STATING A TITLE VII CLAIM FOR SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: THE LEGAL THEORIES AVAILABLE AFTER *RENE V. MGM GRAND HOTEL*

Matthew Clark*

No federal statute explicitly authorizes victims of workplace sexual orientation discrimination to sue their employers for damages. Nevertheless, many such victims have advanced novel legal theories that analyze sexual orientation discrimination as a kind of sex discrimination, thus bringing sexual orientation discrimination within the protection of Title VII of the Civil Rights Act of 1964. This Comment analyzes some of these legal theories, and discusses in detail the recent case of Rene v. MGM Grand Hotel, *in which the Ninth Circuit held that a victim of sexual orientation discrimination adequately had stated a Title VII claim. Ultimately, however, this Comment urges plaintiffs and courts to abandon the legal theories already in use and to adopt in their place a more inclusive theory based on interracial relationship discrimination.*

* Editor, UCLA Law Review, Volume 51. J.D. Candidate, UCLA School of Law, 2004; B.A., UCLA, 2001. Thanks to Professor Chris Littleton for her valuable input and to Jerel Calzo for his love and support.

INTRODUCTION

From 1993 until 1996, Medina Rene worked as a butler on the ultra-luxurious twenty-ninth floor of the MGM Grand Hotel in Las Vegas, where he served VIP casino guests and celebrities.[1] Rene, like the other butlers and the twenty-ninth floor supervisor, was male.[2] Unlike these other employees, however, Rene was openly gay.[3] Because of his sexual orientation, Rene's coworkers and his supervisor turned his job into a waking nightmare, subjecting him to myriad forms of verbal and physical harassment on an almost daily basis.[4] Rene's coworkers grabbed his crotch, poked their fingers in his anus, and hugged and caressed him offensively.[5] They whistled at him, called him "sweetheart" and "*muñeca*,"[6] told crude jokes in his presence, forced him to look at pictures of men having sex, and forced him to open sexually oriented "joke" gifts.[7] MGM Grand discharged Rene in June 1996.[8]

Rene sued MGM Grand in federal district court in April 1997, alleging sexual harassment and retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964.[9] MGM Grand moved for summary judgment, arguing that Rene's claims were based on sexual orientation discrimination and not sex discrimination, and that Title VII therefore afforded him no relief.[10] The district judge agreed, and granted MGM Grand's motion.[11] Rene appealed to the Ninth Circuit on the harassment issue, where a divided three-judge panel affirmed the district court.[12] The Ninth Circuit voted to rehear Rene's case en banc,[13] however, and reversed.[14] Finally, the U.S. Supreme

1. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002).
2. *Id.*
3. *Id.*
4. *See id.*
5. *Id.*
6. *Muñeca* means "doll" in Spanish.
7. *Rene*, 305 F.3d at 1064.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1207 (9th Cir. 2001).
13. Rene v. MGM Grand Hotel, Inc., 255 F.3d 1069 (9th Cir. 2001).
14. *Rene*, 305 F.3d at 1064.

Court denied MGM Grand's petition for certiorari on March 24, 2003,[15] and thus conclusively established Rene's right to sue.

After the Ninth Circuit's decision and the denial of certiorari, Rene finally may present his harassment claims to a jury six years after filing suit. But the legal theories upon which the two prevailing factions of the Ninth Circuit panel relied[16] are so narrow that they provide gay men and women with only limited protection against workplace discrimination, and provide even less practical guidance for employers with regard to what kind of workplace discrimination is unlawful.

Rene's case is not unique. Numerous gay men and women experience on-the-job discrimination, including harassment, every day.[17] Unless these victims of sexual orientation discrimination have the relative good fortune to work in states that provide statutory protection against employment discrimination based on sexual orientation,[18] their only employment discrimination recourse may be to Title VII.[19] Enacted as part of the 1964 Civil Rights Act, Title VII provides a legal basis for employees who have encountered discrimination to sue their employers for damages and equitable relief. Title VII's protection extends to victims of discrimination that occurs "because of [the victim's] race, color, religion, sex, or national origin," but Title VII contains no specific provision dealing with sexual orientation discrimination.[20] Numerous

15. MGM Grand Hotel, LLC v. Rene, No. 02-970, 123 S. Ct. 1573, 2003 WL 1446593, at *1 (Mar. 24, 2003).

16. Rene's case was heard en banc before an eleven-judge panel. A five-judge plurality relied on a sex-specific harassment theory, while a three-judge concurrence relied on a sex-stereotyping theory. Both of these holdings and the legal theories behind them are discussed in some detail *infra* Part III. One judge concurred in both opinions, and four judges dissented.

17. *See, e.g.*, M.V. Lee Badgett, Ph.D., *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination*, ANGLES, September 1997, at 1, *available at* http://www.iglss.org/media/files/angles_21.pdf (reviewing recent studies and noting that "between 27 and 68% of self-identified lesbians and gay men surveyed reported employment discrimination at some point in their lives"); *Documenting Discrimination: A Special Report From the Human Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America's Workplaces* at 11–44 (Human Rights Campaign, Washington, D.C., 2002), *available at* http://www.hrc.org/publications/pdf/DocumentingDiscrimination.pdf (summarizing the experiences of more than one hundred victims of sexual orientation discrimination).

18. If Rene had worked forty-five miles to the west of Las Vegas, for example, he could have availed himself of California's Fair Employment and Housing Act, which offers remedies similar to Title VII's and expressly applies to sexual orientation discrimination. *See* CAL. GOV'T CODE § 12940(a) (West 2003) (making it an unlawful employment practice for an employer to discriminate on the basis of "sexual orientation"). In 1999, Nevada revised its workplace discrimination statute to prohibit sexual orientation discrimination. *See* NEV. REV. STAT. 613.330 (2000). Because the new provisions were not made retroactive, however, they did not affect Rene's case.

19. 42 U.S.C. § 2000e (2000).

20. *See* 42 U.S.C. § 2000e-2(a)(1).

courts have interpreted this omission to mean that Title VII does not protect against sexual orientation discrimination.[21]

Nevertheless, sexual orientation discrimination plaintiffs have advanced—with mixed success—legal theories that analyze sexual orientation discrimination as discrimination "because of . . . sex," which is actionable under Title VII.[22] These legal theories are the topic of this Comment. Part I summarizes briefly the two leading cases, *DeSantis v. Pacific Telephone & Telegraph Co.*[23] and the more recent *Oncale v. Sundowner Offshore Services*,[24] framing the legal background surrounding sexual orientation discrimination under Title VII leading up to *Rene*. Part II analyzes the legal bases, empirical applications, and inherent limitations of three theories that gay men and women have advanced to justify protection under the statute: sex-specific harassment, sex stereotyping, and disparate impact. Part III argues that a little-used but logically compelling legal theory based on interracial relationship discrimination has the potential to allow victims of sexual orientation discrimination to state Title VII claims.

I. THE LEGAL BACKGROUND PRECEDING *RENE V.* MGM GRAND HOTEL

A. *DeSantis v. Pacific Telephone & Telegraph Co.*

Long a leading case in the field of Title VII protection for gays and lesbians, *DeSantis* held definitively that "Title VII does not prohibit discrimination on the basis of sexual preference."[25] Presented with rudimentary versions of most of the legal theories discussed in this Comment,[26] the Ninth Circuit rejected them all, reasoning that allowing homosexuals to assert Title VII claims would "frustrate congressional objectives . . . not effectuate con-

21. *E.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) ("[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."); *see also* cases cited *infra* note 25.

22. *E.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064–65 (9th Cir. 2002). Other such cases are discussed *infra* Part II.C.

23. 608 F.2d 327.

24. 523 U.S. 75 (1998).

25. *DeSantis*, 608 F.2d at 329. Cases following *DeSantis* include, for example, 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); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam).

