“Where the law serves to constrain the range of permissible, or even coherent, sexual meanings, it becomes an instrument of discrimination itself.”

Imagine that you have worked for a prestigious company for ten years and are up for a promotion. On Friday after a long week of work, your significant other picks you up for a well-earned night on the town while you anxiously await the final determination. On Monday morning you arrive to work and are summoned to the boss’s office. Expecting to officially accept your promotion, you arrive quickly . . . and instead are informed that because your boss saw you and your significant other on Friday evening, your employment is being terminated. Given no other explanation, you are dismissed to pack your things and leave the premises.

While this scenario would be illegal if the couple in question were interracial or of differing religions, under federal law it is acceptable if you and your significant other are of the same gender. In fact, the more direct an employer is about their discrimination practices relating to sexual orientation, the more protected the action is. While court findings have varied on this issue, results have been largely disappointing for lesbian, gay, bisexual, and transgendered (LGBT) citizens seeking legal protection from employment discrimination.

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1 Katherine M. Franke, *The Central Mistake of Sex Discrimination: The Disaggregation of Sex from Gender*, p 8
This article will discuss the how courts have interpreted Title VII, particularly in regard to gay and lesbian individuals. First, I will address the methods of bringing lawsuits under Title VII; specifically that lawsuits are typically brought on the basis of quid pro quo discrimination or a hostile work environment. I will then examine how homosexual employees often cannot utilize those methods, and how the courts come to those conclusions. Next, I will discuss the prevalence of gay, lesbian, bisexual, or transgendered individuals in the American population and identify the probable scope of the issue. Finally, I will turn to potential solutions to the problem of sexual orientation discrimination and past efforts to address the problem.

I. Title VII Discrimination Practice

Courts have struggled to define the scope of protection that Title VII affords as applied to sex. Title VII of the Civil Rights Act of 1964 actually states:

“It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”

The legislation was highly controverted at the time of its passage. In an attempt to stop the legislation from passing, Representative Howard Smith amended the proposal to add “sex.” But, this late addition resulted in minimal discussion over

\[2\] 42 U.S.C.A. § 2000e-2 (West)

\[3\] Barnes v Castle, 561 F.2d 983, 986-86.
the scope of the term and the intended interpretation. While legal authorities have argued the larger context of previous legal debate regarding provisions protecting “sex,” courts have instead interpreted its scope narrowly.

In general, to establish a prima facie case of Title VII discrimination, a party must show:

“(1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.”

Interpretations of Title VII that have been used by all claimants bringing cases under sex include sexual harassment constituting a hostile work environment and sex stereotyping. In order for sexual harassment to create a hostile work environment, it must be “so severe or pervasive to create a hostile or abusive work environment.” To succeed under a sex stereotyping claim, "one can fail to conform

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4 Zachary A. Kramer, *Heterosexuality and Title VII*, p 213


6 Zachary A. Kramer, *Heterosexuality and Title VII*, p 213

7 *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2005), 216

8 *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2005), 223
to gender stereotypes in one of two ways: (1) through behavior or (2) through appearance." 9

To bring a viable lawsuit under Title VII relating to gender “a plaintiff must prove discrimination ‘because of’ sex and not ‘because of’ some other characteristic that is not protected by Title VII.” 10 However, “under close examination, almost every claim with regard to sexual discrimination can be shown to be grounded in normative gender rules and roles.” 11 Therefore, depending on how courts choose to interpret the law, claims can be included and excluded almost arbitrarily.

Because of the ability to interpret sex discrimination cases broadly under Title VII, protections have been slow to develop for cases that do not fall squarely within biological sex standards. This practice has resulted in a “paradox of privilege” whereby “heterosexuals and homosexuals are not similarly situated under Title VII,” 12 because “‘heterosexual employees . . . do not risk losing their discrimination claims because of their sexual orientation.” 13 In other words, “an employee’s sexual orientation can swallow up an otherwise actionable claim of sex discrimination.” 14

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9 Dawson v. Bumble & Bumble, 398 F.3d 211 (2005), 221

