation with desire-based sexual harassment may have led the court to overemphasize the extent to which sexual attraction actually motivated the harassers. Specifically, cognitive research shows that we tend to attribute outsiders' schema-consistent behaviors and actions to inherent, unchanging aspects of their personality, and disconfirming events or behaviors to transient, situational or exceptional circumstances.<sup>131</sup> In

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125. See *Medina v. Income Support Div.*, N.M., 413 F.3d 1131, 1134-35 (10th Cir. 2005); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1172, 1176 (D. Nev. 1995).

126. BROWER & NURIUS, *supra* note 5, at 86.

127. *Id.*

128. See Krieger, *supra* note 5, at 1206-07.

129. See Tversky & Kahneman, *A Heuristic*, *supra* note 5, at 207; Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* note 5, at 1124-31; *infra* notes 144—154 and accompanying text.

130. See Edward E. Jones, *How Do People Perceive the Causes of Behavior?*, 64 AM. SCI. 300 (1976); Lee Ross et al., *Social Explanation and Social Expectation: Effects of Real and Hypothetical Explanations on Subjective Likelihood*, 35 J. PERSONALITY & SOC. PSYCHOL. 817, 827-28 (1977); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 593-95 (1980).

131. See Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 268,

contrast, in *Valadez v. Uncle Julio's of Illinois, Inc.*, a male kitchen manager sexually harassed a lesbian bartender.<sup>132</sup> There was evidence that the manager, Todd Conger, wanted to have sex with Monica Valadez because she was a lesbian.<sup>133</sup> He said he would "change [Valadez]'s ways 'if she slept with him'" and stated he wanted to have sex with her and the other lesbian waitress with whom Valadez was having sexual relations.<sup>134</sup>

Parallel to *Wrightson*, we can hypothesize a workplace in *Valadez* in which heterosexual male employees first determine which new female hires are heterosexual and which are lesbians. They then demand sexual favors only from the lesbian employees; they tell them that they should try sex with men and subject them to explicit descriptions of heterosexual sex acts.<sup>135</sup> Although we might view the behavior as motivated by a genuine desire to have sexual relations with these women, we would probably view the conduct as evidencing hostility to lesbianism.<sup>136</sup>

Alternatively, the other possibility in this scenario is that Conger's desire-based harassment was part of a heterosexual male fantasy schema that the right man can convert lesbians to heterosexuality.<sup>137</sup> Thus, due to unobtainability and sexual disinterest, their sexual orientation as lesbians makes homosexual women more desirable. Like the earlier hostility-based explanation, this latter, desire-based fantasy scenario remains based on sexual orientation and not sex. If a woman were heterosexual, she would not be sexually approached; because she is not, she is.

If it is easier for us to see the *Valadez* hypothetical as sexual orientation discrimination than it was for the Fourth Circuit to see the facts of *Wrightson* that way, the difference in perception is attributable to the considerably more nuanced schema most people exhibit towards heterosexuality as opposed to homosexuality. We can recognize and

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279 (1985); Krieger, *supra* note 5, at 1205-06 (discussing the implications of this research for disparate treatment cases and pretext).

132. 895 F. Supp. 1008, 1011 (N.D. Ill. 1995).

133. *Id.*

134. *Id.* at 1011-12.

135. *See id.* at 1011, 1014. On the actual facts of *Valadez*, the court found that Conger sexually harassed several female employees and not simply those who were lesbians. *Id.* at 1014. Thus, the court found that the harassment was based on sex and not sexual orientation. *Id.*

136. *See* Grose, *supra* note 24, at 388, 396 (asserting the alternative that courts find harassment by gay perpetrators covered under Title VII but not by nongay perpetrators whose victims are gay).

137. *See, e.g.,* Jim Keogh, *Movie Review: Chasing Amy*, WORCESTER TELEGRAM & GAZETTE (Mass.), Apr. 19, 1997, at A6 (reviewing the movie, "Chasing Amy," and noting the misguided premise that lesbian sexual orientation can be changed by the right man); Moira Macdonald, *Spike Lee Doesn't Do the Right Thing with "She Hate Me,"* SEATTLE TIMES, Aug. 13, 2004, at H21 (reviewing the Spike Lee movie, *She Hate Me*, containing a similar premise).

ascribe a wider range of rationales for nongay people's behavior than we can with gay persons' conduct. Our schema of heterosexuality has had to encompass and incorporate a wider variety of personal experiences than our schema of homosexuality.

Classic schema research demonstrates that we see our own group as individuals and as more diverse in our characteristics and motivations, while perceiving out-group members as homogeneous.<sup>138</sup> For example, in the lesbian and gay male schema, the homogenization of gay people's diverse lives into one "gay lifestyle" is a common error of attribution.<sup>139</sup> Moreover, the more people believe that there is little variation among members of groups unlike themselves, the more people tend to make stereotypic or schematic judgments about particular individuals within those groups; and the more people trust in the accuracy of their schema of others, the more those judgments tend to be made with great confidence.<sup>140</sup> Again *Wrightson* illustrates these insights.

Certainly, *Wrightson's* treatment was reprehensible. The Fourth Circuit may even have been correct that it was desire-based sexual harassment. Nevertheless, the flaws in the court's schema of lesbians and gay men caused it to gloss over significant issues and may have derailed its analysis. The case stands as an illustration of the power of schemas to distort legal analysis and skew doctrine.

As we have seen, the wider diversity of motivations accessible to courts in cases involving heterosexual harassers allows judges to decide cases more accurately without the distractions of the gay predatory sexuality schema. The mechanics of the salience and vividness heuristics are also at work here. Cognitive psychology has found that the more distinctive, vivid or significant information is to the observer, the more accessible it tends to be for recall and use. Conversely, the more typical, socially expected or accepted information is, the more readily it recedes in value and awareness.<sup>141</sup> Because lesbian or gay sexual orientation is

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138. See Marilyn B. Brewer, *Social Identity, Distinctiveness, and In-Group Homogeneity*, 11 SOC. COGNITION 150, 150-51, 157 (1993); Patricia W. Linville, *The Heterogeneity of Homogeneity*, in *ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES* 423, 430, 436 (John M. Darley & Joel Cooper eds., 1998).

139. See Andrew Barron, *Arts Funding in Peril*, NEWS & REC. (Greensboro, N.C.), May 24, 1997, at A1; Dan Morain, *Assembly OKs Bill Banning Anti-Gay Bias But Rejects Another*, L.A. TIMES, June 5, 1997, at A3.

140. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 368 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

141. See BROWER & NURIUS, *supra* note 5, at 88; Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* note 5, at 1124-31.

less common, it is also more distinctive and salient.<sup>142</sup> This focus on atypicality flattens out the diversity of lesbians and gay men and their lives. Thus, the most nonnormative and atypical aspects of lesbian and gay male lives are the most striking, memorable, and the most easily incorporated into the schema.<sup>143</sup> In the context of sexual harassment, that atypicality is the desire to have sexual relations with members of the same sex. Thus, when that fact appears in same-sex harassment cases, it tends to overshadow everything else.

One case that illustrates the salience heuristic is *Johnson v. Community Nursing Services*.<sup>144</sup> In *Johnson*, Melanie Ann Johnson claimed her lesbian supervisor, Nora Goicoechea, sexually harassed her.<sup>145</sup> Like *Wrightson*, the *Johnson* court ignored important, disconfirming facts that would have cut against its schema of predatory gay sexuality. Significantly, soon after Johnson began working at Community Nursing Services, she began a three-month lesbian relationship.<sup>146</sup> Afterwards, she broke up with her girlfriend and began dating a man.<sup>147</sup> After Goicoechea learned Johnson was dating men and no longer living as a lesbian, Goicoechea stopped being supportive, became increasingly hostile, and said she could no longer protect

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142. See WAYNE H. BREKUS, PEACOCKS, CHAMELEONS, CENTAURS: GAY SUBURBIA AND THE GRAMMAR OF SOCIAL IDENTITY 11-14 (2001) (discussing that because homosexuality is stigmatized, people notice it as significant).

143. Another example is the media depiction of gay pride parades which have usually focused on the more outré aspects and personalities in these events and ignored the less sensational participants and spectators. See MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL 195 (1989); Randy Myers, *Less Flashy Part of Parade Ignored*, CONTRA COSTA TIMES (Cal.), June 30, 2002, at P3 (discussing the choice of focusing on the outré sections of the parade or more tame groups); Don Romesburg, *Media Watch: Pride Media Round-Up*, BAY AREA REP., July 10, 1997, at 12 (describing Reuters news service coverage sensationalizing the 1997 San Francisco gay pride parade, as well as describing the depiction of other pride parades by other media). Repeated portrayals of this type reinforce an acceptance of the image as genuine. See RICHARD ISAY, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT 49 (1989) (describing an instance where an adolescent had so internalized this effeminate image portrayed in the movies that he did not believe that he was truly gay because he did not identify himself with that portrayal). The trope has become so common that the satirical paper *The Onion* used it as the basis for a humorous article. *Gay-Pride Parade Sets Mainstream Acceptance of Gays Back 50 Years*, THE ONION, Apr. 25, 2001, at 6. This problem had led some gay commentators to call for restrictions on public behavior and persons which would reinforce negative perceptions of gay people. See KIRK & MADSEN, *supra*, at 279, 307-312. It has also led to a public relations campaign aimed at showing how mainstream gay people are. See *id.* at 197-245. See generally ANDREW SULLIVAN, VIRTUALLY NORMAL (1996) (discussing the integration of gays and lesbians into American society and institutions).

144. (*Johnson II*), 985 F. Supp. 1321 (D. Utah 1997).

145. *Id.* at 1323-24.

146. *Id.* at 1323.

147. *Id.*

Johnson's job.<sup>148</sup> The defendant in this case said, "[I]f she kissed Johnson at a meeting, it would show the [company] president that [Johnson] was still a lesbian."<sup>149</sup> Johnson and Goicoechea also wagered a dinner on a work matter, and when Johnson lost, Goicoechea asked her numerous times to pay up and provide the dinner; Johnson declined to have dinner alone with Goicoechea.<sup>150</sup> Johnson claimed that Goicoechea sexually desired her and harassed her because of sex.<sup>151</sup>

The salience heuristic begins in the court's description of the two protagonists. Johnson had a "relationship [that] was lesbian in nature" which lasted three months. Plaintiff claims this "sexual orientation was new for [her]."<sup>152</sup> In contrast, "Goicoechea is openly lesbian and plaintiff claims that Goicoechea, by words and conduct, attempted to initiate a sexual relationship with her."<sup>153</sup> The differences in the characterizations of the women's sexuality are telling. "Lesbian" states who Goicoechea is; whereas "lesbian" is only a descriptor of Johnson's past relationship, but not a personal attribute. Sexuality is the most distinctive and defining characteristic for Goicoechea; it is secondary and minimized for Johnson.

Thus, it is unsurprising that the court basically ignored the sequence of events and the alternative inferences that could have been drawn. The harassment Johnson suffered took place after she returned to a heterosexual relationship. Goicoechea's words specifically referred to Johnson's changed sexual orientation: The kiss would show that she was *still* a lesbian; Goicoechea could not protect Johnson now that she was no longer living as a lesbian.<sup>154</sup> This behavior appears to be related to Goicoechea's disappointment or anger at Johnson's conversion. Because the district court was looking for a typical homosexual, desire-based case, it seemed to ignore facts that would disconfirm that model. Therefore, it found the harassment in *Johnson* to be based on attraction and not hostility.

Another case illustrating the overshadowing effects of the salience heuristic is *Dick v. Phone Directories Company, Inc.*<sup>155</sup> Diane Dick was a

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148. *Id.* at 1324.

149. *Id.*

150. *Id.*

151. *Id.* at 1323-24.

152. *Johnson v. Cmty. Nursing Servs. (Johnson I)*, 932 F. Supp. 269, 270 (D. Utah 1996) (first alteration in original).

153. *Id.*

154. *Johnson II*, 985 F. Supp. at 1324.

155. 397 F.3d 1256 (10th Cir. 2005), *aff'g in part and rev'g in part* 265 F. Supp. 2d 1274 (D. Utah 2003).

top sales representative at Phone Directories Company, a predominantly female office.<sup>156</sup> When her supervisor was fired, Dick took over her boss’ workspace, a move that angered at least one of her coworkers.<sup>157</sup> One month after her new supervisor, Laura Bills, was hired, Dick claimed that Bills and other female coworkers began to harass her.<sup>158</sup> Dick claimed they created a working environment permeated by sexually explicit banter, insults, lewd jokes, gestures, games and devices.<sup>159</sup> One of Dick’s coworkers, Ms. Northern, was a lesbian, and Dick said that until she learned that Northern was a lesbian, she often let her granddaughter babysit for Northern.<sup>160</sup> Dick testified that, “I wasn’t upset that [the company] hired a lesbian. I was upset that nobody told me so that I could make a decision about my granddaughter.”<sup>161</sup> Dick also stated that another colleague, Ms. Hinkle, pinched Bills’ breast and buttocks, sometimes mimed giving oral sex to a man, and hung a replica of a penis from the workspace ceiling.<sup>162</sup> Other coworkers would participate in sexually themed behavior, including gestures, swearing, simulating sexual acts, and playing “vulgar rap music” in the office.<sup>163</sup> Dick also alleged that Bills and Northern locked themselves in various rooms in the office for extended periods of time and that the office bulletin board was “decorated in rainbow colors—which symbolizes gay pride.”<sup>164</sup> None of this behavior was directed at Dick, except that “twice Ms. Hinkle attempted to pinch [her] breasts but Ms. Dick told her to get away from her, and that once at a novelty shop over the lunch hour Ms. Hinkle shoved a sex toy in the shape of a penis toward Ms. Dick.”<sup>165</sup> There were many puns on plaintiff’s last name, like calling her “Ivanna Dick,” “the dickhead,” and “Granny Dick.”<sup>166</sup> Another coworker, Ms. Coleman,

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156. *Id.* at 1260.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1261. The court describes her as “an openly gay coworker, Teena Northern.” *Id.* The use of the adjective “open” and its synonyms often signal that the lesbian and gay male schema will skew analysis. *See, e.g.,* Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (“avowedly homosexual plaintiff”); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1207 (9th Cir. 2001) (“openly gay man”); Johnson v. Cmty. Nursing Servs., 932 F. Supp. 2d 269, 270 (D. Utah 1996) (“openly lesbian”).

161. *Dick*, 397 F.3d at 1261.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1284 (D. Utah 2003).

would point to the collection of stuffed Beanie Baby cats on Ms. Dick's desk and comment, "Dick's got a pussy."<sup>167</sup>

A month after Dick filed a discrimination charge with the Utah Anti-Discrimination Division, she saw Coleman's car in Hinkle's driveway.<sup>168</sup> Dick thought the two other women were meeting to talk about her.<sup>169</sup> The next day at seven o'clock in the morning, Dick entered Coleman's home to confront her.<sup>170</sup> Coleman became angry with Dick for being in her home and sent her the following e-mail:

As far as I'm concerned where I go is my business and how long im [sic] there is my business, and I don't ever want to see u [sic] driving by my house watching me and don't ever walk into my home again! . . . No one hates you or is trying to get you fired, we don't understand whats goin thru [sic] your head. But anyway, this all stops here . . . don't try to pull anymore sh\*t, we are not going to put up with it, we are a team and we must all get along.<sup>171</sup>

After receiving the e-mail, Dick phoned another coworker's home, but did not reach her.<sup>172</sup> Dick then phoned the coworker's mother's home but was still unable to contact her.<sup>173</sup> Dick's coworkers complained to the company about her conduct.<sup>174</sup> In court, Dick alleged hostile work environment, same-sex discrimination in violation of Title VII.<sup>175</sup>

In *Dick*, the court transformed what appeared to be instances of colleagues singling out the plaintiff for hostile behavior into lesbian, same-sex desire-based sexual harassment actionable under Title VII.<sup>176</sup> In *Dick*, the United States District Court for the District of Utah had expressly found that

[a]lthough Ms. Dick has provided an exhaustive litany of harassing conduct that she has suffered, none of it creates a question of fact about whether the harassment (and particularly Ms. Hinkle's pinching of her breasts) was an expression of sexual desire. As discussed above, this conclusion finds support in Ms. Dick's own deposition testimony, corrections notwithstanding, where she admitted that she did not think Ms. Hinkle wanted to have a sexual relationship with her, but rather used sexual

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167. *Id.*

168. *Dick*, 397 F.3d at 1261.

169. *Id.*

170. *Id.* at 1261-62.

171. *Id.* at 1261-62.

172. *Id.* at 1262.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.* at 1266 (reversing the decision of the trial court on this point, *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1284 (D. Utah 2003)).

overtures as a way of “aggravating” or “upsetting” her. Accordingly, Ms. Dick’s Title VII same-sex hostile work environment claim fails for lack of evidence that the harassment she endured, however humiliating and sexually-charged, was because of sex.<sup>177</sup>

In response the Tenth Circuit extensively discussed the lower court’s findings, but still reversed as a matter of law.<sup>178</sup> The court stated:

[W]e agree with the District Court that the harassment of which Ms. Dick complains—harassment that is most often expressed by unprofessional conduct, foul-mouthed attempts at humor, and crude puns on Ms. Dick’s last name—could be viewed as an attempt to humiliate Ms. Dick rather than as conduct that was motivated by sexual desire.