26. The *DeSantis* plaintiffs asserted a sex-stereotyping theory, a disparate impact theory, an associative discrimination theory, and an argument that Congress intended to protect homosexuals. *DeSantis*, 608 F.2d at 329.

gressional goals."[27] Only in recent years have subsequent cases begun to abrogate *DeSantis*'s holding.[28]

DeSantis was a judicial consolidation of three separate actions for appeal.[29] The first involved a nursery school employee who alleged he was fired for wearing an earring to work before the school year began.[30] The second involved three gay men who alleged that Pacific Telephone & Telegraph Company either had refused to hire them or had constructively discharged them through ongoing harassment.[31] The final case involved a lesbian couple who alleged harassment and discriminatory discharge because of their relationship.[32] The Ninth Circuit's decision precluded any relief for these individuals, and sent a message to employees and employers everywhere that Title VII did not prohibit harassment or other discrimination against homosexuals or perceived homosexuals.[33]

B. *Oncale v. Sundowner Offshore Services*

For many years after *DeSantis*, the courts disagreed whether any person, gay or straight, could state a claim for sex discrimination under Title VII when the discriminator was the same sex as the victim.[34] Joseph Oncale's case changed that.

During the brief time he worked on Sundowner's offshore oil rig, Oncale was subjected to severe sexual attacks by his male supervisor and two male coworkers.[35] In three separate incidents, Oncale's coworkers restrained Oncale while his supervisor attacked him sexually; first by putting his penis on Oncale's arm, then by putting it on Oncale's neck, and finally by shoving

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27. *Id.* at 330. It is fairly clear, as discussed *infra* Part III.C.2., that Congress did not intend to extend antidiscrimination protection to homosexuals when it enacted Title VII. But the Ninth Circuit's claim that it would "frustrate Congressional objectives" to use an antidiscrimination statute to combat discrimination is far more dubious. *Id.*

28. *E.g.*, Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874–75 (9th Cir. 2001) (overruling the portion of *DeSantis* that held no Title VII claim was available on the sex-stereotyping theory).

29. *DeSantis*, 608 F.2d at 328.

30. *Id.*

31. *Id.* at 328–29.

32. *Id.* at 329.

33. *Id.* at 330.

34. *Compare* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451–52 (5th Cir. 1994) ("'[H]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.'") (citations omitted) *with* Doe by Doe v. City of Belleville, Ill., 119 F.3d 563, 574 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998) ("Unless we read into the statute limitations that have no foundation in the broad, gender-neutral language that Congress employed, it is evident that anyone sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser.").

35. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118–19 (5th Cir. 1996).

a bar of soap into Oncale's anus.[36] Oncale's coworkers also threatened him with rape.[37] Oncale quit shortly after the incident involving the soap[38] because he believed his coworkers would rape him.[39] Despite the severity of Oncale's harassment, both the district court[40] and the Fifth Circuit followed precedent to hold that claims of same sex harassment were not cognizable under Title VII.[41]

In 1998, the Supreme Court reversed the Fifth Circuit, holding that Title VII plaintiffs can state claims for same sex sexual discrimination,[42] but that cognizable discrimination still must arise from the sex—and thus presumably not the sexual orientation—of the victim.[43] The Court included three illustrations of evidentiary paths available to victims of same sex sexual harassment to support the inference that the harassment occurred because of their sex.[44] These evidentiary paths, which some courts treat as exclusive,[45] do not offer much help to victims of sexual orientation discrimination.

First, a plaintiff can show that the harassment was "motivated by sexual desire," a demonstration that requires "credible evidence that the harasser was homosexual."[46] This illustration appears to encompass the facts of *Oncale*,[47]

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36. *Id.*

37. *Id.*

38. *Id.* at 119.

39. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

40. Oncale v. Sundowner Offshore Servs., Inc., No. 94-1483, 1995 WL 133349, at *1, *2 (E.D. La. Mar. 24, 1995).

41. *Oncale*, 83 F.3d at 120–21 (following *Garcia*, 28 F.3d at 451–52).

42. 523 U.S. at 79 ("If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.").

43. *See id.* at 79–80 (noting that actionable discrimination must otherwise meet the Title VII requirements).

44. *Id.* at 80–81. Although the Court discussed these evidentiary devices in the context of sexual harassment, the inferences of discrimination presumably would be available to support claims for other kinds of employment discrimination based on sex.

45. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1074–75 (9th Cir. 2002) Hug, J., dissenting) (discussing *Oncale* and, by systematically excluding each *Oncale* evidentiary route from the facts of Rene's case, implying that they are the only such routes available to victims of same sex discrimination). The text of *Oncale* makes clear, however, that its evidentiary routes are not exclusive, suggesting that a claim for same sex discrimination may lie whenever the "inference of discrimination [is] easy to draw" and that the evidentiary paths are included merely "for example." *Oncale*, 523 U.S. at 80.

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

47. None of the *Oncale* decisions ever states explicitly whether any of Oncale's harassers identified himself as a homosexual. Indeed, there is much confusion on this issue in cases following *Oncale*. *Compare* EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 (6th Cir. 2001) (Guy, J., concurring and dissenting) ("[Mr. Oncale's] harasser was a homosexual.") *with* Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) ("*Oncale* . . . dealt with claims of same-sex harassment by heterosexual males against a heterosexual male plaintiff . . . ."). Nevertheless, the overt sexuality

but cannot be used by sexual orientation harassment plaintiffs like Rene, who by definition are harassed because of *their own* sexual orientation—and not their harasser's.[48]

Second, the Court stated that an inference of sexual discrimination may arise when harassment contains "such sex-specific and derogatory terms by [the same sex harasser] as to make it clear that the harasser is motivated by general hostility to the presence of [her own sex] in the workplace."[49] Sexual orientation discrimination generally is not predicated on this kind of broad gender hostility,[50] and thus sexual orientation discrimination plaintiffs seldom can invoke this portion of *Oncale*.

Finally, the Court held that a same sex harassment plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[51] While sexual orientation discrimination victims theoretically might use this evidentiary route, at least two obstacles stand in their way. First, same sex discrimination, including sexual orientation discrimination, often arises in single-sex working environments, thus defeating an evidentiary showing under this theory.[52] Second, sexual orientation discrimination victims by definition encounter discrimination because of their sexual orientation. Harassers target perceived homosexuals, and generally do not harass heterosexual members of the victim's sex. For this reason, a sexual orientation discrimination plaintiff's anecdotal case would be vulnerable to attack by defense evidence suggesting that the alleged harasser treated heterosexual men and women equally,

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of the physical harassment in the *Oncale* case, as well as the threats of rape, surely constitute "credible evidence" that Oncale's harassers acted, at least in part, out of homosexual desire.

48. This illustration creates an interesting paradox, in which a gay man harassed by a straight man (like Rene) generally has no Title VII claim, while a straight man harassed by a gay man (like Oncale) clearly has such a claim. This result presents an intriguing equal protection question that is beyond the scope of this Comment.

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

50. Nearly all sexual orientation harassment cases, like *Rene*, involve male harassers and a male victim. Patently, the male harassers do not object to the presence of men in the workplace, but merely to the presence of men they perceive to be gay.

With respect to this evidentiary route, the Sixth Circuit once glibly noted that broad hostility toward men "certainly was not the case with [the alleged harasser]. He liked nothing better than to have men in the workplace. If not, who else would he roughhouse with?" *See Harbert Yeargin*, 266 F.3d at 522.

51. *Oncale*, 523 at 80–81.