10 Zachary A. Kramer, Heterosexuality and Title VII, p 212

11 Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, p 2

12 Zachary A. Kramer, Heterosexuality and Title VII, p 209

13 Zachary A. Kramer, Heterosexuality and Title VII, p 230

14 Zachary A. Kramer, Heterosexuality and Title VII, p 207
II. The Changing Court Interpretation of Title VII

There are essentially four different ways the courts could interpret the “sex” protection of Title VII: biological sex, core gender identity, gender role identity, and sexual behavior. The narrow definition of sex that courts originally accepted is biological sex:

"Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females . . . Here the claim is not that Smith was discriminated against because he was a male, but because he was a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate'."16

Cited affirmatively one year later, another federal court declared that Title VII “intended to put women on equal footing with men.”17 Such language was common in regards to sex stereotyping claims raised by LGBT individuals, and still does occur. Mary Anne Case suggests this is due to courts’ discomfort with sexual acts related to coupling among those individuals: “Both gay sex and gay marriage most sharply throw into relief the similarities and differences between couples of

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15 Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, p 7

16 Smith v Liberty Mutual Insurance Co, p 327

17 DeSantis v Pacific Telephone Co., Inc., 608 F.2d 327, 329
the same and of different sexes; they force heterosexuals to give some consideration to their own way of doing things.”

<MERITOR SAVINGS BANK – SCT ALLOWED HOSTILE WORK ENVIRONMENT CLAIM (heterosexual woman):

- Meritor Savings Bank v Vinson: “but for the fact of her sex, [the plaintiff] would not have been the object of harassment because Title VII does not apply to cases in which the conduct complained of is equally offensive to male and female workers . . . the victim of harassment must have been selected by the harasser because of her biological sex, and the conduct complained of must have been harmful only to a member of one biological sex.”
- “To limit the “because of one’s sex” element of a prima facie sex discrimination/harassment case to conduct of this kind is, of course, to conceive of sex biologically – to carve up the population into two different kinds of people, only one of which can be affected by the conduct in question.” –Franke, p 92 >

However, the court’s stance was successfully challenged in *Price Waterhouse v. Hopkins* when a female was refused promotion to partner for which she was qualified on the basis of masculine traits. Evaluators commented on Hopkins as “macho” and suggested she “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.” In their landmark holding the court declared:

“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched

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18 Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 1663

19 *Price Waterhouse v. Hopkins*, 490 U.S. 228

20 *Price Waterhouse v. Hopkins*, 490 U.S. 228, PAGE
the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

Following this decision, courts were forced to reevaluate their previous positions dismissing claims by LGBT individuals resulting from sex stereotyping — what does striking at the entire spectrum really mean? This glimmer of hope has remained such in many cases, however. Perhaps because “This notion, that employers, courts, or anyone for that matter, can, or should, distinguish in an principled manner between impermissible cultural stereotypes and commonly accepted social norms underlies much of our modern equality jurisprudence.”

In *Dawson v Bumble & Bumble*, the court did not allow a Title VII claim of discrimination to continue because the statements made by her coworkers, including that she was “wearing her sexuality like a costume,” were not based on gender nonconformity. However, another court determined that a gay male could not be forced to comply with gender norms because the plaintiff has been subjected to both sexually degrading statements and devising work assignments to “toughen [him] up.”

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21 *Price Waterhouse v. Hopkins*, 490 U.S. 228, PAGE

22 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, p 78

23 *Dawson v Bumble & Bumble*, 398 F.3d 211, 221-22

Facts underlying decisions by differing courts display noticeably the problem with the court's conservative definition of "sex" – that is, the distinctions between what is and is not protected under the term is not readily distinguishable. "Caught between the determinism of biological fact and the legitimate enforcement of commonly accepted social norms about masculinity and femininity, the law allows very little room to embrace a sexual identity that departs from these social norms."  

Another court found that sexual orientation does not provide or prevent a claim under Title VII, and allowed continuation of the lawsuit. Another court found that sexual orientation does not provide or prevent a claim under Title VII, and allowed continuation of the lawsuit.  