Nonetheless, we cannot agree that, as a matter of law, Ms. Dick was harassed out of sheer dislike. The record contains sufficient evidence from which a jury could find that her harassers’ conduct was motivated by sexual desire.<sup>179</sup>

This reversal is most explicable if the lesbian-themed, sexually charged work environment inveigled the appellate court. When we compare the worksite description in the district court’s opinion with that of the Tenth Circuit, some interesting differences emerge. The Tenth Circuit blandly stated that the “office consists primarily of women; only two men worked there during the relevant time period.”<sup>180</sup> The male coworkers then disappear from the opinion. However, according to the lower court:

Ms. Dick alleges . . . that one of these two men was homosexual, “was considered just one of the girls,” and “was included in their conversations.” The other man was a returned missionary who, when “the girls would get really bad with the language and stuff,” would “kind of turn bright red, start singing, but he would say that it didn’t bother him, but everybody could kind of tell that it did.” When asked during her deposition whether the alleged harassers would “ever direct their conversations to the men in a different way or was it just sort of the same office environment,” Ms. Dick responded that “[i]t was just the same office environment.”<sup>181</sup>

Only the lower court mentioned how men were treated in the workplace—the same as the women.<sup>182</sup> The two dissenters from the sexualized environment were Ms. Dick and a former missionary, a

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177. *Dick*, 265 F. Supp. 2d at 1284 (internal citations and formatting omitted).

178. *Dick*, 397 F.3d at 1266.

179. *Id.*

180. *Id.* at 1260.

181. *Dick*, 265 F. Supp. 2d at 1284 (internal citations omitted). The court determined that the evidence of her male colleague’s homosexuality was inadmissible hearsay. *Id.*

182. *Id.*

man.<sup>183</sup> Neither were made uncomfortable in different ways or harassed by different treatment.<sup>184</sup> This last point is significant. The lower court kept in mind *Oncale's* guidance that “[t]he critical issue . . . 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.”<sup>185</sup> Specifically, the *Oncale* court suggested three routes by which same-sex sexual harassment might be proven: desire-based harassment by homosexuals; harassment in such sex-specific and derogatory terms as to show that there is general hostility to the presence of one sex in the workplace; or direct comparative evidence of disparate treatment in a mixed-sex workplace.<sup>186</sup>

The district court’s factual discussion in *Dick* assists us in seeing the plaintiff’s litigation strategy. The general presence of women in the workplace was not unwanted, nor could she assert that men and women were treated differently with respect to the terms and conditions of employment. That left only homosexual desire-based harassment, in which no proof of opposite-sex comparators or class-based treatment of women was necessary. Under that theory, *Dick* could rely on the presence of lesbians in the workplace and how she, alone, was treated. Key to her case was ensuring that she be painted as one of the few heterosexuals in a group of lesbians—enlisting the schema of lesbian identity as predatory sex.<sup>187</sup> That is the image that the Tenth Circuit saw. Thus, it focused on the two times that Hinkle attempted to pinch her breasts but was rebuffed. The court also paid attention to lesbianism—the one fact that would make the workplace different for *Dick* than for the male ex-missionary.

The court of appeals agreed that the district court properly excluded hearsay evidence that the office was known locally as the “lesbian factory” and that other women working there were also homosexual.<sup>188</sup> Nevertheless, the court had access to all that testimony. Remember that the more extraordinary and distinctive facts are, the more they become indelible and salient.<sup>189</sup> The specter of a hardworking Utah grandmother

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183. *Id.*

184. *Id.*

185. *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (internal citations omitted)).

186. *Oncale*, 523 U.S. at 80-81.

187. See also *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (predatory gay male sexuality); *Johnson V. Cmty. Nursing Servs.*, 932 F. Supp. 269 (D. Utah 1996) (predatory lesbian sexuality).

188. *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1266 n.5 (10th Cir. 2005).

189. See *BROWER & NURIUS*, *supra* note 5, at 88; *Tversky & Kahneman, Judgment Under Uncertainty*, *supra* note 5, at 1124-31.

employed in a “lesbian factory” is a fairly vivid image. Accordingly, the schema of lesbian sexuality interposed itself and led the court to find a same-sex desire-based harassment case where it did not exist.<sup>190</sup> The harassment of Dick was not based on desire, but on hostility and personal animosity expressed through sexual behavior that the harassers knew would annoy or upset her.<sup>191</sup> In this aspect, the workplace in *Dick* seems much more similar to sexually themed “horseplay” where the courts have historically rejected Title VII liability.<sup>192</sup> The influence that the lesbian and gay male schema may exert on the judicial mind shows why the Tenth Circuit did not similarly reject liability in *Dick*.

#### IV. THE LESBIAN AND GAY MALE SCHEMA OF CROSS-GENDER CHARACTERISTICS OR GENDER NONCONFORMITY/HOSTILITY-BASED SEXUAL HARASSMENT

##### A. *Evidence of Schema Theory at Work*

Because schemas can be contradictory, and can intersect in myriad ways, individual cases can evince a number of different aspects of schemas. One of the most difficult areas within sexual harassment doctrine has been the application of the Supreme Court’s decision in *Price Waterhouse v. Hopkins* on traditional gender role enforcement in

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190. See, e.g., *EEOC v. Turkey Hill Dairy, Inc.*, Civ. A. No. 06-CV04332, 2007 U.S. Dist. LEXIS 61597, at \*13-15 (E.D. Pa. Aug. 8, 2007) (turning hostility-based case, in which homosexual references were used between male coworkers, into desire-based case).

191. See *Dick*, 397 F.3d at 1265 (discussing the lower court’s use of Dick’s deposition statements); cf. *Davis v. Coastal Int’l Sec., Inc.*, 275 F.3d 1119 (D.C. Cir. 2002). Wallace Davis and two other male employees strongly disliked each other. *Id.* at 1121. Their hostility was expressed by those coworkers making vulgar sexual gestures, kissing noises, describing oral sex and lewd comments or sexual expressions, which taken literally amounted to sexual propositions. *Id.* at 1121-22. The United States Court of Appeals for the District of Columbia noted that there was no evidence that any of the participants were homosexual and in context the behavior could not reasonably have been construed as invitations for sexual activity. *Id.* at 1123-24. Finally, the court found that Davis

has shown not that Smith and Allen treated *men* differently than women, but that they treated *Davis* differently than all other members of the Coastal workforce, whether male or female. If anything, this showing actually undermines Davis’s claim: It suggests that Smith and Allen targeted Davis because of his behavior as an individual rather than because of his sex.

*Id.* at 1124.

192. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 2006 FED App. 0252P (6th Cir.) (male on male harassment); *Baugham v. Battered Women, Inc.*, 2006 FED App. 0919N at 1-2 (6th Cir.) (female on female harassment); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003) (male on male harassment); *Davis*, 275 F.3d at 1119 (male on male harassment); *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997) (male on male harassment); *Allen v. Mineral Fiber Specialists, Inc.*, Civ. A. No. 02-7213, 2004 U.S. Dist. LEXIS 1982, at \*1 (E.D. Pa. Jan. 30, 2004) (male on male harassment).

the workplace.<sup>193</sup> The primary difficulty lies in the schema that gay men and lesbians exhibit gender-atypical characteristics—that gay men are effeminate and lesbians are mannish.<sup>194</sup> Consequently, courts have had trouble applying gender enforcement and stereotyping theory as evidence of sex discrimination when claims arise in same-sex sexual harassment contexts, especially when lesbians or gay men are involved.<sup>195</sup> This difficulty is significant because it often leaves lesbian or gay male plaintiffs remediless when their harassment manifests as gender-role policing. Therefore, *Price Waterhouse* makes a good base from which to explore how aspects of the lesbian and gay male schema interact with sexual harassment prototypes.

The facts and holding of *Price Waterhouse* are familiar. A plurality of the Supreme Court recognized that an employer that required traditional gender roles for female employees perpetuated gender stereotypes in violation of Title VII.<sup>196</sup> The accounting firm Price Waterhouse denied Ann Hopkins a promotion to partnership despite her recognized professional and business development abilities.<sup>197</sup> Price Waterhouse alleged that the denial of partnership was attributable to Hopkins' lack of interpersonal office skills.<sup>198</sup> Although males having or using equally or more abrasive characteristics or language were made partners, the partnership viewed those same qualities in Hopkins

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193. 490 U.S. 228 (1989) (Brennan, J., plurality opinion). An extensive literature already exists on this case and on gender enforcement. *See, e.g.*, Devon Carbado et al., *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105-52 (Joel Wm. Friedman ed., 2006) (discussing Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006)); Joel Wm. Friedman, *supra* note 24, at 205.

194. *See supra* note 18 and accompanying text.

195. *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1066-68 (7th Cir. 2003) (providing an example of a somewhat odd conclusion in Judge Posner's concurrence). In *Hamm*, Judge Posner opined that because courts have a very difficult time distinguishing between hostility to cross-gender behavior and to homosexuality, the *Price Waterhouse* cause of action is flawed as articulated. *See id.* The proper distinction is:

"Sex stereotyping" should not be regarded as a form of sex discrimination, though it will sometimes, as in the *Hopkins* case, be evidence of sex discrimination. In most cases—emphatically so in a case such as this in which, so far as it appears, there are no employees of the other sex in the relevant job classification—the "discrimination" that results from such stereotyping is discrimination among members of the same sex.

*Id.* at 1068.

196. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40 (1989) (Brennan, J., plurality opinion).

197. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112-13 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *aff'd in part, rev'd in part*, 490 U.S. 228 (1989).

198. *Id.* at 1113.

negatively.<sup>199</sup> Hopkins’ interpersonal flaws were expressed by her employer as consequences of her gender atypical (masculine) characteristics. She was described as having perhaps “overcompensated for being a woman” and needing to enroll in a “course at charm school.”<sup>200</sup> She was advised by the partner charged with conveying the partnership’s decision to her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>201</sup> The United States District Court for the District of Columbia (affirmed by the D.C. Circuit and the United States Supreme Court) found that Hopkins was denied a partnership in part because Price Waterhouse did not believe that her behavior and characteristics were appropriate to her gender.<sup>202</sup>

For Price Waterhouse, a person’s behavioral characteristics were determined by his or her sex—despite the demands of the job. This is the double bind to which the Supreme Court plurality alluded: “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 of this bind.”<sup>203</sup>

Nevertheless, we should not focus on the double bind Ann Hopkins faced so as to obscure the core of the sex discrimination, the employer’s insistence on gender conformity. The district court recognized this when it said, “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.”<sup>204</sup> The provenance of this quote is important. The Supreme Court first used it in *City of Los Angeles Department of Water and Power v. Manhart*, which prohibited the use of actuarially appropriate statistics showing that women live longer than men in computing employee benefits.<sup>205</sup> *Manhart* illustrates that even accurate generalizations based on sex can lead to discrimination against particular individuals who do not conform to those generalizations.<sup>206</sup> Accordingly, even if gender atypicality sometimes, or

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199. *Id.* at 1117.

200. *Id.* at 1116-17.

201. *Id.* at 1117.

202. *Id.* at 1117-20.

203. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (Brennan, J., plurality opinion).

204. *Hopkins*, 618 F. Supp. at 1120 (quoting *County of Wash. v. Gunther*, 452 U.S. 161, 180 (1981)).

205. 435 U.S. 702, 707 n.13 (1978).

206. *See id.* at 708.

even often, corresponds to homosexuality, it cannot be assumed in each individual case, as the lesbian and gay male schema dictates. The two are severable constructs; one does not implicate the other. When the courts realize this fact, as in *Price Waterhouse*, they reach the correct result; when they do not realize this fact, they do not reach the correct result.

*Hamner v. St. Vincent Hospital and Health Care Center* exemplifies the distinction between gender discrimination and sexual orientation discrimination.<sup>207</sup> Gary Hamner was a gay man and a nurse in charge of a hospital unit.<sup>208</sup> He had a poor relationship with the physician supervising the unit, Dr. Joseph Edwards.<sup>209</sup> Edwards disliked Hamner because he was gay and would verbally harass him by telling gay jokes, parodying him by using effeminate hand gestures and lisping, and subjecting him to more general hard-timing, such as screaming at Hamner and refusing to communicate with him.<sup>210</sup> Despite Edwards's use of effeminate gestures and speech indicating that he believed Hamner, as a gay man, was not sufficiently masculine, the record was clear that Hamner's sexual orientation was the reason for Edwards's behavior.<sup>211</sup> In contrast, however, if Edwards disapproved of men in nursing,<sup>212</sup> or even if he manifested his disapproval by perceiving all male nurses to be gay because of that gender-atypical career choice, those latter two scenarios would evidence sex discrimination and not sexual orientation bias.<sup>213</sup>

With *Price Waterhouse* and *Hamner* serving as paradigmatic cases, schema-matching should allow judges to appropriately classify new situations into one category or the other. Unfortunately, even these paradigmatic lawsuits may not be that simple; the lesbian and gay male schema may also affect these cases. We can see schema effects in inferences the courts draw from these plaintiffs' descriptions. Although we do not have Ann Hopkins's physical description on the record, we

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207. 224 F.3d 701 (7th Cir. 2000).

208. *Id.* at 703.

209. *Id.*

210. *Id.* at 705-06.

211. *Id.* at 706.

212. *See, e.g.,* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262 (3rd Cir. 2001) (using this scenario as an example of a clear sex discrimination claim by a male against another man); Doe v. City of Belleville, 119 F.3d 563, 598 (7th Cir. 1997) (Manion, J., dissenting in part, concurring in part), *vacated and remanded*, 523 U.S. 1001 (2003) (exemplifying where a male employee was fired by a male supervisor because he believed that it was more appropriate for the job of receptionist to be filled by a woman).

213. *Hamner*, 224 F.3d at 707 n.5.

know she was married.<sup>214</sup> Courts have often equated marriage with heterosexuality.<sup>215</sup> Other courts have taken a more nuanced view of marriage, motherhood and sexuality.<sup>216</sup> Of course, some lesbians are married, mothers, matronly, or any combination thereof and vice versa.<sup>217</sup>

However, we have a description of Dixie Adair, another successful female plaintiff and victim of sex stereotyping who was denied a promotion for being "abrasive, patronizing and demeaning."<sup>218</sup> Adair "presented a neat matronly appearance" and "possess[ed] the very essence of womanhood."<sup>219</sup> Note the gender-coded terminology. Not only is she the essence of womanhood, but she is matronly; thus fulfilling one of the central female gender roles, mother. Suggestively, the court may have been protecting Adair from the hint of lesbianism in a manner similar to the possible insulation afforded by Hopkins's marriage.<sup>220</sup> If so, this is an important factor because the accusation of homosexuality has the power to alter the courts' assessments of appropriate precedent.<sup>221</sup>

In contrast, the Seventh Circuit noted, "Gary Hamner is a male nurse and a homosexual."<sup>222</sup> His sexual orientation is stated right up front and placed on par with his profession.<sup>223</sup> Also noteworthy is the court's phrase, "male nurse." The quoted introductory sentence clearly indicates that Gary Hamner is a man, and as such he can only be a *male* nurse and not a female one. "Male" is superfluous there to show his sex. The court's use of the gender qualifier to the noun "nurse" shows the extent to

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214. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 461-62 (D.C. Cir. 1987). Hopkins arrived at Price Waterhouse from another accounting firm in order to avoid an antinepotism rule. See *id.* Price Waterhouse was aware of her marriage because her husband's employment surfaced as a concern in her partnership decision. *Id.* A 2004 photograph of Ann Hopkins can be found at <http://www.eeoc.gov/abouteeoc/40th/panel/hopkins.html> (last visited Feb. 15, 2009).

215. See, e.g., *Allen v. Mineral Fiber Specialists, Inc.*, Civ. A. No. 02-7213, 2004 U.S. Dist. LEXIS 1982, at \*19 (E.D. Pa. Jan. 30, 2004); *Gibson v. Tanks, Inc.*, 930 F. Supp. 1107, 1109 (M.D.N.C. 1996).

216. See, e.g., *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1069 n.2, 1071 (8th Cir. 2005) (Colloton, J., concurring) (providing an example of the majority and concurrence differing on the inferences about lesbianism that can be drawn from the harasser's long-term heterosexual relationship and five children from a prior marriage).

217. See HOWARD BROWN, *FAMILIAR FACES HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY* 112 (1976); RICHARD ISAY, *BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT* 139 (1989).

218. *Adair v. Beech Aircraft Corp.*, 782 F. Supp. 558, 562 (D. Kan. 1992).

219. *Id.* at 563.

220. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 461-62 (D.C. Cir. 1987).

221. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 146-47 (1995).

222. *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 703 (7th Cir. 2000).

223. *Id.*

which nursing is seen as a female occupation.<sup>224</sup> Men in nursing are unusual<sup>225</sup> and stigmatized as gender-atypical.<sup>226</sup>

As noted earlier, in Title VII litigation one of the most common aspects of the lesbian and gay male schema is the attribution of cross-gender characteristics to gay people.<sup>227</sup> Indeed, often only the atypical gender behavior triggers the label “homosexual.”<sup>228</sup> Thus, the schema also attaches to those whom others perceive to be gay. Remember schemas are idiosyncratic. We incorporate confirming information into our schemas and edit out disconfirming material.<sup>229</sup> Thus, schemas have the ability to shape our perceptions independent of whether that assessment is accurate.