52. The harassment in both *Rene* and *Oncale*, for example, took place in unisex working environments. Although the psychological explanations for this are beyond the scope of this Comment, it is plausible that unisex environments tend to produce greater sex solidarity and thus greater hostility toward persons who, like Rene, deviate from traditional sex stereotypes. Furthermore, the absence of women in the workplace might deprive potential harassers of a heterosexual outlet for their frustrations. The harassment in *Oncale*, for example, might in this way be analogized to sexual violence in prison.

which would undermine the argument that the harassment occurred "because of . . . sex." Perhaps in recognition of these evidentiary hurdles, courts often refuse to evaluate claims of sexual orientation discrimination altogether—even when such comparative evidence does exist—by merely reciting that Title VII does not prohibit sexual orientation discrimination.[53]

After *Oncale*, it is clear that Title VII sex discrimination plaintiffs can state causes of action against discriminators who share their sex. It is not clear, however, how helpful *Oncale* is to sexual orientation discrimination plaintiffs, because its holding—at least as illustrated in the opinion—appears neatly circumscribed to exclude them. The legal theories discussed in Part II of this Comment can be seen as plausible extensions of *Oncale* and other Title VII precedent to allow sexual orientation discrimination victims to sue their employers. The theory advocated in Part III is intended to pick up where *Oncale* left off, definitively incorporating sexual orientation discrimination into Title VII in the same way that *Oncale* incorporated same sex discrimination.

II. ANALYSIS OF LEGAL THEORIES ADVANCED BY SEXUAL ORIENTATION DISCRIMINATION VICTIMS

A. The Sex-Specific Harassment Theory

The sex-specific harassment theory contends that harassment is "because of . . . sex" whenever it consists of physical or verbal abuse that has some obvious relation to the sex of the victim, regardless of the victim's sexual orientation. Because sexual orientation harassment frequently involves some elements that bear a clear relationship to the victim's sex, this theory converts it into actionable sexual harassment under Title VII.[54]

53. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262–64 (3d Cir. 2001) (considering the first two *Oncale* evidentiary paths but largely ignoring the third, instead concluding summarily that the plaintiff's "claim was, pure and simple, that he was discriminated against because of his sexual orientation").

54. Of course, the sex-specific harassment theory only supplies one of the four elements of actionable sexual harassment based on a hostile environment, that is, that the harassment is because of the victim's sex. To prevail on a claim for sexual harassment, a Title VII plaintiff also must show that the harassment was unwelcome and that it was severe or pervasive enough to alter the conditions of employment and create an abusive working environment, under both an objective analysis and from the victim's own subjective viewpoint. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (incorporating the requirement that the environment be both objectively and subjectively hostile); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–67 (1986) (announcing the doctrine and the requirements that the conduct be (1) unwelcome, (2) because of the victim's sex, and (3) severe or pervasive).

The *Rene* plurality relied on this theory, and the facts of *Rene* exemplify well its possible applications. Rene's coworkers repeatedly grabbed his crotch and poked his anus. "Such harassment," the plurality concluded, "grabbing, poking, [or] rubbing . . . areas of the body linked to sexuality—is inescapably 'because of . . . sex.'"[55] Rene's coworkers' forcing him to look at an assemblage resembling a penis and at pictures of naked men also was harassment inherently related to the male sex.[56]

The Supreme Court's decision in *Oncale* provides much of the foundation for the sex-specific harassment theory. Although the theory does not fit neatly into any of *Oncale*'s three evidentiary routes, it relies on *Oncale*'s holding that a cause of action for same sex harassment may lie whenever the "inference of discrimination [is] easy to draw."[57] The facts of *Oncale*, after all, involved harassment of a sexual nature that was "discriminatory" in that it was directed only at Oncale.[58] When a person is singled out for harassment by coworkers of her own sex, and that harassment is sexual in nature, some courts hold that the inference of sex discrimination arises. The Ninth Circuit, for example, reasoned that Rene's harassment was analogous to Oncale's in this regard, and held that the inference of sex discrimination was present, allowing Rene to state a claim under Title VII.[59]

Although the sex-specific harassment theory allowed Rene and Oncale to seek relief for the harassment they suffered, the theory also suffers from major limitations. First, as its name suggests, the theory does not reach any employment discrimination predicated on sexual orientation except harassment. It is generally impossible, for example, to fire an individual because of her sexual orientation in such a way as clearly to implicate her sex.[60] This limitation may explain why Rene abandoned his retaliatory discharge claim, choosing instead to pursue his sexual harassment claim on appeal via the sex-specific harassment theory.

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55. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002) (citation omitted).

56. *See id.* at 1064.

57. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

58. See the discussion of *Oncale*, *supra* Part I.B.

59. *Rene*, 305 F.3d at 1066–68 ("Like the plaintiff in *Oncale*, Rene has alleged a physical assault of a sexual nature that is sufficient to survive a defense motion for summary judgment.").

60. Hypothetical situations in which this would not be true do exist. For example, a male employer who attempts to seduce his female employee only to find out she is a lesbian and fire her on that basis clearly would be liable for sexual harassment, and also probably would be liable for her wrongful termination. It is more difficult, however, to construct a scenario in which an employer, in the absence of any harassment, could be liable under *Rene* and *Oncale* for firing or otherwise altering the terms and conditions of a gay worker's employment. This is because it is unlikely that such discrimination would implicate so clearly the employee's sex as to bring the scenario under the holdings of *Rene* and *Oncale*. Because sexual organs presumably would not be involved in such a scenario, the argument would be difficult to construct.

Second, the sex-specific harassment theory provides no protection for gay people harassed because of their sexual orientation unless that harassment clearly implicates their sex organs or other sex-specific characteristics. As the *Rene* plurality noted, the harassment Rene endured was because of his sex because "Rene's tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus."[61] By negative implication, Rene would have no claim if his coworkers, acting under the identical motivations, had indeed grabbed his elbows or poked his eyes. Requiring the victims of sexual orientation harassment to point out such instances of obviously sex-specific conduct carries an unacceptable danger of allowing some harassers to escape liability, provided their chosen methods do not implicate obviously their victims' sex.[62]

For example, the Third Circuit denied Title VII relief to the gay plaintiff in *Bibby v. Philadelphia Coca Cola Bottling Co.*,[63] even though he endured repeated physical and verbal attacks on the job because of his sexual orientation. In the course of a pattern of harassment, John Bibby's coworker grabbed him, threw him against a row of lockers, trapped him on a platform using a forklift loaded with pallets, and shouted insults at Bibby regarding his sexual orientation.[64] Bibby's supervisors also yelled at him, ignored his reports of mechanical problems, and discriminatorily enforced workplace rules against him.[65] Crude graffiti naming Bibby appeared in the bathroom.[66] Because none of these incidents clearly implicated Bibby's sex, the Third Circuit held that "[n]o reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man," and denied him the opportunity to take his case to a jury.[67]

The final major problem with the sex-specific harassment theory is that some courts refuse to apply it, even when an employee alleges irrefutably sex-specific harassment. Indeed, the three-judge panel that first reviewed Rene's claim examined the same evidence summarized in the Introduction,

61. *Rene*, 305 F.3d at 1065.

62. Because of these limitations, Rene was forced to argue that his case was unusual, contending that "[t]he offensive conduct [he] alleged [was] not gay-bashing or stereotypical comments about gays, which might not fall under Title VII's protection." Opening Brief of Medina Rene, 1998 WL 34079408, at *1, *7 (Dec. 4, 1998). Further, Rene conceded that "[t]his would be a different case if [he] were alleging that he was called names and made fun of because of his sexual orientation." *Id.* at *9.

63. 260 F.3d 257 (3d Cir. 2001).

64. *Id.* at 259–60.

65. *Id.* at 260.

