

**TITLE VII AND THE ETIOLOGIES OF HOMOSEXUAL  
ATTRACTION: HOW THE DISTINCTION BETWEEN SEX  
AND SEXUAL ORIENTATION DISCRIMINATION VANISHED**

*Michael V. Caracappa\**

I. INTRODUCTION .....	338
II. HISTORIC INTERPRETATIONS AND APPLICATIONS OF THE TERM “SEX” .....	339
A. <i>Passage of the Civil Rights Act and the Birth of the Narrow Interpretation of “Sex”</i> .....	339
B. <i>An Implicit Rebuke: Price Waterhouse Embraces the Theory of “Sex Stereotypes”</i> .....	343
C. <i>Modern Conceptual Issues: A Line So Difficult to Draw Because It No Longer Exists</i> .....	347
III. THE PERCEIVED SCOPE OF “SEX” AND THE ETIOLOGY OF SEXUAL ORIENTATION .....	354
A. <i>The Evolution in Psychology</i> .....	354
B. <i>Nature vs. Nurture: Where Does the Science Stand?</i> .....	359
IV. THE THREE OBSTACLES TO INCLUSION .....	367
A. <i>The Legislative History: The Inclusion of “Sex” Was More Than A Joke</i> .....	367
B. <i>Congressional Intent—The 88th Congress Originally Intended Broad Classes</i> .....	369
C. <i>Stare Decisis: A Decision to Stand By?</i> .....	371
V. CONCLUSION .....	374

---

\* J.D. Candidate, Seton Hall University School of Law, 2018; B.A. in Jurisprudence and Political Science, Montclair State University, 2015. I would like to thank my advisor, Dean Charles Sullivan, for his guidance, patience, and support throughout this process and for being my advocate beyond it. Thank you, also, to the editors and members of the *Seton Hall Legislative Journal* for their assistance in the editing process. And thank you to my family and friends for all your support, love, and encouragement—I could not have made through law school without it.

## I. INTRODUCTION

Today, twenty-eight states offer no employment protections against discrimination based on sexual orientation, three of which also have laws barring the enactment or enforcement of local non-discrimination laws.<sup>1</sup> This means fifty percent of lesbian, gay, bisexual, and transgender (“LGBT”) Americans live in states where they can be fired simply because of whom they love or how they express themselves.<sup>2</sup> The Civil Rights Act of 1964 shields employees from discrimination based on race, religion, national origin, and “sex.”<sup>3</sup> A lay person would assume the Civil Rights Act’s protections would extend to LGBT Americans, but the term “sex” has been construed narrowly by federal circuit courts to exclude LGBT Americans.

In Section I, this Note will begin by discussing the history and past applications of the Civil Rights Act’s term “sex” to demonstrate both the growing impracticality and speciousness of maintaining the exclusion of claims based on sexual orientation. Section II will flesh out the historic assumptions regarding the etiology of homosexual attraction, underlying the initial exclusion of claims based on sexual orientation and will show how the shift in society’s understanding of sexual orientation has brought about the realization that “sex” includes sexual orientation. Particularly, Subsection A will show how, in 1964, homosexuals and “transsexuals” were perceived as being mentally ill—a perception that has largely eroded in the United States. Subsection B will show how cutting-edge science is further revealing how sexuality is, at least to some degree, biologically determined and inextricably linked to one’s gender. Finally, Section III will demonstrate why the legislative history (Subsection A), congressional failure to amend the Civil Rights Act (Subsection B), and *stare decisis* (Subsection C) should serve as no impediment in abandoning the narrow interpretation of “sex.”

---

<sup>1</sup> *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.Lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.Lgbtmap.org/equality-maps/non_discrimination_laws) (last visited May 10, 2018). This number did not change even following the Seventh Circuit’s landmark decision in *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) and the Second Circuit’s decision in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), because the six states in the Seventh and Second Circuits already had protections against sexual orientation discrimination. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 115-90) (“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[.]”).

## II. HISTORIC INTERPRETATIONS AND APPLICATIONS OF THE TERM “SEX”

A. *Passage of the Civil Rights Act and the Birth of the Narrow Interpretation of “Sex”*

The Civil Rights Act of 1964 (“the Act”) is one of the most significant milestones in employment protections.<sup>4</sup> Title VII made it an “unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>5</sup> To enforce the Act’s prohibitions on discrimination, Congress established the Equal Opportunity Employment Commission (“EEOC”) and empowered the courts to grant injunctive relief, back-pay, compensatory and punitive damages, and to order any affirmative action that may be deemed appropriate.<sup>6</sup>

But since the Act’s passage, courts have adopted a narrow construction of the term “sex.”<sup>7</sup> The sparse legislative history initially suggested to most courts that the prohibition on “sex” discrimination was added to the Act as a last-minute attempt to thwart the Act’s passage.<sup>8</sup> This led courts to conclude, as most maintain today, that “Congress had a narrow view of sex in mind when it passed the Civil Rights Act.”<sup>9</sup> This

---

<sup>4</sup> Cf. Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. OF WOMEN & L. 137, 161 (1997); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U.L. REV. 995, 1006 (2015).

<sup>5</sup> § 2000e-2.

<sup>6</sup> 42 U.S.C.A. § 2000e-5(a), (g). See Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. OF WOMEN & L. 31, 36 (2015).

<sup>7</sup> Rachel Ostermant, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 426 (2009) (discussing how courts adopted a narrow interpretation of “sex” in Title VII due to the legislative history which, to many, suggested “sex” was put into the Civil Rights Act in an effort to defeat the Act’s passage entirely); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1086 (7th Cir. 1984) (“Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.”).

<sup>8</sup> John Davidson Miller III, *Same-Sex Sexual Harassment Is Actionable Under Title VII of the Civil Rights Act of 1964: Is This the End of Horseplay as We Know it?*, 29 SETON HALL L. REV. 787, 790 (1998) (“There has been unanimously narrow interpretation of the term “sex” and what constitutes sexual discrimination for Title VII purposes.”). See Jennifer L. Nevins, *Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism*, 24 N.Y.U. REV. L. & SOC. CHANGE 383, 413 (1998); *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 700 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017).

<sup>9</sup> Compare *Ulane*, 742 F.2d at 1085 (“Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or

rendition of how “sex” came to be included as a class in the Act was aptly summarized by the District Court for the Western District of Pennsylvania in 1973: “The suave and subtle Southerners in Congress who put sex into the Civil Rights Act of 1964 [were] doubtless with the hope of defeating the bill, but the strategy backfired and a giant step towards ‘women’s lib’ was perhaps unintentionally taken[.]”<sup>10</sup>

The narrow interpretation of “sex” allowed various forms of workplace discrimination to survive the Act’s passage.<sup>11</sup> For example, an employer could lawfully maintain a policy of hiring only single women weighing less than 135 pounds, between the ages of twenty and twenty-six, whom the employer also considered “attractive.”<sup>12</sup> Courts even rejected sexual harassment claims if the victim and harasser were the same gender.<sup>13</sup>

These forms of discriminatory conduct, among others, have since

---

debate.’ This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute’s prohibition against race discrimination. The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment’s adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate.”) (citations omitted), *with Hively*, 830 F.3d at 700 (“We also considered the legislative history of Title VII, explaining that it was primarily meant to remedy racial discrimination, with sex discrimination thrown in at the final hour in an attempt to thwart adoption of the Civil Rights Act as a whole. Therefore, we concluded, ‘Congress had a narrow view of sex in mind when it passed the Civil Rights Act.’”) (quoting *Ulane*, 742 F.2d at 1086). *But see* Ostermant, *supra* note 7, at 434 (“A number of scholars have criticized the continued use of the stock story, arguing that the story is used to undermine the anti-discrimination command of the sex provision. However, . . . the stock story has not always been cited to that effect. In some cases courts explicitly relied on the stock story in order to constrict the application of the sex discrimination ban. In other cases, however, courts were barely troubled by the same supposed set of facts, showing a willingness to ensure equal employment opportunity.”).

<sup>10</sup> *Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 434, 434 (W.D. Pa. 1973).

<sup>11</sup> *See* Ostermant, *supra* note 7, at 426-27.

<sup>12</sup> *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 782-83 (E.D. La. 1967) (“The addition of ‘sex’ to the prohibition against discrimination based on race, religion or national origin just sort of found its way into the equal employment opportunities section of the Civil Rights Bill. . . . [T]he absence of legislative intent or the shortage of judicial precedent among the states is no real problem in this case. By reading the act it is plain that Congress did not ban discrimination in employment due to one’s marital status and that is the issue in this case. Delta has a right to employ single females and to refuse to employ married females[.]”).

<sup>13</sup> *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (“[W]hen the issue arises in the context of a ‘hostile environment’ sexual harassment claim, the state and federal courts have taken a bewildering variety of stances. Some, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims are never cognizable under Title VII.”). *See also* *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (“Simply stated, the defendant’s conduct [same-sex sexual harassment] was not the type of conduct Congress intended to sanction when it enacted Title VII.”).

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 341

been found by the Supreme Court to have been proscribed by the Act.<sup>14</sup> But, when it comes to LGBT Americans,<sup>15</sup> the narrow reading has stubbornly survived and continues to deny employment protections for discrimination based on sexual orientation or gender identity.<sup>16</sup> Courts maintained “sex discrimination” meant an unlawful action against women because they are women and against men because they are men.<sup>17</sup> The courts held a discrimination claim could only be predicated on the physical characteristics of biological sex at birth.<sup>18</sup> The classic example

---

<sup>14</sup> *Gerdom v. Continental Airlines*, 692 F.2d 602, 607 (9th Cir. 1982) (“Because no men had the same duties as the stewardesses, the women could not complain that the no-marriage rule applied solely to them. The Supreme Court’s decision in *County of Washington v. Gunther* rejects that narrow reasoning.”) (citation omitted); *Oncale*, 523 U.S. at 79 (“We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims . . . male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”). *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (reversing summary judgement against an employee who brought a sex discrimination claim against an employer who refused to consider applications by women with school-aged children).

<sup>15</sup> “LGBT” stands for lesbian, gay, bisexual, and transgender. This Note also uses the abbreviation “LGB,” which stands for lesbian, gay, and bisexual.

<sup>16</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 701 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017) (“Our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter.”). *See Ostermant*, *supra* note 7, at 428-29 (“*Grossman v. Bernards Township Board of Education* was typical among these cases in that it concluded that ‘absent [sic] of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.’ Therefore, the court held that transsexuals were not covered under the sex provision.”). *But see Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1011-14, (D. Nev. 2016) (noting that the Seventh Circuit had decided to rehear *Hively*, and *Ulane*, the case on which *Hively* heavily relied, was decided before *Price Waterhouse*) (noting the Ninth Circuit held a transgender person could assert a Title VII claim of sex discrimination based on their gender identity).

<sup>17</sup> *Hively*, 830 F.3d at 700 (quoting *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984)); Darrell R. VanDeusen & Alexander P. Berg, *VanDeusen and Berg on The Developing Law of LGBT Protections Under Title VII*, 2016 Emerging Issues 7459, \*12-13 (“In other words, ‘the phrase in Title VII prohibiting discrimination based on ‘sex’ means that it is unlawful to discriminate against women because they are women and against men because they are men.’ These courts also highlighted that ‘[n]o mention is made of change of sex or of sexual preference’ in the text of Title VII. Furthermore, given the sparse legislative history concerning sex discrimination, courts at the time concluded that ‘[s]ituations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void [courts are] not permitted to fashion [their] own judicial interdictions.’ Thus, as the Seventh Circuit explained in, ‘if the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”). *But see Roberts*, 215 F. Supp. 3d at 1011-14 (questioning whether or not gender identity (i.e., not necessarily gender at birth) is encompassed in the Title VII).

<sup>18</sup> *Velma Cheri Gay, 50 Years Later. . . Still Interpreting the Meaning of ‘Because of Sex’*

is *Ulane v. Eastern Airlines*, where the Seventh Circuit, agreeing with holdings in the Eighth and Ninth Circuits, held “sex” did not include a “diagnosed transsexual.”<sup>19</sup> The court left it to Congress to adopt a broader, “untraditional” definition of “sex.”<sup>20</sup>

From a modern perspective, the Seventh Circuit seemed to go beyond the issue before it (i.e., whether “transsexuals” were entitled to protections under the Act), and also held “sexual orientation” was also not encompassed in the term “sex.”<sup>21</sup> Arguably, this pivotal holding—the nexus of the Seventh Circuit’s recently-abandoned exclusion of sexual orientation from Title VII—was merely dicta with respect to sexual orientation. But, as this Note will explain, courts and Americans at large did not distinguish between sexual orientation and gender identity at the time *Ulane* was decided—both were perceived to be related pathologies.<sup>22</sup> While some courts have recently questioned whether gender identity is excluded from Title VII in light of *Price Waterhouse* (discussed immediately below),<sup>23</sup> the exclusion of gay, lesbian, and bisexual individuals universally endured until recently and remains the majority position.<sup>24</sup>

---

*Within Title VII and Whether it Prohibits Sexual Orientation Discrimination*, 73 A.F. L. REV. 61, 73-74 (2015) (“Initially, the courts defined ‘sex’ as merely biological sex and interpreted the provision to only prohibit discrimination against biological men and women for being a man or being a woman . . . . [A]n employee proving he or she was discriminated against because of his or her sexual orientation remains a difficult challenge.”).