Empirical social cognition studies confirm this pattern. Individuals perceive gender cues like hip sway, gait, and body shape to convey information that is used to assess masculinity and femininity, and also homosexuality and heterosexuality.<sup>230</sup> Research subjects were shown ungendered animated figures walking and asked to judge sex and sexual orientation.<sup>231</sup> Those with a swaggering gait were judged to be men; those with a swaying walk, as women.<sup>232</sup> Similarly, those figures with an

224. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (discussing the number of women in nursing and the stereotypes of nursing as a female occupation).

225. See Metro Creative Connection, *Breaking Barriers: Nontraditional Jobs for Men*, JERSEY J. (N.J.), May 8, 2008, at 17 (discussing nontraditional, cross-gender careers).

226. See Don Colburn, *Supply of Nurses Needs Urgent Care*, OREGONIAN, May 28, 2008, at B01 (reporting that Oregon counteracts stereotype and stigma by implementing its recruiting slogan, “Are You Man Enough to Be a Nurse?”); Erin Duffy, *Pemberton High Nursing Club Tours Hospital*, PHILA. INQUIRER, May 10, 2008, at B02 (reporting that there was only one boy in the high school nursing club and noting the stigma attached to being a male nurse).

227. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 U.C.L.A. L. REV. 915, 948 (1989); Daniel Goleman, *Homophobia: Scientists Find Clues to Its Roots*, N.Y. TIMES, July 10, 1990, at C1; Alan Taylor, *Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals*, in *HOMOSEXUALITY, MASCULINITY AND FEMININITY* 37, 51 (Michael Ross ed., 1985).

228. See, e.g., *Strailey v. Happy Times Nursery*, 608 F.2d 327, 328 (9th Cir. 1979) (consolidated on appeal with *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979)); *Jantz v. Muci*, 759 F. Supp. 1543, 1545 (D. Kan. 1991) (discussing situation where heterosexual teacher was fired for “homosexual tendencies” because the teacher reminded the supervisor’s secretary of her husband “whom she believed to be a homosexual”).

229. See Krieger, *supra* note 5, at 1198 (“We do not ignore evidence and choose to act instead on the stereotype. Rather, the stereotype, acting as an associative construct, biases the way we see the evidence. We recall, through the same cognitive processes that result in other forms of illusory correlation, stereotype-confirming instances as having occurred more frequently than they actually did.”).

230. Kerri L. Johnson et al., *Swagger, Sway and Sexuality: Judging Sexual Orientation from Body Motion and Morphology*, 93 J. PERSONALITY & SOC. PSYCHOL. 321-34 (2007).

231. *Id.* at 322.

232. *Id.*

hourglass figure were perceived to be female, and those with a tubular figure were seen as male.<sup>233</sup> When an hourglass figure swaggered—i.e., engaged in perceived gender-atypical behavior, it was judged to be a lesbian, and when a tubular figure swayed, it was seen as a gay man.<sup>234</sup> Thus, the respondents used gender-stereotypical movement cues to make assumptions about sex and sexual orientation and to show the interactions between those categories.<sup>235</sup> The schemas of gender atypicality and homosexuality are so closely linked that some media reports on that research reversed the findings. Those reports noted that lesbians and gay men were discovered to have distinctive, cross-gendered gaits and body morphology.<sup>236</sup> However, the study did not examine that issue and contained no such conclusion.

From a jurisprudential perspective, this aspect of the lesbian and gay male schema encourages a conflation of sex, gender and sexual orientation.<sup>237</sup> Like the respondents in the university study, judges may assume that a male plaintiff who exhibits gender atypical behavior is gay, even when he is not. Consequently, judges may transform his Title VII claim from one based on gender to one based on sexual orientation. The conflation often leaves male plaintiffs who exhibit gender atypical behavior remediless, and female plaintiffs with limited or uneven results, despite Supreme Court precedent.<sup>238</sup>

In an early case, *Smith v. Liberty Mutual Insurance Co.*, a male plaintiff raised claims for sex and race discrimination and avoided any mention of sexual orientation causes of action.<sup>239</sup> Nevertheless, the United States District Court for the Northern District of Georgia treated Smith’s claim as though it were based on sexual orientation.<sup>240</sup> Bennie Smith, an African-American male, applied to be a mail clerk for Liberty

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233. *Id.* at 323.

234. *Id.* at 322-23.

235. *Id.* at 331.

236. See Melissa Dahl, *Gay or Straight? Watch His Walk: New Study Suggests Body Movement Gives Clues to Sexual Orientation*, <http://www.msnbc.msn.com/id/20762841/> (last visited June 21, 2008); Richard Schneider, Jr., *BTW: Science Prances On*, 15 GAY & LESBIAN REV. WORLDWIDE 11 (2008).

237. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195 (1995); Valdes, *supra* note 221.

238. Gender atypical behavior in female plaintiffs does not always trigger the lesbian and gay male schema leading to this conflation. See *infra* notes 267—282 and accompanying text.

239. Valdes, *supra* note 221, at 139 n.400. The author is indebted to Professor Frank Valdes for his research into the facts and pleadings of *Smith*.

240. See *id.*; *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1101 (N.D. Ga. 1975).

Mutual Insurance Company.<sup>241</sup> He was rejected because the interviewing supervisor, Nathaniel Nash, found Smith to be “effeminate,” and therefore unsuited for the job.<sup>242</sup> According to Nash, the plaintiff was insufficiently male.<sup>243</sup> The EEOC investigative report confirmed and reinforced the trigger of gender atypical characteristics and the homosexual schema by stating that Smith’s offensive behaviors were “quite pronounced” and that he had “interests . . . not normally associated with males (sewing).”<sup>244</sup>

In addition to illustrating the cross-gender trigger for the lesbian and gay male schema, the EEOC investigator’s report evidences the well-documented tendency of people to magnify facts which confirm their schemas and to downplay or ignore contradictory information.<sup>245</sup> Smith’s actual employment application listed four hobbies: playing musical instruments, singing, dancing and sewing.<sup>246</sup> The only hobby significant enough for the EEOC investigator to note in his report was the last, sewing.<sup>247</sup> This last hobby is the most gender identified with women.

Smith’s sex discrimination claim alleged that he was not hired because he was perceived as having female characteristics.<sup>248</sup> Those characteristics would have been gender appropriate for a woman, but not for a man. Therefore, the failure to hire him was based on his sex.<sup>249</sup>

Liberty Mutual was successfully able to trigger the gay male schema in the trial and appellate courts by reworking the evidence of gender atypical behavior. This was the very same behavior that Smith would have needed to win his gender-stereotyping case. Thus, the court transformed Smith’s claim from gender role discrimination to homosexuality. Accordingly, both courts allowed Liberty Mutual to demand and enforce gender conformity in the workplace by denying Smith’s Title VII suit based on sexual orientation.<sup>250</sup>

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241. *Smith*, 395 F. Supp. at 1099.

242. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

243. Valdes, *supra* note 221, at 144.

244. Brief of Appellee at 9 n.7, *Smith*, 569 F.2d 325, No. 75-3230; Valdes, *supra* note 221, at 139 n.397).

245. *See, e.g.*, BROWER & NURIUS, *supra* note 5, at 54; Gottfried & Robins, *supra* note 5, at 33-39; Kihlstrom & Cantor, *supra* note 5, at 1-44.

246. Valdes, *supra* note 221, at 139.

247. *See id.*

248. *Smith v. Liberty Mut. Ins. Co.*, No. 17499, 1973 WL 11513 (N.D. Ga. Dec. 6, 1973).

249. *Id.* Analytically, Smith’s claim is denominated “sex-plus,” sex plus another neutral characteristic. *See Phillips v. Martin-Marietta*, 400 U.S. 542 (1971) (per curiam).

250. *See Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1101 (N.D. Ga. 1975); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 n.1. (5th Cir. 1978). *See generally* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (holding no sex-plus claim because “both sexes are being screened with respect to a neutral fact, i.e., grooming in accordance with

The *Smith* court's reading of Smith's claim as one of sexual orientation discrimination rather than gender discrimination both misses the analytical mark and enshrines the gender atypical behavior aspect of the lesbian and gay male schema into Title VII doctrine.<sup>251</sup> Smith attempted to spotlight that the employer's refusal to hire him "was not based on a determination that plaintiff was in fact a homosexual, but rather the subjective determination that he possess[ed] personal traits that Liberty Mutual associated by stereotype with the female gender."<sup>252</sup> Smith himself argued for keeping gender atypicality from triggering the gay male schema in order to underscore the gendered nature of his discrimination claim.

The manner in which Smith attempted this feat is interesting. His brief stated that he was a happily married, heterosexual male, and was not "demanding that an employer accept [an] unconventional life style and mores."<sup>253</sup> Smith attempted to use marriage to buttress a conclusion of heterosexuality similar to the way in which marriage may have colored Ann Hopkins's claim.<sup>254</sup> Note also the association of homosexuality with abnormal behavior and the foisting of that abnormality on an unwilling target.<sup>255</sup> This association has echoes both of the predatory nature of gay sexuality<sup>256</sup> and the flaunting of that sexuality,<sup>257</sup> both common attributes of the lesbian and gay male schema.

Nevertheless, once Liberty Mutual triggered the gay male schema for the court, this difference was inconsequential.<sup>258</sup> The district court

generally accepted community standards of dress and appearance"); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), (affirming termination of plaintiff teacher fired for wearing gender atypical earring to school).

251. It also helps create what Professor Valdes calls "the sexual orientation loophole." Valdes, *supra* note 221, at 146-47.

252. Brief of Appellant, *supra* note 244, at 20; Valdes, *supra* note 221, at 146.

253. Brief of Appellant, *supra* note 244, at 17; Valdes, *supra* note 221, at 146.

254. See *supra* notes 214-220 and accompanying text. Even when courts have a more sophisticated view of the interrelationship between marital status and sexuality, this technique has had mixed results. See, e.g., *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1069, 1071 (8th Cir. 2005) (Colloton, J., concurring) (differing from the majority on the inferences about lesbianism that can be drawn from the harasser's long-term heterosexual relationship and five children from a prior marriage); *Gibson v. Tanks*, 930 F. Supp. 1107, 1109 (N.D.N.C. 1996).

255. See Brower, *supra* note 71, at 81-82.

256. See *supra* notes 124, 192 and accompanying text.

257. See Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 569 n.24 (2001); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 215 (2d Cir. 2005) (lesbian plaintiff "was wearing her sexuality like a costume").

258. Of course, if Smith's assumed homosexuality and not merely gender atypicality really were the cause of his nonhiring, then Title VII would not literally apply since there would be no discrimination based on sex. See generally *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515-16 (1993) (explaining burdens of proof in Title VII cases).

misconstrued Smith's claim as based on sexual orientation when it was not.<sup>259</sup> Moreover, in discussing Smith's cause of action, the court placed Smith squarely within the reasoning of the Supreme Court in *Price Waterhouse*.

Plaintiff points out that defendant employed a female black applicant for the position sought by plaintiff. He thus argues that the defendant accepted an employee presumably displaying effeminate characteristics resulting in plaintiff's having been discriminated against because he was a male.

The Court views the situation differently. It appears that the defendant concluded that the plaintiff, a male, displayed characteristics inappropriate to his sex, the counterpart being a female applicant displaying inappropriate masculine attributes.<sup>260</sup>

Logically, therefore, courts should have decided *Smith* and other cases of gender atypicality in men by analogy to *Price Waterhouse*.<sup>261</sup> That courts have only incorporated these cases into the *Price Waterhouse* framework many years after that case,<sup>262</sup> or in some instances still reject that precedent,<sup>263</sup> says something significant about the persistence of the lesbian and gay male schema to distort legal doctrine.

One may argue that the difference in male and female gender roles requires the asymmetrical treatment of male and female plaintiffs' cases. While insistence on formal symmetry can sometimes mask relevant differences and lead to unjust results, that pitfall is a small risk here.<sup>264</sup> *Price Waterhouse* focused on the individual nature of Ms. Hopkins's claim.<sup>265</sup> Forced conformity to gender norms for behavior, even commonly accepted ones, still negatively affects individuals. Bennie Smith was surely precluded from employment just as Ann Hopkins was,

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259. *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (N.D.G.A. 1975).

260. *Id.* The Fifth Circuit's analysis is similar. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

261. See, e.g., I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991); Valdes, *supra* note 221, at 161; David R. Wade, *Women Denied Partnerships Revisited: A Response to Professors Madek and O'Brien*, 8 HOFSTRA LAB. L.J. 81, 120-24 (1990).

262. See *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001) (overruling *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), only on this specific point, as inconsistent with *Price Waterhouse*).

263. See *Prowel v. Wise Bus. Form, Inc.*, No. 2:06-cv-259, 2007 U.S. Dist. LEXIS 67792, at \*12-13 (W.D. Pa. 2007).

264. See, e.g., *Pace v. Alabama*, 106 U.S. 583, 585 (1883); *McLaughlin v. State*, 153 So.2d 1, 2 (Fla. 1963), *rev'd*, *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Naim v. Naim*, 87 S.E.2d 749, 754 (Va. 1955).

265. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1120 (D.D.C. 1985) (quoting *Wash. County v. Gunther*, 452 U.S. 161, 180 (1981)).

and for the same reason: their employers’ insistence that they each conform their gender behavior to their biological sex.<sup>266</sup>

Although it should not preclude Bennie Smith’s recovery, gender role asymmetry does affect the lesbian and gay male schema and legal doctrine. The distorting aspect of the lesbian and gay male schema does not always operate in a purely parallel manner when women and men are involved in the workplace. In some contexts, some gender atypical behavior in women may be acceptable, or even expected. Thus, a woman displaying atypical behavior is perceived to be within normal gender appropriate boundaries.<sup>267</sup> Employers and judges tend not to equate gender atypical behavior with lesbian identity and fail to formulate appropriate legal analogies and doctrine.<sup>268</sup>

As *Price Waterhouse* shows, because many workplaces and careers are predominantly and traditionally male, women may be under pressure to utilize more masculine attributes in these settings.<sup>269</sup> Women may be advised that in order to be hired or taken seriously in business, they must not dress or act overtly feminine—not wear too much jewelry, skirts too short, heels too high, and so on.<sup>270</sup> At least for some jobs, therefore, a woman with some traditionally masculine attributes may be preferred.<sup>271</sup>

Similarly, women’s choice of some traditionally male careers may be perceived as rational, particularly if they are high status jobs such as accountant, lawyer, or business executive. However, cross-gender job choices for those entering more blue-collar fields implicates the lesbian

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266. See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

267. See *Fudge v. Penthouse Int’l*, 840 F.2d 1012, 1016 (1st Cir. 1988) (noting there exists a wide spectrum of gender appropriate behavior for schoolgirls).

268. But see *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (holding that non-gender-conforming lesbian’s sex stereotyping claim was actually based on sexual orientation and not sex).

269. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

270. See, e.g., JOHN T. MOLLOY, *THE WOMAN’S DRESS FOR SUCCESS BOOK* (1977); Sandra M. Forsythe, *Effect of Applicant’s Clothing on Interviewers’ Decision to Hire*, 20 J. APPLIED SOC. PSYCHOL. 1579 (1990) (suggesting that female applicants in more masculine attire are perceived to be more business-like, to possess more management skills, and therefore, to be hired); Richard Lacayo et al., *A Hard Nose and a Short Skirt: Two Cases Raise Hard Questions About a Woman’s On-the-Job Style*, TIME, Nov. 14, 1988, at 98, 98 (describing case of Brenda Taylor, assistant state’s attorney reprimanded for looking like a “bimbo” for wearing short skirts, spike heels, and designer blouses); Ellen Goodman, *O.J. Prosecutor Hears Critics Put Her Style On Trial*, FRESNO BEE, Oct. 21, 1994, at B7 (describing decision by Marcia Clark, prosecutor in the O.J. Simpson murder trial, to appear less masculine by changing her hairstyle and dress); WORKING GIRL (20th Century-Fox 1988) (showing advice given to protagonist, a female secretary played by Melanie Griffith, on her first day of work by her new female boss (Sigourney Weaver), that overtly feminine and class-based dress is inconsistent with the professional tenor of her position).

271. See *Price Waterhouse*, 490 U.S. at 251 (describing the double bind Ann Hopkins faced at the accounting firm, Price Waterhouse).

and gay male schema.<sup>272</sup> Contrast the common perception of a woman who seeks to be a corporate securities attorney with one who wants to be a bulldozer driver,<sup>273</sup> or a man who desires to be a nurse or receptionist.<sup>274</sup> Social psychology research bears out this insight. One study of this issue found that men entering traditional female professions were asked about their masculinity (viz., sexual orientation); women were not.<sup>275</sup> By using the noun “masculinity” to cover references to homosexuality, the authors of the study also equated gender atypicality with the gay male schema.<sup>276</sup> Thus, the example illustrates the persistence of the schema, even among researchers who study the societal aspects of gender roles.

The difference in treatment between gender atypical men and women may be partially attributed to the perceived status gains or losses associated with taking traditional male or female jobs.<sup>277</sup> A man who takes a female role by, for example, becoming a secretary, loses social status. A woman may gain status when she chooses a male career, for example as a lawyer.<sup>278</sup> The man’s choice may be perceived as “peculiar,”<sup>279</sup> the woman’s as natural.<sup>280</sup> The available alternative explanation of women seeking increased status may explain why courts have been more able to perceive discrimination against women on the basis of

272. See Richard M. Levinson, *Sex Discrimination in Employment Practices: An Experiment with Unconventional Job Inquiries*, in *WOMEN AND WORK: PROBLEMS AND PERSPECTIVES* 54 (Rachel Kahn-Hut et al. eds., 1982).