66. *Id.*

67. *Id.* at 264.

but nonetheless ruled that Rene had not been harassed because of his sex.[68] Inconsistency also prevails outside the Ninth Circuit in applying the sex-specific harassment theory. The Seventh Circuit, for example, has held that grabbing another's testicles is "impossible to delink" from the victim's sex.[69] The Sixth Circuit, by contrast, has held that the same activity, while "vulgar," simply does not constitute discrimination because of sex.[70]

B. The Sex-Stereotyping Theory

A second legal theory that has enjoyed some success in extending Title VII protection to victims of sexual orientation harassment is the sex-stereotyping theory. Although the *DeSantis* plaintiffs asserted a rudimentary version of this theory,[71] its real genesis was the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[72] In that case, plaintiff Ann Hopkins alleged that she had been denied a promotion in part because she failed to conform to sex stereotypes.[73] The Supreme Court held that discrimination premised on the victim's failure to conform to sex stereotypes was sex discrimination actionable under Title VII.[74] Applied to sexual orientation

68. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209–10 (9th Cir. 2001) ("Like the district court, we conclude that Rene has failed to raise a triable issue of fact with regard to whether the harassment he faced was motivated by his gender, and we therefore conclude that summary judgment was proper.").

69. Doe by Doe v. City of Belleville, Ill., 119 F.3d 563, 580 (7th Cir. 1997) ("Frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender.").

70. The court opined:

> What went on in the case at bar was gross, vulgar, male horseplay in a male workplace. It was the classic example of men behaving badly. . . . 'Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* because of sex." [Citing *Oncale*.] I do not feel that the plaintiff has sustained this burden, nor indeed could he under these facts. Same-sex sexual harassment cases of this nature present a slippery slope, and this case either goes over the edge or comes so close to it that a line needs to be drawn. If not, what's next—towel snapping in the locker room?

EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 (6th Cir. 2001) (Guy, J., concurring and dissenting).

71. *See* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331–32 (9th Cir. 1979) (discussing one plaintiff's argument that he was discriminated against because of his "effeminacy").

72. 490 U.S. 228 (1989).

73. *Id.* at 232–37. Hopkins's evidence was quite compelling. In written promotion evaluations, other employees had described her as "macho," said that she "overcompensated for being a woman" and ought to take "a course at charm school." *Id.* at 235. To improve her future chances for promotion, Hopkins's superior advised that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

74. According to the Court:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . An employer who objects to aggressiveness in women but whose positions

discrimination, the sex-stereotyping theory asserts that people who discriminate on the basis of sexual orientation often are discriminating on the basis of sex stereotypes—perceiving lesbians as being "too macho" or gay men as too effeminate. After the Supreme Court's holding in *Price Waterhouse*, the theory suggests that this kind of sexual orientation discrimination constitutes sex discrimination actionable under Title VII.[75]

Three judges on the panel that reheard *Rene* voted to allow Rene to proceed on a sex-stereotyping theory,[76] although he had not raised that argument below.[77] These judges saw clear evidence of sex stereotyping in Rene's case, pointing to Rene's coworkers' teasing him about the way he walked, whistling at him like men whistle at women, and calling him "sweetheart" and "*muñeca.*"[78] According to the concurring judges, Rene's coworkers used these devices to "remind [Rene] that he did not conform to their gender-based stereotypes."[79]

In a recent Ninth Circuit case, *Nichols v. Azteca Restaurant Enterprises*[80] a three-judge panel unanimously concluded that the gay plaintiff had stated a claim of actionable sexual harassment using the sex-stereotyping theory. In *Nichols*, plaintiff Antonio Sanchez's coworkers referred to him using female pronouns, called him a "faggot" and a "*puta*,"[81] taunted him for walking and carrying a serving tray "like a woman," and made fun of him for not having

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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.

Id. at 250–51.

75. *See, e.g.*, Doe by Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997). The Seventh Circuit, for example, has held that:

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.

Id. at 581.

76. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) ("[T]his is a case of actionable gender stereotyping harassment.") (Pregerson, J., concurring).

77. *Id.* at 1070 ("Rene did not assert a theory of 'sexual stereotyping.'") (Graber, J., concurring). Failure artfully to plead causes of action for sexual orientation discrimination as "sex stereotyping" may have precluded relief for some Title VII plaintiffs. Four judges at the *Rene* rehearing explicitly refused to consider a sex-stereotyping theory because Rene had not pleaded it, pointing instead to Rene's deposition testimony that the harassment had taken place because Rene was gay. *See id.* at 1075 (Hug, J., dissenting). Furthermore, the Third Circuit in *Bibby* refused to evaluate Bibby's claims in light of *Price Waterhouse*, pointing out instead that Bibby "did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave . . . . His claim was, pure and simple, that he was discriminated against because of his sexual orientation." Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001).

78. *See Rene*, 305 F.3d at 1069 (Pregerson, J., concurring).

79. *Id.*

80. 256 F.3d 864, 869 (9th Cir. 2001).

81. A vulgar Spanish term meaning "female whore."

sex with a female friend.[82] Sanchez asserted a sex-stereotyping theory, which the Ninth Circuit panel accepted, holding that the "verbal abuse was closely linked to gender. . . . [and thus] constituted actionable harassment under . . . Title VII."[83]

The lesson of *Nichols* seems to be that a victim of sexual orientation discrimination can obtain relief under Title VII merely by (1) pointing out specific instances of sex stereotyping in the course of the discrimination, and (2) citing *Price Waterhouse*. Other sexual orientation discrimination opinions seem to validate this approach by discussing the sex-stereotyping theory approvingly, but rejecting it on procedural grounds.[84] But the need to identify specific incidents of sex stereotyping may sometimes be an insurmountable hurdle. The *Rene* dissent, for example, remarked that the record disclosed insufficient evidence of sex stereotyping to state a claim on that theory, even if Rene had asserted it.[85] The dissenting judges' conclusion is even more troubling given the similarity of the verbal harassment in *Rene* and *Nichols*. Because even the most overt acts of discrimination do not necessarily involve obvious expressions of sex stereotypes, it will be difficult, if not impossible, for some sexual orientation discrimination plaintiffs to draft their complaints in terms of sex stereotyping.[86]

Furthermore, it is arbitrary and unfair to require sexual orientation discrimination victims to focus on these specific and often very minor instances of sex stereotyping. To find a sex-stereotyping argument for Rene, for example, the concurring judges had to ignore the most egregious harassing conduct (the physical assaults) and focus instead on the fact that the terms

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82. *Nichols*, 256 F.3d at 870, 874.

83. *Id.* at 874–75.

84. Numerous opinions have considered the sex-stereotyping theory but held that the plaintiff waived it by not invoking it in the court below. *E.g.*, *Rene*, 305 F.3d at 1070 (Graber, J., concurring); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259–60 (1st Cir. 1999).

85. *Rene*, 305 F.3d at 1077 ("Rene made no claim of sexual stereotyping and there was virtually no evidentiary basis upon which Rene could have supported such a claim had it been made.") (Hug, J., dissenting).

86. For example, a prospective employee who is not hired because he is gay is unlikely to be able to manufacture a credible complaint in the language of sex stereotyping. Of course, *Price Waterhouse* could be taken to its logical extreme, and the argument advanced that all sexual orientation discrimination is based on sex stereotypes—that men and women ought to pursue romantic relationships with members of the opposite, and not the same, sex. Whether this constitutes a "sex stereotype" is debatable, however, and this argument has not been advanced. For an article arguing for the use of *Price Waterhouse* in conjunction with *Oncale* to combat sexual orientation discrimination, see Nailah A. Jaffree, *Halfway out of the Closet: Oncale's Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799 (2002). This Comment advocates a simpler and more compelling legal theory that may be available to bring sexual orientation discrimination under Title VII's purview, as discussed *infra* Part III.

"sweetheart" and "*muñeca*" imply a female subject.[87] When such de facto pleading requirements exist, Title VII plaintiffs whose cases contain compelling evidence of discrimination still might lose on a dispositive motion if they are unable to point to enough relatively minor episodes in which discriminators manifested obvious sex stereotypes.