<sup>19</sup> *Ulane*, 742 F.2d at 1085-87.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1085 (“While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.”).

<sup>22</sup> See *infra* Sections II.A., II.B.

<sup>23</sup> See *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 884 (11th Cir. 2016) (per curiam); *but see Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674-75 (W.D. Pa. 2015). The conflict between these cases lay in whether the court finds discrimination based on someone’s transgender status necessarily is “sex” discrimination. See *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005). This Note focuses primarily on sexual orientation discrimination—not gender identity discrimination—because, while parts of this note have broader applicability, there are substantive conceptual, legal, and historical differences between the treatment of transgender Americans and sexual orientation minorities.

<sup>24</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 701 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017) (“Our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter.”) (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996); *U.S. Dep’t of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th

*B. An Implicit Rebuke: Price Waterhouse Embraces the Theory of “Sex Stereotypes”*

Since *Ulane*, the Supreme Court has clarified the meaning and scope of the term “sex” in the case of *Price Waterhouse v. Hopkins*.<sup>25</sup> In *Price Waterhouse*, Ann Hopkins—who by all accounts was an “extremely competent” professional with a “deft touch”—was denied a partnership in the accounting firm and told that, to improve her chances of becoming a partner, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>26</sup> Virtually all of the negative remarks about Hopkins’ performance related to her interpersonal skills, specifically her brusqueness.<sup>27</sup> Hopkins brought a Title VII sex discrimination claim against Price Waterhouse and introduced evidence from a social psychologist that the partnership selection process was likely influenced by stereotypes based on gender.<sup>28</sup> Judge Gehard A. Gesell, of the U.S. District Court for the District of Columbia, found that “some of the partners’ remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women;” thus, Price Waterhouse unlawfully discriminated against Hopkins on the basis of sex.<sup>29</sup> Decided in 1989, the Supreme Court agreed with Judge Gesell, and held that the term “sex” encompassed discrimination based on preconceived notions of how women and men ought to act.<sup>30</sup>

Cases like Ann Hopkins’ are known as “mixed motive” cases.<sup>31</sup> In this type of case, the employer is partly motivated by a lawful consideration and partly motivated by an unlawful consideration.<sup>32</sup> Using *Price Waterhouse* as the example, it is perfectly lawful to deny a promotion to someone because of her brusqueness, but it is unlawful to

---

Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)). See *Hively*, 853 F.3d at 346. *But see*, *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 842 (W.D. Pa. 2016) (holding discrimination based on sexual orientation is a subset of sexual stereotyping and thus covered by Title VII).

<sup>25</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (“In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

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.”).

<sup>26</sup> *Id.* at 231-34.

<sup>27</sup> *Id.* at 234-35.

<sup>28</sup> *Id.* at 235.

<sup>29</sup> *Id.* at 236-37.

<sup>30</sup> *Id.* at 250-51.

<sup>31</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

<sup>32</sup> *Id.* at 94-95.

deny only women promotions because they act brusquely. The Court found Hopkins' brusqueness would not have been an issue if she was a man and the disparate treatment she suffered stemmed from her employer's preconceived notions of how women ought to behave; therefore, Hopkins' sex was a "motivating factor" in her employer's decision to pass her over for a promotion and, thus, unlawful under Title VII.<sup>33</sup>

*Price Waterhouse*, among other cases, is a rebuke of the narrow interpretation of "sex" by the Supreme Court; yet the lower courts have remained obdurate in abandoning the narrow interpretation and its reasoning, if only to exclude LGB Americans from garnering federal employment protections.<sup>34</sup> The narrow interpretation lives on for the same three reasons it was created: (1) the legislative history surrounding the inclusion of the term "sex"; (2) repeated failed attempts of Congress to amend Title VII and broaden "sex" to include discrimination based on "affectional or sexual orientation"; and (3) that, in absence of any congressional indication to the contrary, the court should adhere to the "traditional" definition of "sex" (i.e., *stare decisis*).<sup>35</sup>

In *Price Waterhouse*, the Court opined that the prohibition on sex

---

<sup>33</sup> *Price Waterhouse*, 490 U.S. at 237, 250-51.

<sup>34</sup> *Compare id.*, and *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."), *with Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 703 (7th Cir. 2016), *rev'd*, 853 F.3d 339 (7th Cir. 2017) ("[The EEOC] concluded that 'sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.' . . . Whatever deference we might owe to the EEOC's adjudications, we conclude for the reasons that follow, that Title VII, as it stands, does not reach discrimination based on sexual orientation." (citations omitted)).

<sup>35</sup> *Compare Hively*, 830 F.3d at 700-02 ("[Title VII] was primarily meant to remedy racial discrimination, with sex discrimination thrown in at the final hour in an attempt to thwart adoption of the Civil Rights Act as a whole. Therefore, we concluded, 'Congress had a narrow view of sex in mind when it passed the Civil Rights Act.' . . . We are presumptively bound by our own precedent in *Hamner*, *Spearman*, *Muhammad*, *Hamm*, *Schroeder*, and *Ulane* . . . Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."), *with De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 332-33 (9th Cir. 1979) ("Recently the Fifth Circuit similarly read the legislative history of Title VII and concluded that Title VII thus does not protect against discrimination because of effeminacy. We agree and hold that discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII . . . Congress did not and has consistently refused to include homosexuals as a group within the special protection of Title VII." (citation omitted)).

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 345

discrimination was intended to make gender irrelevant in employment decisions.<sup>36</sup> By implicitly adopting a broader reading of the term “sex,” the Court explained that it took the congressional statements in the context of race as general statements on the meaning of Title VII.<sup>37</sup> This reading is incompatible with rulings that cite the legislative history of the term “sex” as suggesting Congress intended only a narrow interpretation.<sup>38</sup> “Sex” had been added to the Act a day before its passage in the House of Representatives seemingly in an attempt to sabotage the bill.<sup>39</sup> But the Supreme Court was not persuaded by arguments that this “somewhat bizarre path” by which “sex” came to be included in the Act precluded the Court from considering congressional statements about race in cases of sex discrimination.<sup>40</sup> The Court considered congressional statements about the statute’s intent to eliminate even subtle discrimination based on race and applied it to sex discrimination.<sup>41</sup> In *Price Waterhouse*, the Court vastly expanded protections against sex discrimination by holding claims of discrimination based on nonconformity with gender stereotypes was cognizable under Title VII, tacitly endorsing a broad reading of the term “sex.”<sup>42</sup>

Further suggesting “sex” should be interpreted broadly, the Supreme Court again read the term broadly in *Oncale v. Sundowner Offshore Servs.* when the Court addressed whether sex discrimination under the Act included same-sex harassment.<sup>43</sup> Joseph Oncale brought a sexual harassment claim based on sexual assaults and threats of rape made by two other male employees.<sup>44</sup> The district court granted summary judgement for the respondent-employer finding a male could not assert a

---

<sup>36</sup> *Price Waterhouse*, 490 U.S. at 239-40 (“We take these words to mean that gender must be irrelevant to employment decisions.”).

<sup>37</sup> *Id.* at 244 n.9.

<sup>38</sup> *Hively*, 830 F.3d at 700 (“We also considered the legislative history of Title VII, explaining that it was primarily meant to remedy racial discrimination, with sex discrimination thrown in at the final hour in an attempt to thwart adoption of the Civil Rights Act as a whole. Therefore, we concluded, ‘Congress had a narrow view of sex in mind when it passed the Civil Rights Act.’”) (quoting *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1086 (7th Cir. 1984)).

<sup>39</sup> *Id.*

<sup>40</sup> *Price Waterhouse*, 490 U.S. at 239-40, 244 n.9 (“We take these words to mean that gender must be irrelevant to employment decisions.”).

<sup>41</sup> *Id.* at 243, 244 n.9.

<sup>42</sup> Zachary R. Herz, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 403 (2016).

<sup>43</sup> *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 76, 79 (“This case presents the question whether workplace harassment can violate Title VII’s prohibition against ‘discrimination . . . because of . . . sex,’ 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex.”).

<sup>44</sup> *Id.* at 76-77.

claim of sexual harassment against another male under Title VII.<sup>45</sup> In overruling that interpretation, the Court stated that, while same-sex sexual harassment was clearly not the principal evil that concerned Congress when drafting the Civil Rights Act, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>46</sup>

Conceivably, the “sex stereotyping” theory should have opened the door to causes of action for employment discrimination based on gender non-conforming behavior, including non-conforming private romantic or sexual behavior.<sup>47</sup> This would have seen the inclusion of LGBT people within the Act’s protections but has not been the case.<sup>48</sup> While homosexual activity is, by definition, gender non-conforming behavior, courts feared that allowing homosexuals to bring sex stereotyping claims would “bootstrap protection for sexual orientation into Title VII[,]” effectively amending the Act.<sup>49</sup> This problematic distinction between “sex” and sexual orientation has led to significant issues in application, including divided approaches between the circuits, peculiar results, and court-sanctioned discrimination against LGB people (echoing long-abandoned conceptions of homosexuality and bisexuality as voluntary deviancy).<sup>50</sup>

---

<sup>45</sup> *Id.* at 77.

<sup>46</sup> *Id.* at 79.

<sup>47</sup> Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under Price Waterhouse*, 123 YALE L.J. 714, 720 (2013).

<sup>48</sup> *E.g.*, *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001).

<sup>49</sup> Ayres & Luedeman, *supra* note 47, at 721-22 (quoting *Simonton*, 232 F.3d at 38).

<sup>50</sup> *E.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (“[T]he line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1066-67 (7th Cir. 2003) (Posner, J., concurring) (“The case law as it has evolved holds, . . . that although Title VII does not protect homosexuals from discrimination on the basis of their sexual orientation, it protects heterosexuals who are victims of ‘sex stereotyping’ or ‘gender stereotyping.’ . . . The origin of this curious distinction, which would be very difficult to explain to a lay person (an indication, often and I think here, that the law is indeed awry), is the Supreme Court’s decision in [*Price Waterhouse*.] . . . If a court of appeals requires lawyers presenting oral argument to wear conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe that he is a homosexual, against whom it is free to discriminate? That seems to me a very strange extension of the *Hopkins* case.”). *See* Ayres & Luedeman, *supra* note 47, at 722-24 (“One approach is to treat gender stereotyping and sexual-orientation discrimination as mutually exclusive. . . . A second approach gives more serious consideration to so-called mixed-motive analysis.”). *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U.L. REV. 715, 766 (2014) (“Plaintiffs who ‘look gay’ succeed under Title VII while those merely known or thought to be gay do not.”). *See id.* at 784-85 (stating the current court holdings excluding sexual

*C. Modern Conceptual Issues: A Line So Difficult to Draw  
Because It No Longer Exists*

The Second, Third, and Seventh Circuit Courts of Appeals have all commented on the incoherence of trying to distinguish “sex” discrimination from discrimination based on sexual orientation.<sup>51</sup> Since *Price Waterhouse*, courts have inconsistently tried drawing lines between the two types of claims with limited success.<sup>52</sup> When looking broadly at the resulting applications, courts have taken at least two approaches in adjudicating claims of sex stereotyping when those claims involve sexual orientation.<sup>53</sup> And, as Brian Soucek showed in his analysis of 117 cases involving gender stereotyping, in trying to tease apart these “separate” claims, courts have implicitly endorsed a distinction between stereotypic homosexuals and those simply thought or believed to be homosexual—affording only the former category some protection under the Act albeit limited.<sup>54</sup>

Since *Price Waterhouse*, some LGB employees have been able to use the sex stereotyping theory to successfully assert a claim of sex discrimination under Title VII.<sup>55</sup> But courts have gone through great pains to try to separate sex stereotyping claims from those based on sexual orientation, a distinction this note argues is no longer cognizable due the fact most judges no longer view homosexual attraction as a literal

---

orientation perpetuates prejudice including (1) “disgust,” (2) the idea homosexuals are trying to gain special rights, and (3) that homosexuals are an “outgroup”).

<sup>51</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121 (2d Cir. 2018) (“Lower courts . . . have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination.”); *Prowel*, 579 F.3d at 291 (“[T]he line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017) (“Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.”).

<sup>52</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 705 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017) (“And so for the last quarter century since *Price Waterhouse*, courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination . . . and sexual orientation discrimination”).

<sup>53</sup> *Id.* at 704.

<sup>54</sup> Soucek, *supra* note 50, at 748 (“*Prowel* and *Vickers* both involved perceived homosexuality, but ‘perceived’ had different meanings in the two cases. *Prowel* looked gay, at least in the eyes of his coworkers and, it seems, the Third Circuit. *Vickers* was thought to be gay. The fact that *Prowel* won and *Vickers* lost is not unusual.”).