273. Compare *Price Waterhouse*, 490 U.S. at 228 (seeking a promotion to partner at “Big Five” accounting firm), with *Valdes v. Lumbermen’s Mut. Cas. Co.*, 507 F. Supp. 10 (S.D. Fla. 1980) (seeking a position as a lower-level warehouse employee).

274. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262 (3d Cir. 2001) (hypothesizing situation of a male doctor who does not believe men should be nurses).

275. Levinson, *supra* note 272, at 61.

276. *Id.* (“Interestingly, several male . . . callers were questioned about their ‘masculinity’ (e.g., ‘Are you a queer?’).”)

277. Lisa A. Serbin & Carol H. Sprafkin, *A Developmental Approach: Sexuality From Infancy Through Adolescence*, in *THEORIES OF HOMOSEXUALITY* 163, 177 (James H. Geer et al. eds., 1987) (“Girls who exhibit cross-sex-typed behavior receive far less censure than boys, . . . possibly because of the higher status the male sex role has in our culture.”).

278. Some have argued that men losing status by taking female roles (and vice versa) is the key to homophobia. See, e.g., Valdes, *supra* note 221, at 258-59; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *TUL. J.L. & SEXUALITY* 9 (1991) (arguing that opposition to same-sex marriage stresses the fact that it would undermine traditional male dominant/female passive roles); Nikolaus Benke, *Women in the Courts: An Old Thorn In Men’s Sides*, 3 *MICH. J. GENDER & L.* 195, 247 (1995) (stating that ancient Roman law abridged the litigation rights of the penetrated male in homosexual male intercourse just as if he were a woman).

279. Levinson, *supra* note 272, at 61.

280. *But see Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J. concurring) (discussing famous example of a woman’s choice to enter the legal profession viewed as unnatural).

gender atypicality as violating Title VII, but have been unable to make a parallel conclusion with men.

Cognitive psychologists have found that people seize upon even tenuous theories to rationalize inexplicable events or behavior,<sup>281</sup> and schemas often fill this need for order and rationality.<sup>282</sup> Consequently, employers and judges may call upon the lesbian and gay male schema when increased status or other acceptable reasons cannot explain gender atypical behavior.<sup>283</sup> Accordingly, when masculine women who work in male-dominated, high status careers appear before the courts as plaintiffs, they often do not trigger the lesbian schema because the alternate explanation of increased status is available. Courts cannot reach the same conclusion for effeminate men in low status jobs. Accordingly, the contrast between the outcomes in *Price Waterhouse* and *Smith* appears less confusing, although no more appropriate.

Further, the stronger the inference that the victim of sexual harassment is homosexual, the more difficult the case tends to be. In *Dillon v. Frank*, fellow workers verbally and physically harassed a male postal employee, Dillon.<sup>284</sup> Coworkers taunted Dillon with "fag," "Dillon sucks dicks," "Dillon gives head," and other epithets.<sup>285</sup> Although the United States Postal Service and the court saw this as sexual orientation harassment, and thus, nonactionable under Title VII, Dillon specifically

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281. See, e.g., Robert H. Lauer & Warren H. Handel, SOCIAL PSYCHOLOGY: THE THEORY AND APPLICATION OF SYMBOLIC INTERACTIONISM (2d ed. 1983); Loren J. Chapman, *Illusory Correlation in Observational Report*, 6 J. VERBAL LEARNING & VERBAL BEHAV. 151, 151 (1967) ("The term 'illusory correlation' is proposed for the report by observers of a correlation between two classes of events which, in reality, (a) are not correlated, or (b) are correlated to a lesser extent than reported, or (c) are correlated in the opposite direction from that which is reported."); Loren J. Chapman & Jean P. Chapman, *Illusory Correlation as an Obstacle to the Use of Valid Psychodiagnostic Signs*, 74 J. ABNORMAL PSYCHOL. 271 (1969) (explaining how practicing psychologists trained in diagnostics failed to report valid correlations and reported invalid correlations between male homosexuality and Wheeler-Rorschach signs). Moreover, untrained observers replicated the experts' illusory correlations. *Id.*

282. See BROWER & NURIUS, *supra* note 5, at 13-14.

283. Ask yourself the question "Is a man who touches another man's butt gay?" Does your opinion change if he is a football coach congratulating a player after a touchdown, or other such example? That response employs the same search for alternative explanations to make a man touching another man fit one's definition of rationality. In fact, the male-male touch may have nothing to do with his being gay or a football player—or the man may be both. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); David Kopay & Perry Deane Young, *THE DAVID KOPAY STORY* (1977) (autobiography of a gay NFL player); David Wharton, *Young Gay Athletes Find a Place out on the Field—An Emerging Generation of Players Is More Open About Sexual Orientation*, L.A. TIMES, July 28, 2007, at A1 (discussing gay football players in the NFL, college, and high school).

284. No. 90-2290, 1992 WL 5436 (6th Cir. 1992).

285. *Id.* at \*1.

disavowed that foundation for his claim.<sup>286</sup> Analogizing his case to *Price Waterhouse*, he couched his cause of action as “sex stereotyping,” classifying certain behavioral characteristics as appropriate for one sex but not the other.<sup>287</sup> Dillon claimed that his coworkers abused him because he contravened their traditional gender expectations.<sup>288</sup> Accordingly, like Ann Hopkins at Price Waterhouse, he was a victim of sex stereotyping.

The Sixth Circuit rejected both Dillon’s analogy and his analysis.

We find this argument unpersuasive, primarily because he has not shown that his co-workers would have treated a similarly situated woman any differently. Dillon’s argument must presume that the abuse was either directed at his supposed homosexuality or at specific sexual practices (such as anal sex or fellation). . . . Dillon has not shown such unisexual oppression: he has not argued that a lesbian would have been accepted at the Center, nor has he argued that a woman known to engage in the disfavored sexual practices would have escaped abuse. *See Porta v. Rollins Env’tl. Serv. (NJ), Inc.*, 654 F. Supp. 1275, 1279 (D.N.J. 1987) (graffiti alleging “Judy sucks Bernie’s dick” part of sexual harassment claim). Without such a showing, his claim to have been discriminated against because he is male cannot succeed.<sup>289</sup>

The court found Dillon’s citation of *Price Waterhouse* to be similarly inapt.

*Price Waterhouse v. Hopkins* . . . does not direct a different result. *Price Waterhouse* was not a hostile environment case. It involved . . . [an] allegation “that gender played a part in a particular employment decision.” Because of this difference, we do not read the Court to mean that any treatment that *could* be based on sexual stereotypes would violate Title VII.

. . . In our case there is no evidence provided that Dillon’s co-workers justified their outrageous behavior based on, or accompanied it with remarks indicating, a belief that his practices would be acceptable in a female but unacceptable in a male.

Further, the Court emphasized the “intolerable and impermissible Catch-22” in the stereotyping in that case. . . . A desirable trait (aggressiveness) was believed to be peculiar to males. If Hopkins lacked it, she would not be promoted; if she displayed it, it would not be acceptable. In our case, Dillon’s supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a “Catch-22.”

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286. *Id.* at \*5.

287. *Id.*

288. *Id.*

289. *Id.* at \*9.

Thus, the discussion of sexual stereotyping in *Price Waterhouse* does not support a holding that discrimination "on account of sex" was involved in this case.<sup>290</sup>

The court misread Dillon's citation to *Price Waterhouse*. He claimed that coworkers' views of appropriate gender roles influenced their treatment and assessment of him. As was true with Ann Hopkins, gendered schemas provoked the disparate treatment. Thus, the doctrinal difference that his claim was sexual harassment and hers was refusal to promote is insignificant. While it was perhaps more obvious that Hopkins's partners viewed her as unwomanly,<sup>291</sup> the particular verbal abuse heaped on Dillon demonstrates that his coworkers saw him as unmanly.<sup>292</sup> *Price Waterhouse* taught that gendered schemas generating different treatment of individuals in the workplace impose a term or condition of employment that members of the opposite sex do not suffer.<sup>293</sup> This disparate treatment constitutes sex discrimination.<sup>294</sup>

Further, Hopkins's "catch-22" may have exacerbated her predicament, but it is not the sine qua non of her sex discrimination cause of action. Whether or not aggressiveness or "masculine" characteristics were required for promotion to partnership, the partners reacted to Hopkins's possession of those traits as unfeminine. The negative reaction is the heart of her Title VII claim.<sup>295</sup>

Coworkers' enforcement of their version of gender-appropriate workplace behavior links *Price Waterhouse* and *Dillon*.<sup>296</sup> Indeed, the very irrelevance of gender-typicality to Dillon's job increases its illegitimacy. After all, if Ann Hopkins truly were too abrasive to be promoted, that characteristic would be a relevant partnership criterion.<sup>297</sup> A male postal worker's effeminacy, on the other hand, is unrelated to his job performance. Accordingly, the Sixth Circuit's reliance on the irrelevance of Dillon's assumed behavior to the workplace is misplaced.

More significantly, the Sixth Circuit fundamentally misconstrued Dillon's legal argument as the court's above-quoted counter-examples

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290. *Id.* at \*9-10.

291. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989).

292. *See Dillon*, 1992 WL 5436.

293. *See Price Waterhouse*, 490 U.S. at 228.

294. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical issue . . . 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.").

295. *See Price Waterhouse*, 490 U.S. 228.

296. *See id.* at 251 ("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.").

297. *See id.* at 252.

illustrate.<sup>298</sup> As *Oncale* noted, where there is direct comparative evidence of the different treatment of the sexes at work, there is proof of sex discrimination.<sup>299</sup> In asking whether Dillon's fellow employees would have treated a similarly situated female differently, one cannot simply examine the treatment of lesbians or women who perform fellatio. Naturally, lesbians working for the Postal Service being treated better than gay males would have been a clear case of sex discrimination.<sup>300</sup> That was not Dillon's allegation. Since no evidence was presented as to how their colleagues treated the lesbians working for the Postal Service,<sup>301</sup> we will never be able to assess this method of proving Dillon's case.

The court more correctly paid attention to the alleged discrimination, the abusive words "Dillon sucks dicks."<sup>302</sup> Nevertheless, it is too simplistic to inquire whether coworkers would have harassed a woman in a parallel manner, i.e., "Judy sucks Bernie's dick."<sup>303</sup> As courts have recognized in other sexual harassment cases,

[E]xpressions such as "fuck me," "kiss my ass," and "suck my dick," are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference.<sup>304</sup>

Moreover, men and women play different roles in American society, and are sexually harassed in different ways.<sup>305</sup> Verbal abuse registers differently according to the sex of the target.<sup>306</sup> "Judy sucks Bernie's

298. *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*9 (6th Cir. 1992).

299. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

300. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979) (holding employer policy that treats men and women who prefer sexual partners of the same sex alike is not sex discrimination).

301. It is fairly safe to assume that they would not have been accused of fellating men. However, they may have been told to have sex with men. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 215 (2d Cir. 2005); *Valadez v. Uncle Julio's of Ill., Inc.*, 895 F. Supp. 1008, 1011 (N.D. Ill. 1995); see also *Keogh*, *supra* note 137 and accompanying text.

302. *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*2 (6th Cir. Jan. 15, 1992).

303. *Porta v. Rollins Envtl. Servs., Inc.*, 654 F. Supp. 1275, 1279 (D.N.J. 1987).

304. *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997).

305. The debate surrounding the use of the "reasonable woman" or "reasonable person" standard in sexual harassment cases is premised on this distinction. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the reasonable woman standard).

306. See, e.g., *Eros DeSouza & Joseph Solberg, Women's and Men's Reactions to Man-to-Man Sexual Harassment: Does the Sexual Orientation of the Victim Matter?*, 50 *SEX ROLES* 623, 636-37 (2004) (describing how men and women see sexual harassment differently); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *YALE L.J.* 1759 (2005) (noting the presence of women on appellate panels correlates

dick" can constitute sexual harassment because it reduces women to sexual beings and illustrates they are not workplace equals.<sup>307</sup> However, it does not connote that Judy is less than a woman or acting inappropriately for her gender.<sup>308</sup> "Dillon sucks dicks," on the other hand, is less a statement describing his possible sexual activity than a slur on his manhood.

In the many same-sex sexual harassment cases where heterosexual men are perpetrators they always place their male victims in the receptive role in intercourse or the active role in oral sex.<sup>309</sup> This is not coincidental. In some modern cultures and historically, men engaging in sex with other men were viewed differently depending on which role they assumed in sex, the insertive/male role or the receptive/female one.<sup>310</sup> Real men are fellated, they do not perform fellatio; real men penetrate, they are not penetrated.<sup>311</sup> Moreover, concentrating on women's sexuality

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to different outcomes in Title VII cases); *cf.* *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995) (contrasting the reactions to a hypothetical conversation about penis length that takes place between a man and a woman, two men or two women). *See generally* *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1494 (M.D. Fla. 1991) (describing sexual harassment claim based in part on pervasiveness of pornographic photos of nude women; male employee testified that nude photos of women in the workplace were normal, while photos of naked men would be "queer").

307. *See, e.g.*, *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-01 (10th Cir. 1996); *E.E.O.C. v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 35-36 (W.D.N.Y. 1994); JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 19 (1990) (discussing the identification of women with sex); LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 14-15 (1978)

308. Indeed, it may connote the opposite, that women are only good for sex. *Cf. A. Sam & Sons Produce Co.*, 872 F. Supp. at 29 (quoting president of company stating that women are only good for "fucking").

309. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998); *Vickers v. Fairfield Med. Ctr.*, 2006 FED App. 0252P at 5-6 (6th Cir.); *Rene v. MGM Grand Hotel*, 243 F.3d 1206, 1211 (9th Cir. 2001) (Nelson, J., dissenting), *rev'd*, 305 F.3d 1061 (9th Cir. 2002) (en banc), *cert. denied*, *MGM Grand Hotel, LLC v. Rene*, 538 U.S. 922 (2003); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Doe v. City of Belleville*, 119 F.3d 563, 566-67 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998) (vacated on other grounds); *Johnson*, 125 F.3d at 410-11; *EEOC v. Turkey Hill Dairy, Inc.*, No. 06-CV-04332, 2007 U.S. Dist. LEXIS 61597, at \*5 (E.D. Pa. 2007); *Allen v. Mineral Fiber Specialists, Inc.*, No. 02-7213, 2004 U.S. Dist. LEXIS 1982, at \*4-5 (E.D. Pa. 2004); *Rasmusson v. Copeland Lumber Yards, Inc.*, 988 F. Supp. 1294, 1295-96 (D. Nev. 1997).

310. *See, e.g.*, Tomas Almaguer, *Chicano Men*, in *THE LESBIAN AND GAY STUDIES READER* 256-58 (Henry Abelove et al. eds., 1993); C.A. Tripp, *THE HOMOSEXUAL MATRIX* 125 (1975) (discussing ways men deny their homosexuality, including using the assumption of the male role in homosexual activity to absolve that individual of homosexuality); George Chauncey Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War One Era*, 19 J. SOC. HIST. 189, 197 (1985) (discussing the selective labeling of men engaged in homosexual activity as "straight" or "queer" based on what sexual and gender roles are assumed).

311. *Cf. Vickers*, 453 F.3d at 763. In *Vickers* the plaintiff alleged that his harassers targeted him because of "those aspects of homosexual behavior in which a male participant

in the workplace often signals that they are not equals with men.<sup>312</sup> In sexual harassment cases, a man placing another man in a female sexual role also demonstrates the victim's second-class status. Both are expressions of dominance and inequality towards others they perceive as not male enough to belong to the group. Thus, Dillon was separated from and excoriated by his fellow postal workers because of maleness, or perceived lack thereof. As the Supreme Court stated in *Price Waterhouse*, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match[] the stereotype associated with their group."<sup>313</sup>

Viewed in this light, the sexual harassment of a gay factory worker, John Bibby, is equally illustrative.<sup>314</sup> Bibby, too, was called "faggot" and "sissy" and harassed by comments like "everybody knows you take it up the ass."<sup>315</sup> Once again, the equation of male homosexuality with femaleness or cross-gender identity forms the core of the gay male schema and the core of the harassment. This attribution exhibits itself in the choice of verbal epithets.<sup>316</sup> As a gay man, Bibby was called sissy and treated sexually as the assumed passive or female partner.<sup>317</sup> Accordingly, the employee's homosexuality *vel non* is not the source of the discrimination, but the rigorous enforcement of traditional male gendered behavior in the workplace.

*Bibby* and *Dillon* also demonstrate that when gay persons (or persons perceived to be gay) are plaintiffs, courts have difficulty accepting the gender stereotyping rationale. In contrast, courts seem to have the easiest time accepting claims of same-sex sexual harassment through sex stereotyping when they believe that plaintiffs could not be gay, as in the harassment of heterosexual women<sup>318</sup> or schoolchildren.<sup>319</sup>

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assume[d] what [they] perceive[d] as a traditionally female-or less masculine-role." *Id.* Vickers noted that he was only teased about giving, not receiving fellatio, and about receiving anal sex. *Id.*

312. See cases and text cited *supra* note 43.

313. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

314. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 259-60 (3d Cir. 2001).