Finally, the sex-stereotyping theory grants Title VII protection only to gay men and women who openly defy sex stereotypes, as opposed to those who embrace more traditional gender roles. Because the latter group may constitute a sizeable percentage, if not a majority, of the gay and lesbian population, this underinclusion constitutes a major problem with the sex-stereotyping theory.[88] For example, a gay man who wears an earring and is later fired because of his sexual orientation easily can point to a sex stereotype—that men should not wear earrings—as the motivation for his termination. Another similarly situated gay man, however, who does not wear earrings or otherwise defy traditional sex stereotypes, would encounter more difficulty asserting a Title VII claim using a sex-stereotyping theory.

C. The Disparate Impact Theory

It appears that only one judge ever has been willing to allow sexual orientation discrimination plaintiffs to proceed to trial on a disparate impact theory.[89] The theory merits mention here, however, because it constitutes another way that sexual orientation discrimination frustrates Title VII's objective of combating sexual inequality in the workplace.

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87. Indeed, the dissent commented that allegations of sex stereotyping constituted only "one line in Rene's deposition of over 100 pages." *Rene*, 305 F.3d at 1077 n.4 (Hug, J., dissenting).

88. Measuring the portion of the gay population that does not openly defy sex stereotypes is well beyond the scope of this Comment. It appears, however, that this portion may be substantial. A pioneering study on the prevalence of homosexuality among men concluded that "10 per cent of . . . males are more or less exclusively homosexual . . . for at least three years between the ages of 16 and 55." ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 651 (1948). While disputing Kinsey's conclusions with respect to *exclusive* homosexuality in men, a more recent survey found that 10.1 percent of American men report some homosexual behavior, desire, and/or identity as adults, and that 9.1 percent report having sex with another man at some point after puberty. *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 287–90, 292–301 (1994). Despite these figures, it is common knowledge that fewer than one in ten American men actively defies sex stereotypes in a manner associated with homosexuality. Thus, a certain percentage of the male population may be vulnerable to on-the-job sexual orientation discrimination (because of their homosexual impulses and/or behavior) but outside the protection of *Price Waterhouse*/*Nichols* (because they do not defy sex stereotypes).

89. *See* DeSantis v. Pac. Tel. & Tel., 608 F.2d 327, 333–34 (9th Cir. 1979) (Sneed, J., dissenting in part).

Disparate impact theory originated in *Griggs v. Duke Power Co.*,[90] in which the Supreme Court recognized that employment criteria that appear nondiscriminatory might unintentionally discriminate against—that is, have a "disparate impact" upon—members of a protected group. Accordingly, the Court held that employers may not use "artificial, arbitrary, and unnecessary" employment criteria if those criteria "operate invidiously to discriminate on the basis of racial or other impermissible classification."[91] In 1993, Congress codified *Griggs*'s holding into Title VII.[92] Under the 1993 amendments, when a plaintiff can show that an employer uses a facially neutral employment criterion that has a disparate impact on a particular protected group, a presumption of discrimination arises, and the evidentiary burden shifts to the employer to show that the criterion is "job related for the position in question and consistent with business necessity."[93]

Applied to sexual orientation discrimination, the disparate impact argument contends that employer policies that exclude homosexuals or perceived homosexuals, although "facially neutral," have a disparate impact on men "because of the greater incidence of homosexuality in the male population and because of the greater likelihood of an employer's discovering male homosexuals compared to female homosexuals."[94] Because it would be difficult for employers to carry an evidentiary burden to prove the exclusion of homosexuals to be "job related and consistent with business necessity," gay men

90. 401 U.S. 424 (1971).

91. *Id.* at 431.

92. *See* 42 U.S.C. § 2000e-2(k)(1) (2000).

93. *Id.* §§ 2000e-2(k)(1)(A)(i).

94. *DeSantis*, 608 F.2d at 330. Both these major premises are debatable and beyond the scope of this Comment. Nevertheless, it appears that an empirical basis may exist for both. Studies have found that homosexuality is more prevalent among men than among women. *See, e.g.*, ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 474–75. Kinsey noted that:

> The incidences and frequencies of homosexual responses and contacts . . . were much lower among the females in our sample than they were among the males on whom we have previously reported . . . . Moreover, compared with the males, there were only about half to a third as many of the females who were, in any period, primarily or exclusively homosexual.

Id. Laumann found that substantially fewer women than men reported sex with same sex partners (4.3 percent of women versus 9.1 percent of men), and that 8.6 percent of women reported same sex behavior, desire, and/or identity, compared to 10.1 percent of men. LAUMANN, *supra* note 88, at 292–99.

It also appears that our society tolerates a greater degree of deviation from traditional sex stereotypes in women than in men. For example, it is socially acceptable for women to wear clothes traditionally worn only by men, while the reverse is not true. Further, as Kinsey observed:

> [F]emales are more openly affectionate than males in our culture. Women may hold hands in public, put arms about each other, publicly fondle and kiss each other, and openly express their admiration for other females without being accused of homosexual interests, as men would be if they made such an open display of their interests in men.

KINSEY, *supra*, at 475. Assuming that gay men and women are equally likely to deviate from sex stereotypes, it follows that gay men would be easier to single out for discrimination.

discriminated against because of their sexual orientation conceivably could win Title VII cases using this theory.

Disparate impact theory as applied to sexual orientation discrimination, however, is fatally flawed. In the first place, it accords no relief to lesbians, whom the theory alleges to be the beneficiaries, and not the victims, of the disparate impact. Furthermore, because the theory only is available to combat facially neutral employment criteria, it would not be available to combat workplace harassment. Thus unable to bring a great percentage of sexual orientation discrimination under Title VII's purview, this legal theory has only a very limited appeal.

III. A PROPOSAL FOR THE FUTURE: THE ASSOCIATIVE DISCRIMINATION THEORY

The final legal theory discussed in this Comment may be the broadest and most potentially effective theory available to victims of sexual orientation discrimination. Nevertheless, except for an occasional mention in a scholarly comment,[95] this theory largely has been ignored since the *DeSantis* court evasively rejected it.[96] Called the "associative discrimination theory," this theory is an analogy to a large volume of racial discrimination cases.

Nearly every court to consider the issue has held that a white person can state a Title VII claim of racial discrimination if she encounters on-the-job discrimination because of her relationship with a person of another race.[97] If terminating a white woman for dating a black man constitutes racial discrimination actionable under Title VII, then surely an equally powerful argument exists that terminating a white woman for dating a woman constitutes actionable sex discrimination. The remainder of this Comment will explore the foundation, applications, and possible criticisms of this legal theory.

95. *E.g.*, Mark W. Honeycutt II & Van D. Turner, Jr., *Third-Party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913, 927–29 (2001); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 7–8 (1992).

96. *DeSantis*, 608 F.2d at 331. As explained *infra* in Part III.C.1., the *DeSantis* court deliberately mischaracterized the associative theory, reasserting it as a straw man argument and unceremoniously dismissing it.

97. *See* cases cited *infra* note 99.

A. Interracial Relationship Cases

After some initial reluctance,[98] courts generally have held that plaintiffs can state Title VII claims for discrimination they encounter as a result of their interracial relationships.[99] Today, courts unanimously agree that discrimination because of a plaintiff's interracial relationship is discrimination because of her race, thus satisfying Title VII's pleading requirements, even if the plaintiff is white.[100] This conclusion rests on the solid logic that, for example, a white woman with a black husband would not encounter discrimination based on her interracial relationship if she were black and her marriage thus not interracial.[101] Such discrimination occurs, therefore, because of the white plaintiff's race.

An illustrative example of the interracial association cases is *Deffenbaugh-Williams v. Wal-Mart Stores*.[102] Plaintiff Julie Deffenbaugh, a white female Wal-Mart employee, began dating Truce Williams, a black male coworker, in 1992.[103] When Deffenbaugh's superiors found out about her relationship, they advised her at a lunch meeting that she "would never move up with the company being associated with a black man . . . ."[104] Deffenbaugh refused to follow her superiors' advice, and married Williams in January 1994.[105] The next day, Wal-Mart fired her.[106] Deffenbaugh sued Wal-Mart under Title

98. *E.g.*, Adams v. Governor's Comm. on Postsecondary Educ., No. C80-624A, 1981 WL 27101, at *1 (N.D. Ga. Sept. 3, 1981) (holding that a white man who encountered harassment and other employment discrimination because of his marriage to a black woman had no standing to sue under Title VII).

99. *E.g.*, Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998) (involving a white woman dating a black man); Ziegler v. K-Mart Corp., No. 95-3109, 1996 WL 8021, at *1 (10th Cir. Jan. 10, 1996) (involving a black woman pregnant with a white man's child); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) (involving a white man married to a black woman); Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298 (S.D.N.Y. 1996) (involving a white man with a black wife); Schutt v. County of Napa, No. C-94 2115 SC, 1995 WL 494588, at *1 (N.D. Cal. Aug. 15, 1995) (involving a white woman pregnant with a black man's child); Chacon v. Ochs, 780 F. Supp. 680 (C.D. Cal. 1991) (involving a white woman married to a Hispanic man); Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1459 (D.C. Colo. 1985) (involving a white woman's "association with the Hispanic community"); Gresham v. Waffle House, Inc., 586 F. Supp. 1442 (N.D. Ga. 1984) (involving a white woman married to a black man); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975) (involving a white woman "maintaining a casual social relationship with" a black man). For a good summary of the development of the interracial association theory, see Honeycutt & Turner, *supra* note 95, at 918–27.

100. *See, e.g.*, *Rosenblatt*, 946 F. Supp at 300.

101. *Id.*

102. 156 F.3d 581.

103. *Id.* at 585.

104. *Id.*

105. *Id.*

106. *Id.* at 586.

VII for racial discrimination based on her interracial relationship, and a jury awarded her lost earnings and punitive damages.[107] Wal-Mart appealed, arguing that Deffenbaugh did not belong to a protected class and thus could not state a claim under Title VII.[108] The Fifth Circuit rejected Wal-Mart's "quite strained" argument, choosing instead to follow the plethora of cases holding that "Title VII prohibits discrimination in employment premised on an interracial relationship."[109]

B. The Sexual Orientation Discrimination Analogy

What if Williams had been a white woman, rather than a black man, and Wal-Mart had terminated Deffenbaugh for having a lesbian relationship rather than an interracial one? To the exact same degree that Wal-Mart discriminated against the real Deffenbaugh because of her race, Wal-Mart in this hypothetical would discriminate against the hypothetical Deffenbaugh because of her sex. Put another way, just as the real Deffenbaugh would not have encountered any discrimination for her relationship if she had been black, the hypothetical Deffenbaugh would not have encountered any discrimination for her relationship if she had been a man. There is thus no denying that the discrimination in this hypothetical is "because of . . . [Deffenbaugh's] sex," and thus theoretically actionable under Title VII.

This analogy should allow the victims of sexual orientation discrimination to state claims under Title VII by arguing that the discrimination they encounter is based on their relationships with members of the same sex (or their coworkers' perception that they have such relationships). This association (or perceived association) is implied definitionally whenever sexual orientation discrimination exists because a person's sexual orientation may be defined by the sex of the persons with whom he tends to associate romantically. Rene's coworkers, for example, harassed him because of his sexual orientation; in other words, they harassed him because they perceived him to engage in romantic relationships with men.[110] Such harassment, by definition, would not have transpired if Rene had been a woman. It was, therefore, discrimination "because of . . . [Rene's] sex."

Bridging the gap between the interracial association cases and sexual orientation discrimination cases requires addressing only two minor legal

107. *Id.*
108. *Id.* at 587.
109. *Id.* at 589.
110. This is quite obvious given the facts of the case. Rene's coworkers, for example, forced him to look at pictures of men having sex, thus tormenting Rene because they believed he pursued such same sex associations. Rene's coworkers' touching Rene's crotch and anus also clearly indicates their perception that Rene engaged in sexual relations with men.

hurdles: (1) whether associative theory is available to sex discrimination plaintiffs; and (2) whether associative theory allows claims based on perceived—as well as actual—association. Ample legal precedent exists to provide an affirmative response to both of these inquiries.

1. Associative Theory as Applied to Sex Discrimination

There is no good reason why the associative theory should not be available to sex discrimination plaintiffs—courts liberally construe Title VII to effectuate Congress's intention to eliminate discrimination in the workplace.[111] Indeed, sex discrimination plaintiffs already have prevailed on associative theories. In *Nicol v. Imagematrix*,[112] the court held that plaintiff Nicol, who alleged that the defendant had fired him because his wife was pregnant, could state a claim for sex discrimination under Title VII.[113] Reasoning that "[a] woman could never be terminated due to her employer's animus against a pregnant spouse because her spouse could not be pregnant," the court held that Nicol's being a man was a but-for cause of the alleged discrimination.[114] Analogizing to the interracial association cases, the court held that the discrimination had occurred "because of . . . [Nicol's] sex," and that he therefore could state a claim of sex discrimination under Title VII.[115] Associative theory, therefore, is available to sex discrimination plaintiffs, including victims of sexual orientation discrimination.

2. Associative Theory Based on the Discriminator's Perception of the Victim's Associations

It is settled law that a discriminator's perception that his victim is a member of a protected class confers standing on the victim to sue under Title VII regardless of whether the victim is, in fact, a member of the protected class.[116]

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111. *See, e.g.*, Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989) ("Title VII . . . is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of . . . [workplace] discrimination.").

112. 773 F. Supp. 802 (E.D. Va. 1991).

113. *Id.* at 806.

114. *Id.* at 804.

115. *Id.* at 805–06.

116. The Ninth Circuit has held that the discriminator's perception controls the plaintiff's standing. *See, e.g.*, Estate of Amos *ex rel.* Amos v. City of Page, Ariz., 257 F.3d 1086, 1094 (9th Cir. 2001) (analyzing race discrimination under 42 U.S.C. § 1983, which is closely related to Title VII). The court held that:

> [Deceased plaintiff] was the direct target of discrimination based upon mistaken racial identity. That [plaintiff] was actually white does not make that discrimination or its resulting injury less direct. Thus, for purposes of standing, [plaintiff] should be viewed as [his

Furthermore, legal precedent exists for using the perception doctrine in association cases. In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks*,[117] plaintiff Tetro, a white male, sued his former employer for racial discrimination under Title VII, alleging that he was constructively terminated after his employer discovered he had a biracial child.[118] The Sixth Circuit held that Tetro had stated a claim of racial discrimination under Title VII.[119] *Tetro* is strong precedent for associative discrimination arguments based on discriminators' perception because the discrimination Tetro alleged probably was based, at least in part, on the employer's *perception* upon seeing Tetro's biracial child that Tetro had associated intimately with a woman of another race.[120] Sexual orientation discrimination plaintiffs, therefore, can state causes of action for discrimination based on discriminators' perceptions about their associations.

3. Potential Breadth of the Associative Discrimination Theory

Once it is established (1) that a compelling analogy exists between interracial association discrimination and sexual orientation discrimination; (2) that the associative theory is available to sex discrimination claimants; and (3) that the associative theory is available when discrimination is based on the discriminator's perception of the victim, the associative discrimination theory becomes available to all sexual orientation discrimination plaintiffs. Indeed,

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estate] alleges the [defendant] police officers viewed him: as a Native American. [Defendants'] alleged discrimination is no less malevolent because it was based upon an erroneous assumption.

Id.; *see also, e.g.*, LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 769–70 (D. Neb. 1999) (approving an Italian-American plaintiff's cause of action for racial discrimination based on employer's mistaken belief that the plaintiff was Hispanic); Perkins v. Lake County Dept. of Util., 860 F. Supp. 1262, 1277–78 (N.D. Oh. 1994) (holding that under Title VII, "it is the employer's reasonable belief that a given employee is a member of a protected class that controls this issue. . . . As with the joy of beauty, the ugliness of bias can be in the eye of the beholder").

117. 173 F.3d 988 (6th Cir. 1999).

118. *Id.* at 990–91.

119. *Id.* at 995.

120. Neither Tetro nor the Sixth Circuit ever explicitly advanced a perception rationale, but it is difficult given the facts of *Tetro* to believe that such perception did not motivate his employer's action. In a particularly telling incident, Tetro's employer was overheard complaining that "no one ever told me that [Tetro] had a mixed race child," that "this was going to hurt [the employer's] image in the community and his dealership," and that "I can't believe he has a mixed child and [the person who recommended him] didn't tell [me]." *Id.* at 990. Tetro's employer's repeated references to Tetro's child as being "mixed race" rather than "black" indicate that he was more upset that Tetro had "mixed races" by conceiving a child with a black woman than that Tetro was raising a child of another race. Tetro's employer thus probably discriminated based on his perception that Tetro had associated with a woman of another race, rather than his actual knowledge that Tetro's child was biracial. *See also* Honeycutt & Turner, *supra* note 95, at 926 (recognizing that "the actual reason [Tetro] was fired was because his child was biracial, indicating that [Tetro] was intimate with a female of another race").

if courts accept the foregoing arguments, sexual orientation discrimination will be subsumed within the definition of sex discrimination, just as interracial association discrimination has been subsumed within the definition of racial discrimination. No longer would sexual orientation discrimination plaintiffs have to sift through the facts of their cases, highlighting certain allegations and omitting others, to try to fit their claims ad hoc into the mold of *Price Waterhouse* or *Oncale*. Instead of waiting six years for the courts to decide that his tormentors had poked him in the correct anatomical regions to implicate Title VII, Rene and others like him could pursue their claims secure in the knowledge that Title VII would redress the discrimination they have encountered.

The associative discrimination theory has the potential to eradicate discrimination in situations where the other theories fail. Unlike the sex-specific harassment theory, the associative theory would allow plaintiffs to litigate all forms of employment discrimination—not just harassment. It would not force sexual orientation discrimination plaintiffs to rely only on potentially minor portions of their allegations that clearly implicate gender, or to forgo their claims if no such allegations were available. Unlike the sex-stereotyping theory, the associative theory would protect all victims of sexual orientation discrimination—and not just those who defy sex stereotypes—because all these victims have in common a perception on the part of discriminators that they associate with members of the same sex. And unlike the disparate impact theory, the associative theory would protect lesbians and would provide a remedy for harassment based on sexual orientation.

C. Potential (and Actual) Criticism of the Associative Discrimination Theory

1. The *DeSantis* Court's Argument

The Ninth Circuit rejected the associative discrimination theory in seven sentences.[121] By mischaracterizing the associative discrimination theory as an

121. DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979). The full text of the Ninth Circuit's opinion on this point follows:

> Appellants argue that the EEOC has held that discrimination against an employee because of the race of the employee's friends may constitute discrimination based on race in violation of Title VII. They contend that analogously discrimination because of the sex of the employees' sexual partner should constitute discrimination based on sex.
>
> Appellants, however, have not alleged that appellees have policies of discriminating against employees because of the gender of their friends. That is, they do not claim that the appellees will terminate anyone with a male (or female) friend. They claim instead that the appellees discriminate against employees who have a certain type of relationship—i.e., homosexual relationship—with certain friends. As noted earlier, that relationship is

inquiry into the sex of an employee's "friends," the Ninth Circuit was able to dismiss the argument by reasoning that the plaintiffs "ha[d] not alleged that [the defendants] ha[d] policies of discriminating against employees because of the gender of their friends."[122] But the Ninth Circuit missed the point. Associative discrimination theory is seldom related to a person's "friends."[123] On the contrary, to state a claim of associative discrimination, a plaintiff generally must show a very substantial relationship with the other person that is greater than friendship.[124] Indeed, courts have dismissed claims of associative discrimination where the plaintiff was only a "good friend" of the protected class members on the grounds that the relationship was not sufficiently substantial to merit Title VII protection.[125] Under these cases, a gay relationship would be sufficiently "substantial" to qualify for Title VII associative discrimination protection,[126] while the "friendships" that the Ninth Circuit mentioned

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not protected by Title VII. Thus, assuming that it would violate Title VII for an employer to discriminate against employees because of the gender of their friends, appellants' claims do not fall within this purported rule.

Id. at 331 (citations omitted).

122. *Id.*

123. In associative discrimination cases, the protected class membership of persons with whom the plaintiff associates is circumstantial evidence that the discrimination complained of was because of the plaintiff's own class membership. Unless these relationships are substantial, often more than mere friendship, the inference of discrimination may be impossible to draw. A jury simply might refuse to believe that a defendant would discriminate merely because one of the plaintiff's friends was a different race. Absent this inference, a plaintiff cannot establish a *prima facie* case of discrimination, and thus has no standing to sue. Successful associative discrimination cases, therefore, typically are based on marriages and other substantial romantic relationships. *See also* discussion *infra* note 126.

124. Zielonka v. Temple Univ., No. 99-5693, 2001 WL 1231746, at *6 (E.D. Pa. Oct. 12, 2001) (reasoning that the white "[p]laintiff did not have the type of relationship with [a black coworker] that alone may reasonably support an assumption that plaintiff's race motivated the action he complains of"); Robinett v. First Nat'l Bank of Wichita, No. 87-2561-S, 1989 WL 21158, at *2 (D. Kan. Feb. 1, 1989) (holding that the white plaintiff's "good friendship" with a black coworker was "insufficient to establish the type of relationship" necessary to support the cause of action).

125. *Robinett*, 1989 WL 21158, at *1–*2.

126. The substantiality requirement invoked in some cases is not a moral judgment related to the degree of intimacy in a given relationship. Instead, it is a question of the sufficiency of the plaintiff's prima facie evidence, that is, whether or not the plaintiff's association with the member of the protected class was sufficiently substantial to support an inference that the association motivated the defendant to discriminate. *See, e.g.*, *Zielonka*, 2001 WL 1231746, at *6 (recognizing that the plaintiff's association with the member of the protected class was so insubstantial that no reasonable trier could conclude that defendant had discriminated because of the relationship). When the plaintiff's evidence is sufficient to raise an inference of discrimination, the precise nature of the relationship is not an issue. In *Whitney*, for example, the plaintiff presented evidence that the defendants had threatened and warned her many times that she must discontinue her casual friendship with a black man or face termination. Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975). Because of these threats, the court had no trouble determining that the plaintiff had presented evidence sufficient to raise the inference of discrimination based on the relationship, even though it was admittedly a mere "casual social relationship." *Id.* As long as sufficient evidence exists in a sexual orientation discrimination

might not.[127] Because it presumes that associative discrimination claims can be based only upon friendships and not romantic associations, the Ninth Circuit's analysis is founded on principles that contradict settled law. The *DeSantis* analysis, therefore, presents no tenable impediment to associative discrimination theory.