<sup>55</sup> *Hively*, 830 F.3d at 704 (“As a result of *Price Waterhouse*, a line of cases emerged in which courts began to recognize claims from gay, lesbian, bisexual, and transgender employees who framed their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity (which we also refer to, interchangeably, as sex stereotype discrimination) and not sexual orientation.”).

infirmity.<sup>56</sup> The first approach taken by some courts forgoes any attempt to discover whether the employer's discriminatory conduct was based on gender stereotypes or perceived sexual orientation.<sup>57</sup> If the employer's discriminatory behavior was in any way based on the perpetrator's perception of the plaintiff's sexual orientation, the plaintiff's claim fails.<sup>58</sup> This is because courts following this approach hold sex stereotyping claims and claims based on sexual orientation mutually exclusive.<sup>59</sup> These courts reasoned that, while the plaintiff may exhibit gender non-conforming behavior unrelated to his or her sexual orientation, the behavior was simply a means for the employer to draw conclusions about the plaintiff's sexuality and, thus, the true object of the employer's discrimination was the plaintiff's perceived sexual orientation—a form of discrimination that Title VII does not proscribe.<sup>60</sup>

Other courts take a different approach.<sup>61</sup> Instead of throwing out any case intimating sexual orientation, these courts endeavor to untangle the perpetrator's motive.<sup>62</sup> Even if the plaintiff is a homosexual, he or she may succeed so long as the employer's discrimination was motivated by gender non-conforming behavior unrelated to sexual proclivity.<sup>63</sup> Once an employee establishes a prima facie case for discrimination based on sex stereotypes, the onus is on the employer to raise the affirmative

---

<sup>56</sup> Ayres & Luedeman, *supra* note 47, at 722. See Soucek, *supra* note 50, at 766 (“The cases surveyed . . . suggest that rather than trying to separate the gender stereotyping wheat from the homosexual chaff, courts instead distinguish between two types of stereotypes: those violated visibly and those whose violations are cognitively perceived. Or, given the blurring of categories just endorsed, this distinction might be rephrased in terms of sexuality rather than stereotyping. Plaintiffs who ‘look gay’ succeed under Title VII while those merely known or thought to be gay do not. Courts resist this description.”).

<sup>57</sup> Ayres & Luedeman, *supra* note 47, at 722 (“But once some courts decide that a plaintiff's sexual orientation was in play, they often altogether refuse to allow the plaintiff to frame his or her complaints in terms of gender stereotyping.”). See Soucek, *supra* note 50, at 722.

<sup>58</sup> *Id.* See *Hively*, 830 F.3d at 706 (“For example, some courts attempting to differentiate between actions which constitute discrimination on the basis of sexual orientation and those which constitute discrimination on the basis of gender non-conformity essentially throw out the baby with the bathwater.”).

<sup>59</sup> See Soucek, *supra* note 50, at 722. See also *Hively*, 830 F.3d at 706.

<sup>60</sup> Ayres & Luedeman, *supra* note 47, at 722 (“The court could reach such a conclusion by inferring that the nonsexual traits were merely the means by which the employer made inferences about the plaintiff's sexuality, or that the nonsexual traits were eclipsed in salience by the plaintiff's sexuality.”). See Soucek, *supra* note 50, at 722.

<sup>61</sup> See Ayres & Luedeman, *supra* note 47, at 722-23.

<sup>62</sup> Ayres & Luedeman, *supra* note 47, at 723.

<sup>63</sup> Ayres & Luedeman, *supra* note 47, at 723 (“A second approach gives more serious consideration to so-called mixed-motive analysis. The court entertains the possibility that, although the plaintiff may have been known or assumed to be bi/homosexual, the employer still could have been responding, at least in substantial part, to the plaintiff's nonsexual gender-nonconformity.”).

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 349

defense that it would have taken the same action for some other, lawful reason—which, under the current prevailing conception of “sex,” includes the plaintiff’s sexual orientation as a lawful motive for discrimination.<sup>64</sup>

While not as objectionable, the second approach is far from laudable.<sup>65</sup> An employer’s affirmative defense could very well be “yes I fired John Doe because he’s effeminate (unlawful under Title VII’s sex stereotyping theory), but that’s okay because I would have fired him anyway because I thought he was a fag.”<sup>66</sup> And—as it stands—most federal courts would give effect to such a defense.<sup>67</sup> The narrow interpretation of “sex” has implicitly allowed courts to add discrimination against homosexuals as an affirmative defense to claims of discrimination. Plaintiffs in these cases would have the burden to prove the employer’s “legitimate non-discriminatory reason” for taking an adverse employment action against the plaintiff (i.e., that the employer was discriminating against the employee because of her sexuality) was pretextual and the true object of the employer’s discrimination was her other gender non-conforming behaviors.<sup>68</sup> Furthermore, employees will not succeed under the mixed motive approach, so long as the illicit motive is coextensive with the permissible one (although this defies the language of the Act).<sup>69</sup>

Surprisingly, in cases where sexuality is unknown or not raised, the prevailing interpretation of the Act tends to sustain claims by plaintiffs who conform to overtly stereotypical homosexual behaviors (e.g., feminine mannerisms in a man or an “Ellen DeGeneres kind of look” in

---

<sup>64</sup> Ayres & Luedeman, *supra* note 47, at 723.

<sup>65</sup> This Author, of course, is assuming that everyone, from right to left—though they may disagree on matters of marriage and faith—support the ideal that everyone should be free from on-the-job harassment.

<sup>66</sup> Ayres & Luedeman, *supra* note 47, at 723-24.

<sup>67</sup> Ayres & Luedeman, *supra* note 47, at 723-24.

<sup>68</sup> *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (requiring a fair opportunity for the plaintiff to show that an employer’s stated reason was in fact pretext for unlawful discrimination).

<sup>69</sup> Ayres & Luedeman, *supra* note 47, at 724. *Compare, e.g., Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“A mixed motive approach is important here, precisely because of the difficulty in differentiating behavior that is prohibited (discrimination on the basis of sex) from behavior that is not prohibited (discrimination on the basis of sexual orientation) . . . . The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, ‘real men don’t date men.’”), with 42 U.S.C.A. § 2000e-2(m) (Westlaw through Pub. L. No. 115-90) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, *even though other factors also motivated the practice.*”) (emphasis added).

a woman).<sup>70</sup> Brian Soucek's survey distinguished between two types of sex stereotyping claims: (1) "visible stereotypes" and (2) "cognized stereotypes."<sup>71</sup> In cases involving the first type—visible stereotypes—the plaintiff exhibits gender nonconforming behavior other than sexual proclivity, but either sexual orientation is never at issue or the court is willing to try and untangle the primary motivation behind the discrimination.<sup>72</sup> The implications of these holdings are curious. For example, it would be (or is) unlawful for an employer to fire its homosexual employees only if they act flamboyantly, but perfectly lawful to simply fire all homosexual employees.<sup>73</sup>

In Soucek's second type of claim—those involving cognized stereotypes—homosexual employees fare much worse.<sup>74</sup> These are cases where the claimed harassment stemmed from someone's knowledge or belief about the plaintiff's sexual orientation.<sup>75</sup> Of the thirty-six cases Soucek analyzed from this species, only one plaintiff succeeded.<sup>76</sup>

Soucek concluded that distinguishing between sex stereotyping and sexual orientation is not only conceptually untenable but, in light of his data, also "descriptively inaccurate."<sup>77</sup> His research showed that courts are distinguishing between the ways in which gender stereotypes concerning sexual orientation are perceived, which is inconsistent with the application of Title VII in other contexts.<sup>78</sup> For example, courts would make no distinction between an employer's discriminatory conduct, whether motivated by his belief that a female employee had children ("cognized"), or motivated by his knowledge after seeing a picture of her children on her desk ("visible").<sup>79</sup> In either circumstance the female employee would be afforded no lesser protection.<sup>80</sup>

The flaw in the current conception of "sex" discrimination is not just in its inconsistent approaches between the circuits or difficulty in

---

<sup>70</sup> Soucek, *supra* note 50, at 749-50.

<sup>71</sup> Soucek, *supra* note 50, at 748, 755.

<sup>72</sup> Soucek, *supra* note 50, at 748-55.

<sup>73</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 709 (7th Cir. 2016), *rev'd*, 853 F.3d 339 (7th Cir. 2017) ("We recognize that doing so creates an uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior, and the more the plaintiff exhibits those behaviors and mannerisms at work, the more likely a court is to recognize a claim of gender non-conformity which will be cognizable under Title VII as sex discrimination.").

<sup>74</sup> Soucek, *supra* note 50, at 756.

<sup>75</sup> Soucek, *supra* note 50, at 755.

<sup>76</sup> Soucek, *supra* note 50, at 756.

<sup>77</sup> Soucek, *supra* note 50, at 718.

<sup>78</sup> Soucek, *supra* note 50, at 718.

<sup>79</sup> Soucek, *supra* note 50, at 718.

<sup>80</sup> Soucek, *supra* note 50, at 718.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 351

application, but also in the logical inconsistencies (exemplified above) in the application of Title VII. This becomes clear when one looks to other Title VII precedent regarding affectional or associational discrimination. Employer policies that discriminate based on marital status only violate Title VII if they treat women differently from men or the inverse.<sup>81</sup> For example, it would be lawful for an employer to have a blanket no marriage-policy, but would be unlawful to maintain a no-marriage policy only for female employees.<sup>82</sup> One would likely assume the affectional protections of Title VII would apply to LGB Americans too—but, for some reason (identified and discussed in Part II *infra*), they have not, despite the fact such employment decisions inherently consider gender.<sup>83</sup> To illustrate, it is unlawful for an employer to maintain a no-marriage policy only for its female employees, but it is lawful for an employer to terminate female employees for having wives despite the fact that the employer would not fire its male employees for having wives.<sup>84</sup> In a post-*Obergefell* era, we have yet to see if the traditional exclusion of “sexual orientation” from Title VII protections will survive.<sup>85</sup> But division has been growing among the district courts and—with the Seventh Circuit’s *en banc* decision in *Hively v. Ivy Tech Community College of Indiana* and the Second Circuit’s *en banc* decision in *Zarda v. Altitude Express, Inc.*—among the circuit courts.<sup>86</sup>

---

<sup>81</sup> *Sangster v. United Air Lines, Inc.*, 438 F. Supp. 1221, 1225-26 (N.D. Cal. 1977), *aff’d*, 633 F.2d 864 (9th Cir. 1980), *cert denied*, 451 US 971 (1981) (“It should be noted that a discrimination claim based on marital status relies on a showing of disparate treatment between the sexes. For example, an employer’s ban on hiring people who are married may not be unlawful, but a ban on hiring married women would be because the policy is premised on gender differences.”); *accord* *Coleman v. B-G Maint. Mgmt.*, 108 F.3d 1199, 1204 (10th Cir. 1997) (“Title VII prohibits employers from treating married women differently than married men, but it does not protect marital status alone.”).

<sup>82</sup> *Id.*

<sup>83</sup> Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208-09 (“As a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex.”).

<sup>84</sup> *Compare* *Foray v. Bell Atl.*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (holding homosexuals cannot legally marry, and therefore disparate employee-benefits policies is not an unlawful employment practice), *with* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015) (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

<sup>85</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) (“In the context of Title VII, the statutory prohibition extends to all discrimination ‘because of . . . sex’ and sexual orientation discrimination is an actionable subset of sex discrimination.”); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (holding sexual orientation discrimination is not ‘sex’ discrimination under Title VII). *See* *Obergefell*, 135 S. Ct. at 2608 (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

<sup>86</sup> *Compare* *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 620 (S.D.N.Y.

Similarly frustrated with the incongruent approaches, the EEOC has abandoned the distinction.<sup>87</sup> While addressing both the legislative history and failed attempts to legislatively cure the perceived deficiencies of the Act, the EEOC took the position that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>88</sup> Following the decision, the United States District Court for the Central District of California echoed the sentiment and adopted the holding stating: “[T]he line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”<sup>89</sup>

Since the EEOC’s decision, three circuit courts have addressed the issue.<sup>90</sup> In October 2016, the Seventh Circuit questioned whether the line between discrimination based on “sex” and sexual orientation existed, but maintained the exclusion of homosexuals from the protection of Title VII due to binding precedent.<sup>91</sup> In March 2017, the Eleventh Circuit also rested on precedent, but a dissenting judge sided with the EEOC, finding discrimination based on sexual orientation necessarily is “sex”

---

2016) (“The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims. Yet the prevailing law in this Circuit — and, indeed, every Circuit to consider the question — is that such a line must be drawn.”), *and* *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807, 817 (E.D. Va. 2016) (“In sum, Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely persuasive power of the EEOC’s decision.”), *with* *Winstead v. Lafayette County Bd. of Cnty. Comm’r*, No. 1:16CV00054-MW-GRJ, 2016 U.S. Dist. LEXIS 80036, at \*26-27 (N.D. Fla. 2016) (“This view—that discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination—is persuasive to this Court, as it has been to numerous other courts and the EEOC.”). *Compare* *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351 (7th Cir. 2017) (“We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”), *Zarda*, 883 F.3d at 121, *and* *Evans*, 850 F.3d at 1261 (Rosenbaum, J., dissenting), *with* *Evans*, 850 F.3d at 1255 (explaining how binding precedent forecloses a Title VII action for sexual orientation discrimination).

<sup>87</sup> *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*8 (EEOC July 15, 2015) (“Indeed, many courts have gone to great lengths to distinguish adverse employment actions based on ‘sex’ from adverse employment actions based on ‘sexual orientation.’ The stated justification for such intricate parsing of language has been the bare conclusion that ‘Title VII does not prohibit . . . discrimination because of sexual orientation.’”).