315. *Id.* at 260.

316. See *Carreno v. Local Union No. 226, Int'l Bhd. of Elec. Workers*, 54 Fair Empl. Prac. Cases (BNA) 81, 81 (D. Kan. 1990) (discussing situation where gay electrician was called "faggot" and "Mary").

317. *Bibby*, 260 F.3d at 260.

318. Compare *Price Waterhouse*, 490 U.S. 228, and *Adair v. Beech Aircraft Corp.*, 782 F. Supp. 558 (D. Kan. 1992), with *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (finding lesbian victim of harassment only stated claim based on sexual orientation and not gender stereotyping). *But see Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (finding lesbian stated a claim for gender-stereotyping and sexual orientation was irrelevant).

For example, in *Doe v. City of Belleville*, the plaintiffs, two sixteen-year-old brothers, were employed as groundskeepers in the municipal cemetery.<sup>320</sup> Male coworkers called J. Doe “fat boy” due to his weight, and his brother, H. Doe, “fag” or “queer” because he wore an earring.<sup>321</sup> Much of H’s harassment consisted of calling him “fag,” “queer” and “bitch,” taunts to “go back to San Francisco with the rest of the queers,” and threats to take H. into the woods and sodomize him.<sup>322</sup> One worker grabbed H’s testicles to find out if he was a girl or a boy.<sup>323</sup> As the United States Court of Appeals for the Seventh Circuit noted, no court would have had any difficulty finding that a woman in similar circumstances had been subjected to sexual harassment:

If the harassment were triggered by that woman’s decision to wear overalls and a flannel shirt to work, for example—something her harassers might perceive to be masculine just as they apparently perceived H’s decision to wear an earring to be feminine—the court would have all the confirmation that it needed that the harassment indeed amounted to discrimination on the basis of sex.<sup>324</sup>

Nevertheless, when a similar sexual harassment case involved an adult gay man, the very same epithets, “fag,” “bitch,” and drag queen references were determined by a different appellate panel of the Seventh Circuit only three years later to refer to sexual orientation and not to gender stereotyping.<sup>325</sup>

Interestingly, many of the men in these cases were viewed as gay or effeminate for wearing earrings.<sup>326</sup> As Judge Kozinski noted in *Jespersen v. Harrah’s Operating Company, Inc.*, “[C]ultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed.”<sup>327</sup> He is no doubt correct about cultural shifts. But we should be careful to remember that our experiences may have disproportionate resonance

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319. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000).

320. 119 F.3d 563, 566 (7th Cir. 1997).

321. *Id.*

322. *Id.* at 567.

323. *Id.*

324. *Id.* at 568.

325. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1083, 1086 (7th Cir. 2000) (finding that graffiti on workplace bulletin board stating “Aids kills faggots dead . . . RuPaul, RuSpearman” evidenced sexual orientation discrimination, not gender stereotyping). RuPaul is the name of an African-American drag queen and entertainer. *Id.* at 1083.

326. See, e.g., *Doe v. City of Belleville*, 119 F.3d 563, 556 (7th Cir. 1997); *Kay v. Independence Blue Cross*, 142 Fed. App’x 48, 51 (3d Cir. 2005); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (plaintiff teacher fired for wearing gender atypical earring to school).

327. 444 F.3 1104, 1118 (9th Cir. 2006) (Kozinski, J., dissenting).

only to us. This is the availability heuristic.<sup>328</sup> Our experiences may idiosyncratically shape our schemas leading us to overstate the probability of our experiences' occurrence in the world. One classic example is the comment attributed to Pauline Kael, late film critic for *The New Yorker*.<sup>329</sup> After Richard Nixon won forty-nine states, a landslide victory in the 1972 presidential race, Kael wondered, "How can that be? No one I know voted for Nixon."<sup>330</sup> Perhaps in the circles in which Judge Kozinski moves, earrings on men pass unnoticed. They apparently do not do so for the male plaintiffs in these cases.

### B. *The Mechanics of Schema Theory*

We have seen that one effect of the lesbian and gay male cross-gender schema is to transform sex-stereotyping cases into sexual orientation claims. We can now examine schema mechanisms to explain how this transformation from gender-atypicality to sexual orientation occurs.

In the last decade, some lesbian and gay male plaintiffs have prevailed and have been able to have the courts resist the earlier distortions of the gay, cross-gender model.<sup>331</sup> In *Nichols v. Azteca*

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328. See, e.g., Tversky & Kahneman, *Judgment Under Uncertainty*, supra note 5, at 1124-31; Tversky & Kahneman, *A Heuristic*, supra note 5, at 208.

329. John McCormick, *When the Press Misses a Story*, CHI. TRIB., Nov. 9, 2004, at C-21.

330. *Id.*

331. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (gay man); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (ambiguous); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (lesbian). Some commentators suggest that gay men and lesbians in such cases suffer the "ultimate" gender stereotype—that "real" men are attracted to women and "real" women are attracted to men. See, e.g., Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (arguing that sexual harassment of gay men and lesbians is "based upon the ultimate stereotype of proper sexual roles"); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187, 196 (theorizing that societal disapprobation of gay men and lesbians stems from those individuals' violation of gender norms and not solely from scorn of their sexual practices).

This view would mean that every sexual orientation case is essentially a gender stereotype cause of action. See *Vickers v. Fairfield Med. Ctr.*, 2006 FED App. 0252P at 6 (6th Cir.) ("Ultimately, recognition of Vickers' claim [that gay men are perceived to have traditionally female or less masculine sexual practices] would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."). As the Sixth Circuit in *Vickers* recognized, indeed, that is its point. *Id.* ("Vickers argued that the act of identification with a particular group [gays and lesbians], in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim."). As Professor Kramer correctly notes, however, most courts would not

*Restaurant Enterprises, Inc.*, the sexuality of the plaintiff, Antonio Sanchez, is ambiguous.<sup>332</sup> Although one United States Court of Appeals for the Ninth Circuit concurrence in a subsequent case referred to Sanchez as gay,<sup>333</sup> neither *Nichols* nor the accompanying unpublished memorandum opinion dealing with the claims of his female coplaintiffs contained any mention of his sexuality.<sup>334</sup> *Nichols* is the first case in which a possibly gay man may have prevailed on a *Price Waterhouse* sex-stereotyping claim. The omission of Sanchez’s sexual orientation is significant given the history of losses by lesbian and gay plaintiffs when their sexuality surfaces in court.<sup>335</sup>

Antonio Sanchez worked at two of Azteca’s restaurants in Washington and Oregon.<sup>336</sup> The court stated:

Sanchez was subjected to a relentless campaign of insults, name-calling, and vulgarities. Male coworkers and a supervisor repeatedly referred to Sanchez in Spanish and English as “she” and “her.” Male coworkers mocked Sanchez for walking and carrying his serving tray “like a woman,” and taunted him in Spanish and English as, among other things, a “faggot” and a “fucking female whore.”<sup>337</sup>

Sanchez prevailed on a *Price Waterhouse* sex discrimination claim; the verbal abuse he suffered was cast in female terms and was based on the perception that he was effeminate.<sup>338</sup> Accordingly, that harassment occurred because of sex.<sup>339</sup> In *Nichols*, the ambiguity of Sanchez’s sexual

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welcome that approach. Kramer, *supra* note 24, at 34 (discussing that theory without specifically applying it to *Vickers*).

Moreover, such a conclusion would call for a reversal of *Medina* and *Hamner*. Neither *Medina*, discussed *supra* notes 99–100 and accompanying text, nor *Hamner*, discussed *supra* notes 207–213 and accompanying text, contain any evidence that gender nonconformity played any part in the alleged harasser’s motive for the harassment. Both of those cases properly decided that plaintiffs’ claims were based on sexual orientation and not sex-stereotyping—*Medina* on the basis of heterosexuality, *Hamner* on the basis of homosexuality. See *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1131 (10th Cir. 2005); *Hamner v. St. Vincent Hosp. Health Care Ctr., Inc.*, 224 F.3d 701, 701 (7th Cir. 2000).

332. 256 F.3d 864 (9th Cir 2001).

333. *Rene*, 305 F.3d at 1069 (Pregerson, J., concurring) (comparing the facts of *Nichols* with those of *Rene* and finding gay male employees in both cases were harassed in similar ways and by similar terms).

334. See *Nichols v. Azteca Rest. Enters., Inc.*, No. 99-35579, 2001 WL 804002 (9th Cir. July 16, 2001).

335. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Spearman v. Ford Motor Co.*, 231 F.2d 1080 (7th Cir. 2000); *Carreno v. Local Union No. 226, Int’l Bhd. of Elec. Workers*, 54 Fair Empl. Prac. Cases (BNA) 81 (D. Kan. 1990).

336. *Nichols*, 256 F.3d at 870.

337. *Id.*

338. *Id.*

339. *Id.* at 874–75.

orientation and the heavily gender-encoded epithets may have both combined to help the court resist the erroneous schema and its skewed perspectives.

We have already discussed how one aspect of schematic thinking is the tendency to edit facts to incorporate confirming information within the schema and reject disconfirming material as irrelevant or exceptional. One prime example is found in the treatment of Harry Kay by coworkers at Independence Blue Cross (IBC).<sup>340</sup> Specifically, the difference in the decisions of the district court and the United States Court of Appeals for the Third Circuit reflects this selection principle.<sup>341</sup> Harry Kay was employed by IBC as an analyst.<sup>342</sup> His harassment began almost immediately after he changed jobs and changed floors at the IBC offices.<sup>343</sup> His new coworkers left comments like “queer,” “faggot,” and “fem” on his voicemail and posted an anonymous letter to Kay’s supervisor alleging that he had been “staring, glaring and mumbling comments at the men who passed by his desk.”<sup>344</sup> Kay also received a letter that said, “Stop staring at me in the bathroom and on the floor, you faggot.”<sup>345</sup> There was also a petition in the restroom stating, “If you want this queer off the floor, sign here.”<sup>346</sup> One employee walked behind him limply bending his wrist and pointing at Kay.<sup>347</sup>

Kay related two other incidents: In July 1998, Kay received a photocopy of an advertisement for a telephone chat line “1-800-FREE-GAY” with a typewritten addition “A real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a ‘real man’!!!!!!”<sup>348</sup> In August 1999, Kay declined to replace the empty water bottle atop an office water cooler.<sup>349</sup> When one of his male coworkers performed that job, a female colleague, Donna Bennett, commented that she was “glad there was a real man on the floor.”<sup>350</sup> She later joked with fellow workers that Kay had not replaced the water

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340. *Kay v. Independence Blue Cross*, 91 Fair Empl. Prac. Cases (BNA) 1559 (E.D. Pa. 2003).

341. *Id.*; *Kay v. Independence Blue Cross*, 142 Fed. App’x 48 (3d Cir. 2005) (unpublished).

342. *Kay*, 91 Fair Empl. Prac. Cases (BNA) at 1561.

343. *Id.* at 1562.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* Again note the earring trigger. *See supra* notes 326—327 and accompanying text.

349. *Kay*, 91 Fair Empl. Prac. Cases (BNA) at 1562.

350. *Id.*

bottle.<sup>351</sup> Bennett also testified that she considered Kay to be a “miss prissy.”<sup>352</sup>

The trial court found that Kay had sufficiently alleged facts to withstand summary judgment on his *Price Waterhouse* gender-stereotyping claim, and agreed he was not harassed based on sexual orientation as IBC contended.<sup>353</sup> However, the court granted summary judgment because his claim was not sufficiently severe or pervasive to create an abusive working environment, nor was the employer responsible for the coworkers’ actions.<sup>354</sup>

The Third Circuit affirmed the lower court, but on the ground that his claim was based on sexual orientation and not gender-stereotyping.<sup>355</sup> In addition to the facts as related by the district court, the Third Circuit stated that the record contained multiple references to Kay’s sexual orientation.<sup>356</sup> In his deposition Kay was asked why his coworker may have mimicked a limp wrist, Kay responded, “Well, maybe it was because [Foley] knows that [Butts] is gay. And anyone that hangs out with the gay men must be gay.”<sup>357</sup> Moreover, Kay had stated that he had been harassed based on sexual orientation when he filed charges with the Pennsylvania Human Rights Commission and in his long-term disability benefits claim.<sup>358</sup> The Third Circuit also added that the water cooler incident included a statement by Bennett, “You are just so gay,” as well as the “real man” remark.<sup>359</sup> The appellate court stated that the gay chat-line flyer included the phrase: “GAY! GAY! GAY!”<sup>360</sup>

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351. *Id.*

352. *Id.*

353. *Id.* at 1568.

354. *Id.*

355. *Kay v. Independence Blue Cross*, 124 Fed. App’x 48, 51 (3d Cir. 2005) (Rendell, J., concurring) (stating that she would have affirmed on the basis given by the district court and not resolved the gender-stereotyping/sexual orientation claim).

356. *Id.* at 50.

357. *Id.* The labeling of one person as gay because he or she associates with a known homosexual is called an “associative stigma.” See Belle Rose Ragins et al., *Heterosexism in the Workplace: Do Race and Gender Matter?*, 28 GROUP & ORG. MGMT. 45, 49 (2003) (discussing “courtesy stigmas”); Gregory M. Herek & John P. Capitanio, “Some of My Best Friends:” *Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412, 424 (1996); Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effect on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 151-52, (2007) (discussing empirical research on the personal experiences of lesbians and gay men in courts; examples of associative stigma); see also *Vickers v. Fairfield Med. Ctr.*, 2006 FED App. 0252P at 2 (6th Cir.) (illustrating example of associative stigma causing workplace harassment under Title VII).

358. *Kay*, 142 Fed. App’x at 50.

359. *Id.* at 50-51.

360. *Id.*

These accretions to the retelling of the factual record are small but significant for understanding both how schemas work and why the Third Circuit ruled as it did. Both the district court and the court of appeals are liberally editing information to fit their model of what happened in the case. They each extracted and retained certain information because it was useful to them and consonant with their schema for that case, and rejected information when it was inconsistent or no longer useful.<sup>361</sup> Moreover, as each of their models was idiosyncratic, the other judges examining the same record did not share those schemas or those conclusions.<sup>362</sup>

Notice the difference in the two discussions. The United States District Court for the Eastern District of Pennsylvania found a gender-stereotyping claim, but nowhere in the district court's opinion did it mention Kay's deposition testimony on possible reasons for the limp wrist gesture.<sup>363</sup> Nor did that court mention Kay's charge to the state administrative agencies that he had suffered sexual orientation discrimination, although the lower court had noted the required administrative proceedings.<sup>364</sup> Conversely, the Third Circuit found a sexual orientation claim.<sup>365</sup> The appellate court stressed the advertising line "GAY! GAY! GAY!" for the chat-line flyer and added Bennett's remark, "You are just so gay" to the water cooler story.<sup>366</sup>

None of those additions provide significant new information. After all, both courts' versions contained facts supporting either perspective on the workplace conduct. For example, both courts noted the telephone line was for a gay chat service: the district court mentioned that the phone number was 1-800-FREE-GAY, while the Third Circuit included the line, "GAY! GAY! GAY!"<sup>367</sup> Moreover, although the water cooler epithet 'gay' in the context Bennett employed it may have been a reference to Kay's assumed sexual orientation, it could also have signified "lame," "useless" or "bad."<sup>368</sup> Instead, the additions reinforced

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361. See BROWER & NURIUS, *supra* note 5, at 14 (discussing schema theory generally).

362. See *id.* at 14-15.

363. *Kay v. Independence Blue Cross*, 91 Fair Empl. Prac. Cases (BNA) 1559 (E.D. Pa. 2003).

364. *Id.*

365. *Kay*, 142 Fed. App'x at 48.

366. *Id.* at 50-51.

367. *Id.* at 51; *Kay*, 91 Fair Empl. Prac. Cases (BNA) at 1562.

368. See, e.g., JONATHON GREEN, *THE CASSELL DICTIONARY OF SLANG* 470 (1998) (defining "gay" as "[1970s+] . . . a general pejorative: stupid, ugly, eccentric"); Denise Winterman, *How "Gay" Became Children's Insult of Choice*, BBC NEWS MAGAZINE (2008), available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/7289390.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7289390.stm) (last visited Mar. 18,

the particular decisions that the courts made on the case. What is noteworthy is the increased emphasis on those facts that support the courts’ eventual conclusions on sexual orientation or gender stereotyping, and de-emphasis on those aspects that contradict that decision. This is classic schema editing and one of the major mechanisms by which schemas work in legal decision-making.<sup>369</sup>

The tendency to ignore contradictory facts and boost the importance of those that support a particular schema is also evident in *Dawson v. Bumble & Bumble*.<sup>370</sup> Dawn Dawson was employed by Bumble & Bumble, a high-end hair salon in Manhattan, as a stylist trainee and hair assistant.<sup>371</sup> Dawson described herself as a “lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman.”<sup>372</sup> Specifically, she generally wore leather pants and a denim jacket on the job, sported a mohawk hairstyle and did not wear feminine jewelry, perfume, or makeup.<sup>373</sup> The salon itself contended if there were a norm for Bumble employees, it would be the norm of nonconformance.<sup>374</sup> The district court noted that the salon’s employees “embod[ied] many lifestyles and sexual preferences and reflect[ed] varying physical appearances, overall looks, and different manners of hair[,] dress and clothing.”<sup>375</sup> While Dawson worked at the salon, her fellow employees included several lesbians and gay men, a bisexual, a female-to-male transsexual, and a pre-operative male-to-female transsexual.<sup>376</sup> Dawson was not reticent about her sexuality and would sometimes refer to herself as a “dyke.”<sup>377</sup>

After Bumble & Bumble terminated her, Dawson sued claiming discrimination on the bases of sex, sex stereotyping, and/or sexual

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2009) (“[G]ay’ has partly lost its sexual connotations among young people . . . . While still pejorative, for the majority of youngsters it has replaced words such as ‘lame.’”).

369. This schematic filtering of facts is not unique to courts in Title VII cases. *See, e.g.*, *Saia v. New York*, 334 U.S. 558 (1948). Compare Justice Douglas’s factual statement in the majority opinion in *Saia*, *id.* at 559, with Justice Frankfurter’s dissent, *id.* at 562-63 (Frankfurter, J., dissenting) (First Amendment context). Also compare Justice Dye’s factual description in *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 29-30 (N.Y. Ct. App. 1952), with Justice Fuld’s dissent, *id.* at 31 (Fuld, J., dissenting) (adverse possession context).

370. 398 F.3d 211 (2d Cir. 2005).

371. *Id.* at 213.

372. *Id.*

373. *Id.* at 221-22 (stating that the salon found her clothing acceptable work attire and that a stylist there gave Dawson her Mohawk).

374. *Id.* at 214

375. *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 310 (S.D.N.Y. 2003).

376. *Dawson*, 398 F.3d at 214.

377. *Id.*

orientation in violation of Title VII and New York state and local law.<sup>378</sup> Dawson alleged that she was harassed about her appearance and “that she should act in a manner less like a man and more like a woman.”<sup>379</sup> Her coworkers teased her and called her “Donald” instead of “Dawn” in front of colleagues and customers.<sup>380</sup> She was also harassed about her sexuality: she was accused of “wearing her sexuality like a costume” and was once told she needed to have sex with a man.<sup>381</sup> Both the district court and the United States Court of Appeals for the Second Circuit found that Dawson had not stated a claim based on sex or gender stereotyping, but that her claim was based on sexual orientation and not covered by Title VII.<sup>382</sup>

Both courts had major difficulties in separating out gender-atypicality from sexual orientation in Dawson’s claims. Specifically, the courts had problems with understanding Dawson’s claims; she had difficulty articulating those claims, and the coworkers who engaged in this behavior may not have separated those two bases for liability. This confusion should not surprise us. Schemas are cognitive images that enable us to classify a lot of information in compact paradigms by using prototypical features. They tend to be unarticulated and informal.<sup>383</sup> Further, this process occurs semi-automatically, with a relative lack of awareness.<sup>384</sup> We sort and classify information through schemas with little recognition of the fact that this triage is taking place.

Naturally, schemas serve as shortcuts both for people with limited experience with a particular situation and also those who have a lot of

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378. *Id.* at 213.

379. *Id.* at 215.

380. *Dawson*, 246 F. Supp. 2d at 306-07.

381. *Id.* at 307, 329 (stating that Dawson says she was told, “You know what you need, Dawn, you need to get fucked”). Although probably not a significant difference in the minds of the deciding judges, who may not have understood the contextual nuances, the courts’ version is more explicitly about heterosexual sexual activity than the statement Dawson reports in her deposition. The “get fucked” statement may have referred to a need to relax, to have sexual activity generally, or to lesbian sexual activity specifically with sex toys. *See generally* Doggy Style, *April Fool’s Issue: GW: You need to get FUCKED*, G.W. HATCHET (Wash., D.C.), April 1, 2006, available at <http://media.www.gwhatchet.com/media/storage/paper332/news/2006/04/01/Opinions/April.Fools.Issue.GW.You.Need.To.Get.Fucked-1765364.shtml> (using the term “get fucked” as a synonym for “relax” or “have sexual relations” generally); Patcondell, A Video Response to Osama, Text Comments, <http://www.youtube.com/watch?v=uG8ZGHHvuYk> (last visited Mar. 19, 2009) (using the term “get fucked” for sexual relations generally— “[M]iddle [E]astern men just need to get fucked and they will calm down . . . they have so much built up sexual frustration and so much backed up cum that they need to release”).

382. *Dawson*, 398 F.3d at 223; *Dawson*, 246 F. Supp. 2d at 314-18.

383. *See* David E. Rumelhart, *Schemata and the Cognitive System*, in 1 HANDBOOK OF SOCIAL COGNITION 161, 166 (Robert S. Wyer et al. eds., 1984).

384. *Id.*; Langer, *supra* note 5.

experience. But more experience is not necessarily better. Indeed the more experience we have, the more ingrained our schema may be. It may be more sophisticated or nuanced, but it does not necessarily have to be so. Accordingly, your schema may be very different than mine even though we are relating to the same object, situation or person.

Applied to *Dawson* then, we would expect that Dawn Dawson herself may have a schema about lesbian identity and nontraditional gender behaviors and that she may apply it idiosyncratically to herself and others. Additionally, that schema would probably be different from that of the district court judge, although the two may overlap. That incongruence may explain the following passage:

Dawson's claims of sexual discrimination, as she articulates them in the Complaint and elaborates in her deposition, take on somewhat protean quality, hard to grasp or pinpoint precisely what conduct she accuses of offending whatever behavioral norms she asserts govern the circumstances. At various times in her pleadings and testimony, she asserts that she was disparately treated because of the way she looked, because she was a woman, because she was not a man, because she was a lesbian, because she was a lesbian who did not conform to gender norms. Adding to the complexity, Dawson, perhaps aware of some of the conceptual challenges and legal obstacles her charges implicate, invokes a novel stereotyping theory that tests the elasticity of the law to encompass her grievances: that she was a victim of sexual discrimination because she is a lesbian who refuses to conform to gender norms. . . .

. . . As a threshold matter, because the borders are so imprecise, it is not evident[t] exactly what conduct by Bumble Dawson claims as the gravamen of the claims she asserts on sex or gender grounds, as opposed to what actions she bases on sexual orientation or sexual stereotyping. Moreover, insofar as Dawson relies on a basis of discrimination that seems to be founded on her status as member of a subset, "a lesbian who does not conform to gender norms," the theory she essays is not readily definable. It suggests that the offender presumably would classify lesbians into types and distinguish between forms of discrimination so that the misconduct could then be parsed between actions prompted by animus based strictly on sex and sexual stereotyping, as opposed to those motivated instead only by sexual orientation or affiliations. In other words, under Dawson's hypothesis, Bumble would practice disparate treatment by kinds of homosexuality, discriminating against an admitted lesbian who looks and behaves more like a man than like a woman, and presumably not against another lesbian known to be openly gay but who does not display her sexual preference by any visible expression or appearance.

At her deposition Dawson was asked whether "it's your view that you were discriminated against simply because you were a lesbian or whether

being a lesbian would have been okay, it was being a lesbian combined with not conforming to gender norms that caused a problem?” She replied: “Yes, the latter answer.” . . . In a similar vein, she testified that in her view it was acceptable at the Salon for a male to be gay as long as he appeared like a heterosexual male, but not if he looked effeminate.<sup>385</sup>

As this passage demonstrates, the court’s schema of lesbians is that they all gender-identify in the same way. Thus, it simply does not capture one of the classic tropes of lesbian identity, the butch/femme dichotomy.<sup>386</sup> At one end of the gender spectrum is the butch, a lesbian who rejects traditional feminine roles, trappings and behaviors, opting instead for more traditionally masculine characteristics.<sup>387</sup> At the other end of the gender spectrum is the femme.<sup>388</sup> The term “Lipstick Lesbian” denotes a modern variation, fashioning an identity that may be described as ultra-feminine since it stresses prototypically feminine dress and behavior.<sup>389</sup> The salon in *Dawson* had a high concentration of sexual minorities.<sup>390</sup> We would expect the workers in that nontraditional workplace to be aware of, and to incorporate, more sophisticated gender gradations within the schema of lesbians and gay men than would the model of sexual orientation normally used by some members of the federal judiciary.<sup>391</sup> Consequently, the district judge may not have been able to comprehend how Bumble may “practice disparate treatment by kinds of homosexuality, discriminating against another lesbian who looks and behaves more like a man than like a woman, and presumably not against another lesbian known to be openly gay but who does not display her

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385. *Dawson*, 246 F. Supp. 2d at 311-12.

386. See, e.g., Valdes, *supra* note 221, at 104-06; Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J.L. & GENDER 337, 341 (2005). The historical trope is so ingrained in the larger gay community that it can be used today with very little regard for its original referents.

387. See generally Elizabeth Lapovsky Kennedy & Madeline Davis, “They Was No One to Mess With”: *The Construction of the Butch Role in the Lesbian Community of the 1940s and 1950s*, in THE PERSISTENT DESIRE: A FEMME-BUTCH READER 45, 62 (Joan Nestle ed., 1992); Soyon Im, *Gender Warriors*, SEATTLE WKLY. 26, June 21, 2000.

388. See, e.g., Danae Clark, *Commodity Lesbianism*, in THE LESBIAN AND GAY STUDIES READER 186, 188-94 (Henry Abelove et al. eds., 1993) (discussing butch/femme iconography in advertising and how the two aesthetics are shown in dress and fashion).

389. See, e.g., Benoit Denizet-Lewis, *Putting On A Good Face: Lipstick Lesbians May Favor Makeup and Dress-Up Over Political Activism, but Their Very Existence Rejects the Stereotype That Femininity Is Reserved for Straight Women*, BOSTON GLOBE, Mar. 2, 2003 (Magazine), at 11; Lindsay Van Gelder, *Lipstick Liberation*, L.A. TIMES, Mar. 15, 1992 (Magazine), at 30.

390. *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 310 (S.D.N.Y. 2003).

391. See Benoit Denizet-Lewis, *supra* note 389 (discussing the distinctions among butch lesbians, femme lesbians, lipstick lesbians, and others who defy quick categorization).

sexual preference by any visible expression or appearance.”<sup>392</sup> Such gender-based distinctions within the class of lesbians may not have registered within the judge’s more basic schema of homosexuality and gender. Nevertheless, that the judge’s model cannot encompass a gendered distinction within sexual orientation expression does not mean that it may not have been part of the workplace culture or that it was not integrated within Dawson’s or her former coworkers’ schema of lesbians and gay men.

I am not arguing that Dawson or her colleagues at the salon necessarily had such a schema of lesbians and gay men. The record simply does not contain data that would allow us to confirm or disconfirm that fact. However, that schema does more closely comport with Dawson’s deposition testimony that being a lesbian would have been acceptable, but being a lesbian who did not conform to traditional gender norms would not.<sup>393</sup> If Bumble did distinguish between butch and femme lesbians (or between effeminate gay men and gay men who had a traditional heterosexual gendered appearance), that distinction would be based on gender as in *Price Waterhouse* and not on sexual orientation.<sup>394</sup> Remember that in addition to positive aspects of schematic thinking, we can also employ schemas negatively to blind ourselves to the reality of others, events, or concepts or to the reality as they perceive it. We may, and often do, enlist inappropriate or inaccurate schemas, and thus make false analogies or distinctions. We begin a journey of erroneously anticipating and interpreting events and legal precedent.<sup>395</sup> The mismatch between the judge’s schema of gay identity and that possibly employed by Dawson and the others at the salon may have led the district and appellate courts to misanalyze the appropriate factual and legal context of her claim.

We have already made the connection between traditional modes of legal analysis and precedential reasoning and schema matching. The Second Circuit’s opinion in *Dawson* also illustrates the potential distortions that schema-matching and traditional legal analysis may provoke. In discussing precedent on gender stereotyping claims, the appellate court cautioned:

When utilized by an avowedly homosexual plaintiff . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that “[s]tereotypical notions about how men and women

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392. *Dawson*, 246 F. Supp. 2d at 311.

393. *Id.*

394. *Id.*

395. See BROWER & NURIUS, *supra* note 5, at 28.

should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII.”<sup>396</sup>

Note two points about this passage. The court states that problems arise because perceptions of sexual orientation and gender role conformity blend into each other. That insight is true; indeed it is a significant part of the schema for lesbians and gay men—that they engage in cross-gender behavior. However, the court prefaces its argument with the statement that “avowed homosexuals” raise specific problems for bench officers judging gender-stereotyping claims. But of course, that conflation is equally true with closeted homosexuals. Indeed, mere gender atypicality often leads to perceptions of homosexuality. And without more explicit workplace disclosure of an employee’s sexual orientation, gender atypicality may be all coworkers have on which to decode a fellow worker’s sexuality.<sup>397</sup> Within the lesbian and gay male schema the boundaries between sexual orientation and gender are permeable; sexuality equals cross-gender characteristics and vice versa.

If there is a greater difficulty under Title VII for open or avowed gay people, it must be because their visibility allows others to know they are lesbian or gay and may mistreat them on that basis—a basis not prohibited by Title VII. Once again, that mistreatment can occur with closeted homosexuals, especially if they exhibit cross-gender behavior that others will read as indications of sexual orientation.

What is different for visible and hidden lesbians and gay men is the opposite attribution. Openly gay people can have cross-gender behaviors misattributed to them, even if they are not gender-atypical. A gender-conforming, closeted gay person would not suffer that misattribution because the gender trigger of sexuality is out of sight.

If that schema underlies Title VII doctrine, where does that leave lesbians and gay men? They should not be out at work because the courts will not remedy the resulting harassment—either because it is nonactionable sexual orientation discrimination, or because it is gender discrimination that the courts will misread.<sup>398</sup> But hiding one’s sexuality

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396. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (internal citations omitted).

397. See generally Brower, *supra* note 257 (discussing the ways in which visibility of sexual orientation affects lesbians and gay men); Brower, *supra* note 357 (same).

398. See Kristin M. Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) (advising gay plaintiffs to avoid discussing sexuality unless absolutely necessary).

imposes significant costs on gay people, costs not imposed on heterosexuals, who may be as open about their sexual orientation as they wish.<sup>399</sup> Moreover, the idea that gay men and lesbians should not be out at work is reminiscent of claims that gay men and lesbians deserve mistreatment by being visible.<sup>400</sup>

Additionally, by using the term “bootstrapping,” the court strongly suggests that open lesbians and gay men are seeking to game the system, to transform an impermissible cause of action (sexual orientation) into a permissible one (gender-stereotyping) by surreptitiously transforming one argument into another. The court reinforces the inference that gay people are somehow cheating and being deceptive by following this statement with a quotation from an employment law treatise and a law review article, both cautioning lesbian and gay plaintiffs that they risk having courts misattribute gender claims to sexual orientation if sexuality is raised.<sup>401</sup> The original context of both secondary sources make judges the subjects and gay people’s claims the objects of distortion; judges will misconstrue gay plaintiffs’ claims. The Second Circuit’s opinion reverses the subject and object. By calling this misattribution bootstrapping, the court transforms the advice that lesbians and gay men need to be careful that courts don’t destroy their causes of action, into advice on how to manipulate innocent judges.<sup>402</sup> Thus, the Second Circuit starts out looking at these cases with a jaundiced eye—it is not surprising that Dawson loses.<sup>403</sup>

Schema theory also elucidates the mechanisms predicting that outcome. Social schemas lead us quickly and efficiently to catalog people or legal problems. When we encounter a person or an issue of first impression, we enlist schemas to develop appropriate responses. Our schema inclines us to attribute a range of beliefs to the person or event, and we attach subsequent interpretations consistent with those impressions. Thus, our “good student” schema tells us that that person does well in school, is prepared for class, writes and speaks well, and so on. We may also attach negative characteristics to an otherwise positive schema; good student may also signify socially inept or sycophantic. Additionally, we can anchor feelings and emotions to that schema. If we

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399. See Brower, *supra* note 357, at 145-47.

400. See *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996) (describing gay middle school student’s dilemma after a mock rape by male students, in which he was told by his school principal that “boys will be boys” and that if the student was “going to be so openly gay,” he should “expect” such treatment).

401. *Dawson*, 398 F.3d at 218.

402. See *id.*

403. *Id.* at 225.

see friendliness as a component of good student, we will feel friendly towards someone who is a good student. If we are feeling friendly towards someone, it is easier to see that person as a good student. Finally, if we associate sycophantism with good students, when such a student is in our office, we may be overly attentive to any hint that he or she is trying to curry favor. We can become suspicious or mistrusting of a new individual, simply because something about them resonates with components of our schema.<sup>404</sup> Accordingly, once the court associates cheating and gaming the system with openly gay or lesbian plaintiffs and their gender-stereotyping causes of action, it is not unusual that those plaintiffs lose and that nongay plaintiffs win.<sup>405</sup>

*Dawson* also increases the burden on gay or lesbian plaintiffs in these cases. The court stated that a claim of nonconformity to gender stereotypes can be made in two ways: (1) through behavior or (2) through appearance.<sup>406</sup> The court then held that Dawn Dawson met neither of those methods.<sup>407</sup> Even assuming that the court's structure is appropriate, the court's method ignores how schemas actually work.<sup>408</sup> For heterosexuals, this model works fine. A gender-nonconforming woman like Ann Hopkins can show that others saw her appearance (for example, a partner suggesting that she "wear makeup, have her hair styled, and wear jewelry") or her behaviors (for example, suggesting she needed to take a "course in charm school") as inappropriate for her sex.<sup>409</sup> Moreover, because the courts harbor no cross-gender beliefs about heterosexual married women, they can objectively assess that appearance or behavior. But because the lesbian or gay male schema conflates sexual orientation and gender nonconformity, the harassment is often expressed in both ways, as in *Doe v. City of Belleville*.<sup>410</sup> Remember that the Seventh Circuit in *Doe* viewed the harassment victim as heterosexual,

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404. See *Jantz v. Muci*, 759 F. Supp. 1543, 1545 (D. Kan. 1991) (describing firing of nongay teacher for "homosexual tendencies" because teacher reminded supervisor's secretary of her husband "whom she believed to be gay").