Transgendered individuals seem to benefit most from the *Price Waterhouse* decision. <Cases following *Price Waterhouse*: Smith v City of Salem, "sex stereotyping based on a person's non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior" p 575; > Additionally, courts have found that providing an adequate response to complaints of sexual harassment based on a sex stereotype under Title VII cannot put the "remedial burden" on the victim.  When an employer was notified that an employee was frequently subject to verbal harassment by coworkers took no action

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26 *Rene v MGM Grand*, PAGE

27 *Nichols v Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 876
to stop the conduct or discipline coworkers and instead required the employee to report future occurrences, the remedy was insufficient.28

While sexual orientation employment discrimination jurisprudence has developed (slowly) to provide additional protection, it is difficult to predict whether a court will uphold the protection. It is still largely true that:

“[t]he only people who can be harassed or discriminated against because of their sex are those people whose biological sex, core gender identity, and gender role identity meet the expectations of our contemporary gender schema – that is, the social criteria for real women and real men. When people who violate or confound these traditional expectations suffer adverse treatment, their claims, although unfortunate, are not actionable under sex discrimination statutes.”29

III. How Big is the Issue?

How big is the problem of this legally enforceable discrimination? In a report done by The Williams Institute at the University of California in 2011, one scholar suggests that approximately 9 million American adults identify as gay, lesbian, or bisexual – approximately 3.5% of the population – and that approximately 0.3% of

28 Nichols v Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 876

29 Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, p 94
American adults identify as transgender. In the same report, results from surveys showed a range of 1.2% - 5.6% of the American population identifying as gay, lesbian, or bisexual. As evidenced, consistent statistics are unavailable due to varying definitions, methods, and questioning.

The reported approximately 3.5% of the population is significantly lower than estimated by Americans who were asked, “Just your best guess, what percent of Americans today would you say are gay or lesbian?” On average, a random sample of 1,018 adults suggests approximately 25% of the adult American population is gay or lesbian.

While in reality those number suggest that it is illegal to discriminate against 3.5% of the population, based on American perception it would be legal for employers to discriminate against up to 25% of the United States population. But how much of the LGBT community is in the American workforce? In other words, if sexual orientation and gender identity laws are passed, will the courts be flooded with additional legislation? Or, are protective laws even necessary?

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30 Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?* Pg 1

31 Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?* Pg 2


Dissatisfied with information provided in response to this question and the debate around creating protective laws, a California researcher attempted to answer this question in 2001.34 Interestingly, previous studies failed to account for the number of gays in the workforce and instead offered only raw data regarding the number of sexual orientation claims brought in states with protective laws – at the time, only 3% of claims brought in 12 states.35 However, when adjusting for the number of gay employees in the workforce, “the utilization of gay rights laws, per gay worker, is roughly equivalent to, if not slightly higher than, the utilization of sex discrimination laws by female workers.”36

In summation, while the LGBT presence in the United States is relatively small, their employment discrimination difficulties are comparable to difficulties experienced by protected classes.

IV. Past Attempted at Legislation and Alternatives

A. Federal Legislation. Initial legislation to protect individuals based on sexual orientation was first introduced unsuccessfully to Congress in 1974, and has been reintroduced periodically since.37 In 1994 the Employment Non-Discrimination Act (ENDA) to disallow sexual orientation discrimination by employers and provide


36 William B. Rubenstein, Do Gay Rights Laws Matter?: An Empirical Assessment, 75 S. Cal. L. Rev. 65 at 68

37 Lamba Legal, Out at Work, p 7
exception for religious organizations was first introduced. Despite being reintroduced in 1996 and 1997, ENDA has failed to succeed on the basis of arguments relating to a flood or drought of litigation. Specifically, that laws created will be either unnecessary or overly utilized.

There are valid arguments as to why federal legislation may not be desired. Sexual discrimination claims must go through the Equal Employment Opportunity Commission (EEOC). The EEOC has up to six months to investigate a claim, and lawsuit cannot be established until either the six months have elapsed or a notice of right to sue has been issued. This investigative process adds significant delay to the claims process, and can make witnesses difficult to contact. Additionally, claims related to sex under federal law at present can only be maintained against companies with 15 or more employees.

<conclusion>

B. State and Municipal Laws Some states and municipalities have addressed sexual orientation discrimination on their own, although in varying degrees. To date, sixteen states and the District of Columbia have passed laws protecting both sexual orientation and gender identity, while an additional five states’ employment


discrimination laws protect sexual orientation. Regardless, “49% of LGBT population live in states that do not protect employment discrimination based on sexual orientation and gender identity.”