<sup>88</sup> *Id.* at \*5.

<sup>89</sup> *Videckis v. Perpperdine Univ.*, No. CV 15-00298 DDP, 2015 U.S. Dist. LEXIS 169187, at \*16 (C.D. Cal. 2015).

<sup>90</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 703 (7th Cir. 2016); *Evans*, 850 F.3d at 1257; *Christiansen*, 852 F.3d at 200-01.

<sup>91</sup> *Hively*, 830 F.3d at 703 (“Whatever deference we might owe to the EEOC’s adjudications, we conclude for the reasons that follow, that Title VII, as it stands, does not reach discrimination based on sexual orientation.”).

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 353

discrimination under Title VII.<sup>92</sup> Later that same month, the Chief Judge of the Second Circuit, concurring in result and joined by another judge on the three-judge panel, similarly found sexual orientation discrimination necessarily established a claim for sex discrimination under Title VII.<sup>93</sup> In the meantime, the Seventh Circuit reheard *Hively en banc* and, in April 2017, became the first circuit court to hold discrimination based on sexual orientation is sex discrimination under Title VII.<sup>94</sup> In February 2018, the Second Circuit joined the Seventh and held sexual orientation discrimination was a subset of “sex” discrimination prohibited by Title VII.<sup>95</sup>

What is perhaps most telling about the EEOC’s pivotal decision is the agency’s citation to the American Psychiatric Association’s definition of sexual orientation.<sup>96</sup> Though likely intended to be merely illustrative that the definitions of “gay” and “lesbian” include gender, the need for clarifying the meaning of sexual orientation is understandable given the tremendous and rapid evolution of our understanding of the concept. This Note hypothesizes that the current exclusion of sexual orientation from Title VII protections is a vestige of eroded assumptions about the etiology homosexual attraction.<sup>97</sup> The proceeding section develops this point and

---

<sup>92</sup> *Evans*, 850 F.3d at 1257, 1261.

<sup>93</sup> *Christiansen*, 852 F.3d at 201-04.

<sup>94</sup> *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017).

<sup>95</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018).

<sup>96</sup> *See Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 15, 2015).

<sup>97</sup> Judge Posner suggested the same in his concurrence in *Hively*. *Hively*, 853 F.3d at 353 (“It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. I had graduated from law school two years before the law was enacted. Had I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered ‘only in the pages of *À la recherche du temps perdu*.’ Homosexuality was almost invisible in the 1960s. It became visible in the 1980s as a consequence of the AIDS epidemic; today it is regarded by a large swathe of the American population as normal. But what is certain is that the word ‘sex’ in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality. A diehard ‘originalist’ would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress’s amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning.”). Judge Posner goes farther than many would tolerate. *Id.* at 352-53 (“Finally and most controversially, interpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text. . . . And a common form of interpretation it is, despite its flouting ‘original meaning.’”). This note demonstrates how the meaning of “sex” has not changed, but the American understanding of sexuality has. In fact, the narrow reading of the class dishonors the 88th Congress’s original intention to create broad classes of protection and eliminate gender as an employment consideration. *See infra* Section III.B.

illustrates why maintaining the exclusion of sexual orientation serves only to preserve discrimination and perpetuate stale assumptions debunked by science and overturned by social progress. What it will show is that the definition of “sex” has not shifted—society’s understanding of sexuality has changed. In other words, the inclusion of sexual orientation discrimination in the ambit of “sex” discrimination is not a reinterpretation of the class, but a reexamination of the facts and circumstances to which Title VII’s proscription of “sex” discrimination is applied.

### III. THE PERCEIVED SCOPE OF “SEX” AND THE ETIOLOGY OF SEXUAL ORIENTATION

#### A. *The Evolution in Psychology*

The true impediment to the inclusion of sexual orientation discrimination within the meaning of “sex” discrimination is the anachronistic assumptions underlying the original exclusion from Title VII’s protections.<sup>98</sup> Specifically, it was the historic assumptions regarding the etiology of homosexual attraction (i.e., that such attraction was caused by demonic corruption or a psychiatric or medical condition)<sup>99</sup> that was responsible for its initial exclusion from Title VII’s protections. By continuing to exclude sexual orientation from the ambit of “sex” discrimination, courts are clinging to and perpetuating these assumptions, which have been displaced by considerable scientific and social advancement.<sup>100</sup> The distinction between discrimination based on sex stereotypes and discrimination based on sexual orientation is so difficult for judges to perceive, because judges today do not share the same worldview or assumptions common in 1964 when the Civil Rights Act was drafted.<sup>101</sup> Today, there is simply no logical distinction between

---

<sup>98</sup> See Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 568 (2015). Cf. Robert Epstein, *Do Gays Have a Choice?*, SCIENTIFIC AMERICAN MIND, June 2009, at 63 (“It is difficult for most people to think objectively about homosexuality, in large part because biases against it are literally of biblical proportions.”).

<sup>99</sup> Epstein *supra* note 98, at 63.

<sup>100</sup> See Soucek, *supra* note 50, at 784-85 (stating the current court holdings excluding sexual orientation perpetuates prejudice including (1) disgust, (2) the idea homosexuals are trying to gain special rights, and (3) that homosexuals are an “outgroup”).

<sup>101</sup> See *Videckis v. Perpperdine Univ.*, No. CV 15-00298 DDP, 2015 U.S. Dist. LEXIS 169187, at \*16 (C.D. Cal. 2015) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”); *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 706 (7th Cir. 2016) (“Whether the line is nonexistent or merely exceedingly difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents.”); Jeremiah Garretson & Elizabeth Suhay, *Scientific Communication about Biological Influences on Homosexuality*

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 355

discrimination based on “sex” and discrimination based on sexual orientation.<sup>102</sup>

For the majority of American and Western history, homosexual activity fell solely within the purview of religion.<sup>103</sup> Most religions deemed homosexuality morally corrupt—an idea that not only survived the religious skepticism of the Enlightenment, but evolved to find a new home in secular thought.<sup>104</sup> In 1886, Richard von Krafft-Ebing, a German psychiatrist, wrote the *Psychopathia Sexualis*, which theorized that some people might be born with homosexual inclinations and that these inclinations should be viewed as a congenital disease, a defect, contrary to the laws of Darwinian natural selection.<sup>105</sup> Counterposing his own theory, the much extolled founder of psychology, Sigmund Freud, put forward the influential idea that homosexuality was caused by arrested

---

*and the Politics of Gay Rights*, 69 *POLITICAL RESEARCH QUARTERLY* 17, 25 (2016) (“In sum, analyses of two overtime datasets demonstrate that, in the wake of the American media’s focus in the early 1990s on biological causes of homosexuality and their progressive implications, public opinion in the United States changed in substantial ways. First, an increasing commitment to the belief that homosexuals are born gay was concentrated among liberals in the 1990s, particularly educated liberals. Moderates adopted this belief at a lower rate, while conservatives appeared to dismiss evidence for biological influences on homosexuality. These patterns suggest that ideologically biased assimilation of scientific communication about homosexuality was occurring among both liberals and conservatives during the period we examine. Second, Americans who believed homosexuality to be innate shortly after the spike in ‘born gay’ messages became more progressive on gay rights over time, suggesting that altered causal attributions contributed to progressive changes in societal attitudes toward lesbians and gays during the 1990s. Third, together, these two empirical patterns appeared to contribute to left–right attitude differences over gay rights during the 1990s.”). Cf. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“There can be no doubt that the conduct allegedly engaged in by Simonton’s co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace.”).

<sup>102</sup> See *Videckis*, No. CV 15-00298 DDP, 2015 U.S. Dist. LEXIS 169187, at \*16. See also *Hively*, 830 F.3d at 706. Cf. *Simonton*, 232 F.3d at 35.

<sup>103</sup> Drescher, *supra* note 98, at 568. See Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 *AM. MED. ASS’N J. OF ETHICS* 916, 916 (2014) (explaining nineteenth century U.S. sodomy laws were enacted to protect women, “weak men,” and children against sexual assault, and court records from that time show consenting adults who engaged in sodomy within their homes were considered immune from prosecution); *Sodomy and Homosexuality in Medieval Europe*, HITCHHIKER’S GUIDE TO THE GALAXY: EARTH EDITION, [https://h2g2.com/edited\\_entry/A7715315](https://h2g2.com/edited_entry/A7715315) (explaining homosexual activity was not considered a legal issue until the thirteenth century, and even then prosecutions were rare for men and nearly nonexistent for women).

<sup>104</sup> Drescher, *supra* note 98, at 568; see Epstein, *supra* note 98 (“Thousands of American pulpits to this day repeat the old biblical injunctions, which fuel discomfort with homosexuality at every layer of our society.”); see generally Jessie Szalay, *What Was the Enlightenment?*, LIVESCIENCE, <https://www.livescience.com/55327-the-enlightenment.html> (last visited May 10, 2018) (explaining the Enlightenment was a period in Europe and North America marked by a shift towards rational thought and religious skepticism, and also saw the development of the scientific method).

<sup>105</sup> Drescher, *supra* note 98, at 568.

sexual development.<sup>106</sup> Freud himself held a pessimistic view about the success of converting homosexuals into heterosexuals, but the community of optimistic psychoanalysts who took up Freud's mantle after his death in 1939 believed homosexuality was not only pathological (and likely the product of bad parenting), but curable.<sup>107</sup> These ideas were influential, and saw the inclusion of homosexuality in the first Diagnostic Statistical Manual (DSM-I), published in 1952, as a "sociopathic personality disturbance."<sup>108</sup> It was later reclassified in 1968—four years after the passage of the Civil Rights Act—as a "sexual deviation," which included necrophilia, pedophilia, and transsexualism.<sup>109</sup>

A few psychologists, most notably Alfred Kinsey and Evelyn Hooker, published works suggesting homosexuality was a natural deviation and not indicative of psychological disturbance.<sup>110</sup> Yet the American Psychiatric Association ("APA") ignored the then-nascent but growing body of research as it conflicted with the prevailing conceptions and theories on the origin of homosexual attraction.<sup>111</sup> Even many gay activists bought into the pathological theory of homosexuality—genuinely working with the psychiatric community to find a cure.<sup>112</sup>

Following the Stonewall Riots in 1969, LGBT activists protested the annual meetings of the APA because they believed the APA was a major source of the social stigma that plagued them.<sup>113</sup> These protests, along

<sup>106</sup> Drescher, *supra* note 98, at 568-69.

<sup>107</sup> Drescher, *supra* note 98, at 569.

<sup>108</sup> Drescher, *supra* note 98, at 569.

<sup>109</sup> Drescher, *supra* note 98, at 569; THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-II], § 302 (Am. Psychiatric Ass'n 2d ed.) (1968).

<sup>110</sup> Drescher, *supra* note 98, at 569-70.

<sup>111</sup> Drescher, *supra* note 98, at 570.

<sup>112</sup> Drescher, *supra* note 98, at 570. See, e.g., Michael M. Miller, *Hypnotic-Aversion Treatment of Homosexuality*, J. NAT'L MED. ASSOC. 411, 415 (1963). Well-meaning people still seek a cure. See, e.g., Zoë Schlanger, *JONAH, the Largest Jewish Gay Conversion Therapy Organization, Takes Its Last Breath*, NEWSWEEK (Dec. 18, 2005, 1:44 PM), <http://www.newsweek.com/life-and-death-jewish-exgay-therapy-organization-406898> ("On a trip home for Passover, [Unger] finally told his parents about his attraction to men. It went better than he expected. They were 'extremely loving,' but just as confused as he was about how to proceed. One rabbi said it might be a chemical imbalance, and that Unger should seek medical attention. Another was sure Unger would live a happy enough life if he just found a wife who could cook really well. Eventually, Unger's father gave him the number for 'Rabbi Arthur Goldberg.' Two to four years, Goldberg told Unger over the phone. That's how long it would take for JONAH's program to turn him from gay to straight, if he just put in the work . . . Putting in the work, it turned out, meant beating a pillow effigy of his mother with a tennis racket until his hands bled, screaming 'Mom!' with each blow. It meant cutting off contact with his mother for several months . . .").

<sup>113</sup> Drescher, *supra* note 98, at 570. See Epstein, *supra* note 98, at 63 ("It was largely gays themselves—understandably tired of being viewed as freaks of nature—who began to

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 357

with internal pressures, changing demographics, and a growing climate of public distrust towards psychiatry following renewed criticisms over “drapetomania” (a psychological “disorder” diagnosed in slaves “who [had] a tendency to run away from their owner due to an inborn propensity for wanderlust”) led to the APA’s board of trustees to vote to remove homosexuality as a pathological diagnosis from the DSM-III in 1973.<sup>114</sup> The APA reclassified same-sex attractions as “Sexual Orientation Disturbance,” meaning that, even though homosexuality was no longer *per se* pathological, it remained a treatable disorder.<sup>115</sup> In 1987, the APA completely removed homosexuality from the DSM-III-R.<sup>116</sup> It took until 2013 for the APA to depathologize so-called “gender identity disorders,” reclassifying them as simply “gender dysphoria,” which was intended to stress a change in approach but still allow access to psychological resources.<sup>117</sup> In 1990, the World Health Organization (“WHO”) removed homosexuality from the International Classification of Diseases.<sup>118</sup> The WHO has yet to declassify being transgender as a mental disorder.<sup>119</sup>

The preceding brief history of homosexuality in psychiatry—with a particular emphasis on the 1960s—demonstrates that the prevailing view of homosexuality among the most well-respected and well-educated people of the time was that homosexuality was pathological.<sup>120</sup> If one adopts this view in the context of applying Title VII, the distinction between “sex” discrimination and sexual orientation discrimination becomes much clearer. When labeled a pathology, same-sex attraction is easily divorced from gender, especially when seen as something that is “unnatural” and “curable.” Perhaps, if sexual orientation had not been

---

assert that their orientation was not pathological. A defining moment came on June 27, 1969, after a police raid on a gay bar in Greenwich Village in New York City provoked a riot.”)

<sup>114</sup> Drescher, *supra* note 98, at 570-71. See Epstein, *supra* note 98, at 63 (“[T]he nomenclature committee of the American Psychiatric Association (APA) set about reassessing the profession’s dark characterization of homosexuality. Leading the charge was psychiatrist Robert L. Spitzer of Columbia University . . . . As a result of his committee’s recommendation, the term ‘homosexuality’ disappeared from the next edition of the DSM. That hardly settled the matter, however. In a poll of psychiatrists conducted soon after the APA’s leadership voted to make the change, 37 percent said they opposed the change, and some accused the APA of ‘sacrificing scientific principles’ in the service of ‘civil rights’ — in other words, of giving in to pressure.”)

<sup>115</sup> Drescher, *supra* note 98, at 571.

<sup>116</sup> Drescher, *supra* note 98, at 571.

<sup>117</sup> Pam Belluck, *W.H.O. Weighs Dropping Transgender Identity From List of Mental Disorders*, N.Y. TIMES (July 26, 2016), <https://www.nytimes.com/2016/07/27/health/who-transgender-medical-disorder.html>.

<sup>118</sup> Drescher, *supra* note 98, at 571.

<sup>119</sup> Belluck, *supra* note 117.

<sup>120</sup> See Drescher, *supra* note 98, at 569.

removed from the DSM in 1987 before the passage of the American's with Disabilities Act ("ADA") in 1990, discrimination based on sexual orientation would be protected under the ADA as a disability.<sup>121</sup> It took longer for the average American's ideas about sexuality to shift, which is likely why older judges did not initially take issue with drawing a line between "sex" discrimination and discrimination based on sexual orientation, but younger judges increasingly found the line impossible to perceive.<sup>122</sup> Now, it is not only unjust but impractical to expect judges to attempt to separate sex discrimination from sexual orientation discrimination by adopting the outmoded pathological view of same-sex attraction.<sup>123</sup>

While the evolution in psychiatric thought is emblematic of the shift, it alone does not do justice to the impressive change in Americans' understanding of same-sex sexual behavior. A greater understanding of the biology of sexual orientation was likely the most influential factor in Americans' shift in perception of same-sex attraction.<sup>124</sup> The next section will discuss the biological findings that have underlined the paradigmatic shift in the professional and public perception of LGB Americans.<sup>125</sup> This change in understanding helps explain why the line between "sex" and sexual orientation has vanished, and demonstrates why sexual orientation discrimination is, in fact, sex discrimination under Title VII. Specifically, the next section will show how a growing body of scientific evidence has demonstrated that sexuality and gender are inextricably

---

<sup>121</sup> See Christine Michelle Duffy, *Chapter 16: The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, in *GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE* 16-42 (Denise M. Visconti ed., 2014) ("The ADA expressly states that homosexuality and bisexuality are not impairments and, thus, not disabilities. Because homosexuality and bisexuality were no longer considered a medical condition, having been removed from the DSM prior to the enactment of the ADA, there was no need to include this exclusion in the ADA. Nonetheless, certain legislators wanted this to be made explicit in the text of the law. Thus, there is no cause of action under the ADA for discrimination against a person because of the individual's sexual orientation. [A]lthough homosexuality is also excluded from the ADA, a person with HIV, AIDS, or some other disability is still protected by the ADA. [Despite the opposition, the final version of the ADA bill did not exclude individuals with HIV or AIDS.]").

<sup>122</sup> See Garretson & Suhay, *supra* note 101 (explaining how new biological theories that homosexuality was innate influenced a shift in the public perception of and attitudes toward LGB people in the 1990s).

<sup>123</sup> *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations . . . for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, . . . whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification[.]") (emphasis added).

<sup>124</sup> See Garretson & Suhay, *supra* note 101.

<sup>125</sup> See Garretson & Suhay, *supra* note 101.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 359

linked. This more-informed understanding of sexuality should, in part, serve as an impetus for the federal courts to abandon the exclusionary, narrow interpretation of “sex” in the Civil Rights Act.<sup>126</sup> To that end, we take up an age-old debate.

*B. Nature vs. Nurture: Where Does the Science Stand?*

The nature versus nurture debate has been argued since the sixteenth century, involving great philosophers including John Locke and his intellectual successor John Stuart Mills.<sup>127</sup> Both were proponents of the “blank slate” theory, which perceived the notion that acuity, talent, and other human behaviors were in-born (a product of nature) as a privileged philosophical tendency, and hypothesized that human differences were purely a product of circumstance (nurture).<sup>128</sup> These ideas formed the core of “behaviorism”—a theory of behavior that dominated psychology between the 1920s and 1960s.<sup>129</sup> The theory of behaviorism encompassed most, if not all human behavior, including sexual desires.<sup>130</sup> As late as 1974, prominent psychologist B.F. Skinner advocated against studying the human brain because he thought it was futile to try to understand the behavior of an organism by studying its insides.<sup>131</sup> Behaviorism not only dominated psychology, but pervaded the public consciousness, appearing in popular childrearing books and giving rise to many ideas now debunked.<sup>132</sup> An example of just how influential behaviorism was can be found in the still infamous belief that a parent

---

<sup>126</sup> *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 350–51 (7th Cir. 2017) (“The logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.”); *id.* at 357 (Posner, J., concurring) (“We understand the words of Title VII differently not because we’re smarter than the statute’s framers and ratifiers but because we live in a different era, a different culture. . . . I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.”). *Cf. Planned Parenthood*, 505 U.S. at 854.

<sup>127</sup> DAVID S. MOORE, *THE DEVELOPING GENOME: AN INTRODUCTION TO BEHAVIORAL EPIGENETICS* 5 (2015); STEVEN PINKER, *THE BLANK STATE: THE MODERN DENIAL OF HUMAN NATURE* 18 (2002).

<sup>128</sup> MOORE, *supra* note 127, at 5; PINKER, *supra* note 127, at 18-19.

<sup>129</sup> PINKER, *supra* note 127, at 18-19.

<sup>130</sup> PINKER, *supra* note 127, at 19.

<sup>131</sup> PINKER, *supra* note 127, at 19-20.

<sup>132</sup> PINKER, *supra* note 127, at 20.

should never comfort a crying infant because, in doing so, the parent rewards the child for crying, thereby encouraging the behavior.<sup>133</sup>

As an aside, the logical antithesis of behaviorism is “biological determinism;” but this theory—that genetics entirely determine human behavior—has never pervaded the public consciousness the same way behaviorism did and, to an extent, still does.<sup>134</sup> Biological determinism remains more of an entertaining thought experiment, raising philosophical questions about culpability and autonomy.<sup>135</sup>

Today, an emerging sub-branch of biology—epigenetics—has been changing Americans’ understanding about the nexuses of certain human behaviors and has undermined the clichéd nature versus nurture debate by demonstrating behavior may be a product of both.<sup>136</sup> A word of caution: this Note will not try to convince readers that sexual orientation is absolutely hereditary (solely and exclusively determined by one’s genes), but it will demonstrate that sexuality (including bisexuality) is a largely innate and uncontrollable characteristic biologically linked to one’s gender.<sup>137</sup> This understanding of sexuality is at odds with the pathological theory of homosexual attraction, which undergirded its initial exclusion from the Civil Rights Act’s proscription on “sex” discrimination. The goal of this Note is to flesh out the logical underpinnings of the current exclusion and demonstrate why such interpretations are out of step with shifts in biology, psychiatry, and general social understanding—resulting in an impractical and unfair

---

<sup>133</sup> PINKER, *supra* note 127, at 20.

<sup>134</sup> MOORE, *supra* note 127, at 5; PINKER, *supra* note 127, at 122.

<sup>135</sup> MOORE, *supra* note 127, at 5; PINKER, *supra* note 127, at 5. See Celeste M. Condit, Nneka Ofulue, & Kristine M. Sheedy, *Determinism and Mass-Media Portrayals of Genetics*, 62 AM. J. HUM. GENET. 979, 983 (1998) (“Taken as a whole, this systematic study of the character and degree of genetic determinism in popular media does not support statements by critics that contemporary attention to genetics represents an increasingly biologicistic determinism.”). *E.g.*, Law & Order: Special Victims Unit: Spiraling Down.

<sup>136</sup> MOORE, *supra* note 127, at 5; PINKER, *supra* note 127, at 6. For a brief (five-minute) primer on epigenetics, see Carlos Guerrero-Bosagna, *What Is Epigenetics?*, YOUTUBE (June 27, 2016), [https://www.youtube.com/watch?v=\\_aAhcNjmvhc](https://www.youtube.com/watch?v=_aAhcNjmvhc).

<sup>137</sup> By “uncontrollable,” the Author does not mean to imply that all people with homosexual inclinations cannot choose to maintain exclusively heterosexual relationships. The debate is not about whether all LGB Americans have a choice, as sexuality is a spectrum. Some can make the decision to deny same-sex desires, while others, specifically three to seven percent of Americans, would condemn themselves to lives of celibacy. See Epstein, *supra* note 98, at 65-66 (explaining that, while some self-identified homosexuals can carry on consistent and enjoyable heterosexual relationships, it is likely due to the fact they are more towards the center of the sexuality spectrum, while three to seven percent of the population is exclusively homosexual and would not be able to make the same “choice”). The point is that, wherever someone lies on that spectrum, his or her inclinations are irreproachable, because they are not the product of choice. In other words, while some bisexuals could ignore their same-sex attraction, such inclinations are natural, normal, and innate.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 361

distinction between putative types of the same form of discrimination.

What the discussion below will demonstrate is that, since the 1990s, scientific research has revealed: (1) all homosexual sexual attraction—including bisexuality—is likely inherited; (2) while inherited, these genes only predispose someone to same-sex attraction, and various environmental and other factors play a role in the presentation of one's sexuality; and (3) some people with this genetic predisposition (about three to seven percent of the general population) cannot “choose”—much less “change”—their sexual orientation, nor can their sexual orientation be influenced by environmental factors (i.e., for this sub-group, their sexual orientation is likely *entirely* inherited).<sup>138</sup>

First, it should be noted that DNA—our genetic “code”—is not like a recipe where each of the listed ingredients impacts the ultimate outcome.<sup>139</sup> In other words, what is written in the ribbons of your DNA is not always what you get.<sup>140</sup> In more scientific terms, your genotype (genetic code) is not necessarily your phenotype (the characteristics you express).<sup>141</sup> Gene expression is more complex and our genetic code commonly carries traits that are not outwardly expressed because those genes are either inactive (commonly known as “recessive”), or have not been activated.<sup>142</sup> Epigenetics is the study of gene expression, where scientists try to discover what causes certain genes to be turned on or off.<sup>143</sup> The term “epigenetics” has also been colloquially adopted to refer to what causes the expression or suppression of a particular gene, and these “epigenetics” may be heritable (i.e., caused by someone's environment (nurture)) or inheritable (caused by genes alone (nature)).<sup>144</sup> The study of epigenetics is helping better explain human behavior and its insights “have the potential to change how we treat ourselves and other people, so [its insights] are too important to remain the property of biologists.”<sup>145</sup> The implications of this new field of study and its findings regarding sexual attraction are that sexual orientation, whether heritable

---

<sup>138</sup> See *infra* pp. 24-27.

<sup>139</sup> Cf. Yusuf Tutar, *Pseudogenes*, COMP. FUNCT. GENOMICS, May 2012, at 1 (“Noncoding regions of human genome in general were thought to be nonfunctional and ‘junk,’ or of no purpose DNA. . . . Pseudogenes originate from decay of genes that originated from duplication through evolution.”).

<sup>140</sup> See MOORE, *supra* note 127, at 11-12. Cf. Tutar, *supra* note 139, at 1.

<sup>141</sup> MOORE, *supra* note 127, at 11-12.

<sup>142</sup> MOORE, *supra* note 127, 11-14; *Measuring Gene Expression*, GENETIC SCI. LEARNING CTR., <http://learn.genetics.utah.edu/content/science/expression/> (last visited May 10, 2018).

<sup>143</sup> *Epigenetics: Fundamentals*, WHAT IS EPIGENETICS, <http://www.whatisepigenetics.com/fundamentals/#fnref-12-1> (last visited May 10, 2018); MOORE, *supra* note 127, at 14.

<sup>144</sup> MOORE, *supra* note 127, at 21-22, 164, 169.

<sup>145</sup> MOORE, *supra* note 127, at 7.

or inheritable, is biologically linked and, therefore, same-sex activity is “natural” whether or not directly the product of “nature.” While Americans are largely unaware of the specifics of these studies, since the 1990s, this growing body of research has in fact helped change Americans’ views on sexual orientation,<sup>146</sup> depathologizing same-sex proclivities and bringing discrimination based on sexual orientation within the ambit of “sex” discrimination under Title VII.

The idea that a behavior can be “natural” without being a product of “nature” is, understandably, a confusing concept. But a comparison between the biological gender assignment of snakes and turtles provides the perfect example of how characteristics with environmental nexuses can still be “natural.”<sup>147</sup> The gender of most types of snakes is determined by sex chromosomes and, thus, in the traditional sense, the gender of any given snake is determined by nature.<sup>148</sup> Turtles, on the other hand, throw a wrench in the traditional nature versus nurture dichotomy. As opposed to snakes, the gender of any given turtle is based on the temperature of the egg after fertilization during the so-called “critical period.”<sup>149</sup> If, for example, humans construct a lifeguard tower near a nest of sea turtles and shadow cast by the tower cools a nest of turtle eggs enough so that all of those turtles are born male, is the sex of those turtles a product of “nature” or “nurture?”<sup>150</sup> Scientists can even manipulate this phenomenon and determine each turtle’s sex.<sup>151</sup> Nevertheless, once the critical period passes, each individual turtle’s sex is innate and unchangeable.<sup>152</sup> Does this make turtle gender any less “natural?”<sup>153</sup> Do the turtles bear any responsibility?

<sup>146</sup> See Garretson & Suhay, *supra* note 101.

<sup>147</sup> Cf. SCOTT F. GILBERT, ENVIRONMENTAL SEX DETERMINATION, IN DEVELOPMENTAL BIOLOGY 567 (6th ed. 2000), <https://www.ncbi.nlm.nih.gov/books/NBK9989/>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Cf. GILBERT, *supra* note 147. Theoretically someone could still argue same-sex behavior is *unnatural* and the cure lies in the *natural* solution of genetic modification. This note posits that sexuality is as natural as eye color. *See generally* Guerrero-Bosagna, *supra* note 136. Perhaps, one day, people will be able to choose their own, or more likely their child’s, sexuality along with hair color, intelligence, strength, etc. But this Author leaves it to the reader to struggle with the ethics of such a *cure*. *See generally* Kurzgesagt – In a Nutshell, Genetic Engineering Will Change Everything Forever – CRISPR, YOUTUBE (Aug. 10, 2016), <https://www.youtube.com/watch?v=jAhjPd4uNFY>; Jennifer Doudna, Geneticist and Co-inventor of CRISPR-Cas9, TED Talk London, England: How CRISPR Lets Us Edit Our DNA (Sept. 2015), <https://www.youtube.com/watch?v=TdBAHexVYZc>; Paul Knoepfler, Biologist, TED Talk Vienna, Austria: The Ethical Dilemma of Designer Babies (Oct. 2015), <https://www.youtube.com/watch?v=nOHbn8Q1fBM>.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 363

Undoubtedly, human sexual expression (a.k.a. orientation) is more complex than sea turtle gender (though perhaps not more complex than handedness, though that biological mystery also has yet to be solved).<sup>154</sup> Archeological evidence has shown that, despite consistent persecutions and prejudice, homosexuality is a natural phenomenon present in almost all human populations since prehistory.<sup>155</sup> Familial patterns demonstrate there is at least some “natural” (inheritable), biological basis.<sup>156</sup> Lesbians, for example, are more likely to have homosexual sisters,

<sup>154</sup> See Epstein, *supra* note 98, at 65 (“The way sexuality plays out is eerily similar to the process by which people become left or right handed. It may sound contrary to common sense, but scientific studies suggest that genes play a relatively small role in handedness; its heritability — an estimate of what proportion of a trait’s variability can be accounted for by genes — is only about [32%], compared with, say, [84%] for height and [95%] for head width. Then why is more than 90 percent of the population righthanded? It is because of that cultural ‘push’ working again. Subtle and not so subtle influences make children favor their right hand, and the flexibility they probably had when they were young is simply lost as they grow up. Although they can still use the left hand, their handedness becomes so well established that they would find it difficult, if not impossible, to become lefthanded.”). See also Ray Blanchard et al., *Interaction of Fraternal Birth Order and Handedness in the Development of Male Homosexuality*, 49 *HORMONES AND BEHAV.* 405, 411 (2006) (“[S]ome factor associated with non-right-handedness increases the odds of homosexuality in first male births. This same factor, however, prevents older brothers from increasing the odds of homosexuality in later male births. If that interpretation is correct, the problem becomes one of identifying the postulated factor. One possible candidate is fetal testosterone.”). Cf. Michael C. Corballis, *Left Brain, Right Brain: Facts and Fantasies*, *PLoS BIOL.*, Jan. 2014, at 6, 8 (“Handedness, at least, is partly influenced by parental handedness, suggesting a genetic component, but genes can’t tell the whole story. For instance some 23 percent of monozygotic twins, who share the same genes, are of opposite handedness. . . . Although it may be the absence of [left-handed accommodations] rather than [attempts at] reversal that can be linked to problems of social or educational adjustment, left-handed individuals have often been regarded as deficient or contrarian, but this may be based more on prejudice than on the facts.”).

<sup>155</sup> Andrea Camperio Ciani, Umberto Battaglia, & Giovanni Zanzotto, *Human Homosexuality: A Paradigmatic Arena for Sexually Antagonistic Selection?*, *COLD SPRING HARBOR PERSPECTIVES IN BIOLOGY*, Jan. 2015, at 3.

<sup>156</sup> See Brendan P. Zietsch, *Genetic Factors Predisposing to Homosexuality May Increase Mating Success in Heterosexuals*, 29 *EVOLUTION AND HUMAN BEHAV.* 424, 429-31 (2008) (“Our evidence is consistent with a mechanism whereby some genetic variation underlying homosexuality could have been maintained over evolutionary time. The genes influencing homosexuality have two effects. First, and most obviously, these genes increase the risk for homosexuality, which ostensibly has decreased Darwinian fitness. Countervailing this, however, these same genes appear to increase sex-atypical gender identity, which our results suggest may increase mating success in heterosexuals. This mechanism, called antagonistic pleiotropy, might maintain genes that increase the risk for homosexuality because they increase the number of sex partners in the relatives of homosexuals. . . . Previous findings suggesting that male homosexuals tend to come from bigger families are consistent with our results and interpretation.”) (citations omitted); Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 13 (“In conclusion, human [homosexuality] has likely different inheritance systems in the two genders, although sexually antagonistic effects are likely driving forces for any (epi)genetic HS heritable components affecting their transmission. The imprint of sexual conflict appears well detectable in males, whereas in females it seems clouded by a number of other unresolved questions.”).

daughters, nieces, and female cousins by way of their paternal uncles.<sup>157</sup> Gay men are more likely to have homosexual brothers, cousins, and maternal uncles.<sup>158</sup> This indicates homosexuality clusters in families, but in different manners for both genders.<sup>159</sup> Further, if one twin is homosexual the other is much more likely to also be homosexual.<sup>160</sup>

Skeptics of a genetic link to sexuality note that homosexuality violates the laws of natural selection (i.e., homosexuals do not reproduce so, if the trait were inheritable, homosexuals should have died out through natural selection).<sup>161</sup> In fact, studies of reproduction rates do show homosexuals reproduce at a significantly lower rate than heterosexuals.<sup>162</sup> But these studies have also shown mothers, aunts, and grandmothers of homosexual or bisexual men have significantly higher reproduction rates than average heterosexual female relative of heterosexual men.<sup>163</sup> Families of lesbians, on the other hand, do not demonstrate the same patterns of increased fecundity, though the size of their family in the three antecedent generations is significantly larger than average.<sup>164</sup> These correlations have given rise to the “sexual antagonism

---

<sup>157</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 4.

<sup>158</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 4.

<sup>159</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 4.

<sup>160</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 6-9 (discussing how concordance rates between twins are too high to suggest there is no genetic link, and even epigenetics could not alone explain the rate of concordance in twins). See Epstein, *supra* note 98, at 65; Sergey Gavrilets & William R. Rice, *Genetic Models of Homosexuality: Generating Testable Predictions*, 273 PROC. R. SOC. B 3031 (2006); Zietsch, *supra* note 156, at 424.

<sup>161</sup> See Zietsch *supra* note 156, at 424-25 (“In contemporary Western societies, homosexual individuals tend to have fewer children than heterosexual individuals, and lowered reproductive fitness in homosexuals may have been the case in ancestral times as well. How, then, has homosexuality evolved, and how is it maintained in the population at a relatively high frequency? Numerous theoretical explanations have been proposed for this ‘Darwinian paradox,’ . . . evidence suggests that homosexual men, compared to heterosexual men, tend to come from larger families, which has been interpreted as greater fecundity in relatives of homosexual men.”) (citations omitted). See also Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 12 (“For male [homosexuality], about which there exist adequate population data, the systematic mathematical analysis of the evolutionary propagation mechanisms eliminates the possible Darwinian paradox associated with [homosexuality], resolving it within the framework of sexual conflict [theory.]”).

<sup>162</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 5.

<sup>163</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 5-6; Andrea Camperio Ciani & Elena Pellizzari, *Fecundity of Paternal and Maternal Non-Parental Female Relatives of Homosexual and Heterosexual Men*, 7 PLOS ONE (Issue 12) at 4 (2012) (“In males, this genetic factor increases the probability of homosexuality through androphilia, whereas in females, it increases fecundity through androphilia, or better through a complex pattern of behavior, personality and enhanced fertility that increases attraction from males and fecundity.”).

<sup>164</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 6.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 365

theory” of sexual orientation.<sup>165</sup> In these correlations, scientists have found evidence that the countervailing evolutionary benefit that maintains homosexuality is an increased sex drive in other relatives—hence increased fecundity.<sup>166</sup> In other words, some members of the family may be biologically “sacrificed” (i.e., born with homosexual attraction) for the family as a whole to benefit from the trait.<sup>167</sup> There are also alternative theories like the “kin altruism theory,” which hypothesizes that homosexual children give their families and communities an evolutionary advantage because they serve their family or community without adding members to it.<sup>168</sup> Nevertheless, the sexual antagonism theory has received the most empirical support.<sup>169</sup>

While there is a demonstrable genetic link for homosexuality, the complexity in its presentation and maintenance in humans has given rise to numerous theories attempting to explain exactly how homosexuality is caused.<sup>170</sup> Discussion of such theories goes well beyond the scope of this

<sup>165</sup> Clara Moskowitz, *Why Gays Don't Go Extinct*, LIVE SCIENCE (June 17, 2008), <http://www.livescience.com/2623-gays-dont-extinct.html> (“‘This is the first time that a model fits all our empirical data,’ said Andrea Camperio-Ciani, an evolutionary psychologist at the University of Padova in Italy who led the study. ‘These genes work in a *sexually antagonistic* way — that means that when they’re represented in a female, they increase fecundity, and when they’re represented in a male, they decrease fecundity. It’s a trait that benefits one sex at the cost of the other.’” (emphasis added)); Jessica L. Hoskins, Michael G. Ritchie, & Nathan W. Bailey, *A Test of Genetic Models for the Evolutionary Maintenance of Same-Sex Sexual Behaviour*, PROC. R. SOC. B, May 2015, at 5 (“Fecundity was influenced by both maternal and paternal genotypes; it was higher in crosses where the mother had a high-[same-sex behavior] genotype . . . , which is what the *sexual antagonism model* predicts . . . .” (emphasis added)).

<sup>166</sup> See Andrea Camperio-Ciani, Francesca Corna, & Claudio Capiluppi, *Evidence for Maternally Inherited Factors Favouring Male Homosexuality and Promoting Female Fecundity*, 271 PROC. R. SOC. LOND. B 2217, 2220 (2004) (“Specifically, the assumption of an X-linked allele beneficial to female fecundity, but detrimental to male fecundity, would fit the pattern in our data. The existence of X-linked genetic factors associated with male homosexuality has been suggested previously from DNA-linkage analysis of homosexual brothers[.]”). See also Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 13 (“Sexual antagonism for a multilocus factor with at least an X-linked locus is the selection mode providing closest adherence of the models to the empirically known patterns for both [homosexual] sexual orientation of males and higher-than-average fecundity for females in their maternal line.”); Zietsch, *supra* note 156, at 431-32 (“Our results address both male and female sexual orientations, and suggest a specific mechanism whereby pleiotropic genetic factors predispose to nonheterosexuality and increase mating success in heterosexuals via advantageous sex atypicality. While not explaining the birth-order effect, our results cannot simply be a by-product of it.”).

<sup>167</sup> See Zietsch, *supra* note 156, at 431-32.

<sup>168</sup> See James O’Keefe, Director of the Charles & Barbara Duboc Cardio Health & Wellness Center and the Preventive Cardiology service at Saint Luke’s Mid America Heart Institute, TEDx Talk in Tallaght, Dublin: Homosexuality: It’s About Survival - Not Sex (Oct. 2016), [https://www.youtube.com/watch?v=4Khn\\_z9FPmU](https://www.youtube.com/watch?v=4Khn_z9FPmU); DAVID BUSS, *EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND* 151 (2015 5th ed.).

<sup>169</sup> *Id.*

<sup>170</sup> Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 2 (“Since the 1990s, the

note, and an exploration of why homosexuality presents in some and not others who likely have the trait is unnecessary. The evidence that sexual orientation—including bisexuality—has a genetic component (i.e., is inheritable) has already shattered the assumptions underlying the maintenance of the exclusion of sexual orientation from Title VII’s “sex” protections, specifically, that deviation from heterosexual behavior is pathological and unnatural.<sup>171</sup> No matter the role of other factors on the presentation of sexuality, genetics predispose some Americans to same-sex attraction and, for smaller subset there is no *choice* in the matter.<sup>172</sup>

In short, no matter where someone falls on the spectrum of sexuality, it is natural—not pathological.<sup>173</sup> Even the Supreme Court has recognized the intrinsic nature of sexuality, and it is time for the Federal Courts of Appeals to follow suit.<sup>174</sup>

---

role of biological factors, both genetic and nongenetic, has come to light in relation to [homosexuality]. The possible genetic components influencing human [homosexuality] have since been explored empirically and theoretically. However, we emphasize at the outset that a number of environmental factors (zygotic, prenatal, and postnatal) are known to affect [homosexual] preference in either or both genders, such as maternal stress, mother estrogen-progestin assumption during fetal development, fraternal birth order, as well as environmental and social influences. Thus, genetic components can never be considered as exclusive determinants of [homosexuality], and they should always be interpreted as acting within the frame of an environmental background that may also significantly contribute to same-sex preference in individuals.” (citations omitted). See generally Francesca Iemmola & Andrea C. Ciani, *New Evidence of Genetic Factors Influencing Sexual Orientation in Men: Female Fecundity Increase in the Maternal Line*, 38 ARCH. OF SEX. BEHAV. 393-94 (2008).

<sup>171</sup> See Drescher, *supra* note 98, at 571 (explaining how the prevailing view of psychologists during the 1960s (when the Civil Rights Act was passed) was that homosexuality was a pathology, and it was not until 1987 homosexuality was completely removed as a treatable affliction); Garretson & Suhay, *supra* note 101.

<sup>172</sup> *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 350–51 (7th Cir. 2017) (“Finally, the Court’s decision in *Obergefell* held that the right to marry is a fundamental liberty right, protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court wrote that ‘[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.’ . . . [T]his court sits en banc to consider what the correct rule of law is now in light of the Supreme Court’s authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago. The logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[.]”) (citations omitted). See Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 13. See also Epstein, *supra* note 98, at 65-66 (“[I]t is reasonable to assume that most of the people who currently live as homosexuals were probably close to the gay end of the continuum to begin with; in other words, they probably have strong genetic tendencies toward homosexuality. Even though the evidence is clear that some gays can switch their sexual orientation, the vast majority probably cannot — or at least not comfortably. If you doubt that — and assuming that you are righthanded — try eating with your left hand for a day or two, and good luck with your soup.”).

<sup>173</sup> Epstein, *supra* note 98, at 65-66.

<sup>174</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (“And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”).

## IV. THE THREE OBSTACLES TO INCLUSION

The following section addresses each of the three major reasons courts maintain the exclusion of sexual orientation from the protections of Title VII, and demonstrates why the courts ought to abandon the exclusion.

*A. The Legislative History: The Inclusion of “Sex” Was More Than A Joke*

The first obstacle to the inclusion of LGB individuals within the protections of the Civil Rights Act is the legislative history surrounding the addition of “sex” as a protected class.<sup>175</sup> Courts still rely on the narrative that the Act was primarily intended to remedy racial discrimination and that “sex” was thrown in at the final hour as an attempt to thwart the Act’s passage.<sup>176</sup> Based on this narrative, courts conclude: “Congress had a narrow view of sex in mind when it passed the Civil Rights Act.”<sup>177</sup>

But scholar Robert Bird points out that this common reading of the legislative history is belied by the dauntless efforts of those supporting women’s rights, especially the National Women’s Party, which, with great political acuity, successfully lobbied for the inclusion of “sex” in

---

<sup>175</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 700 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017). *Cf.* Bird, *supra* note 4, at 142-43 (“The most harmful, and most common, misuse of the legislative history is found in judicial efforts to restrict coverage of the ban on sex discrimination. Judges have applied such restrictions in spite of later congressional and judicial conduct affirming the broad remedial goals of Title VII. Judges have used legislative history to restrain uniformly-accepted doctrine and to restrict expansions of sex discrimination law beyond established frontiers.”). *E.g.*, *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute’s prohibition against race discrimination. The total lack of legislative history . . . coupled with the circumstances of the amendment’s adoption clearly indicates that Congress never considered nor intended [the Act] apply to anything other than the traditional concept of sex.”) (citations omitted).

<sup>176</sup> See Bird, *supra* note 4, at 137-38.

<sup>177</sup> *Ulane*, 742 F.2d at 1086. *E.g.*, *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977). See Bird, *supra* note 4, at 143-44 (“[M]isreadings of the legislative history have thwarted attempts to expand sex discrimination to protect transsexuals and to prohibit same-sex sexual harassment.”). *But see Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 142 (2d Cir. 2018) (Lynch, J., dissenting) (“If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horrors.”).

the Civil Rights Act.<sup>178</sup> To read the amendment's introduction by conservative Democrat and staunch Civil Rights opponent Howard Smith as simply a ploy to defeat the Act's passage neglects the complex political maneuvering by a traditionally disenfranchised group to garner employment protections.<sup>179</sup> In fact, it is evident that Congressman Smith genuinely preferred a bill that included "sex" as a protected category, because he feared the Act would otherwise give special protections to black women at the expense of white women.<sup>180</sup> Ultimately, the House of Representatives passed the Act with the addition and Congresswoman Martha Griffiths—a trailblazer who was the first woman to serve on the House Committee on Ways and Means—championed the controversial amendment through the Senate.<sup>181</sup>

Narrowly interpreting the term "sex" based on the faulty narrative also appears to contradict Supreme Court precedent. In footnote nine of *Price Waterhouse*, the Court addressed the dearth of legislative history concerning the addition of the class "sex" to the Act and, while noting legislators focused primarily on race, stated: "We do not, however, limit [the legislators'] statements to the context of race, but instead we take them as general statements on the meaning of Title VII."<sup>182</sup> In the same footnote, the Court even addressed the common narrative surrounding the inclusion of "sex" as a protected class, referring to its addition as a "somewhat bizarre path," but explaining the narrative was unpersuasive

---

<sup>178</sup> Bird, *supra* note 4, at 161.

<sup>179</sup> Bird, *supra* note 4, at 149-50 ("[T]he [National Women's Party ('NWP')] framed its request for the amendment in terms that would benefit [Smith's] agenda. On December 10, 1963, the NWP wrote to Smith, stating that, '[t]his single word 'sex' would divert some of the high pressure, which is being used to force this Bill through without proper attention to all the effects of it.' Smith appeared hesitant at first, but he eventually warmed to the idea of adding the 'sex' amendment. In a rare appearance on 'Meet the Press', a televised interview program, Elizabeth May Craig, a well-known journalist, feminist, and prominent member of the NWP, questioned Smith. After Ms. Craig questioned him on the issue, Smith hinted that he might offer an Amendment in the Civil Rights Bill prohibiting sex discrimination in employment.").

<sup>180</sup> Bird, *supra* note 4, at 157-58 ("I put a question to you in behalf of the white women of the United States. Let us assume that two women apply for the same job and both of them are equally eligible, one a white woman and one a Negro woman. The first thing that employer will look at will be the provision with regard to the records he must keep. If he does not employ that colored woman and has to make that record, that employer will say, 'Well, now, if I hire the colored woman I will not be in any trouble, but if I do not hire the colored woman and hire the white woman, then the Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit.' That will happen as surely as we are here this afternoon. You all know it.") (quoting 110 CONG. REC. 2583 (1964) (remarks of Reps. Tuten, Pool, Andrews, and Rivers)).

<sup>181</sup> Bird, *supra* note 4, at 155-56, 161; *Martha Griffiths and the Equal Rights Amendment*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/features/griffiths>. (last visited May 10, 2018).

<sup>182</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989).

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 369

in suggesting that the legislators' statements about race were irrelevant in application to gender discrimination.<sup>183</sup> The Court held "the statute on its face treats each of the enumerated categories exactly the same."<sup>184</sup> These statements by the Court suggest a narrow interpretation of "sex" is inapposite even if one believes the common story surrounding the legislative history. In *Price Waterhouse*, the Court went on to vastly expand protections against sex discrimination by establishing the sex stereotyping theory, undoubtedly a broad reading of the term "sex."<sup>185</sup>

Further evincing the supremacy of a broad interpretation of "sex," the Court in *Oncale* held "sex" discrimination under Title VII fully encompassed same-sex harassment.<sup>186</sup> The late Justice Antonin Scalia, writing for the majority, explained that, even though male-on-male sexual harassment was certainly not the principal evil Congress was concerned with when it passed the Civil Rights Act, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>187</sup>

*B. Congressional Intent—The 88th Congress Originally Intended Broad Classes*

The second reason federal courts have been hesitant to overturn past precedent and move to include sexual orientation within Title VII's protections against "sex discrimination" is that Congress has, on numerous occasions, failed to amend the Civil Rights Act and explicitly extend employment protections to LGBT Americans.<sup>188</sup> The most recent failure came with the death of the Equality Act in the 114th Congress (January 2015 to January 2017), which would have amended the Civil Rights Act, Fair Housing Act, the Equal Credit Opportunity Act, and jury selection standards to include prohibitions on sexual orientation discrimination.<sup>189</sup> But these failures on Congress's part should prove no

---

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Herz, *supra* note 42.

<sup>186</sup> *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

<sup>187</sup> *Id.*

<sup>188</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 702 (7th Cir. 2016), *rev'd*, 853 F.3d 339 (7th Cir. 2017) ("In short, Congress' failure to act to amend Title VII to include sexual orientation is not from want of knowledge of the problem. And as a result, our understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act, so far, appears to be correct."). See Soucek, *supra* note 50, at 721-22.

<sup>189</sup> Summary: *H.R.3185 — 114th Congress (2015-2016)*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hr3185/summary> (last visited May 10, 2018).

impediment to the inclusion of sexual orientation within “sex” given the erosion of assumptions underlying the original exclusion of sexual orientation.<sup>190</sup> The Supreme Court has even stated, “[c]ongressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’”<sup>191</sup> This Note submits that Title VII has always incorporated sexual orientation in the broad class of “sex,” but society has mistakenly excluded it because of the assumption that homosexuality attraction was a psychological malady—rather than natural sexual diversity.

The EEOC’s decision in *Baldwin v. Foxx* addressed this very issue.<sup>192</sup> The Commission explained that the concerns over congressional inaction stem from the notion that the inclusion of sexual orientation in the Act’s protections would effectively create a new class.<sup>193</sup> The Commission pointed out a “new class” was not created with the inclusion of “interracial couples” within the Act’s protections against racial discrimination, or with the inclusion of “non-believers” in the Act’s protection of “religion,” or with the inclusion of “mothers” in Act’s protections of “sex.”<sup>194</sup> Rather than “adding” new classes to the Act by judicial fiat, each of these subgroups was afforded protection through logical extension of the Act’s original principles.<sup>195</sup> Initial exclusion of LGB plaintiffs is, perhaps, understandable considering the old assumptions widely held at the time of the Act’s passage.<sup>196</sup> But today, sexual orientation is clearly within the original principles of the Act and the modern exclusion of sexual orientation—a natural subset of gender—from the “sex” class is illogical.<sup>197</sup>

Moreover, the Supreme Court held that Congress intended “to strike at the entire spectrum of disparate treatment of men and women in

---

<sup>190</sup> Cf. Drescher, *supra* note 98, at 572 (“Most importantly, in medicine, psychiatry, and other mental health professions, removing the diagnosis from the DSM led to an important shift from asking questions about ‘what causes homosexuality?’ and ‘how can we treat it?’ to focusing instead on the health and mental health needs of LGBT patient populations.”).

<sup>191</sup> *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *U.S. v. Wise*, 370 U.S. 405, 411 (1962)). See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 130 (2d Cir. 2018) (“This theory of ratification by silence is in direct tension with the Supreme Court’s admonition that ‘subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress,’ particularly when ‘it concerns, as it does here, a proposal that does not become law.’”).

<sup>192</sup> *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*27 (EEOC July 15, 2015).

<sup>193</sup> *Id.*

<sup>194</sup> See *id.* at \*27-29.

<sup>195</sup> See *id.*

<sup>196</sup> See Drescher, *supra* note 98, at 569.