405. See, e.g., *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (permitting young mother working as a school psychologist to bring a sex discrimination claim under 42 U.S.C. § 1983). In neither case do the courts accuse those women of bootstrapping.

406. *Dawson*, 398 F.3d at 221.

407. *Id.* at 221-23.

408. That model is not consistent with prior Title VII doctrine. See Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002) (describing the classic "sex-plus" cases and cases finding that race discrimination against whites frequently involved social relationships (marriage, parenting, etc.) and not just physical appearance and behavior).

409. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

410. 119 F.3d 563 (7th Cir. 1997).

thus the schema of gay men as effeminate did not affect the court's perception of the case.<sup>411</sup> Nevertheless, Doe's coworkers equated effeminacy with homosexuality.<sup>412</sup> Doe's appearance in wearing an earring and being slightly built triggered harassment that took an anti-gay form: "fag," "queer," "bitch," "go back to San Francisco with the rest of the queers," and threats to sodomize Doe, in addition to other, more gender-policing remarks such as "are you a boy or a girl?"<sup>413</sup>

However, with openly gay men or women, the lesbian or gay male schema of cross-gender behavior may be triggered both for coworkers and judges. The court's insistence on either behavior or appearance effectively means that open lesbians or gay men who are outwardly gender conforming can never win their cases, even if they are treated as though they are gender atypical on the job. If they conform to gender stereotypes by behavior or appearance and if they are harassed, the court will read any harassment that hints at traditional gender role enforcement as bootstrapping on sexual orientation because they are not visibly cross-gendered in appearance or behavior. Gender nonconforming lesbians or gay men like Dawn Dawson, on the other hand, will also lose as the courts will read their gender claims as inextricably linked to sexual orientation. Their gender nonconformity will be reformulated as sexual orientation. In contrast, heterosexual plaintiffs will prevail<sup>414</sup> because the courts do not have a schema of heterosexual gendered behavior and sexual orientation; their sexual orientation recedes and we are left with gender policing.<sup>415</sup> Thus courts sometimes state that it would have made no difference to Ann Hopkins's gender-stereotyping case if she had been a lesbian.<sup>416</sup> As *Dawson* makes clear, that promise may often ring hollow.

Although similar to *Dawson*, *Rene v. MGM Grand Hotel* illustrates different mechanisms of schema theory and builds upon now familiar ones.<sup>417</sup> Medina Rene was an openly gay man employed as a butler by the MGM Grand Hotel in Las Vegas.<sup>418</sup> His male supervisor and coworkers subjected him to daily harassment consisting of "being

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411. *Id.* at 566.

412. *Id.* at 581.

413. *Id.* at 566-67.

414. *See, e.g., Price Waterhouse*, 490 U.S. 228; *Adair v. Beech Aircraft Corp.*, 782 F. Supp. 558 (D. Kan. 1992); *Dick v. Phone Directories*, 397 F.3d 1256 (10th Cir. 2005); *Doe*, 119 F.3d 563.

415. *See Kramer, supra* note 24, at 1.

416. *See, e.g., Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

417. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003).

418. *Id.* at 1064.

grabbed in the crotch and poked in the anus. . . , being forced to look at pictures of naked men having sex while his co-workers looked on and laughed, being caressed, hugged, whistled and blown kisses at, and called ‘sweetheart’ and ‘Muneca [sic].’<sup>419</sup> Rene stated that he was harassed because he was gay, but also filed a complaint with the Nevada Equal Rights Commission that he was “discriminated against because of [his] sex, male.”<sup>420</sup>

It may seem odd that Rene said that his harassment was for being gay but that he filed a sex discrimination claim under Title VII. However, judges are not the only ones with schemas for lesbians and gay men that include gender atypicality; the individual actors in the cases may also have that schema.<sup>421</sup> As we saw in *Dawson*, the schema that judges may have about homosexuality may be different from those held by the individuals in the case.<sup>422</sup> *Rene* illustrates that insight, as well as that the protagonists in these cases may have models where gender and sexuality intertwine.<sup>423</sup>

On reflection it seems clear that many of the harassers in same-sex cases maintain a schema that conflates homosexuality with gender-atypicality. A quick glance back at the cases already discussed shows that sexual orientation and gender-enforcement language often appear simultaneously: *Doe v. City of Belleville* (“queer,” “fag,” “go back to San Francisco with the rest of the queers,” “are you a boy or a girl?”),<sup>424</sup> *Kay v. Independence Blue Cross* (“gay,” gay chat line, male plaintiff told

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419. *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1207 (9th Cir. 2001) (quoting Rene’s brief on appeal). *Muñeca* is Spanish for “doll.” *Id.* Addressed to a girl, the term has a figurative meaning of “babydoll” or the like. See Urban Dictionary: *muñeca*, <http://www.urbandictionary.com/define.php?term=mu%C3B1eca> (last visited Mar. 21, 2009); *Rene*, 305 F.3d at 1068 (Pregerson, J., concurring) (quoting plaintiff that *muñeca* is “a word that Spanish men will say to Spanish women”).

420. *Rene*, 243 F.3d at 1207.

421. See *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“Centola never disclosed his sexual orientation to anyone at work. His coworkers made certain assumptions about him, assumptions informed by gender stereotypes. For example, they placed a picture of Richard Simmons ‘in pink hot pants’ in Centola’s work area. Without placing too fine a point on it, Richard Simmons ‘in pink hot pants’ is hardly what most people in our society would consider to be a masculine icon. Certainly, a reasonable jury could interpret this picture, unaccompanied by any text, as evidence that Centola’s coworkers harassed him because Centola did not conform with their ideas about what ‘real’ men should look or act like. . . . Although Centola never disclosed his sexual orientation to anyone at work, if Centola’s co-workers leapt to the conclusion that Centola ‘must’ be gay because they found him to be effeminate, Title VII’s protections should not disappear.”).

422. See *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

423. See *Rene*, 305 F.3d at 1061.

424. 119 F.3d 563, 566-67 (7th Cir. 1997).

that his wearing an earring to work meant he was not a "real man"),<sup>425</sup> *Nichols v. Azteca Restaurant Enterprises, Inc.* ("faggot," male plaintiff teased for carrying his serving tray "like a woman," male plaintiff called "she" and "her"),<sup>426</sup> *Prowel v. Wise Business Forms, Inc.* ("faggot," "fag," male plaintiff called "Rosebud," "Princess," "Did you see Rosebud sitting there with his legs crossed, filing his nails?"),<sup>427</sup> *Dawson v. Bumble & Bumble* ("dyke attitude," lesbian named Dawn called "Donald"),<sup>428</sup> *Heller v. Columbia Edgewater Country Club* ("fag," "homo," comments to lesbian plaintiff such as, "Oh, I thought you were the man," "I thought you wore the pants," "faggy shoes" as a reference to a woman wearing men's shoes).<sup>429</sup>

Lesbian or gay plaintiffs also may have internalized the part of the schema about homosexuality that conflates gay or lesbian sexual orientation with cross-gender behavior, traits or appearance.<sup>430</sup> While initially surprising, it should not be. Gay people grow up in the same society that their heterosexual siblings do and are exposed to the same cultural influences.<sup>431</sup> Social scientists have noted the persistence of this schema, even among gay people.<sup>432</sup> If the schema exists for some lesbian

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425. 142 Fed. App'x 48, 50-51 (3d Cir. 2005).

426. 256 F.3d 864, 870 (9th Cir. 2001).

427. No. 2:06-CV-259, 2007 U.S. Dist. LEXIS 67792, at \*2 (W.D. Pa. 2007).

428. 398 F.3d 211, 215 (2d Cir. 2005).

429. 195 F. Supp. 2d 1212, 1217 (D. Or. 2002).

430. See, e.g., Steve MacIsaac, *You Do The Math, in 2 SHIRTLIFTER 55* (2007) (portraying perceptions of masculinity/femininity and other stereotypes of gay and nongay men in online comic-book format), available at <http://www.stevemacisaac.com/comics/ISSUE%20TWO/YD TM/YDTM01.html>.

431. See Steve Rothaus, *Band of Bruthaz: The Challenges Facing Gay Black and Hispanic Men*, MIAMI HERALD, July 21, 2007 (describing cultural influences about masculinity and homosexuality in the African-American and Latino communities).

432. See, e.g., Isay, *supra* note 143, at 49 (describing how one adolescent did not believe he was really gay because the only media images of gay men portrayed them as effeminate); Monika Kehoe, *Lesbians Over 60 Speak for Themselves*, 16 J. HOMOSEXUALITY 1, 46-47 (1989) (discussing one woman's dislike of the term "lesbian" as connoting an image of women trying to act like men); Richard Goldstein, *The Myth of Gay Macho*, VILLAGE VOICE (N.Y.), July 2, 2002, at 59 (complaining about the pull of gender conformity and the status it confers within the gay male community); Benoit Denizet-Lewis, *The Regular Guys: They Follow Sports, Wear Flannel Shirts, Smoke, Drink, Belch, and Make Crude Jokes. Oh, One Other Thing. They're Gay*, S.F. WEEKLY, June 21, 2000, available at <http://www.sfweekly.com/2000-06-21/news/the-regular-guys> (describing a social group, "The Regular Guys," composed of gay men who epitomize traditional American masculinity). Others have noted the ingrained nature of this perception. See, e.g., Stephen F. Morin & Ellen M. Garfinkle, *Male Homophobia*, 34 J. SOC. ISSUES, 29, 42-43 (1978) (relating amazement of some male therapists at the apparent masculinity of men in gay bars—more masculine than the therapists' own self-perceptions); David P. McWhirter & Andrew M. Mattison, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP*, 246 (1984) (describing a group of blue-collar gay men, firemen, telephone linemen, and construction workers who drink beer and watch sports on TV, as though the existence of such men were an anomaly).

and gay persons then we can understand a facet of these cases that often puzzles courts: why plaintiffs themselves make inconsistent statements as to the reasons they believe they were harassed, sometimes stating gender-nonconformity and other times sexual orientation.<sup>433</sup> The schema equivalency explains Dawn Dawson's statement in her deposition when she was asked to distinguish clearly between sexual orientation and gender reasons as a basis for her termination: "Dawson remarked that it was both '[b]ecause the two are not different.'"<sup>434</sup> Remember that Dawson's own schema of the interaction between sexuality and gender may have been much more nuanced and sophisticated than the courts' model of those same characteristics.

Similarly in *Rene*, Judge Hug's dissent concludes that the following colloquy in Rene's deposition evidences sexual orientation harassment while Judge Pregerson's concurrence claims it shows gender stereotyping:

- Q. And in this note he's teasing you about the way you walk and he whistles at you like a woman; is that right?
- A. Right. Like a man does to a woman.
- Q. And that's what you report on the third page of Exhibit 39 as well, that Elisio [a co-worker] is whistling at you as a man does to a woman?
- A. Correct.
- ....
- Q. Was he whistling at you you think to make fun of you because you were gay?
- A. Yes. Of course. The way he looked at me, you know, and winked his eye. Come on.<sup>435</sup>

For Judges Hug and Pregerson, this colloquy may evidence that Rene held a schema of sexual orientation and gender that was like their own, a comparatively undifferentiated model. For Judge Hug, sexual orientation and gender may be coextensive; therefore the important fact is that Rene was harassed because of his sexual orientation. For Judge Pregerson, sexual orientation and gender may be completely separate; therefore the

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433. See, e.g., *Centola v. Potter*, 183 F. Supp. 2d 403, 411 (D. Mass. 2002); *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 317 (S.D.N.Y. 2003); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1077 (9th Cir. 2002) (Hug, J. dissenting).

434. *Dawson*, 246 F. Supp. 2d at 318 (quoting Dawson's deposition); see also *id.* ("Finally, in concluding her testimony, Dawson was asked once more whether she felt that not having been promoted to the razor class was discriminatory on the basis of her sexuality 'in that they needed straight men and very feminine looking women.' She responded: A. Yeah, that's what I mean by sexuality. Q. Because of your being a lesbian, that didn't confirm [sic] to gender norms? A. Correct.") (internal citations and formatting omitted).

435. *Rene*, 305 F.3d at 1077.

key fact in the testimony is that Rene's colleagues whistled at him like a man does to a woman.

But as a gay man, Rene's own model of sexuality and gender appears to have been differentiated as was Dawn Dawson's. In another section of his deposition, Rene referred to another worker who had harassed him, stating "He's skinny. He is not masculine like I am."<sup>436</sup> For Judge Hug, this comment seems to have demonstrated that Rene's claim could not be based on gender stereotyping because Rene himself believed he was masculine and gender conforming. Therefore, Rene presented no evidence of gender role enforcement and had no Title VII cause of action.<sup>437</sup> Of course, as a doctrinal matter, Judge Pregerson's response to Judge Hug is correct. The question is not what Rene thought of his masculinity or femininity, but what his harassers believed and how they acted.<sup>438</sup>

Nevertheless, Rene's testimony can remind us of a truth about schemas: that they vary with individuals and that models we have about our own group are different and more nuanced than those we hold about outsiders. Like Dawson, Rene may distinguish between genders within both sex and sexual orientation. Both effeminate and masculine gay men exist in his schema. Indeed, Rene's comment about his coworker not being as masculine as himself may refer to the fact that he sees himself belonging to a masculine gay male cohort. Consequently, he cannot understand why his skinny colleague would harass him for being feminine or womanly. For Rene, masculinity appears to be linked to body morphology. Thus, while Rene might agree that gender and sexuality overlap, he does not agree with his coworkers that they do so in his case.

It is not uncommon for gay men to have a schema of sexual orientation that distinguishes between masculine gay men and effeminate ones. Often, too, there is a status difference between the two groups, with more masculine men having higher rank than more effeminate men.<sup>439</sup> The loss of status that comes with being perceived as less masculine mirrors traditional heterosexual roles and appears to be part of Rene's schema of gender and sexual orientation. Thus, Rene may mirror traditional gender roles within an untraditional sexual orientation

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436. *Id.*

437. *Id.*

438. *Id.* at 1069 (Pregerson, J., concurring).

439. See, e.g., Denizet-Lewis, *supra* note 432; Goldstein, *supra* note 432; Richard A Kaye, *Not Your Average Bear*, L.A. TIMES, Feb. 4, 2007, at M-6 (discussing the "bear" subculture in gay male life, and complaints that it has begun to mimic masculine stereotypes and become stratified based on appearance).

schema. Unlike his harassers, Rene may not automatically equate effeminacy with gayness. Thus the distinction between his being gay and being womanly may be made. This distinction, like Dawn Dawson's, is about gender within homosexuality. Unfortunately for Rene, his harassers do not make that distinction. For them, it is implied that even the skinniest straight man is more masculine than an openly gay man like Rene simply because that man is heterosexual.

*Rene* is an example of how conflicting schemas can lead analysis in different directions. The schema of lesbians and gay men and gender-atypicality is different for Rene, for his harassers, and for the concurrence and dissent in the Ninth Circuit's en banc decision.<sup>440</sup> Understanding the mechanisms of how schemas operate provides more insight into the fractured opinions in *Rene*.<sup>441</sup>

## V. EMPIRICAL LESSONS AND CONCLUSION

As the Seventh Circuit perceptively noted:

We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes. "A homophobic epithet like 'fag' for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation . . . . [I]t is not always

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440. See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002).

441. There were five separate opinions issued by the en banc panel in *Rene*: the opinion of the court by Judge William Fletcher, *id.* at 1063 (joined by Judges Pregerson, Trott, Thomas, Graber, Fisher, Berzon); three separate concurrences, by Judges Pregerson, *id.* at 1068 (joined by Judges Trott and Berzon); Graber, *id.* at 1069; and Fisher, *id.* at 1070; and a dissent by Judge Hug, *id.* at 1070 (joined by Judges Fernandez and T.G. Nelson and Chief Judge Schroeder). Judge Hug also wrote the original panel decision that was reversed by the court en banc. *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001) (affirming the opinion of the United States District Court for the District of Nevada). With the original dissent in the Ninth Circuit decision by Judge Dorothy Nelson, *id.* at 1210 (Nelson, J., dissenting) and the district court's judgment by Judge Pro, *id.* at 1206 (holding that defendant MGM Grand Hotel was entitled to summary judgment that Rene was not harassed on the basis of sex, but on sexual orientation, and dismissing his claim), fourteen federal judges weighed in on Rene's case in seven published opinions. The relevant facts were not in dispute, although the courts' opinions divided on how they should be interpreted – as harassment based on sex because of offensive sexual assault and touching (Judge Fletcher's opinion for the en banc panel, Judge Graber's concurrence, Judge Fisher's concurrence, Judge Dorothy Nelson's dissent to the original appellate decision), harassment based on sex because of gender nonconformity and sex stereotyping under *Price Waterhouse* (Judge Pregerson's concurrence, Judge Fisher's concurrence), or as nonactionable harassment based on sexual orientation (Judge Hug's two opinions and the District Court's opinion).

possible to rigidly compartmentalize the types of bias that these types of epithets represent."<sup>442</sup>

In truth the rigid compartmentalization that Title VII doctrine requires is the root of all these issues and contributes to why schematic analysis distorts legal reasoning. The law requires strict separation between sexual orientation and gender; litigants and judges are forced to classify in ways that social scientists often do not and that empirical research shows people generally may not.<sup>443</sup> Rather than be atomized into distinct categories, many social science research studies show that racial bias is often linked to sex and sexual orientation prejudice and discrimination; the categories are mutually reinforcing and not rigidly separate.<sup>444</sup> Accordingly, the legal constructs of Title VII that require sharp classifications between race, color, ethnicity, sex, gender, sexual orientation, and so on may necessitate distinctions that are often counterfactual to the way in which people behave or do not capture the differentiations that some individuals make.