2. The Congressional Intent Argument

A better argument against the associative discrimination theory is that, although the analogy to racial discrimination may be hard to refute, Congress primarily intended Title VII to protect racial minorities, and thus the associative discrimination theory should be available only to racial discrimination claimants. Furthermore, the argument continues, Congress clearly did not intend to extend Title VII protection to homosexuals: as the *Rene* dissent points out, several amendments to Title VII have been proposed to protect homosexuals, and none has passed.[128]

While it undoubtedly is true that Congress intended to grant protection against workplace discrimination to racial minorities, nowhere in Title VII is there any indication that Congress intended to extend different degrees of protection to race discrimination plaintiffs, as opposed to sex discrimination plaintiffs. Indeed, the words "sex" and "race" appear near each other in the same clause of Title VII.[129] Furthermore, precedents established in the field of race discrimination routinely have analogized to sex discrimination. For example, disparate impact theory, first developed in connection with racial discrimination, soon was applied to sex discrimination.[130] The theory that harassment is a form of discrimination in the terms and conditions of employment—and thus actionable under Title VII—also originated in the field of race discrimination, and was analogized by the Supreme Court to

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case to show that the discriminator acted on the basis of his belief that the victim associated romantically with members of the same sex, therefore, a viable claim for associative discrimination should lie. The relationship need only be sufficiently substantial to support the inference that the discrimination would not have taken place had the victim been a member of the opposite sex. Gay relationships (whether real or perceived) pass this test.

127. In its defense, the Ninth Circuit was interpreting ambiguous EEOC guidelines and not the associative discrimination cases cited in this Comment. Nonetheless, the Ninth Circuit's terse and dismissive attitude toward the *DeSantis* plaintiff's arguments (for example, dismissing many of them merely as "bootstraps") suggests it was reasoning in a deliberately obtuse fashion.

128. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1076 & n.3 (9th Cir. 2002) (Hug, J., dissenting). Judge Hug cited several failed pieces of federal antidiscrimination legislation. *Id.* at 1076 n.3.

129. *See* 42 U.S.C. §2000e-2(a)(1) (2000).

130. First announced in *Griggs*, the disparate impact theory soon was applied to sex discrimination. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328–31 (1977) (analogizing the disparate impact theory to protect female victims of a discriminatory policy).

create a cause of action for sexual harassment.[131] The argument that Congress intended that legal theories extending Title VII's reach—such as associative discrimination—be confined to the field of race discrimination, therefore, does not survive inquiry.

As for the second part of the congressional intent argument, it is difficult to dispute that Congress did not intend Title VII to protect gay people from discrimination. After all, at the time Congress passed Title VII, homosexuality still was considered to be a mental disease.[132] For the sake of combating discrimination in the workplace, however, courts have appended to Title VII vast bodies of law that Congress could not have foreseen, much less intended, in 1964. The very framework by which an employee states an inferential claim of intentional workplace discrimination is a judicial invention.[133] So is the theory that workplace harassment is actionable discrimination[134]—Congress was not thinking about "sexual harassment" in 1964.[135] The Supreme Court, not Congress, invented disparate impact theory,[136] which Congress later amended Title VII to include.[137] The courts also invented associative discrimination theory,[138] and continue to apply it with near unanimity,[139] despite the fact that Congress never has amended Title VII to include the theory explicitly.[140]

131. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986) (citing cases establishing a cause of action for hostile environment racial harassment, and holding that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited.").

132. *See* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 454 (6th Cir. 1984) (noting that the *Diagnostic and Statistical Manual II of Mental Disorders* of the American Psychiatric Association was revised in 1974 to delete homosexuality from its list of mental disorders).

133. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (outlining the burden-shifting regime by which Title VII plaintiffs may prove intentional discrimination); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–56 (1981) (refining *McDonnell Douglas* to hold that the ultimate burden of persuasion at all times rests with the plaintiff).

134. *E.g.*, Rogers v. EEOC, 454 F.2d 234, 238–39 (5th Cir. 1971) (holding that harassment based on race is a change in the terms and conditions of employment and is thus discrimination actionable under Title VII).

135. A cause of action for workplace sexual harassment has only been conceivable under Title VII since *Meritor* in 1986.

136. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

137. *See* 42 U.S.C. § 2000e-2(k)(1) (2000).

138. *See* Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366–67 (S.D.N.Y. 1975) (creating the associative discrimination theory).

139. *See* cases cited *supra* note 99.

140. Congress has, however, adopted associative language in later antidiscrimination statutes, such as the Americans with Disabilities Act. *See* 42 U.S.C. § 12112(b)(4) (making it an unlawful practice to "exclud[e] or otherwise deny[ ] equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association").

It also must be noted that the very same congressional intent argument was made against the Supreme Court's decision in *Loving v. Virginia*.[141] In that case, the Supreme Court held that state statutes prohibiting interracial marriage were unconstitutional under the Equal Protection Clause.[142] Defending its statute, however, Virginia contended—probably correctly—that the framers of the Fourteenth Amendment never intended to overrule state antimiscegination statutes.[143] Congressional intent, therefore, only takes the courts so far. Sometimes a legal theory simply is right as a matter of law and public policy and the courts must give it effect regardless of the intent of the legislative body that enacted the law underlying the theory.

The Court's recent decision in *Lawrence v. Texas*[144] further illustrates this point in the gay rights field. In *Lawrence*, the Court held unconstitutional state laws criminalizing gay sex.[145] *Lawrence* is consistent with a line of cases delineating a right to privacy in matters pertaining to sex.[146] Further, *Lawrence* comports with a sound social policy recognizing that gays and lesbians are full citizens of our democracy and are entitled to protection from tyrannical majorities.[147] Despite this, it seems inconceivable that the legislative bodies that enacted the constitutional provisions underlying the right to privacy—the Bill of Rights and the Fourteenth Amendment—intended those provisions to protect gay sex.[148] *Lawrence* thus confirms that a strong legal foundation supported by compelling social policy can trump congressional intent.

It is appropriate for courts to take an active role where Congress, beholden to popular opinion for reelection, does not have the freedom to take politically controversial positions in its legislation—regardless of whether those positions are legally and morally correct.[149] This was the case with

141. 388 U.S. 1 (1967).

142. *Id.* at 11–12.

143. *Id.* at 9 ("The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws.").

144. 123 S. Ct. 2472 (2003).

145. *See id.* at 2484.

146. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

147. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–36 (1996) (striking down a Colorado constitutional provision that the Court found to be "inexplicable by anything but animus toward [gay people]").

148. *See* Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986) ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.").

149. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 399 (1989) (upholding a protestor's First Amendment right to burn the flag as political expression). The decision—while probably a foregone conclusion under First Amendment jurisprudence—was and is wildly unpopular. The authors of the First Amendment probably did not envision protecting those who would burn the flag, and

interracial marriage in *Loving*, and it is also the case with sexual orientation discrimination. To allow sexual orientation discrimination to continue unabated in the name of effectuating congressional intent is, at best, callous and improvident. At worst, it is a superficial and mean-spirited means to save employers the expense of protecting their gay employees from discrimination.

CONCLUSION

Workplace discrimination based on sexual orientation is wrong because it harms a particular minority group irrationally. Sexual orientation, like race, is plainly irrelevant to a person's ability to perform her job. Instead, sexual orientation discrimination, like racial discrimination, arises from societal prejudice. Moreover, sexual orientation harassment cannot be justified. Even the three-judge panel that voted to deny Rene relief recognized that "[t]he degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court."[150]

The courts have the power to put a stop to all this. Courts should not continue denying Title VII relief to sexual orientation discrimination plaintiffs merely because they are bound by "precedent" or "congressional intent." Instead, courts should consider a broader range of cases as applicable to sexual orientation discrimination, and should abandon the congressional intent argument as an obvious attempt to perpetuate past inequities.

This Comment has outlined a theory of associative discrimination based on legal precedent that sexual orientation discrimination plaintiffs should raise, and the courts should use, to bring all sexual orientation discrimination under Title VII's purview. Until Congress has the courage to amend Title VII to include sexual orientation as a protected category, that may be the best the courts can do.

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the modern Congress certainly will not legislate to protect such dissent. On the contrary, *Texas v. Johnson* has prompted a series of attempts to amend the Constitution to stop flag burning. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1228–1230 (13th ed. 1997).

150. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001).