<sup>197</sup> See Epstein, *supra* note 98, at 65-66.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 371

employment.”<sup>198</sup> Discrimination against female employees because they have wives while leaving male employees undisturbed *is* unlawful disparate treatment under Title VII. Congress’s original intent *was* broad, and this broad intent to protect against disparate treatment has always included sexual orientation as we know it today. The confusion about whether Title VII’s protections can be “extended” to sexual orientation discrimination comes from the fact that society had mistakenly thought homosexuality was pathological fifty years ago.<sup>199</sup>

Imagine if the Civil Rights Act was passed in 1692 instead of 1964. At that time, the people of Salem believed “witches” were conspiring with the Devil to destroy humanity.<sup>200</sup> If twenty years passed and society came to realize Wiccans—practicing pagans who draw on the old traditions of witchcraft—were not evil magicians, but adherents to an unfamiliar religion, would Congress have had to amend the Civil Rights Act to specifically include them within its proscription on religious discrimination?<sup>201</sup> A modern example proves this point just as well: must Congress amend the Civil Rights Act to include Scientology? Surely the 88th Congress would not have thought the belief human souls were brought to Earth by an evil space warlord named Xenu was a religion.<sup>202</sup> This is not a debate between judicial originalism and activism. The 88th Congress intended the Civil Rights Act’s identified classes to be broad enough to cover whatever fell or would fall within their scope, regardless of whether the specific subgroup was known or prominent at the time.

### *C. Stare Decisis: A Decision to Stand By?*

The final reason relied on by federal courts in maintaining the exclusion of sexual orientation is the principle of *stare decisis*.<sup>203</sup> But as

---

<sup>198</sup> *Oncle v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998).

<sup>199</sup> See Drescher, *supra* note 98, at 569; DSM-II § 302 (Am. Psychiatric Ass’n 2d ed. (1968)).

<sup>200</sup> Leonie Roderick, *The Trials of Being a Witch Today: Society Doesn’t Burn Witches at the Stake Anymore, But That Doesn’t Mean Life Is Easy for Those Who Come Out of the Broom Closet*, BROADLY (Oct. 28, 2014), [https://broadly.vice.com/en\\_us/article/xye9zz/the-trials-of-being-a-witch-today](https://broadly.vice.com/en_us/article/xye9zz/the-trials-of-being-a-witch-today); Jess Blumberg, *A Brief History of the Salem Witch Trials: One Town’s Strange Journey from Paranoia to Pardon*, SMITHSONIAN (Oct. 23, 2007), <https://www.smithsonianmag.com/history/a-brief-history-of-the-salem-witch-trials-175162489/>.

<sup>201</sup> See *Roberts v. Ravenwood Church of Wicca*, 249 Ga. 348, 354 (Ga. 1982) (“... demonology and stereotypical witchcraft most emphatically do not constitute religion . . .”).

<sup>202</sup> Cf. Janet Reitman, *Inside Scientology: Unlocking the Complex Code of America’s Most Mysterious Religion*, ROLLING STONE (Feb. 23, 2006, 1:16 PM), [https://web.archive.org/web/20080622123603/http://www.rollingstone.com/politics/story/9363363/inside\\_scientology/print](https://web.archive.org/web/20080622123603/http://www.rollingstone.com/politics/story/9363363/inside_scientology/print).

<sup>203</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 701 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (“We likewise do

discussed in Sections I.A. and I.C., the Supreme Court has time and time again endorsed a broad interpretation of the term “sex.”<sup>204</sup> In fact, the Court has never endorsed a narrow interpretation of “sex,” and has explicitly rejected it with respect to the exclusion of same-sex harassment claims and claims based on sex stereotypes.<sup>205</sup>

Moreover, adherence to the narrow interpretation, the validity of which has been dubious for at least the past thirty years, defies principles of constitutional avoidance. With the *Obergefell* decision in 2015, courts that interpret the Civil Rights Act to exclude sexual orientation put the Act on a collision course with the Equal Protection and Due Process clauses.<sup>206</sup>

While it is beyond the scope of this Note to explore possible Due Process and Equal Protection implications of excluding LGB people from the Act’s protection, there is a potential argument that reading LGB people out of the Act, given our nation’s improved understanding of sexual minorities, transgresses either or both of these constitutional guarantees. In brief, the Supreme Court held in *Obergefell* that excluding homosexual Americans from marriage violated both the Equal Protection and Due Process rights by depriving them of a fundamental liberty interest because of their gender or sexuality.<sup>207</sup> By excluding LGB Americans from the province of the Civil Rights Act and depriving them of employment protections afforded to others simply because of their sexual orientation or the gender of their partners, one could constitute a similar hybrid Equal Protection and Due Process argument.<sup>208</sup> In fact, the Chief Judge of the Second Circuit recently suggested this very point in *Anonymous v. Omnicom Grp., Inc.*<sup>209</sup> Citing to *Loving v. Virginia*, the case in which the Supreme Court found an Equal Protection violation where Virginia law treated interracial couples equally but less favorably than non-interracial couples, the Chief Judge found “the same logic suggests that it is sex discrimination to treat all individuals in same-sex

---

not see how *Oncale* changes our well-settled precedent that ‘sex’ refers to membership in a class delineated by gender.”).

<sup>204</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40 (1989) (“We take these words to mean that gender must be irrelevant to employment decisions.”); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

<sup>205</sup> See *Price Waterhouse*, 490 U.S. at 239-40; *Oncale*, 523 U.S. at 79.

<sup>206</sup> Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

<sup>207</sup> *Obergefell*, 135 S. Ct. at 2604-05. It should be noted that the Supreme Court is not absolutely clear whether its ruling was based on sexuality (i.e., Equal Protection) or just Due Process. Nevertheless, either “fills the gap,” so to speak, when it comes to the Equal Protection and Due Process Rights of LGB Americans.

<sup>208</sup> Cf. *id.*

<sup>209</sup> See *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 203 (2d Cir. 2017) (Katzman, C.J., concurring).

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 373

relationships the same, but less favorably than individuals in opposite-sex relationships.”<sup>210</sup>

Whether *Price Waterhouse* or, more recently, *Obergefell*, the Supreme Court seems to have rejected the narrow interpretation of “sex” and, implicitly, the exclusion of LGB Americans from the protection of the Act.<sup>211</sup> In this case, for the federal courts to stand by things decided would be a grave mistake that not only perpetuates harm against LGB Americans, but also threatens the constitutionality of half-century old legislation that has transformed the fabric of working life in the United States.

Alternatively, in *Planned Parenthood v. Casey*, the Court opined that an old rule may be abandoned if the facts have changed or have “come to be seen so differently” as to rob the rule of justification or if the rule proves intolerable because it defies practical workability.<sup>212</sup> Considering the shift in social, psychological, and scientific understanding, a broad interpretation of “sex” would be in line with *Casey*. As described in Section I.C., courts are in agreement that the line between sexual orientation discrimination and sex discrimination is either so elusive that it has yet to be found, or it simply does not exist.<sup>213</sup> It defies practical workability to require that courts make a distinction that does not exist in order to determine whether or not an individual plaintiff may state a claim under Title VII. And, as discussed in Section II.A. and

---

<sup>210</sup> *Id.*

<sup>211</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40 (1989); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998); *Obergefell*, 135 S. Ct. at 2604-05.

<sup>212</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (“Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, . . . whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, [example omitted].”) (emphasis added).

<sup>213</sup> *E.g.*, *Hively, v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 706 (7th Cir. 2016), *rev’d*, 853 F.3d 339 (7th Cir. 2017) (“Whether the line is nonexistent or merely exceedingly difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents.”); *Videckis v. Perpperdine Univ.*, No. CV 15-00298 DDP (JCx), 2015 U.S. Dist. LEXIS 169187, at \*16 (C.D. Cal. Dec. 14, 2015) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (“[T]he line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1066-67 (7th Cir. 2003) (Posner, J., concurring) (“The origin of this curious distinction, which would be very difficult to explain to a lay person (an indication, often and I think here, that the law is indeed awry)[.]”).

II.B., the facts surrounding the distinction have come to be seen so differently over the course of the past forty years that it has robbed the old exclusionary rule of any meaning.<sup>214</sup> No longer is it assumed that homosexuals or bisexuals are deviants choosing to engage in wicked behavior—no longer do most believe deviation from heterosexuality is a curable pathology.<sup>215</sup>

This quote from the landmark gay rights case of *Lawrence v. Texas* is both instructive and plaintive: “[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”<sup>216</sup>

## V. CONCLUSION

Each of the three major justifications supporting the exclusion of LGB Americans from the protections of the Civil Rights Act is a judicially created Potemkin Village. First, the legislative history should not be used to justify a narrow interpretation of “sex” because it neglects the richer history surrounding the inclusion of the term.<sup>217</sup> And, even if believed, the Supreme Court has explicitly stated “sex” should not be read any differently than race or religion, based on the legislative history.<sup>218</sup> The Supreme Court has plainly rejected the narrow interpretation of “sex” in *Price Waterhouse* and *Oncale*.<sup>219</sup> Second, inclusion of LGB people within the Act’s protections would not effectively amend the Act because other subgroups of protected classes were afforded protection under the Act without changing the Civil Rights Act’s character.<sup>220</sup> Further, Congress’s original intent in creating the Act’s classes was broad in order to accommodate all that fell, and all that would fall, within the ambit of the five named classes.<sup>221</sup> This is not a case where courts must choose between originalism and activism—they must simply apply the 88th Congress’s original intent in an era when society recognizes sexual orientation as a natural variation and not a pathology. Finally, when it comes to the narrow interpretation of “sex,” courts should not rely on the

---

<sup>214</sup> See *supra* Sections II.A., II.B.

<sup>215</sup> Cf. Drescher, *supra* note 98, at 568; DSM-II § 302 (Am. Psychiatric Ass’n 2d ed.) (1968); Katy Steinmetz, *Oregon Becomes Third State to Ban Conversion Therapy on Minors*, TIME (May 19, 2015), <http://time.com/3889687/oregon-conversion-therapy-ban/>.

<sup>216</sup> *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

<sup>217</sup> See Bird, *supra* note 4, at 149-50.

<sup>218</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989).

<sup>219</sup> *Id.* at 244 n.9, 250-51; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

<sup>220</sup> *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*7-9 (EEOC July 15, 2015).

<sup>221</sup> *Price Waterhouse*, 490 U.S. at 244 n.9, 250-51; *Oncale*, 523 U.S. at 78; *Obergefell*, 135 S. Ct. at 2604-05.

2018] *SEX AND SEXUAL ORIENTATION DISCRIMINATION* 375

principles of *stare decisis*, as the judicially-created exclusionary rule's precedential status is both dubious and raises Equal Protection and Due Process questions.<sup>222</sup>

Preserving the exclusion of sexual orientation from the Civil Rights Act's protections against "sex" discrimination is impractical, illogical, and a misreading of the 88th Congress's original intent. It is imperative courts cease excluding LGB Americans from the protections of the Civil Rights Act, as such exclusion works a grave and continuing harm that defies the Act's core principles.<sup>223</sup>

"A man will be imprisoned in a room with a door that is unlocked and opens inwards; as long as it does not occur to him to pull rather than push it."<sup>224</sup> As the Seventh Circuit wondered, "Perhaps the writing is on the wall."<sup>225</sup> Indeed, it is.<sup>226</sup>

<sup>222</sup> Cf. *Price Waterhouse*, 490 U.S. at 244 n.9, 250-51; *Obergefell*, 135 S. Ct. at 2604-05.

<sup>223</sup> See Soucek, *supra* note 50, at 784-85.

<sup>224</sup> Daniel S. Goldberg, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463, 497 (2002) (citing MARIE MCGINN, *THE ROUTLEDGE GUIDEBOOK TO WITTGENSTEIN'S PHILOSOPHICAL INVESTIGATIONS* 20 (1997) (citing LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 42 (G.H. von Wright & H. Nyman eds., 1980))).

<sup>225</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 701 (7th Cir. 2016), *rev'd*, 853 F.3d 339 (7th Cir. 2017).

<sup>226</sup> See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) ("Since 1964, the legal framework for evaluating Title VII claims has evolved substantially[;] traits that operate as a proxy for sex are an impermissible basis for disparate treatment of men and women. Under *Price Waterhouse*, discrimination on the basis of sex stereotypes is prohibited. Under *Holcomb*, building on *Loving*, it is unlawful to discriminate on the basis of an employee's association with persons of another race. Applying these precedents to sexual orientation discrimination, it is clear that there is 'no justification in the statutory language . . . for a categorical rule excluding' such claims from the reach of Title VII."); Camperio Ciani, Battaglia, & Zanzotto, *supra* note 155, at 13 ("Sexual antagonism for a multilocus factor with at least an X-linked locus is the selection mode providing closest adherence of the models to the empirically known patterns for both [homosexual] sexual orientation of males and higher-than-average fecundity for females in their maternal line."). See also Epstein, *supra* note 98, at 65-66 ("[I]t is reasonable to assume that most of the people who currently live as homosexuals were probably close to the gay end of the continuum to begin with; in other words, they probably have strong genetic tendencies toward homosexuality."). Cf. *Psalms* 139:13-17 (New American Bible, Revised Edition) ("You formed my inmost being; you knit me in my mother's womb[—]I praise you, because I am wonderfully made; wonderful are your works! My very self you know. My bones are not hidden from you, When I was being made in secret, fashioned in the depths of the earth. Your eyes saw me unformed; in your book all are written down; my days were shaped, before one came to be. How precious to me are your designs, O God; how vast the sum of them!").