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442. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (internal citations and formatting omitted).

443. See Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 313-14 (2000).

444. See, e.g., BOB ALTEMEYER, *THE AUTHORITARIAN SPECTER* 301 (1996) (discussing sexism, racism, and homophobia related to highly authoritarian personality types); Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 64-65 (John C. Gonsiorek & James D. Weinrich eds., 1991) (discussing connection between anti-homosexual attitudes and authoritarianism, racism, sexism); Christopher R. Agnew et al., *Proximal and Distal Predictors of Homophobia: Framing the Multivariate Roots of Outgroup Rejection*, 23 J. OF APPLIED SOC. PSYCHOL. 2013 (1993) (describing how personality constructs, current beliefs, and acquaintance with homosexuals correlated with homophobia more strongly than did parental education and family environment); Margaret M. Bierly, *Prejudice Toward Contemporary Outgroups as a Generalized Attitude*, 15 J. APPLIED SOC. PSYCHOL. 189 (1985) (studying interrelatedness of attitudes toward homosexuals, African-Americans, women, and the elderly); David G. Embrick et al., *Working Class Masculinity: Keeping Gay Men and Lesbians out of the Workplace*, 56 SEX ROLES 757 (2007) (discussing how white working class men have constructed and maintained a form of white male solidarity, a collective practice directed toward women, people of color, and nonheterosexuals); Serge Guimond et al., *Does Social Dominance Generate Prejudice? Integrating Individual and Contextual Determinants of Intergroup Cognitions*, 84 J. OF PERSONALITY & SOC. PSYCHOL. 697 (2003) (exploring personality and environmental correlates of attitudes towards homosexuals, African-Americans, and women); Nancy M. Henley & Fred Pincus, *Interrelationship of Sexist, Racist, and Antihomosexual Attitudes*, 42 PSYCHOL. REP. 83 (1978); Lawrence A. Kurdek, *Correlates of Negative Attitudes Toward Homosexuals in Heterosexual College Students*, 18 SEX ROLES 727 (1988) (finding that negative attitudes toward homosexuals are part of a larger belief system regarding conventional social order). Some have even argued for a personality disorder covering racism, sexism, and homophobia. See, e.g., Mary H. Guindon et al., *Intolerance and Psychopathology: Toward a General Diagnosis for Racism, Sexism, and Homophobia*, 73 AM. J. ORTHOPSYCHIATRY 167 (2003).

Title VII cases bear out this insight. In *Heller v. Columbia Edgewater Country Club*, a lesbian line cook brought a Title VII claim for sex discrimination against her female boss, the executive chef.<sup>445</sup> The workplace contained verbal harassment referring to sex, gender, sexual orientation, race, and ethnicity, as well as sexual relationships across racial lines, and retaliation for associating with gays and lesbians.<sup>446</sup> Commonplace were epithets and comments such as “homo,” “fag,” “I thought you were the man [in the lesbian relationship],” and also, “[B]eing a lesbian isn’t bad enough, she has to date a Black girl,” “niggers,” “beaners,” “wetbacks,” “fucking Mexicans.”<sup>447</sup>

Similarly in *McCoy v. Johnson Controls World Service*, African-American female coworkers sexually harassed a white female.<sup>448</sup> Robin McCoy alleged that Marjorie Ivey rubbed her breasts against McCoy, rubbed McCoy between her legs and forced her tongue down McCoy’s throat—all of which might indicate homosexual sexual attraction.<sup>449</sup> However, there was also evidence that Ivey and another coworker called McCoy, “stupid poor white trash” or “stupid poor white bitch” and stated that they would make plaintiff quit, as they had made other “white bitches.”<sup>450</sup> These comments would seem to show animosity, both racial and sexual. Of course we can make distinctions between race and sex or between gender-enforcement and sexual orientation discrimination.<sup>451</sup> Schemas about lesbians and gay men often mean that we misattribute

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445. 195 F. Supp. 2d 1212 (D. Or. 2002).

446. *Id.*

447. *Id.* at 1217-18.

448. 878 F. Supp. 229 (S.D. Ga. 1995).

449. *Id.* at 231.

450. *Id.*

451. There is an extensive legal literature on intersectionality, the confluence of sex, race, sexual orientation, and other identities. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140, 149 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991); Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); Gowri Ramachandran, *Intersectionality As “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 U.M.K.C. L. REV. 485 (2002); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 U.M.K.C. L. REV. 251 (2002).

and blur distinctions between categories, or we make distinctions not shared by others.<sup>452</sup>

Social cognition has demonstrated that in these cases a search for definitive explanations that completely exclude all alternatives is problematic. Rather, correlations among a range of explanations are more likely. One empirical study of same-sex sexual harassment confirms that premise. The study asked questions of 433 male and female undergraduates at a large midwestern state university.<sup>453</sup> Students were provided one of two scenarios based on *Doe v. City of Belleville* concerning male on male harassment.<sup>454</sup> The only difference between the scenarios was that in one the victim was gay; in the other he was heterosexual.<sup>455</sup> Students were then asked the extent to which the scenario victim had been harassed and appropriate remedies, if any.<sup>456</sup> Respondents were also asked about beliefs and attitudes about harassment and what behaviors constituted harassment.<sup>457</sup>

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452. See, e.g., Chapman, *supra* note 281, at 151 (“‘[I]llusory correlation’ is . . . the report by observers of a correlation between two classes of events which, in reality, (a) are not correlated, or (b) are correlated to a lesser extent than reported, or (c) are correlated in the opposite direction from that which is reported.”); Chapman & Chapman, *supra* note 281, at 271 (explaining how practicing psychologists trained in diagnostics failed to report valid correlations and reported invalid correlations between male homosexuality and Wheeler-Rorschach signs). Moreover, untrained observers replicated the experts’ illusory correlations. *Id.*

453. DeSouza & Solberg, *supra* note 306, at 623.

454. *Id.* at 631.

455. *Id.*

456. *Id.* at 631-32.

457. *Id.* at 632-34. Some students were given the following scenario:

Dear University Hearing Panel:

My parents and I moved to Illinois from San Francisco last year, and I decided to attend this university. I moved into a campus residence hall this Fall. I am an 18 year-old straight freshman, have a slight build, and wear an earring. My roommate, also a freshman, is a linebacker on the varsity football team.

Whenever I was alone in the dorm room with my roommate, he would constantly refer to me as “queer” and “fag” and urge me to “go back to San Francisco with the rest of the queers.” He would also ask me, “Are you a boy or a girl?” At first I tried to ignore his remarks, but when my roommate started calling me his “bitch,” I decided to complain to the Resident Assistant. When the RA asked him about these events, my roommate admitted calling me a “sissy” because I wore an earring and didn’t play sports with the guys. My roommate claimed that he didn’t perceive “sissy” as having sexual connotations; rather, he wanted to be funny and get laughs.

I have decided to file this formal complaint because I believe that my roommate has been sexually harassing me. Thus, I want the University to take disciplinary action against my roommate.

Sincerely,  
John XXXXXX.

*Id.* at 637.

The study found a significant correlation between the victim's sexual orientation and respondents' perceptions of harassment—more respondents found harassment when the victim was gay than when he was not.<sup>458</sup> Schema theory states that people seek explanations for events consistent with their schemas. Accordingly, if more respondents found that the exact same facts constituted sexual harassment when the victim was homosexual, gay male sexuality must often be a trigger or explanation for harassment because it is consistent with the gay male schema.

Additionally, students who believed that enforcement of traditional masculine gender roles constituted harassment were more likely to find a hostile environment in the scenario.<sup>459</sup> To restate that finding: when respondents' harassment model included gender-policing, they more easily matched the scenario to their schema.<sup>460</sup> Concomitantly, seeing harassment through gender-policing on these facts implies that the victim had or was seen to have gender-atypical characteristics.

The study did not ask respondents the crucial Title VII question, whether the harassment they found was based on sex/gender role enforcement or sexual orientation. Nor did the study attempt to correlate traditional masculine role perceptions with homosexuality: the gay male cross-gender schema. Nevertheless, putting the first study finding together with the second, we might postulate that respondents may see the same facts illustrate harassment based on gender-atypicality or on sexual orientation. Alternatively, we might speculate that respondents may see the same facts illustrate harassment based on gender-atypicality *and* on sexual orientation. If so, we should expect to see exactly the same overlap and conflation of those reasons when people are harassed in the workplace under similar factual circumstances and when judges must decide those matters in court.

Indeed, the cases discussed earlier in this Article demonstrate this truth. If a judge's sex discrimination schema truly includes workplace policing of gender-stereotypes, then she is more likely to find that harassment even in same-sex situations.<sup>461</sup> On the other hand, if a judge's gender-stereotyping schema is that lesbians and gay men attempt to use it

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458. *Id.*

459. *Id.* at 636. The same pattern was true, albeit to a lesser degree, for students whose schema of sex harassment encompassed lewd comments. *Id.*

460. *See supra* notes 70-72 and accompanying text.

461. *See, e.g.,* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 684, 874-75 (9th Cir. 2001); Doe v. City of Belleville, 119 F.3d 563, 580-83 (7th Cir. 1997); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

as a bootstrap to sneak in an impermissible claim, then prototype-matching for actionable harassment will set aside the gender explanation when a gay or lesbian plaintiff is present.<sup>462</sup> Thus it will be extraordinarily difficult for homosexual harassment victims to win their cases, because the judge's model of harassment is distorted. Finally, a schema of homosexuality that includes cross-gender behavior exacerbates this harassment model of cheating gay plaintiffs. The combination of both of those distortions means that the judge will seek to explain workplace conduct consistent with that amalgamation: a gender-atypical lesbian or gay man is trying to pass a sexual orientation claim off as gender discrimination. Thus, she is likely not to find gender-conformity policing but sexual orientation harassment.<sup>463</sup>

Moreover, if lesbians and gay men have different schemas of interactions between sexual orientation and gender than do their harassers or the judges who must decide these cases, then we will have a difficult time harmonizing the disparate views of these persons—leaving each participant puzzled or unsatisfied by the decisions of the others. Judges will have difficulty accepting plaintiffs' testimony, plaintiffs will be unsure why they were harassed, and harassers will blend sexual orientation with gender. Consequently, cases will be inconsistent and under-theorized.

Conversely, as we have seen in the desire-based harassment decisions, the model of same-sex sexual harassment can be easily prototype-matched with traditional opposite-sex desire cases. Plaintiffs succeed when persons of the same sex harass them.<sup>464</sup> Although these situations are more quickly assimilated into traditional harassment models, the lesbian and gay male schema still has a significant effect on

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462. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 2006 FED App. 0252P at 6 (6th Cir.); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005); *Samborski v. W. Valley Nuclear Servs.*, No. 99-CV-0213E(F), 2002 WL 1477610, at \*1, \*3 n.11 (W.D.N.Y. 2002) (stating in dicta that although "being called a 'lesbian' [may be] based not on a perception of true sexual orientation, but rather [may be] a means of denigrating a person because of sexual stereotype," plaintiff's gender stereotyping claim is "somewhat undermined" to the extent that it rests upon being called a lesbian).

463. Compare *Kay v. Independence Blue Cross*, 142 Fed. App'x 48, 50-51 (3d Cir. 2005), with *Kay v. Independence Blue Cross*, 91 Fair Empl. Prac. Cas. (BNA) 1559, 1564-63 (E.D. Pa. 2003); compare *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1077-78 (9th Cir. 2002) (Hug, J., dissenting), with *id.* at 1068-69 (Pregerson, J., concurring). Note that in other legal areas, the conflation of gender atypicality and sexual orientation may assist gay petitioners. See Alex Roth, *Gay Man Granted Political Asylum; Basis of Ruling Said To Make It a First*, SAN DIEGO UNION-TRIB., Aug. 25, 2000, at A-3 (reporting that a cross-dressing gay man had been granted political asylum because gender-atypicality was an innate part of his personality).

464. See, e.g., *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1507 (11th Cir. 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 447-48 (6th Cir. 1997).

judicial decisions; when the schema of lesbians and gay men as sexual predators intersects with desire-based sexual harassment, heterosexual plaintiffs win those cases in which they are harassed by homosexuals—even if the court has to misread a fact pattern to fit it within the desire-based model.<sup>465</sup> This skewing of categories leaves precedent hard to follow and contradictory.

The problem is that the law requires clear distinctions. Title VII in particular requires neat categorization of sexuality and gender and sex. On the other hand, social cognition strongly suggests that we may not truly be able to classify those characteristics cleanly or that we can only classify them idiosyncratically depending on our underlying schemas.<sup>466</sup> That tension is exacerbated because legal doctrine assumes that people are aware of, and can access and understand, their cognitive processes. Schema theory stands in contradistinction to both those two premises underlying Title VII doctrines.<sup>467</sup> Thus it provides an alternate explanation for the behavior of the individual actors in these cases and of the judges who decide them. It also demonstrates why complete consistency and clarity in legal doctrine is an expectation in which we are fated to be disappointed.

What we can do is recognize the limitations that schemas impose on legal doctrine and on participants in the judicial system. Judges who are aware of how social cognition works can understand why the people before them in court may seem inconsistent or think in ways that the judges find unusual or incomprehensible. The judge herself may appreciate that her perceptions of events are also shaped by schemas and do not simply chronicle what has occurred. She should also realize that her perspective will not necessarily be consistent with others' explanations for those same events. As in this Article's opening mini-quiz, if we know that our thought process is filtered unconsciously through our schemas of persons or events, that knowledge can make us mindful of cognitive processes and more open to alternative explanations or

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465. See, e.g., *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1265-66 (10th Cir. 2005); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 139-144 (4th Cir. 1996).

466. Lawyers' use of history also suffers from the need to neatly discover answers to historical questions where historians see history completely differently. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660-661 (1987) (describing how lawyers and historians approach the historical record differently, and employ different methods and seek different things from it).

467. See, e.g., BROWER & NURIUS, *supra* note 5, at 13; Krieger, *supra* note 5, at 1188 (discussing empirical research in cognitive psychology showing stereotyping is automatic and unconscious).

answers.<sup>468</sup> Of equal importance, jurists and legal scholars may recognize that the sharp classifications Title VII demands and the jurisprudential consistency we prefer must be tempered with a more realistic acceptance of the limits of doctrine in capturing reality.

Even the eventual passage of the Employment Non-Discrimination Act (ENDA) amendment to Title VII will not necessarily solve the underlying problem that schemas reveal. However, it will help in practical terms. If sexual orientation is included within the protections of Title VII, we will still have to distinguish between sexual orientation discrimination and sex or gender discrimination—a task that is fraught with the same pitfalls and problems as it is now. Nevertheless, the consequences of doing so improperly or doing so skewed by our schemas of lesbians or gay men are minimized because both sexual orientation and sex discrimination would be included within the law's protections.

Accordingly, we may still be wrong that the victim in any given case was subjected to disparate treatment based on sexual orientation when it was really sex or vice versa, or that a case was desire-based when it was truly rooted in hostility. Those lines can be still almost impossible to draw because they are inconsistent with how schema theory says people think. Moreover, we may still be wrong that our perceptions on these cases are unfiltered by our cognitive processes and not skewed by our schemas. But those who are subjected to this discriminatory treatment will now have the right to bring their cases to court, be protected by the law, and seek appropriate redress under ENDA. This may be the one situation in which two wrongs do, in fact, make a right.

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468. Social cognition research reveals that awareness alone will not change schemas or behavior. Awareness is a necessary precondition for change, but is not sufficient. Rather, the schema has to cease to be functional, to stop working in real terms for the individual who holds it. See Stein, *supra* note 5, at 162 (providing the example of the college valedictorian who must reconcile her "naturally smart and effortlessly successful" self-schema with her mediocre first semester law school grades); see also BROWER & NURIUS, *supra* note 5, at 94 (describing how social science practitioners' schema-motivated bias is not significantly reduced by mere desire to change or awareness of the bias); Bransford, et al., *supra* note 5, at 1078-89 (noting mere awareness of the presence of a schema is insufficient to modify it; neither good intentions, nor admonitions not to use preexisting schemas, are adequate); Salovey & Singer, *supra* note 5, at 372 (discussing the goals of cognitive restructuring therapies).