<Explain how state’s protective laws work, particularly the difference between laws protecting both sexual orientation and gender identity v sexual orientation>

C. Alternative Viewpoints. Legal scholars seem to arrive at the same conclusion in a variety of ways: leave sexual orientation out of the legal analysis. That is, evaluate cases without regard to an individual’s preference, whatever it may be.

i. Recognition and Neutralization. One scholar suggests that there are two steps to Title VII sex analysis in all cases: first, identify the employee’s sexual orientation, and then neutralize it. Essentially, because hiding sexuality during a lawsuit regarding sexual discrimination can be difficult, especially when at issue it


42 States protecting both sexual orientation and gender identity include: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. States protecting people based on sexual orientation include: Delaware, Maryland, New Hampshire, New York, and Wisconsin.


44 Zachary A. Kramer, Heterosexuality and Title VII, p 234-36
should not be hidden from the court.\textsuperscript{45} But sexuality should also not influence the court’s analysis.\textsuperscript{46} This is critical because courts rarely recognize, in any form, heterosexuality.\textsuperscript{47}

Because courts do not acknowledge heterosexuality, they fail to see the intersectionality of all sexual harassment claims: when sexual harassment occurs, it is because the harasser is sexually attracted to the other party \textit{because of her gender and her sexuality}.\textsuperscript{48} Put in this way, sex discrimination claims are \textit{all} due the same analysis, regardless of the sexual orientation of the individual making the claim.

However, other scholars have emphasized the court’s discomfort with homosexuals as key to their determinations in all sexual orientation matters. Theoretically this is because homosexuals as a group are defined by the type of sexual activity they participate in (or are inclined to), and therefore are defined by their relationship to one another.\textsuperscript{49}

Another concern raised by this approach relates to privacy issues: by relating a litigant’s sexual orientation to the lawsuit, the court may effectively “give

\textsuperscript{45} Zachary A. Kramer, \textit{Heterosexuality and Title VII}, p 234-36

\textsuperscript{46} Zachary A. Kramer, \textit{Heterosexuality and Title VII}, p 234-36

\textsuperscript{47} Zachary A. Kramer, \textit{Heterosexuality and Title VII}, p 208

\textsuperscript{48} Zachary A. Kramer, \textit{Heterosexuality and Title VII}, p 224, emphasis supplied

\textsuperscript{49} Mary Anne Case, \textit{Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights}, see p 1643-44
employers in the future any excuse to pry into the sexual practices of applicants and employees.”

Still, in a legal system where “the most reliable predictor of failure for a gay litigant in a public employment case has in the past been that, to his employer’s knowledge, he views himself as having a spouse of the same sex,” a strategy that suggests initial identification of sexual orientation seems excessively risky.

Feminist Katherine Franke suggests that the base assumption of gender differences should be removed from jurisprudence altogether. Specifically, not only does she argue that the law should leave sexual orientation out of its analysis, but that the fundamental belief of sexual differences should not be recognized: “. . . the wrong of sex discrimination is premised upon a right of sexual differentiation, that is, a fundamental belief in the truth of biological sexual difference.”

Franke discusses the court’s differing duties: one to “describe” and one to “pronounce.” When describing, the court’s goal is “that the judge’s words fit the

50 Mary Anne Case, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights, p 1689
51 Mary Anne Case, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights, p 1670
52 Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, p 5
53 Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, p 51
world, whereas with the second case the world is changed to fit the judge’s words.”

Because of this, the court has relied too heavily on biology as a basis for law pertaining to sex, and not enough on the “fundamental right to determine gender independent of biology.” Therefore, recognizing sex differences on any level is inappropriate for the courts because restricting sexual meanings causes the court to discriminate.

V. Conclusion

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54 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, p 51


56 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, p 8
### Appendix 1

*Just your best guess, what percent of Americans today would you say are gay or lesbian?*

All numbers are in percentages

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*Asked of a half sample with wording, with separate questions:
Just your best guess, what percent of men in the United States today would you say are homosexual or gay?
Just your best guess, what percent of women in the United States today would you say are homosexual or lesbian?

GALLUP

**Source:**
Appendix 2

Employment non-discrimination law covers sexual orientation and gender identity (16 states + D.C.)

- Employment non-discrimination law covers only sexual orientation, but federal law prohibits discrimination against transgender and gender non-conforming people (see note) (5 states)

- No employment non-discrimination law covering sexual orientation or gender identity, but federal law prohibits discrimination against transgender and gender non-conforming people (see note) (29 states)

Source: