Social Cognition 'At Work:' Schema Theory and Lesbian and Gay Identity in Title VII

todd brower
1. Introduction, Social Cognition and Schema Theory

Take this short quiz:

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

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

The correct answer is C. 2.0.¹ Most people find that answer surprising. We ordinarily think of lesbians and gay men as predominantly childless, urban residents of cities like San Francisco, New York, Chicago, or Los Angeles or as inhabitants of the Northeastern or Pacific Coast states. However, data from the 2000 census demonstrate that same-sex couples are located in virtually every county in each of the 50 states.² Moreover, many of the states with the highest proportion of same-sex couples raising children are not those with the highest concentrations of lesbian or gay couples; rather they tend to be states in which all couples tend to have children.³ Thus, like their heterosexual counterparts, lesbian or gay couples raising children may be attracted to locations with child-friendly amenities like good schools and parks, or where...
couples share similar values, rather than automatically locating near other gays and lesbians. Our error is attributable to what we think we know about lesbians and gay men and the consequent distortion that occurs because of our beliefs.

This phenomenon is less puzzling than it first appears. Psychologists have demonstrated that our perceptions of the world are shaped by schemas, a set of beliefs about people, events or situations that we use as guides in our interaction with these things. Having a schema about a person or thing enables us to know (or believe we know) a great deal about that person or thing in a shorthand fashion. Thus, we are able to treat that person or object in what we perceive to be an appropriate manner, that is, consistent with our schema. For example, we may schematically assign furniture into separate groups, tables and chairs. Therefore, when we categorize a new thing with one schema or the other, we know whether to sit in that object or to place our drink on it.

Schemas are crucial to our ability to function in the world. If we had to constantly analyze each piece of information, event or situation anew, we would either be swamped by minutia or paralyzed into inactivity. Schemas, therefore, are one way to process the incessant stream of demands and inputs.


Brower and Nurius, supra note 5.

Brower and Nurius, supra, note 5, at 28.
permit us to understand others or new situations and to interact successfully with them after only a brief encounter.

As applied to social situations, schemas tell us what is appropriate and how to act. For example when we enter a restaurant, we call upon our “restaurant” schema to help us delineate our expectations or behavior. Thus, we know when to wait for a table, how to signal the waiter, where and how to pay the check, etc. These schemas are socially or culturally based. As anyone who has traveled in foreign countries can recognize, native American culture’s restaurant schema is not necessarily useful or accurate as a guide to ordering coffee in a café in Rome\(^8\) or figuring out how to leave a tip in Berlin.\(^9\) Reasoning by analogy to our schemas is sometimes inapposite.

Traditional legal analogical reasoning follows a pattern called schema-matching.\(^10\) We apply precedent to the circumstances before us when a prior case is consistent with our understanding of the current situation. We know when the situations are congruent when our schema of a new factual or legal pattern resonates with another. For example, if a judge recognizes new facts as characteristic of First Amendment incitement speech, she will know which constitutional standards to apply, as well as which legal precedents to examine and what factual issues to address. Thus, a judge or legal scholar need not reanalyze each problem from scratch each time she encounters a new situation, but can rely on prior cases and doctrine. Of course, judges are aware that they are applying precedent to make decisions. However, the processes of decision-making are often obscure or misattributed.\(^11\)

Additionally, our schemas may not always remain appropriate due to the way these models evolve. We extract and retain certain information because it is useful to us and consonant with our schema for that concept, and reject information when it is not consistent, or no longer useful.\(^12\) We liberally edit information to fit our schemas, and, as they are idiosyncratic, they are neither necessarily accurate nor consistent with others’ schemas of the same things.

We interact with people in a manner consistent with our social schemas. We quickly develop models which ascribe a range of characteristics to others corresponding to their skin color,\(^13\) sex,\(^14\) and

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\(^8\) See, Mario Costantino and Lawrence Gambello, THE ITALIAN WAY, 6 (1996) (describing the practice of going to the cashier and paying for the order, then presenting the receipt (scontino) to the barman to receive the coffee); Rick Steve, Rick Steve’s Italy 2008, 23 (2007) (same).

\(^9\) See, Richard Lord, CULTURE SHOCK -- GERMANY, 188 (2008) (describing the custom of handing the tip directly to the server, rather than leaving it on the table, or having it included on the credit card slip).

\(^10\) Id. at 14-15. For an interesting essay examining how historians’ “plots” affect their narratives of environmental history by a process similar to schema theory, see William Cronon, A Place For Stories: Nature, History and Narrative, Mar. 1992 J. AM. HIST. 1347, 1347-67 (describing the different histories of the Great Plains generated from the same historical evidence).

\(^11\) That a judge may base her decisions on other inputs than pure legal doctrine was one of the insights of the legal realist movement of the 1930’s. See, e.g., Jerome Frank, LAW AND THE MODERN MIND, 148-155 (1936). Critical Legal Studies often makes a similar point. See, e.g., Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES, 200-204 (1987).

\(^12\) Brower and Nurius, supra note 5 at 14.

\(^13\) E.g., Kenneth Clark and Mamie Clark, “Racial Identification and Preference in Negro Children”, in Readings in Social Psychology (T. Newcomb and E. Harley, eds. 1947). There is an extensive legal literature about race and racial perceptions. See e.g., Neil Gotanda, A Critique of Our Constitution is
other physical attributes.\textsuperscript{15} It is unsurprising, therefore, that people have a schema for lesbians and gay men and for homosexuality. We can quickly identify some major characteristics of the popular schema about gay people.\textsuperscript{16} (1). That lesbians and gay men exhibit “cross-gender” or gender atypical behavior, behavior traditionally associated with the opposite sex.\textsuperscript{17} (2). That gay identity is solely about sexual behavior\textsuperscript{18} and


\textit{See e.g.,} Wendy Williams, \textit{The Equality Crisis: Some Reflections on Culture, Courts, and Feminism,} 7 WOMEN’S RTS LAW REPT’R 175 (1982).

This article distinguishes between “sex” and “gender.” I use “sex” to refer to biological characteristics associated with men or women. \textit{J.E.B. v. Alabama, ex rel T.B.,} 511 U.S. 127, 157n.1(1994)(Scalia, J., dissenting); \textit{Richard Epstein, Gender Is For Nouns,} 41 DEPAUL L. REV. 981, 982 (1992). Thus, menstruation exemplifies a sex difference; the differing perception of a woman or a man in a dress illustrates a gender one.

\textit{David Stipp, “Mirror, Mirror On the Wall, Who’s the Fairest of Them All?”}, \textit{FORTUNE,} Sept. 9, 1996 at 87) (Describing the conclusions of a 1990 University of Pittsburgh study finding that businessmen’s average yearly salary rose $1,300.00 per inch of height -- a six foot man made $6,500.00 more in salary than one who was five feet, seven inches, and other studies of the correlation between physical attractiveness and success.).

\textit{Professor Marc Fajer also pointed to the significance of these issues. See, Fajer, supra, note 5, at 514, 607.}

Of course, many other aspects of the lesbian and gay male schema are not directly relevant to the legal doctrines discussed in this article. For example, gay men are supposed to be more artistic, creative or stylish than non-gay men. \textit{See, e.g., A Tree Grows in Guadalajara,} \textit{UGLY BETTY,} Season 1 - Episode 22, Original Air date May 10, 2007, (ABC) (heterosexual fashion designer Tavares (Mykel Shannon-Jenkins) pretends to be gay in order to succeed in the fashion business), episode synopsis at http://en.wikipedia.org/wiki/A_Tree_Grows_in_Guadalajara (last accessed 5/31/08); \textit{Cheers} episode in which Norm (George Wendt), in order to meet clients’ expectations, pretends to be gay to obtain a job as an interior designer. \textit{Cheers,} (NBC) (Thurs., Dec. 8, 1988), \textit{TV Highlights for Thursday Dec. 8, 1988, U.P.I., Entertainment} (December 8, 1988)(describing episode); \textit{George F. Cusen, Strange Brew: Hollywood and the Fabrication of Homosexuality in Tea and Sympathy,} in QUEER REPRESENTATIONS, 119 n.9 (Martin Duberman, ed. 1997) (discussing newspapers’ accounts of Cole Porter being the interior decorator for his (and his wife’s) apartment and his general sense of style as codedly identifying him as gay).

Lesbians are often seen as angry, overly serious and hyper-vigilant about patriarchy. \textit{E.g.,} Jennifer Vanasco, \textit{Laughing With Us,} INDEPENDENT GAY FORUM, at http://www.indegayforum.org/news/show/31509.html (last accessed 5/1/2008) (discussing lesbian comedians; lesbians were once thought to have no sense of humor, and retelling joke: “Q: How many lesbians does it take to change a lightbulb? A: That isn’t funny.”).

\textit{E.g., Frontline: Assault on Gay America,} Interview with Michael Kimmel, (originally aired February 15, 2000), at http://www.pbs.org/wgbh/pages/frontline/shows/assault/interviews/kimmel.html (last accessed 5/21/08) (“To be gay inverts the gender order. In the public fantasy, in the homophobic mentality, to be gay is to be a man acting like a woman, or a woman acting like a man. One of the most common questions that straight people ask gay people is: ‘Which one of you is the boy, and which one of you is the girl?’”); \textit{Frances Romero, GUESS WHO’S GAY IN HIP HOP,} \textit{TIme,} at http://www.time.com/time/arts/article/0,8599,1807080,00.html (last accessed 5/21/08)(interview with Terrance Dean, gay author of \textit{Hiding Within Hip Hop,} in which Mr. Dean discusses being on the “down-low” and relates that Black gay men have difficulty coming out within African-American community and linking gayness with effeminacy.); \textit{See generally,} Fajer, supra, note 5 at 607. Some empirical evidence exists that gay men and women possess certain interests and traits more common to the other sex. \textit{Richard A. Lippa, The Gay-Straight Divide: What are the connections between sexual orientation and gender?,} National Sexuality Resource Center (NSRC) – American Sexuality Magazine (2004), http://nsrc.sfsu.edu/HTMLArticle.cfm?Article=833 (last accessed 4/15/08)(discussing personality trait research).
that lesbians and gay men experience sexuality and sexual activity different from heterosexuals.

Homosexuality, according to the schema, is omni-present, predatory, and uncontrollable. Sex is completely divorced from love, long-term relationships and family structures,\textsuperscript{19} all of which form part of the schema for heterosexuality.\textsuperscript{20}

This is the crux of schema theory to this article. The schema of lesbians and gay men used by some judges has prevented them from appropriately interpreting legal doctrine and precedent, and has led

\textsuperscript{18} See, e.g., Sasha Lewis, \textit{SUNDAYS WOMEN: A REPORT ON LESBIAN LIFE}, 11 (1979) (“Something that people don’t understand is that it’s not who you go to bed with that determines if you’re straight or gay. Sex has nothing to do with it. You can be celibate and gay. Identification as gay or straight is an emotional thing – do you relate primarily emotionally to women or to men in an intimate situation?... That was what was missing in my marriage. Sex was okay with him. What was missing was the emotional intensity. I was never in love with him or with any other man. I didn’t know what “in love” meant until I had my first lesbian relationship.”). Even non-sexual meetings of lesbian and gay men are assumed to be sexual. Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317, 1323 (5\textsuperscript{th} Cir. 1984)(expert testimony that sex certainly followed any meeting of lesbian and gay male services organization); Press release, ACLU, \textit{Federal Judge Rules That Students Can’t Be Barred From Expressing Support for Gay People} (5/13/2008) available at http://www.aclu.org/lgbt/youth/35265prs20080513.html (last assessed at 5/30/2008)(Panama City FL school principal testified under oath “that he had banned students from wearing any clothing or symbols supporting equal right for gay people. [He] also testified that be believed rainbows were ‘sexually suggestive’ and would make students unable to study because they’d be picturing gay sex acts in their mind.”); see generally Fajer, supra, note 5, at 537-70 (discussing the “sex as lifestyle” assumption and lesbian and gay male counter-examples).

\textsuperscript{19} Accord, Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986)(“No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, [...] Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupported.”). Cf. 142 Cong. Rec. S. 9998, 104\textsuperscript{th} Cong, 2d Sess. (Fri. Sept. 9, 1996)(remarks of Sen. Nickles, R. Okla., on the Employment Non-Discrimination Act [ENDA] which would have amended Title VII to add sexual orientation as a prohibited category)” In my days as an employer, I had a sales force. Sales people spend a lot of time together. They go on the road together. They travel together. They go to conventions together. They spend weeks together. What if an employer found out this person is a good salesman, has a good reputation, but he openly admits that he is bisexual. Now, that may be fine in some sales organizations but in some other sales organizations it will not be very popular. It will not be very popular. It will not be very popular with some of the spouses, maybe male and female. If an employer says, ‘Well, no, that person really will not fit into our organization. We do not think we should have promiscuous people in our sales team because of the time spent away from home, the time and travel, so I think as a policy we will not do that.’ You say, wait a minute, this bill does not protect that. Wait a minute, this bill protects homosexuals and bisexuals. The very definition of bisexual means you are promiscuous. You are having sex with males and females. Bisexuals are protected under this bill.”)

The structure of Senator Nickles’s logic is telling in several ways: The Bill protects bisexuals and homosexuals. Bisexuals, by definition, are attracted to both men and women. Consequently, they can never be satisfied with just one person, male or female. Therefore, they must be promiscuous, since no matter whom they are with, they always want other sexual partners of the other sex. Moreover, they will seek these partners in the workplace, at the expense of other workers’ marriages or commitments. The leap of logic in these last three sentences is enormous, until we remember that only heterosexuals have relationships based on love and family. Under Senator Nickles’s schema, there is no notion of fidelity, selectivity, or even self-control in bisexuality. A bisexual must have these sexual urges and act on them indiscriminately.

\textsuperscript{20} Fajer, supra note 5, at 514.
to anomalous results. Moreover, the relatively non-rigorous and unconscious nature of schema-matching, which is a feature of both legal and non-legal reasoning, has exacerbated this tendency for inaccuracy and distorted legal doctrine where lesbians and gay men are involved.

Some of the most jarring examples have occurred under the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964, specifically those cases involving same-sex sexual harassment. Significant commentary exists on same-sex sexual harassment. This article differs from that commentary because it does not seek to explain or revise that doctrine through theoretical or jurisprudential constructs. Rather it uses same-sex sexual harassment as one example of how law can employ the insights of social science, particularly cognitive schema models. The article explores how social cognition theories inform and misinform judicial decisions and those of the participants in the cases.

Similarly, although the Supreme Court’s brief opinion in Oncale v. Sundowner Offshore Services, Inc. held that same-sex sexual harassment is actionable under Title VII, neither that decision, nor the lower court cases before or after it, resolve the concerns of this article. This article does not comprehensively survey the landscape of same-sex sexual harassment decisions, nor provide a unified field theory of sexual harassment. Instead the article will focus on selected cases decided both before and after Oncale to illustrate how the schema of lesbians and gay men has affected judicial decision-making.

Consequently, part 2 of the article will briefly touch upon basic Title VII doctrine on sexual harassment and the Court’s Oncale opinion, but will quickly move to how the lesbian and gay male schema

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21 For a similar discussion in the context of racial schemas, see Lawrence, supra note 13; for a discussion of the way that cultural values limit and shape legal doctrines using gender, see Williams, supra note 14.


25 Id. at 82.


has influenced judicial analysis in the selected cases in parts 3 and 4. When significant discussion of legal theories is necessary to understand the impact of schema on doctrine, that legal discussion will usually be reserved until required by the schema analysis.

Part 3 will examine how the lesbian and gay male schema has sometimes helped courts make appropriate analogies to relevant precedent on desire-based sexual harassment and sometimes skewed judicial analysis. Part 4 will explore the more subtle effects caused by the cross-gender aspects of the schema. The gender atypicality facet has created significant problems for courts and for the individuals involved in those cases. The article also reveals the mechanism by which schemas provoke these distortions. Finally, the article concludes with a look at one empirical study in cognitive psychology of same-sex sexual harassment to confirm the insights gained by applying schema theory to these cases and to sketch a judicial prescription for the future.

2. Oncale and same-sex sexual harassment

Title VII prohibits sexual harassment in the workplace perpetrated by men against women,\(^ {28} \) by women against men,\(^ {29} \) and since the Court’s 1998 *Oncale* decision, by either men or women against persons of their own sex.\(^ {30} \) Courts traditionally divide sexual harassment into two types: quid pro quo or hostile environment.\(^ {31} \) The former is a request for sexual favors, which is directly linked to an economic or other tangible benefit.\(^ {32} \) The latter describes a workplace where employees are subject to unwanted sexual attention or discriminatory intimidation, ridicule, and insult without a direct connection to employment benefits.\(^ {33} \) Although the elements for the two causes of action differ slightly,\(^ {34} \) the difference does not affect our analysis. Both can be based on subjecting members of one sex to conduct or behavior (and thus terms and conditions of employment) not applicable to members of the other sex.\(^ {35} \) Both are created by unwanted sexual advances, other verbal or physical activity of a sexual nature, or other harassing behaviors on the basis of sex.\(^ {36} \)

To see better how schemas affect sexual harassment cases, we can ignore that doctrinal distinction and focus instead on examining the perpetrator’s motivations in same-sex sexual harassment. Some sexual harassment appears motivated by attraction or desire for the harassment victim, others by hostility or


\(^{30}\) *Oncale*, 523 U.S. at 82.

\(^{31}\) *Meritor*, 477 U.S. at 64.

\(^{32}\) *Id.*

\(^{33}\) *Id.* at 65; *Harris*, 510 U.S. at 21.

\(^{34}\) *Prescott*, 878 F. Supp. at 1549.

\(^{35}\) *Meritor*, 477 U.S. at 64-65.

\(^{36}\) *Id.* at 65.
antipathy to the individual. Thus, requests for sexual favors, dates and similar physical advances would fall into the desire-based sexual harassment category. Sexual innuendoes, taunts, unwanted sexual attention, or other conduct of a sexual nature that is so “sufficiently severe or pervasive to alter the conditions of the victim’s employment” and which fill the workplace with “discriminatory intimidation, ridicule and insult” constitute hostility-based sexual harassment.

Courts do not always appropriately employ the distinction between desire- and hostility-based sexual harassment. Nor have courts traditionally required plaintiffs to show motive, and this paper does not suggest that they should do so. However, motivation serves as an analytical tool to understand how the lesbian and gay male schema affects same-sex sexual harassment cases.

Before Oncale and despite significant experience with opposite-sex sexual harassment, the lower federal courts had splintered badly on the question of whether same-sex sexual harassment was encompassed under the sex discrimination provisions of Title VII. For example, many judges refused to equate same-sex sexual harassment with opposite-sex harassment. When a man harassed a woman, Title

37 See, Oncale, 523 U.S. at 80. This division is not meant to suggest that the two categories are mutually exclusive, or that sexual advances ostensibly motivated by desire cannot evidence hostility towards women in the workplace. See, e.g., Catherine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION, 209-10 (1979).
38 See, e.g., Meritor, 477 U.S. 59.
39 Harris, 510 U.S. at 21.
40 Id. Classic anti-female, hostility-based sexual harassment can take many forms, including conduct not having an explicitly sexual content: from unwanted physical contact of a sexual nature (e.g., groping, rubbing, intentional bumping, staring), [E.g., Agugliaro v. Brooks Bros., 1996 U.S. Dist. LEXIS 7965 (S.D.N.Y. 1996).] to insults, ridicule and other verbal abuse referring to gender (e.g., “bitch, slut, stupid woman”), [Jensen v. Evaleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993); Winsor v. Hinckley Dodge, Inc., 79 F.3d 996 (10th Cir. 1996).] and sex-based refusal to cooperate or hard-timing (e.g., not trading shifts, not sharing workload). [E.g., Andrews v. Philadelphia, 895 F.2d 1469, 1495 (3d Cir. 1990)(files taken and/or defaced, not given certain assignments, equipment sabotaged); Porta v. Rollins Envtl. Serv., Inc., 654 F. Supp. 1275, 1279 (D. N.J. 1987).] Naturally, these types of behaviors are neither exhaustive nor mutually exclusive. [See, e.g., Andrews, 895 F.2d 1469 (sexual comments and innuendo, pornography, destruction of office equipment, hiding of files); Gus v. Hall Constr. Co., 842 F.2d 559 (8th Cir. 1988).] The key is that a woman was targeted because of her sex. Unwanted touching and verbal harassment evidence the view that women are sexual playthings first and employees or co-workers second. [Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job, 14-15 (1978); accord, Judith P. Butler, Gender Trouble: Feminism and the Subversion of Identity, 19 (1990)(discussing the identification of women with sex).] Comments to a female bookkeeper like “Whore, what’s the amount?” or “Women are only good for fucking” [E.E.O.C. v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35-36 (W.D.N.Y. 1994).] are blatant illustrations of the denigration of women because of sex. [Farley, supra, at 14-15; Butler, supra, at 19; MacKinnon, supra, note 37, at 209-10.] This treatment of women signals to them that they are not equals in the workplace with men. [MacKinnon, supra, note 37, at 235.] Thus, it is related to hard-timing or non-sexual disparate treatment of female workers.
42 For a good discussion of the various theories and decisions prior to Oncale, see Axam & Zalesne, supra, note 23, at 177-205.
VII applied; when he harassed another man, it did not. Additionally, although courts recognized a Title VII cause of action against an employer when it required conformity to traditional gender behavior for women, often they did not permit an equivalent suit by an effeminate or a non-traditionally masculine man. As the Supreme Court stated in reviewing this “bewildering variety of stances,” some cases “held that same-sex sexual harassment claims are never actionable,” others that such claims are only appropriate “if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire),” and other courts had found that sexual workplace harassment was always actionable, “regardless of the harasser’s sex, sexual orientation, or motivations.”

Against that background, in 1998 the United States Supreme Court decided Oncale v. Sundowner Offshore Services, Inc., holding that same-sex sexual harassment falls within Title VII. Plaintiff Joseph Oncale was employed as a roustabout on an eight-man, all male oil platform crew. On several occasions, Oncale was forcibly subjected to sexually degrading and humiliating actions by his supervisors and co-workers, including sodomy with a bar of soap in the showers, restraint by co-workers allowing physical contact with another man’s penis, and threats of rape. In a brief, unanimous opinion penned by Justice Scalia, the Supreme Court held that “nothing in Title VII necessarily bars a claim of discrimination ‘because of … sex’ merely because the plaintiff and the defendant … are of the same sex.” In Oncale, the Court also outlined three situations in which a victim of same-sex sexual harassment could show gender discrimination: (1) when the harasser was homosexual and thus motivated by sexual desire; (2) when the harasser used sex specific and derogatory terms so as to make it clear that he or she was motivated by general hostility to persons of that sex in the workplace, and (3) where there was direct comparative evidence that the sexes were treated differently at work. Contrary to some judicial opinions, the Court’s list was illustrative and not exhaustive. Oncale itself illustrated that point. It described neither

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47 Oncale, 523 U.S. at 79.
48 Id. (citing Goluszek v. H. P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988))
49 Oncale, 523 U.S. at 79. (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996)).
50 Oncale, 523 U.S. at 79. (citing Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 523 U.S. (1998)).
52 Oncale, 523 U.S. at 77.
54 Id. The Supreme Court coyly elided the details of Oncale’s treatment “in the interests of brevity and dignity.” 523 U.S. at 77. Because Oncale was on certiorari from the Fifth Circuit, which had held same-sex sexual harassment never actionable, the precise facts were irrelevant. Id. at 77-78.
55 523 U.S. at 77
56 Id. at 79.
57 Oncale, 523 U.S. at 80-81.
homosexual desire, nor general hostility towards males in the workplace, nor any direct comparison with female workers’ treatment.\footnote{See, supra, notes 52 - 55.} Finally, in \textit{Oncale}, the Court explained that prior case law requiring a severe or pervasive hostile environment mandated a distinction between “ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation -- [and] discriminatory conditions of employment.\footnote{\textit{Oncale}, 523 U.S. at 81 (quotation marks removed)}

A decade after \textit{Oncale}, courts have continued to struggle with the Court’s guidance on same-sex sexual harassment. In particular and most relevant to this article, lower courts have had a difficult time distinguishing between gender and sexual orientation discrimination. This distinction is crucial because Title VII covers the former, but not the latter.\footnote{See, e.g., Rene v. MGM Grand Hotel, Inc, 305 F.3d 1061, 1075-76 (9th Cir. 2002)(en banc)(Hug, J., dissenting), \textit{cert. denied}, MGM Grand Hotel, Inc., 538 U.S. 922 (2003); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3rd Cir. 2001), \textit{cert. denied}, 534 U.S. 1155 (2002); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc. 876 F.2d 69, 70 (8th Cir. 1989)(per curiam); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984), \textit{cert. denied}, 471 U.S. 1017 (1985); DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329-30 (9th Cir. 1979).}

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

3. \textit{The schema of lesbian and gay identity as sexual behavior / desire-based sexual harassment}

As \textit{Oncale} noted in dicta, same-sex sexual harassment where the perpetrator is gay or lesbian is discrimination on the basis of sex parallel to opposite-sex sexual harassment by non-gay persons. A
heterosexual male supervisor, who demands sexual favors from a female because he is attracted to her, does so because only members of her sex have the potential to be found sexually appealing to him. Accordingly, but for her sex, she would not be treated differently. Both before and after Oncale, courts have had the least amount of trouble seeing that same-sex, desire-based sexual harassment is also actionable under Title VII. Since same-sex desire-based sexual harassment most closely resembles the prototype of cross-sex sexual harassment, it is unsurprising that courts are able to incorporate unwanted homosexual attention into Title VII cases.

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

62 Harris, 510 U.S. at 25 (Ginsburg, J., concurring)(“The critical issue… is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”); Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981).

63 E.g., Post-Oncale cases: Bibby, 260 F.3d at 264; LaDay v. Catalyst Tech., Inc., 302 F.3d 474, 478 (5th Cir. 2002); Dick v. Phone Directories Co., Inc., 397 F.3d 1256, 1264 (10th Cir. 2005); Shepard v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir. 1999); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 (11th Cir. 2001). Pre-Oncale cases: EEOC v. Waldenbook Co., 885 F.Supp. 1100, 1102-04 (M.D. Tenn. 1995)(discussing Meritor and reasoning by analogy to it.); Joyner v. AAA Cooper Transp., 597 F.Supp. 537 (M.D. Ala. 1983); Marrero-Rivera v. Dept. of Justice, 800 F.Supp. 1024 (D. Puerto Rico 1992). See also, e.g., Fredette v. BVP Management Assoc., 112 F.3d 1503, 1507 (11th Cir. 1997); Yeary, 107 F.3d 443. Those courts have clarified that their holdings only extended to desire-based sexual harassment claims. Id. at 448; Fredette, 112 F.3d at 1507.

Even in same-sex situations, the line between these two categories can be murky. E.g., McCoy v. Johnson Controls World Serv., 878 F. Supp. 229 (S.D. Ga. 1995) (white female plaintiff sexually harassed by African-American female co-workers.). Robin McCoy alleged that Marjorie Ivey rubbed her breasts against her, rubbed McCoy between her legs and forced her tongue down McCoy’s throat [id. at 231.] – all of which would indicate sexual attraction. However, there was also evidence that Ivey and another co-worker called McCoy, “stupid poor white trash” or “stupid poor white bitch” and stated that they would make plaintiff quit, as they had made other “white bitches.” Id. These comments would seem to show animosity, both racial and sexual. Since the harassment was by co-workers without the ability to promote or fire McCoy, quid pro quo sexual harassment was inapplicable. The court properly decided that plaintiff demonstrated hostile environment sexual harassment and did not inquire into motive. Id. at 232. For another example where the line between attraction- and hostility-based sexual harassment is unclear, see Wrightson v. Pizza Hut of America, 99 F.3d 138 (4th Cir. 1996).


One early example is *Yeary v. Goodwill Industries-Knoxville, Inc.* 67 Shortly after Goodwill hired Terry Yeary, his male co-worker, Robert Lee, asked Yeary on a date. The court stated, “it was very well known among employees and higher level management that Mr. Lee was a homosexual and was notorious for harassing male employees of Goodwill.” 68 Yeary was also subjected to sexual remarks about nudity and masturbation, and asked whether “he had ever seen ’12 inches’ or if he had ever had ’12 inches.‘” 69 Lee also touched Yearly sexually and pinned him against the wall of Lee’s office while whispering obscene comments about Yearly’s physical appearance. 70 Although decided before *Oncale*, the Sixth Circuit easily found Title VII prohibited this conduct.

It is not necessary for this court to decide today whether same-sex sexual harassment can be actionable only when the harasser is a homosexual; all that is necessary for us to observe is that when a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male—that is, “because of…sex.” 71

In 2001, a different Sixth Circuit panel split on whether a hostility-based male-on-male harassment claim was proper. 72 However, in reviewing *Yeary* and *Oncale*, all of those judges agreed that “predatory homosexual conduct [would] ground a Title VII claim.” 73 Note the word “predatory.” The opinion uses that term three times, twice explicitly with reference to sexual harassment by gay people against non-gay persons. 74 This linking of homosexuality and predation resonates with the lesbian and gay male schema of recruitment of non-gay persons into the “gay lifestyle.” 75

The gay recruitment schema is a one-way ratchet. Most frequently, same-sex sexual harassment has been actionable when the harasser is homosexual and the victim heterosexual, not the reverse, or not when both are homosexual or both heterosexual. *Prichett v. Sizeler Real Estate Management Company* 76

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68 Id. at 444.
69 Id.
70 Id.
71 Id. at 448 (emphasis in original).
72 EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001)
73 Id. at 519 (Guy, J., concurring in part, dissenting in part, opinion for the court in this section).
74 Id. (“The court [in *Yeary*] decided that the majority of circuits would allow predatory homosexual conduct to ground a Title VII claim”)(emphasis added); Id. at 522 (“Mr. Oncale quit his job because he thought he ‘would be raped or forced to have sex.’ The harasser was a homosexual. Because this was the fact, it was easy to conclude the harasser would not have been predatory toward females.”)(emphasis added)(discussing the Supreme Court’s decision in *Oncale*); Id. at 520 (“It [Title VII] also protects, in certain circumstances, workers from predatory conduct carried out by persons who are of the same sex as the person being ‘discriminated’ against.”)(emphasis added).
75 See, e.g., Jon Carroll, SAN FRANCISCO CHRONICLE, June 24, 2005, Daily Datebook, at E18, (discussing gay pride day and anti-gay groups’ beliefs); Andrew Heller, *Yikes, folks, did we grow up straight?*, FLINT JOURNAL (MICHIGAN), Feb. 2, 2005, Today, at D01, (discussing attacks by the Reverend James Dodson, Focus on the Family, to cartoon characters as encouraging gay behavior and acceptance), see also, infra, note 114; accord, Aumiller v. University of Delaware, 434 F. Supp. 1273, 1285 (D. Del. 1977)(termination of professor/advisor to campus gay organization for “advocacy of the homosexual lifestyle for the undergraduate” violated the First Amendment).
helps decipher this pattern. In Pritchett, a lesbian supervisor sexually harassed a female employee. The district court rejected then-extant Fifth Circuit precedent the denying recovery for same sex sexual harassment so that the court could protect heterosexuals from homosexual sexual predations.

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

Several aspects of the court’s opinion are noteworthy. First, the quote is consistent with the skewed effect of the lesbian and gay male schema. The judge jumped immediately from the notion that had a gay plaintiff been involved, the case would have been barred because Title VII does not cover sexual orientation discrimination. That conclusion is erroneous; the desire-based discrimination would still have been based on sex, not sexual orientation. Homosexuality is no more the foundation for a same-sex, desire-based sexual harassment suit than heterosexuality is the basis of an opposite-sex sexual harassment cause of action. In both cases, the harasser’s sexual orientation is only relevant to explain why the harasser targeted a particular sex. But for their sex, the victims would not have been the objects of unwanted attention.

Second, we can hear an echo of some anti-gay rights campaigners’ “no special rights” rhetoric in the court’s concern about providing an exemption for homosexuals. Although Title VII could now cover same-sex sexual harassment, this judge believed the holding merely closed a loophole that homosexuals could have exploited. A common judicial schema in these cases is that gay people seek to exploit doctrinal loopholes to gain unfair advantage and that judges must vigilantly police that cheating. That schema is

77 Id. at 1.
78 Id. at 2.
79 Id.
81 See supra, note 62, and accompanying text.
especially clear because the court clarified that it was only protecting heterosexuals by this holding, not homosexuals.  

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

The language of Title VII does not support the first option. Title VII ought not be applied differently based on claimants’ sexuality. Of course, Title VII prohibits discrimination based on sex but not sexual orientation. Heterosexual plaintiffs alleging sexual orientation discrimination under Title VII should have their claims dismissed like those of their lesbian and gay co-workers. If this point is not obvious to courts, it is because schemas distort their reading of precedent. Our schema for “sexual orientation” typically includes lesbians, gay men, and bisexuals; however we often forget that heterosexuals also have a sexual orientation. Accordingly, we tend to see sexual orientation protections in civil rights statutes as protecting gay men, lesbians or bisexuals but not heterosexuals. Nevertheless, those regulations also protect non-gay persons from discrimination.

In a parallel manner, since Title VII does not apply to sexual orientation discrimination, it must bar such claims by anyone, lesbian, gay, bisexual, or heterosexual. In Medina v. Income Support Division, New Mexico, the court dismissed the claim of Rebecca Medina, a heterosexual woman, who alleged that

85 See, e.g., Rene, 305 F.3d at 1070 (Graber, J., concurring); Bibby, 260 F.3d at 264; Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1999); DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 329-30 (9th Cir. 1979).
86 Accord, Medina v. Income Support Div., New Mexico, 413 F.3d 1131 (10th Cir. 2005); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1175 (D. Nev. 1995) (Plaintiffs in Fox claimed that they suffered sexual harassment as males because of the workplace discussions and pictures of gay sexual activity. The court restated their claim as one based on sexual orientation not covered by Title VII and rejected it).
87 See, e.g., Kramer, Heterosexuality and Title VII, supra note 80, at 29-30 and examples cited therein.
88 For a striking example of judges reading sexual orientation to pertain to lesbians, gay men and bisexuals but forgetting about heterosexuals, see Justice Scalia’s dissent in Romer v. Evans, 517 U.S. 620 (1996). There Justice Scalia describes Colorado’s constitutional Amendment 2 as merely banning special rights for gay people and returning Colorado law to neutrality. Id. at 638-39 (Scalia, J., dissenting). Nevertheless, Justice Scalia misstates the effect of the Colorado law. Each of the ordinances affected by the amendment, e.g., Aspen, Boulder, Denver, and the state Executive Order, barred sexual orientation discrimination. Id. at 623-24, 626-27 (quoting Evans v. Romer, 854 P.2d 1270, 1284-85 (Colo. 1993)(Evans I)). Amendment 2 prohibited anti-discrimination provisions based on homosexual, lesbian, or bisexual orientation only. Colo. Const. Art. II, § 30b; Romer, 517 U.S. at 624. Thus, heterosexuals, as heterosexuals, would have remained protected against sexual orientation discrimination under these ordinances; gay people would not have been protected. Brower, A Stranger To Its Laws, supra note 65, Santa Clara L. Rev. at 87-88.
her lesbian supervisor, Debie Baca, subjected Medina to a hostile work environment because of Medina’s heterosexuality. 90 The Medina court stated “We construe Ms. Medina's argument as alleging she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality.”91 The Tenth Circuit properly refused to differentiate doctrinally between heterosexual sexual orientation claims and homosexual ones. Thus, the first reading of the Pritchett court’s statement cannot be true.

Further, the second alternative that gay people do not ever harass other gay people cannot factually be correct; gay on gay sexual harassment must occur.92 The third possibility that gay people harassing other gay people is not actionable sexual harassment equivalent to that suffered by non-gay victims seems inconceivable unless we consider the effects of the lesbian and gay male schema. That schema states that gay relations are purely uncontrolled, indiscriminate physical and sexual escapades.93 Sexual advances by one homosexual towards another cannot constitute harassment. Actionable harassment requires that the sexual conduct be unwelcome.94 And sexual attention cannot be unwelcome unless gay sexuality encompasses notions of selectivity and fidelity. Since the lesbian and gay schema generally holds that it does not do so,95 then gay or lesbian sexual conduct in the workplace is always desirable, reciprocated and not actionable. Accordingly, gay or lesbian victims do not require protection from attraction-based sexual harassment because it does not truly occur in the legal sense.

The issue of unwelcomeness has also bedeviled visibly sexually active female plaintiffs. In Burns v. McGregor Electronics Industries,96 the owner of McGregor Electronics Industries, Paul Oslac, sexually harassed Lisa Ann Burns. Nevertheless, the trial court found that the sexual harassment was not uninvited

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90 Medina v. Income Support Div., New Mexico, 413 F.3d 1131 (10th Cir. 2005). Medina actually claimed that Baca harassed her because of her failure to comport with gender stereotypes – specifically, that she was punished for not acting like a stereotypical woman who worked at that employer, which, according to Medina, was a lesbian. Id. at 1135.
91 Id.
92 See generally, e.g., “Woman wins $ 360,000 bias case; Verdict may be first where boss, employee were both lesbians,” SAN FRANCISCO EXAMINER, July 4, 1997, at A-7, (discussing jury award in California state lawsuit). Cf., Johnson v. Community Nursing Servs., 932 F. Supp. 2d 269 (D. Utah 1996)(lesbian supervisor harassed female who had had a lesbian relationship, but was later dating a man). Johnson is discussed, infra, at note 119.
93 See, e.g., Brower supra, note 65, at 77-90, discussing the gay identity as sex aspect of the lesbian and gay male schema.
94 E.g., Meritor, 477 U.S. at 68 (the gravamen of a sexual harassment complaint is that it was unwelcome).
95 See supra, notes 19, 65.
96 E.g., Burns v. McGregor Electronics Indus., 989 F.2d 959 (8th Cir. 1993) (woman who had pierced nipples and had posed semi-nude for magazine not thereby disqualified from claiming sexual harassment). Accord, Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) (woman who had engaged in sexually explicit behavior not barred from claiming sexual harassment was unwelcome); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (same); Cunningham v. Town of Ellicott, 2007 U.S. Dist. LEXIS 24779 (W.D.N.Y. 2007) (female plaintiff’s prior consensual sexual conduct with co-workers or others not admissible); Wilburn v. Fleet Fin. Group, Inc., 170 F. Supp. 2d 219 (D. Conn. 2001) (female plaintiff’s consensual sexually explicit computer chat room messages on her personal computer affects credibility, but cannot establish a defense as a matter of law).
or offensive and thus, not unwelcome, because the plaintiff had posed nude for a lewd national magazine and had her nipples pierced.\(^97\) More specifically, the Eighth Circuit stated:

The trial court made explicit findings that the conduct was not invited or solicited despite her posing naked for a magazine distributed nationally. The court believed, however, that because of her outside conduct, including her "interest in having her nude pictures appear in a magazine containing much lewd and crude sexually explicit material," the uninvited sexual advances of her employer were not "in and of itself offensive to her." The court explained that Burns "would not have been offended if someone she was attracted to did or said the same thing."\(^98\)

The Court of Appeals rejected that reasoning: "A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment."\(^99\) Nevertheless, Lisa Ann Burns's prior behavior in posing for nude pictures in \textit{Easyriders} magazine was relevant to the totality of the workplace events, said the Eighth Circuit—although it could not constitute a complete defense to her claim of a hostile sexual harassment environment at the workplace.\(^100\)

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

To demonstrate that I am not overstating this point, let us examine \textit{Wrightson v. Pizza Hut of America}.\(^101\) Even before \textit{Oncale}, \textit{Wrightson} allowed a Title VII claim by a non-gay employee against his gay supervisor and co-workers to withstand a motion to dismiss for failure to state a cause of action.\(^102\) Viewing the case as homosexual, desire-based sexual harassment, the court properly analogized gay male to male harassment to heterosexual male to female precedent. In its recitation of the facts, the court stated: "Wilson [a gay employee] called Wentzel [a non-gay employee] at Wentzel’s home and asked him on a date, \textit{even though Wilson was aware that Wentzel was heterosexual}."\(^103\) In context, we are to conclude from the italicized portion of the quote that Wilson’s request was unwelcome, and thus actionable harassment. Literally, however, it merely stated that Wilson’s request was probably futile because Wentzel was not gay. This implies that had Wentzel been gay, Wilson’s demand would have been neither futile, nor unwelcome. Accordingly, there would have been no harassment.

Again, that conclusion is only possible if the schema of lesbians and gay men is that gay sex is indiscriminate and non-selective. Only then is sexual orientation relevant to unwelcomeness. We have no such schema about heterosexuality. A heterosexual man can still harass a heterosexual woman, although

\(^{97}\) \textit{Id.} at 962-63. (discussing and reversing the district court).
\(^{98}\) \textit{Id.} at 963.
\(^{99}\) \textit{Id.} at 963, n. 4 (quoting \textit{Katz v. Dole}, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).
\(^{100}\) \textit{Burns}, 989 F.2d. at 964.
\(^{102}\) \textit{Wrightson}, 99 F.3d at 143.
\(^{103}\) \textit{Wrightson}, 99 F.3d at 140 (emphasis added).
she is sexually attracted to men – the question is unwelcomeness, not her sexuality. Our schema about lesbians and gay men makes sexual orientation a relevant factor in determining unwelcomeness for them, but not for heterosexuals. Once again, cognitive process explains this incongruity. The schema equates a homosexual harasser-heterosexual victim scenario with unwelcomeness, while the contrary implied equation of shared gay sexual orientation with non-selectiveness is the reverse of this schema.

Cognitive psychologists recognize that the more accepted or common information is, the more it recedes in value or salience. Because we treat non-gay sexual orientation as the neutral baseline against which everything else is measured, it recedes from consciousness. More specifically, we do not have a separate schema for heterosexuals; they are just “people” and not a group characterized by their sexual behavior. Thus, the heterosexuality schema does not distract judges from looking for the relevant evidence of unwelcomeness or for other legal issues. In contrast, the schema of homosexual identity carries with it certain assumptions and legal conclusions and leads to twisting of both facts and law.

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

Wrightson contained many allegations of egregious conduct. Gay male supervisors and other gay employees sexually propositioned Arthur Wrightson and two other heterosexual employees. They were subject to sexual innuendo, descriptions of gay sex, and touched inappropriately. But the court’s analysis asked the wrong initial question: was the perpetrator gay? The important first issue was causation, whether the harassment was because of sex. Only if harassment were desire-based and not hostility-based

104 Cf., Burns, 989 F.2d at 962 (issue is the unwelcomeness of the conduct, not the sexual or other activities of the plaintiff).
105 Brower & Nurius, supra note 5, at 88; Tversky & Kahneman supra note 5, at 1124-31.
107 See Kramer, supra note 87 at , Brower, supra, note 65, at 147-48, discussing the awkwardness of the expression, “openly non-gay” and the implications of that awkwardness.
108 Some gay people refer to heterosexuals as “breeders.” E.g., Rob Morse, We’re here, we’re having a beer..., SAN FRANCISCO EXAMINER, June 29, 1997, at A-2); Rich Kane, AOHELL, Can A Gay Man Find Love Online?, OC WEEKLY (ORANGE COUNTY, CALIF.), Apr. 4, 1997, at 8, First Person; Michael J. Ybarra, Odd Man In: Businessman Gavin Newsom Is the Latest Addition to S.F.’s Board of Supervisors. His Biggest Selling Point? The Fact That He’s A Straight White Male – A Relatively Rare Commodity In That City, L.A.TIMES, Life-Style, Mar. 31, 1997, View Part E, at 1; Edward Porter, Nine Dead Gay Guys, TIMES NEWSPAPERS, LTD.(U.K.), Sept. 21 2003 Features, at 12, (reviewing movie from the perspective of a “boring old Breeder”), accord, Kevin Courtney, The Straight Talk, There’s never been a better time to be a gay Irishman. I hate to say it, guys, but being straight is sooo last season. THE IRISH TIMES, (IRELAND), Nov. 24, 2001, at 61 (using the term in Ireland as an ‘affectionate term’ by gay people for non-gays.). The rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity.
109 Wrightson, 99 F.3d at 139-141.
could the perpetrators’ homosexuality provide the link to sex discrimination. Instead, the Fourth Circuit inquired about the harassers’ sexuality, as though homosexuality alone were always an adequate substitute for causation.

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

The Fourth Circuit’s insistence that the key allegation in same-sex sexual harassment was the perpetrator’s homosexuality led the court to downplay other potentially important data. The court noted, “After Pizza Hut hired a male employee, the homosexual employees attempted to learn whether the new employee was homosexual or heterosexual. If the new employee was heterosexual, then the homosexual employees began to pressure the employee into engaging in homosexual sex.” This fact is important, for it undermines Wrightson’s claim of sex discrimination and may even turn it into sexual orientation discrimination. The warping effect of the predatory sex schema of homosexuality caused the Fourth Circuit to ignore that fact’s significance.

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

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110 Id. at 141, 144 (“Therefore, because a claim may lie under Title VII for same-sex hostile work environment sexual harassment, where, as here, the individual charged with the discrimination is a homosexual, the judgment of the district court is reversed.”).
111 Id. at 139-140 (citations to the record omitted).
112 When Pizza Hut made this argument, the court responded by stating that, on a motion to dismiss, Wrightson’s claims were sufficient. Wrightson stated that he was discriminated against because he was male, that his harassers were homosexuals, and that other harassed employees were also male. Id. at 143-144.
113 E.g., Viren Swami, Martin J. Tovee, The muscular male: a comparison of the physical attractiveness preferences of gay and heterosexual men, 7 Int’l J. Men’s Health 59 (March 22, 2008)
court’s decision that targeting only heterosexual males shows desire and not harassment based on sexual orientation. And of course if it is homosexual sexual attraction, Wrightson suffered cognizable sex-based discrimination under Title VII; if it is harassment stemming from gay employees singling out heterosexual employees for hostile treatment, it is sexual orientation discrimination not covered by Title VII.\textsuperscript{115}

Because judges measure same-sex sexual harassment claims against a flawed prototype, they make commensurately flawed analogies and decisions. The terms of the prototype or schema used dictate the resulting categorization or use of analogy.\textsuperscript{116} We interpret the welter of ambiguous or contradictory information in a manner that makes sense to us, whether or not it is accurate.\textsuperscript{117} Thus, once we activate a schema, marginally consistent information is shaped to supplement and strengthen the presumed innate personal characteristics dictated by the schema. We stop looking for alternative or more appropriate evidence or causes.\textsuperscript{118} We tend to find explanations or precedent in line with our schemas, in part because they are the only ones for which we are looking.\textsuperscript{119} The schema acts as a filter through which we view events, and this how information is interpreted and utilized.\textsuperscript{120} The Fourth Circuit’s rather selective reading of the facts in \textit{Wrightson v. Pizza Hut of America} evidences these aspects of schema theory.\textsuperscript{121}

In fact, the Fourth Circuit’s equation of the gay perpetrators’ sexual orientation with desire-based sexual harassment may have led the court to over-emphasize the extent to which sexual attraction actually motivated the harassers. Specifically, cognitive research shows that we tend to attribute outsiders’ schema-consistent behaviors and actions to inherent, unchanging aspects of their personality, and disconfirming events or behaviors to transient, situational or exceptional circumstances.\textsuperscript{122} As contrast, in \textit{Valadez v.}

\begin{itemize}
\item veiled efforts to recruit new homosexuals); Sandra Crockett and Chris Kaltenbach, \textit{Ellen’s night out}; \textit{TV: While many turn out to celebrate the much-hyped event, others pledge financial consequences for sponsors of the ABC show}, \textit{BALTIMORE SUN}, May 1, 1997, Features, at 1E (describing the scene in which Laura Dern, playing the episode’s love interest, countered Ellen’s accusation that she was trying to recruit gays by lamenting, “Just one more [heterosexual person turned gay by Dern] and I would have gotten that toaster oven.”); Rick Bickmore, Letter to the editor, \textit{Gays don’t recruit others} \textit{DESERET NEWS} (SALT LAKE CITY), December 3, 1997, Opinion at A50, (“This [recruitment by gay people of heterosexuals] is by no means the general rule, and as much as we may joke about winning toaster ovens, I don’t know any gay people who try to recruit heterosexuals into the gay community.”).
\item See, e.g., \textit{Medina}, 413 F.3d 1131; \textit{Fox}, 876 F. Supp. 1169.
\item Brower and Nurius, \textit{supra}, note 5, at 86.
\item Brower and Nurius, \textit{supra}, note 5, at 86.
\item Krieger, \textit{supra}, note 5 at 1206-07.
\item See \textit{supra}, notes 102 - 126, and accompanying text.
\item See, e.g., Galen V. Bodenhausen & Robert S. Wyer, Jr., \textit{Effects of Stereotypes on Decision Making and Information-Processing Strategies}, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 268, 279 (1985); Krieger,
Uncle Julio’s of Illinois, Inc., a male kitchen manager sexually harassed a lesbian bartender. There was evidence that the manager, Todd Conger, wanted to have sex with Monica Valadez because she was a lesbian. He said he would “change [plaintiff’s] ways if she slept with him” and stated he wanted to have sex with her and the other lesbian waitress with whom Valadez was having intimate sexual relations. Parallel to Wrightson, we can hypothesize a workplace in Valadez in which heterosexual male employees first determine which new female hires are heterosexual and which are lesbians. They then demand sexual favors only from the lesbian employees; they tell them that they should try sex with men, grope them, and subject them to explicit descriptions of heterosexual sex acts. Although we might view the behavior as motivated by a genuine desire to have sexual relations with these women, we would probably view the conduct as evidencing hostility to lesbianism.

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

If it is easier to see the Valadez hypo as sexual orientation discrimination than it was for the Fourth Circuit in Wrightson to come to the same conclusion, that difference in perception is attributable to the considerably more nuanced schema most people exhibit towards heterosexuality as opposed to homosexuality. We can recognize and ascribe a wider range of rationales for non-gay people’s behavior than we can with gay persons’ conduct. Our schema of heterosexuality has had to encompass and incorporate a wider variety of personal experiences than our schema of homosexuality.

Classic schema research demonstrates that we see our own group as individuals and more diverse in our characteristics and motivations, while perceiving out-group members as homogeneous. For

supra, note 5 at 1205-06 (discussing the implications of this research for disparate treatment cases and pretext).
124 Id. at 1011-12.
125 On the actual facts of Valadez, the court found that that Conger sexually harassed several female employees and not simply those who were lesbians. Thus, the court found that the harassment was based on sex and not sexual orientation. Id. at 1014.
126 For an alternate assertion that courts find harassment by gay perpetrators covered under Title VII, but not by non-gay perpetrators whose victims are gay, see Grose, supra, note 23, at 388, 396.
127 See, e.g., Jim Keogh, Movie Review: Chasing Amy, Entertainment, WORCESTER TELEGRAM & GAZETTE, INC. (MASSACHUSETTS), April 19, 1997, at A6 (reviewing the movie, “Chasing Amy”, and noting the misguided premise that lesbian sexual orientation can be changed by the right man); Moira Macdonald, Spike Lee doesn’t do the right thing with “She Hate Me”, ROP ZONE; THE SEATTLE TIMES, August 13, 2004, MovieTimes, at H21, (reviewing the Spike Lee movie, “She Hate Me” partially containing a similar premise.).
example, in the lesbian and gay male schema, the homogenization of gay people’s diverse lives into one “gay lifestyle” is a common error of attribution. Moreover, the more people believe that there is little variation among members of groups unlike themselves, the more people tend to make stereotypic or schematic judgments about particular individuals within those groups; and the more people trust in the accuracy of their schema of others, the more those judgments tend to be made with great confidence.

Again Wrightson illustrates these insights.

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

As we have seen, the wider diversity of motivations accessible to courts in cases involving heterosexual harassers allows judges to decide cases more accurately without the distractions of the gay sexuality schema. The mechanics of the salience and vividness heuristics are also at work here. Cognitive psychology has found that information that is particularly distinctive, vivid or significant to the observer tends to be the most accessible for recall and use. Conversely, the more typical, socially expected or accepted information is, the more readily it recedes in value and awareness. Since lesbian or gay sexual orientation is less common, it is also more distinctive and salient. This focus on atypicality flattens out the diversity of lesbians and gay men and their lives. Thus, the most non-normative and atypical aspects of lesbian and gay male lives are the most striking, memorable, and the most easily incorporated into the schema. In the context of sexual harassment, that atypicality is the desire to have sexual relations with

129 See, e.g., Dan Morain, Assembly Oks Bill Banning Anti-Gay Bias But Rejects Another, L.A.TIMES, June 5, 1997, Metro, part A, at 3; Andrew Barron, Arts Funding In Peril, NEWS & RECORD (GREENSBORO, N.C.), May 24, 1997, at A1; Aimee Green, No Review Of Gay Books -- Purchase Is Called Done Deal; Librarians Will Field Complaints, May 20, 1997, at B1. Tellingly, courts had once described interracial marriages as a “lifestyle” to create the same marginalizing effect on an out-group prior to the Supreme Court’s decision in Palmore v. Sidoti, 466 U.S. 429, 431 (1984), citing the Record at 84 (lower court changed custody from the mother because “the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society.”).


132 See Wayne H. Brekhus, PEACOCKS, CHAMELEONS, AND CENTAURS 11-14 (2001)(because homosexuality is stigmatized, people notice it as significant.)

133 Another example is the media depiction of gay pride parades which have usually focused on the more outré aspects and personalities in these events and ignored the less sensational participants and spectators. E.g., Marshall Kirk & Hunter Madsen, AFTER THE BALL, 195 (1989); Don Romesburg, Media Watch: Pride media round-up, BAY AREA REPORTER, July 10, 1997, at 12 (describing Reuters news service coverage sensationalizing the 1997 San Francisco gay pride parade, as well as describing the depiction of other pride parades by other media); Randy Myers, Less flashy part of parade ignored, CONTRA COSTA TIMES (CALIFORNIA), June 30, 2002, section P at 3, (discussing the choice of focusing on the outré sections of the parade or more tame groups). Repeated portrayals of this type reinforce an acceptance of the image as genuine. See, e.g., Richard Isay, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT, 49 (1989) (one adolescent had so internalized this image that he did not believe that he was truly gay because he did not identify himself with that portrayal). That trope has also become so common that the satirical paper, THE ONION, used it as the basis for a humorous article, Gay-Pride Parade Sets Mainstream Acceptance of
members of the same sex. Thus, when that fact appears in same-sex harassment cases, it tends to overshadow everything else.

One example of the salience heuristic is *Johnson v Community Nursing Services*. In *Johnson*, Melanie Ann Johnson claimed her lesbian supervisor, Nora Goicoechea, sexually harassed her. Like *Wrightson*, the *Johnson* court ignored important, disconfirming facts that would have cut against its schema of predatory gay sexuality. Significantly, soon after Johnson began working at Community Nursing Services, she began a three-month lesbian relationship. Afterwards she broke up with her girlfriend and began dating a man. After Goicoechea learned Johnson was dating men and no longer living as a lesbian, Goicoechea stopped being supportive, became increasingly hostile, and said she could no longer protect Johnson’s job. Goicoechea said that if she kissed Johnson in a meeting, it would show the company president that Johnson was still a lesbian. Johnson and Goicoechea also wagered a dinner on a work matter and when Johnson lost, Goicoechea asked her numerous times to pay up and provide the dinner; Johnson declined to have dinner alone with Goicoechea. Johnson claimed that Goicoechea sexually desired her and harassed her because of sex.

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

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

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*Gays Back 50 Years, The Onion (US), Gay Pride Issue (June 26, 2008), at 6. This problem had led some gay commentators to call for restrictions on public behavior and persons which would reinforce negative perceptions of gay people [Kirk & Madsen, *supra*, at 279, 307-312.] and for a public relations campaign aimed at showing how mainstream gay people are. *Id.* at 197-245. For another discussion of the integration of gays and lesbians into American society and institutions, see generally, Andrew Sullivan, *VIRTUALLY NORMAL*, (paperback ed., Vintage Books, 1996).  
*Johnson v. Community Nursing Servs., Inc.*, 985 F. Supp 1321, 1323-24 (D. Utah 1997) (“Johnson II”)(original internal quotations and modifications omitted) These facts are taken from this subsequent decision in which the events and chronology are clearer than in *Johnson I*.  
*Johnson I*, 932 F. Supp. at 270.  
*Id.*  
*Johnson II*, 985 F. Supp. at 1324.
it seemed to ignore facts that would disconfirm that model. Therefore, it found *Johnson* to be based on attraction and not hostility.

One final example of overshadowing effects of the salience heuristic occurred in *Dick v. Phone Directories Company, Inc.* Diane Dick was a top sales representative at the Phone Directories Company, a predominantly female office. When her supervisor was fired, Dick took over her boss' workspace, a move that angered at least one of her co-workers. One month after her new supervisor, Laura Bills, was hired, Dick claimed that Bills and other female co-workers began to harass her. Dick claimed they created a working environment permeated by sexually explicit banter, insults, lewd jokes gestures, games and devices. One of her co-workers, Ms. Northern, was a lesbian, and Dick said that until she learned that Northern was a lesbian, she often let her granddaughter babysit for her. Dick testified that, "I wasn’t upset that [the company] hired a lesbian. I was upset that nobody told me so that I could make a decision about my granddaughter." Dick also stated that another colleague, Ms. Hinkle pinched Bills’ breast and buttocks, sometimes mimed giving an oral sex to a man, and hung a replica penis from the workspace ceiling. Other co-workers would participate in sexually themed behavior, such as gestures, swearing, simulating sexual acts, and playing “vulgar rap music” in the office. Plaintiff also alleged that Bills and Northern locked themselves in various rooms in the office for extended periods of time and that the office bulletin board was “decorated in rainbow colors – which symbolizes gay pride.” None of this behavior was directed at Dick, except that “twice Ms. Hinkle attempted to pinch her breasts but Ms. Dick told her to get away from her, and that once at a novelty shop over the lunch hour Ms. Hinkle shoved a sex toy in the shape of a penis toward Ms. Dick.” There were many puns on plaintiff’s last name, like calling her “Ivanna Dick,” “the dickhead,” and “Granny Dick.” Another co-worker, Ms. Coleman, would point to the collection of stuffed beanie-baby cats on Ms. Dick’s desk and comment, “Dick has a pussy.”

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

> As far as I'm concerned where I go is my business and how long im [sic] there is my business, and I don't ever want to see u [sic] driving by my house watching me and don't ever walk into my home again! . . . No one hates you or is trying to get you fired, we don't understand what goin thru [sic] your head. But anyway, this all stops here . . . don't

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140 The court describes her as, “an openly gay coworker, Teena Northern.” *Id.* The use of the adjective “open” and its synonyms often signal that the lesbian and gay male schema will skew analysis. Cf. e.g., *Johnson I*, 932 F. Supp. 2d at 270 (“openly lesbian”); *Dawson*, 398 F.3d at 218 (“avowedly homosexual plaintiff”); *Rene*, 243 F.3d at 1207 (“an openly gay man”). See also, supra, note 119, discussing the differing descriptions of plaintiff and defendant in *Johnson*.

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

142 *Id.*

143 *Id.*

144 *Id.*

try to pull anymore sh*t, we are not going to put up with it, we are a team and we must all get along.\footnote{Id. at 1261-62. (bowdlerized version by the Tenth Circuit, \textit{cf.}, Dick, 265 F. Supp. 2d at 1285n.10).}

After receiving the e-mail., Dick phoned another coworker’s home, but did not reach her. Dick then phoned the co-worker’s mother’s home but was still unable to contact her. Dick’s co-workers complained to the company about her conduct.\footnote{Id. at 1262.} In court, Dick alleged hostile work environment, same-sex discrimination in violation of Title VII.\footnote{Id.}

In \textit{Dick}, the court transformed what appeared to be instances of colleagues singling out the plaintiff for hostile behavior into lesbian, same-sex desire-based sexual harassment actionable under Title VII.\footnote{Dick, 397 F.3d at 1266, reversing the decision of the trial court on this point, Dick v. Phone Directories Co., Inc., 265 F. Supp. 2d 1274, 1284 (D. Utah 2003). See also, \textit{Johnson I}, 932 F. Supp. at 274 for another example of this transformation.} In \textit{Dick}, the District Court expressly had found:

Although Ms. Dick has provided an exhaustive litany of harassing conduct that she has suffered, none of it creates a question of fact about whether the harassment (and particularly Ms. Hinkle's pinching of her breasts) was an expression of sexual desire. As discussed above, this conclusion finds support in Ms. Dick's own deposition testimony, corrections notwithstanding, where she admitted that she did not think Ms. Hinkle wanted to have a sexual relationship with her, but rather used sexual overtures as a way of "aggravating" or "upsetting" her. Accordingly, Ms. Dick's Title VII same-sex hostile work environment claim fails for lack of evidence that the harassment she endured, however humiliating and sexually-charged, was because of sex.\footnote{Dick, 265 F. Supp. 2d at 1284. (original citations and internal formatting omitted)}

In response the Tenth Circuit extensively discussed the lower court’s findings, but still reversed as a matter of law. The Court of Appeals stated:

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

Nonetheless, we cannot agree that, as a matter of law, Ms. Dick was harassed out of sheer dislike. The record contains sufficient evidence from which a jury could find that her harassers' [sic] conduct was motivated by sexual desire.\footnote{Dick, 397 F.3d at 1266.}

This reversal is most explicable if the lesbian-themed, sexually charged work environment inveigled the appellate court. When we compare the worksite description in the District Court’s opinion with that of the Tenth Circuit, some interesting differences emerge. The Court of Appeals blandly stated that the “office consists primarily of women; only two men worked there during the relevant time period;”\footnote{Id. at 1260.} then the male coworkers disappear from the opinion. However, according to the lower court:
Ms. Dick alleged […] that one of these two men was homosexual, “was considered just one of the girls,” and “was included in their conversations.” The other man was a returned missionary who, when “the girls would get really bad with the language and stuff,” would “kind of turn bright red, start singing, but he would say that it didn't bother him, but everybody could kind of tell that it did.” When asked during her deposition whether the alleged harassers would “ever direct their conversations to the men in a different way or was it just sort of the same office environment,” Ms. Dick responded that “it was just the same office environment.”

Only the lower court mentioned how men were treated in the workplace – the same as the women. The two dissenters from the sexualized environment were Ms. Dick and the former Mormon missionary, a man. Neither were made uncomfortable in different ways or harassed by different treatment. This last point is significant. Remember Oncale's guidance that "the critical issue … is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Specifically, Oncale suggested three routes by which same-sex sexual harassment might be proven: desire-based harassment by homosexuals, harassment in such sex-specific and derogatory terms in order to show that there is general hostility to the presence of one sex in the workplace, or direct comparative evidence of disparate treatment in a mixed-sex workplace.

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

The Court of Appeals agreed that the District Court properly excluded hearsay evidence that the office was known locally as the “lesbian factory” and that other women working there were also homosexual. Nevertheless, the court had access to all that testimony. Remember that the more extraordinary and distinctive facts are, the more they become indelible and salient. The specter of a hard working, Utah grandmother employed in a lesbian factory is a fairly vivid image. Accordingly, the schema

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153 Dick, 265 F. Supp. 2d at 1283 (original citations to Dick’s deposition omitted). The evidence of her male colleague’s homosexuality was inadmissible hearsay. Id.
154 Oncale, 523 U.S. at 80 (internal citations omitted).
155 Id. at 80-81.
156 Accord, Johnson, 932 F. Supp. 269 (predatory lesbian sexuality); cf., Wrightson, 99 F.3d 148 (predatory gay male sexuality).
157 Dick, 397 F.3d at 1266 n.5
158 See supra, note 131.
of lesbian sexuality interposed itself and led the court to find a same-sex desire-based harassment case where it did not belong.\textsuperscript{159} It is not based on desire, but on hostility and personal animosity expressed through sexual behavior that the harassers knew would annoy or upset plaintiff.\textsuperscript{160} In this aspect, the workplace in \textit{Dick} seems much more similar to sexually themed “horseplay” where the courts have historically rejected Title VII liability.\textsuperscript{161} The influence that the lesbian and gay male schema may exert on the judicial mind shows why the Tenth Circuit did not similarly reject liability in \textit{Dick}.

\section*{4. The lesbian and gay male schema of cross-gender characteristics or gender non-conformity / Hostility-based sexual harassment}

\subsection*{A. Evidence of schema theory at work}

Because schemas can be contradictory, and can intersect in myriad ways, individual cases can evince a number of different aspects of schemas. One of the most difficult areas within sexual harassment doctrine has been the application of the Supreme Court’s decision in \textit{Price Waterhouse v. Hopkins}\textsuperscript{162} on traditional gender role enforcement in the workplace. The primary difficulty lies in the schema that gay

\begin{itemize}
\item \textsuperscript{159} See also, e.g., EEOC v. Turkey Hill Dairy, Inc., 2007 U.S. Dist. LEXIS 61597 (E.D. Pa. 2007)(court turns hostility-based case in which homosexual references were used between male co-workers into desire-based case).
\item \textsuperscript{160} \textit{Dick}, 397 F.3d at 1265 (discussing the lower court’s use of Dick’s deposition statements). Cf., e.g., Davis v. Coastal Int’l Security, Inc., 275 F.3d 1119 (DC Cir. 2002). Wallace Davis and two other male employees strongly disliked each other. Their hostility was expressed by those co-workers making vulgar sexual gestures, kissing noises, describing oral sex and lewd comments or sexual expressions, which taken literally amounted to sexual propositions. \textit{Id.} at 1122-23. The court noted that there was no evidence that any of the participants were homosexual and in context the behavior could not reasonably have been construed as invitations for sexual activity. \textit{Id.} at 1123-24. Finally, the court found that Davis has shown not that Smith and Allen treated men differently than women, but that they treated Davis differently than they treated all other members of the Coastal workforce, whether male or female. If anything, this showing actually undermines Davis’s claim: It suggests that Smith and Allen targeted Davis because of his behavior as an individual rather than because of his sex. \textit{Id.} at 1124 (emphasis in original).
\item \textsuperscript{162} \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989) (Brennan, J., plurality opinion). An extensive literature already exists on this case and on gender enforcement. In addition to the commentary cited in \textit{supra}, note 23, literature exists on gender enforcement and individual self-presentation. See, e.g., Friedman, \textit{supra}, note 23; Devon Carbado, Mitu Gulai & Gowri Ramachandran, \textit{The Jesperson Story: Makeup and Women at work}, in EMPLOYMENT DISCRIMINATION STORIES 105-52 (Joel Wm. Friedman, ed, Foundation Press 2006)(discussing Jesperson v. Harrah’s Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002), aff’d, 392 F.3d 1076 (9th Cir. 2004), vacated 409 F.3d 1061 (9th Cir. 2005), aff’d en banc, 444 F.3d 1104 (9th Cir. 2006)). As with other aspects of this article, I seek to focus less on elucidating the doctrine and commentary around that cause of action, and more on exploring it as an example of how schemas interact with doctrine and judicial decision-making.
\end{itemize}
men and lesbians exhibit gender-atypical characteristics – that gay men are effeminate and lesbians are mannish. Consequently, courts have had difficulty applying that claim in same-sex sexual harassment contexts, especially when lesbian or gay plaintiffs are involved. Therefore, it makes a good base from which to explore how aspects of the lesbian and gay male schema interact with sexual harassment prototypes.

The facts and holding of Price Waterhouse are familiar. A plurality of the Supreme Court recognized that an employer who requires traditional gender roles for female employees perpetuates gender stereotypes in violation of Title VII. Price Waterhouse denied Ann Hopkins a promotion to an accounting partnership despite her recognized professional and business development abilities. Price Waterhouse alleged that the denial of partnership was attributable to her lack of interpersonal office skills. Although males having equally or more abrasive characteristics or language were made partners, the partnership negatively viewed those same qualities in her. Those interpersonal flaws, however, were expressed as consequences of Hopkins’ gender atypical (masculine) characteristics. She was described as having perhaps “overcompensated for being a woman” and needing to enroll in a “course at charm school.” She was advised by the partner charged with conveying the partnership’s decision to her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” The Court found that Ms. Hopkins was denied a partnership in part because Price Waterhouse did not believe that her behavior and characteristics were appropriate to her gender.

For Price Waterhouse, a person’s behavioral characteristics were determined by his or her sex – despite the demands of the job. This is the double bind to which the Supreme Court plurality alluded: “An employer who objects to aggressiveness in women but whose positions require this trait places women in...
an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they
do not. Title VII lifts women out of this bind."\textsuperscript{171}

Nevertheless, we should not focus on the double bind Ann Hopkins faced so as to obscure the core
of the sex discrimination, the employer’s insistence on gender conformity. The district court recognized
this when it quoted \textit{County of Washington v. Gunther}:\textsuperscript{172} “In forbidding employers to discriminate against
individuals because of their sex, Congress intended to strike at the \textit{entire spectrum} of disparate treatment of
men and women resulting from sex stereotypes.”\textsuperscript{173} The provenance of this quote is important. The
Supreme Court first used it in \textit{City of Los Angeles Department of Water and Power v. Manhart},\textsuperscript{174} which
prohibited the use in employee benefits of actuarially appropriate statistics showing that women live longer
than men. \textit{Manhart} illustrates that even accurate generalizations based on sex can lead to discrimination
against particular individuals who do not conform to those generalizations.\textsuperscript{175} Accordingly, even if gender
atypicality sometimes, or even often, corresponds to homosexuality, it cannot be assumed in the individual
case, as the lesbian and gay male schema dictates. The two are severable constructs; one does not implicate
the other. When the courts realize this fact, as in \textit{Price Waterhouse}, they reach the correct result; when
they do not, they do not.

\textit{Hamner v. St. Vincent Hospital and Health Care Center}\textsuperscript{176} exemplifies the distinction between
gender and sexual orientation discrimination. Gary Hamner was a gay man and a nurse in charge of a
hospital unit. He had a poor relationship with the physician supervising the unit, Dr. Joseph Edwards.
Edwards disliked Hamner because he was gay and would verbally harass him by telling gay jokes, parody
him by effeminate hand gestures and lisping, as well as more general hard-timing such as screaming at
Hamner and refusing to communicate with him.\textsuperscript{177} Despite Edwards’s use of effeminate gestures and
speech indicating that he believed Hamner as a gay man was not sufficiently masculine, the record was
clear that Hamner’s sexual orientation was the reason for Edwards’s behavior. In contrast, however, if
Edwards had disapproved of men in nursing,\textsuperscript{178} or even if he manifested his disapproval by perceiving all
male nurses to be gay because of that gender-atypical career choice, those latter two scenarios would
evidence sex discrimination and not sexual orientation bias.\textsuperscript{179}

With \textit{Price Waterhouse} and \textit{Hamner} serving as paradigmatic cases, schema-matching should
allow judges to appropriately classify new situations into one category or the other. Unfortunately, even

\begin{footnotes}
\item[171] \textit{Price Waterhouse}, 490 U.S. at 251.
\item[173] \textit{Price Waterhouse}, 618 F. Supp. at 1120 (quoting \textit{Gunther}, 452 U.S. at 180.)
\item[175] \textit{Manhart}, 435 U.S. at 708.
\item[176] \textit{Hamner v. St. Vincent Hosp. & Health Care Center}, 224 F.3d 701 (7th Cir. 2000).
\item[177] \textit{Id}. at 705-06.
\item[178] \textit{See}, Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262 (3rd Cir. 2001)(using this
scenario as an example of a clear sex discrimination claim by a male against another man). \textit{Accord}, Doe v.
City of Bellville, 119 F.3d 561, 598 (7th Cir. 1997) (Manion, J., dissenting in part, concurring in part),
vacated and remanded, 523 U.S. 1001 (2003)(example of male employee fired by male supervisor because he
believed that it was more appropriate for the job of receptionist to be filled by a woman).
\item[179] \textit{Hamner}, 224 F.3d at 707 n.5.
\end{footnotes}
these paradigmatic lawsuits may not be that simple; the lesbian and gay male schema may also affect these cases. We can see schema effects in inferences the courts draw from these plaintiffs’ descriptions. Although we do not have Ann Hopkins’s physical description on the record, we know she was married. Courts have often equated marriage with heterosexuality. Other courts have taken a more nuanced view of marriage, motherhood and sexuality. Of course, some lesbians are married, mothers, matronly, or any combination thereof and vice versa.

However, we have a description of Dixie Adair, another successful female plaintiff and victim of sex stereotyping denied a promotion for being abrasive, patronizing, and demanding. Adair “presented a most matronly appearance” and “possess[ed] the very essence of womanhood,” according to the trial court. Note the gender-coded terminology. Not only is she the essence of womanhood, but she is matronly; thus fulfilling one of the central female gender roles, mother. Suggestively, the district court may have been protecting Adair from the hint of lesbianism in a manner similar to the possible insulation afforded by Hopkins’s marriage. If so, this is an important factor because the charge of homosexuality has the power to alter the courts’ assessments of appropriate precedent.

In contrast, the Seventh Circuit noted, “Gary Hamner is a male nurse and a homosexual.” His sexual orientation is stated right up front and placed on a par with his profession. Also noteworthy is the court’s phrase, “male nurse.” The quoted introductory sentence clearly indicates that Gary Hamner is a man, as such he can only be a male nurse and not a female one. “Male” is superfluous there to show his sex. The courts use of the gender qualifier to the noun “nurse” shows the extent to which nursing is seen as a female occupation. Men in nursing are unusual and stigmatized as gender-atypical.

She came to Price Waterhouse from another accounting firm in order to avoid an anti-nepotism rule. Price Waterhouse was aware of her marriage because her husband’s employment surfaced as a concern in her partnership decision. Price Waterhouse, 825 F.2d at 461-62. A photograph of Ann Hopkins taken in 2004 can be found at http://www.eeoc.gov/abouteeoc/40th/panel/hopkins.html (last accessed 5/21/08).


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

See, e.g., Howard Brown, FAMILIAR FACES, HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY, 112 (1976); Richard Isay, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT, 139 (1989); HALL CARPENTER ARCHIVES LESBIAN ORAL HISTORY GROUP, INVENTING OURSELVES: LESBIAN LIFE STORIES, 63-64 (1989).


Id. at 563. Compare the inferences flowing from Adair’s description with those of the following: “Anthony Goluszek has never been married nor has he lived anywhere but at his mother’s home… [He] blushes easily and is abnormally sensitive to comments pertaining to sex.” [Goluszek v. Smith, 687 F. Supp. 1452, 1453 (N.D. Ill. 1988)] Goluszek lost.


Hamner, 224 F.3d at 703.

See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982)(discussing the number of women in nursing and the stereotypes of nursing as a female occupation)
As noted earlier, in Title VII litigation one of the most common aspects of the lesbian and gay male schema is the attribution of cross-gender characteristics to gay people. Indeed, often only the atypical gender behavior triggers the label “homosexual.” Thus, the schema also attaches to those whom others perceive to be gay. Remember schemas are idiosyncratic. We incorporate confirming information into our schemas and edit out disconfirming material. Thus, schemas have the ability to shape our perceptions independent of whether that assessment is accurate.

Empirical social cognition studies confirm this pattern. Individuals perceive gender cues like hip sway, gait and body shape to convey information that is used to assess masculinity and femininity, and also homosexuality and heterosexuality. Research subjects were shown ungendered animated figures walking and asked to judge sex and sexual orientation. Those with a swaggering gait were judged to be men; those with a swaying walk, as women. Similarly, those figures with an hourglass figure were perceived to be female, and those with a tubular figure were seen as male. When an hourglass figure swaggered – i.e., engaged in perceived gender-atypical behavior, it was judged to be a lesbian, and when a tubular figure swayed, it was seen as a gay man. Thus, the respondents used gender-stereotypical movement cues to make assumptions about sex and sexual orientation and to show the interactions between those categories. The schemas of gender atypicality and homosexuality are so closely linked that some media reports on that research reversed the findings. Those reports noted that lesbians and gay men were

190 See, e.g., Breaking Barriers, JERSEY JOURNAL (NJ), May 8, 2008, at 17, (discussing non-traditional, cross-gender careers).
191 See, e.g., Erin Duffy, Pemberton High nursing club tours hospital, THE PHILADELPHIA INQUIRER, May 10, 2008, Philadelphia-South Jersey section, at B02, (only one boy in the high school nursing club, male nurse notes the stigma attaching to that ob choice for men); Don Colburn, Supply of nurses needs urgent care: Living – How we live, THE OREGONIAN (PORTLAND, OR), May 28, 2008, at b01, (Oregon counteracts stereotype and stigma by its recruiting slogan, “Are You Man Enough to Be a Nurse?”).
193 E.g., Strailey v. Happy Times Nursery, 608 F.2d 327 9th Cir. 1979)(consolidated on appeal with DeSantis v. Pacific Tel. & Tel. Co.); Jantz v. Muci, 759 F. Supp. 1543, 1545 (D.Kan.1991)(Non-gay teacher fired for “homosexual tendencies” because teacher reminded supervisor’s secretary of her husband “whom she believed to be gay.”)
194 See, Krieger, supra, note 5, at 168 (“We do not ignore evidence and choose to act instead on the stereotype. Rather, the stereotype, acting as an associative construct, biases the way we see the evidence. We recall, through the same cognitive processes that result in other forms of illusory correlation, stereotype-confirming instances as having occurred more frequently than they actually did.”); see also, text accompanying notes 304-305.
196 Id.
discovered to have distinctive, cross-gendered gaits and body morphology.\textsuperscript{197} However, the study did not examine that issue and contained no such conclusion.

From a jurisprudential perspective, this aspect of the lesbian and gay male schema encourages a conflation of sex, gender and sexual orientation.\textsuperscript{198} Like the respondents in the university study, judges may assume that a male plaintiff who exhibits gender atypical behavior is gay, even when he is not. Consequently, judges may transform his Title VII claim from one based on gender to one based on sexual orientation. The conflation often leaves male plaintiffs who exhibit gender atypical behavior remediless, and female plaintiffs with limited or uneven results, despite Supreme Court precedent.\textsuperscript{199}

For example in an early case, \textit{Smith v. Liberty Mutual Ins. Co.}, a male plaintiff raised claims for sex and race discrimination, and avoided any mention of sexual orientation causes of action.\textsuperscript{200} Nevertheless, the courts treated Smith’s claim as though it were based on sexual orientation.\textsuperscript{201} Bennie Smith, an African-American male, applied to be a mail clerk for Liberty Mutual Insurance Company. He was rejected because the interviewing supervisor, Nathaniel Nash, found Smith to be “effeminate,” and therefore unsuited for the job.\textsuperscript{202} According to Nash, plaintiff was insufficiently “male.”\textsuperscript{203} The EEOC investigative report confirmed and reinforced the trigger of gender atypical characteristics and the homosexual schema by stating that Smith’s “offensive” behaviors were “quite pronounced” and that he had “interests… not normally associated with males (sewing).”\textsuperscript{204}

In addition to illustrating the cross-gender trigger for the lesbian and gay male schema, the EEOC investigator’s report evidences the well-documented tendency of people to magnify facts which confirm their schemas, and to downplay or ignore contradictory information.\textsuperscript{205} Smith’s actual employment application listed four hobbies: playing musical instruments, singing, dancing and sewing.\textsuperscript{206} The only hobby significant enough for the EEOC investigator to note in his report was the last, sewing. This last hobby is the most gender identified with women.


\textsuperscript{199} Gender atypical behavior in female plaintiffs does not always trigger the lesbian and gay man schema leading to this conflation. \textit{See infra} notes 225 - 240, and accompanying text.

\textsuperscript{200} Valdes, \textit{supra}, note 187, at 139 n. 400. I am indebted to Professor Frank Valdes for his research into the facts and pleadings of \textit{Smith}.

\textsuperscript{201} \textit{Smith}, 395 F. Supp. at 1101.


\textsuperscript{203} Valdes, \textit{supra}, note 187, at 144.

\textsuperscript{204} Brief for Appellee, Liberty Mutual Ins. Co., in \textit{Smith}, 395 F.2d 325, No. 75-3230, at 9n. 7; Valdes, \textit{supra}, note 187, at 139n. 397.

\textsuperscript{205} \textit{See, e.g.}, Brower & Nurius, \textit{supra}, note 5, at 54; Gottfried & Robins, \textit{supra}, note 5, at 33-39; Kilstrom & Cantor, \textit{supra}, note 5, at 1-44.

\textsuperscript{206} Valdes, \textit{supra}, note 187, at 139.
Smith’s sex discrimination claim alleged that, since the person hired as the mail clerk was a woman, the employer would have expected her to behave “effeminately” and have interests such as sewing. Those characteristics would have been gender appropriate for a woman, but not for a man. Therefore, the failure to hire him was based on his sex.\textsuperscript{207}

Liberty Mutual was successfully able to trigger the gay male schema in the trial and appellate courts by reworking the evidence of gender atypical behavior. This was the very same behavior that Smith would have needed to win his gender-stereotyping case. Thus, the court transformed Smith’s claim from gender role discrimination to homosexuality. Accordingly, both courts allowed Liberty Mutual to demand and enforce gender conformity in the workplace by denying Smith’s Title VII suit based on sexual orientation.\textsuperscript{208}

The \textit{Smith} court’s reading of plaintiff’s claim as one of sexual orientation discrimination rather than gender discrimination both misses the analytical mark and enshrines the gender atypical behavior aspect of the lesbian and gay male schema into Title VII doctrine.\textsuperscript{209} Smith attempted to spotlight that the employer’s “refusal to hire him was not based on a determination that plaintiff was in fact homosexual, but rather the subjective determination that he possessed personal traits that Liberty Mutual associated by stereotype with the female gender.”\textsuperscript{210} Smith himself argued for keeping gender atypicality from triggering the gay male schema in order to underscore the gendered nature of his discrimination claim.

The manner in which Smith attempted this feat is interesting. His brief stated that he was a happily married, heterosexual male, and was not “demanding that an employer accept [an] unconventional life style or mores.”\textsuperscript{211} Smith attempted to use marriage to buttress a conclusion of heterosexuality similar to the way in which marriage may have colored Ann Hopkins’s claim.\textsuperscript{212} Note also the association of homosexuality with abnormal behavior and the foisting of that abnormality on an unwilling target.\textsuperscript{213} This

\textsuperscript{207} Analytically, Smith’s claim is denominated “sex-plus,” sex plus another neutral characteristic. \textit{See}, \textit{e.g.}, Phillips \textit{v.} Martin-Marietta, 400 U.S. 542 (1971)(per curiam).

\textsuperscript{208} Smith, 395 F. Supp. at 1101; 569 F.2d. at 327 n.1. \textit{Accord, Willingham}, 507 F.2d at 1092 (not sex-plus because “both sexes screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted standards of dress and appearance.”) For examples of other successful employer claims to enforce workplace gender appropriateness, \textit{see e.g.}, Strailey \textit{v.} Happy Times Nursery School, (consolidated under the name DeSantis \textit{v.} Pacific Tel. \& Tel. Co.), 608 F.2d. 327 (9th Cir. 1979), (plaintiff teacher fired for wearing gender atypical earring to school); Willingham \textit{v.} Macon Tel. Publishing Co., 507 F2d. 1084 (5th Cir. 1975)(en banc)(gender atypical long hair on male inappropriate, employer may legitimately be concerned about image presented to customers).

\textsuperscript{209} It also helps create what Professor Valdes calls “the sexual orientation loophole.” Valdes, \textit{supra}, note 187, at 146-47.

\textsuperscript{210} Brief for Appellant, Bennie Smith, in \textit{Smith}, 569 F.2d 325 (No. 75-3230), at 17; Valdes, \textit{supra}, note 187, at 146.

\textsuperscript{211} Brief for Appellant, Bennie Smith, in \textit{Smith}, 569 F.2d 325 (No. 75-3230), at 17; Valdes, \textit{supra}, note 187, at 146.

\textsuperscript{212} \textit{See supra} notes 180-186, and accompanying text. Even when courts have a more sophisticated view of the interrelationship between marital status and sexuality, this technique has had mixed results. \textit{See, e.g.}, Pedroza 397 F.3d at 1069n.2 (8th Cir. 2005); \textit{Id.} at 1071 (Colloton, J., concurring)(majority and concurrence differ on the inferences about lesbianism that can be drawn from the harasser’s long-term heterosexual relationship and five children from a prior marriage); \textit{Gibson}, 930 F. Supp. at 1109.

\textsuperscript{213} \textit{See, Brower, supra}, note 65, at 81-82.
association has echoes both of the predatory nature of gay sexuality\textsuperscript{214} and the flaunting of that sexuality,\textsuperscript{215} both common attributes of the lesbian and gay male schema.

Nevertheless, once Liberty Mutual triggered the gay male schema for the court, this difference was inconsequential.\textsuperscript{216} The district court misconstrued Smith’s claim as based on sexual orientation, when it was not.\textsuperscript{217} Moreover, in discussing Smith’s cause of action, the court placed Smith squarely within the reasoning of the Supreme Court in \textit{Price Waterhouse}:

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

The Court views the situation differently. It appears that the defendant concluded that the plaintiff, a male, displayed characteristics inappropriate to his sex, the counterpart being a female applicant displaying inappropriate masculine attributes.\textsuperscript{218}
\end{quote}

Logically, therefore, courts should have decided Smith and other cases of gender atypicality in men\textsuperscript{219} by analogy to \textit{Price Waterhouse}.\textsuperscript{220} That courts have only incorporated these cases into the \textit{Price Waterhouse} framework many years after that case,\textsuperscript{221} or in some instances still reject that precedent,\textsuperscript{222} says something significant about the persistence of the lesbian and gay male schema to distort legal doctrine.

We might argue that the difference in male and female gender roles requires the asymmetrical treatment of male and female plaintiffs’ cases. While insistence on formal symmetry can sometimes mask relevant differences and lead to unjust results,\textsuperscript{223} that pitfall is a small risk here. \textit{Price Waterhouse} focused

\textsuperscript{214} See text accompanying notes 114, 161.
\textsuperscript{216} Of course, if Smith’s assumed homosexuality and not merely gender atypicality really were the cause of his non-hiring, then Title VII would not literally apply since there would be no discrimination based on sex. \textit{Accord, e.g.}, St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 515-16 (1993)(explaining burdens of proof in Title VII cases).
\textsuperscript{217} Smith, 395 F. Supp. at 1099.
\textsuperscript{218} \textit{Id.} The Fifth Circuit’s analysis is similar. \textit{Smith}, 569 F.2d at 327.
\textsuperscript{219} E.g., \textit{Strailey}, 608 F.2d. 327 (plaintiff teacher fired for wearing gender atypical earring to school).
\textsuperscript{221} For example, the Ninth Circuit only overruled \textit{Strailey} in 2001. Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001)(overruling \textit{DeSantis}, 608 F.2d 327, only on this specific point as inconsistent with \textit{Price Waterhouse}).
\textsuperscript{223} \textit{See, e.g.}, racial formal symmetry cases: Pace v. Alabama, 106 U.S. 583, 585 (1883); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, 754 (1955); McLaughlin v. State, 153 So. 2d 1, 2 (1963), rev’d, McLaughlin v. Florida, 379 U.S. 184 (1964).
on the individual nature of Ms. Hopkins’s claim.\textsuperscript{224} Forced conformity to gender norms for behavior – even commonly accepted ones – still negatively affect individuals. Bennie Smith was just as surely precluded from employment as Ann Hopkins was, and for the same reason – their employers’ insistence that they each conform their gender behavior to their biological sex.

Although it should not preclude Bennie Smith’s recovery, gender role asymmetry does affect the lesbian and gay male schema and legal doctrine. The distorting aspect of the lesbian and gay male schema does not always operate in a purely parallel manner when women and men are involved in the workplace. In some contexts, some gender atypical behavior in women may be acceptable, or even expected. Thus, a woman displaying them is perceived to be within “normal” gender appropriate boundaries.\textsuperscript{225} Employers and judges tend not as often to make an equation with lesbian identity, and formulate appropriate legal analogies and doctrine.\textsuperscript{226}

As \textit{Price Waterhouse} shows, because many workplaces and careers are predominantly and traditionally male, women may be under pressure to utilize more masculine attributes in these settings.\textsuperscript{227} Women may be advised that in order to be hired, or be taken seriously in business, they must not dress or act overtly feminine – not wear too much jewelry, too short skirts, too high heels, etc.\textsuperscript{228} At least for some jobs, therefore, a woman with some traditionally masculine attributes may be preferred.\textsuperscript{229}

Similarly, women’s choice of some traditionally male careers may be perceived as rational, particularly if they are high status jobs such as accountant, lawyer, business executive, etc. However, cross-gender job choice by males, or by women entering other, more blue-collar fields, implicates the lesbian and gay male schema.\textsuperscript{230} Contrast the common perception of a woman who seeks to be a corporate

\begin{itemize}
\item \textsuperscript{224} See \textit{supra}, notes 172 to 175, and accompanying text.
\item \textsuperscript{225} Cf, Fudge v. Penthouse Int’l, 840 F.2d 1012, 1016 (1\textsuperscript{st} Cir. 1988)(“amazon” not libelous when referring to schoolgirls. Sufficiently wide spectrum of gender appropriate behavior for schoolgirls exists).
\item \textsuperscript{226} But see, \textit{e.g.}, Dawson v. Bumble & Bumble, 398 F.3d 211 (2\textsuperscript{nd} Cir. 2005)(court holds that non-gender conforming lesbian’s sex stereotyping claim was actually based on sexual orientation and not sex).
\item \textsuperscript{227} \textit{Price Waterhouse}, 490 U.S. at 251.
\item \textsuperscript{228} See, \textit{e.g.}, Sandra Forsythe, \textit{Effect of Applicant’s Clothing on Interviewers’ Decision to Hire}, 20 J. APPLIED SOC. PSYCHOL. 1579 (1990)(suggesting that female applicants in more masculine attire are perceived to be more business-like, to possess more management skills, and therefore, to be hired); John T. Molloy, \textit{The Woman’s Dress for Success Book}, (1977); Richard Lacayo, \textit{A Hard Nose and a Short Skirt: Two cases raise hard questions about a woman’s on-the-job style}, \textit{TIME}, Nov. 14, 1988, at 98 (describing case of Brenda Taylor, assistant state’s attorney reprimanded for looking like a “bimbo”: short skirts, spike heels, designer blouses); Ellen Goodman, \textit{O.J. Prosecutor Hears Critics Put Her Style On Trial}, \textit{THE FRESNO BEE}, Oct. 21, 1994, at B7 (Describing decision by Marcia Clark, O.J. Simpson prosecutor to appear less masculine by changing her hairstyle and dress.); \textit{Working Girl}, (Mike Nichols. Director; Kevin Wade, writer)(20\textsuperscript{th} Century-Fox 1988)(advice given to protagonist (Melanie Griffith), a female secretary, on the first day of work for her new female boss (Sigourney Weaver), that overtly feminine and class-based dress is inconsistent with the professional tenor of her position).
\item \textsuperscript{229} Recall the Supreme Court’s description of the double bind Ann Hopkins faced at the accounting firm, \textit{Price Waterhouse}. \textit{Price Waterhouse}, 490 U.S. at 251.
\end{itemize}
securities attorney with one who wants to be a bulldozer driver – or a man who desires to be a nurse or receptionist. Social psychology research bears out this insight. One study of this issue found that men entering traditional female professions were asked about their “masculinity” (viz., sexual orientation); women were not. By using the noun “masculinity” to cover references to homosexuality, the authors of the study also equated gender atypicality with the gay male schema. Thus, the example illustrates the persistence of the schema, even among researchers who study the societal aspects of gender roles.

The difference in treatment between gender atypical men and women may be partially attributed to the perceived status gains or losses associated with taking traditional male or female jobs. A man who takes a female role, e.g., by becoming a secretary, loses social status. A woman gains status when she chooses a male career, e.g., a lawyer. The man’s choice may be perceived as “peculiar,” the woman’s as natural. The available alternative explanation of women seeking increased status may explain why courts have been more able to perceive discrimination against women on the basis of gender atypicality as violating Title VII, but have been unable to make a parallel conclusion with men.

Cognitive psychologists have found that people seize upon even tenuous theories to rationalize inexplicable events or behavior, and schemas often fill this need for order and rationality.

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232 Cf., Bibby, 260 F.3d at 262 (court’s hypothetical of a male doctor who does not believe men should be nurses).

233 Levenson, supra, note 230 at 61.

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

235 Lisa Serbin and Carol Sprafkin, A DEVELOPMENTAL APPROACH: SEXUALITY FROM INFANCY THROUGH ADOLESCENCE: THEORIES OF HOMOSEXUALITY, 163, 177 (“Girls who exhibit cross-sex-typed behavior receive far less censure than boys, possibly because of the higher status that male sex roles have in our culture…”)

236 Fajer, supra, note 5 at 628. Some have argued that men losing status by taking female roles (and vice versa) is the key to homophobia, see, e.g., Valdes, supra, note 187, at 258-59; Nan Hunter, Marriage Law and Gender: A Feminist Inquiry, 1 LAW & SEXUALITY 9 (1991)(arguing that opposition to same-sex marriage stresses the fact that it would undermine traditional male dominant/female passive roles). See also, Nikolaus Benke, Women and the Courts: An Old Thorn In Men’s Sides, 3 MICH. J. GENDER & L. 195, 247 (1995) (stating that ancient Roman law abridged the litigation rights of the penetrated male in homosexual male intercourse just as if he were a woman).

237 Levenson, supra, note 230 at 61.

238 Of course, it was not always so. For a famous example of a woman’s choice to enter the legal profession viewed as unnatural, see Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873)(Bradley, J. concurring).

239 Robert H. Lauer and Warren H. Handel, SOCIAL PSYCHOLOGY: THE THEORY AND APPLICATION OF SYMBOLIC INTERACTION (2d ed. 1983); See also, Loren J. Chapman, Illusory Correlation in Observational Report, 6 J. VERBAL LEARNING & VERBAL BEHAV. 151, 151 (1967)(discussing “illusory correlation:” “the report by observers of a correlation between two classes of events which, in reality, (a) are not correlated, or (b) are correlated to a lesser extent than reported, or (c) are correlated in the opposite direction from that which is reported.”); Loren J. Chapman & Jean P. Chapman, Illusory Correlation as an Obstacle to the Use of Valid Psychodiagnostic Signs, 74 J. ABNORMAL PSYCHOL. 271 (1969)(explaining how practicing psychologists trained in diagnostics failed to report valid correlations and reported invalid correlations.
Consequently, employers and judges may call upon the lesbian and gay male schema when increased status or other acceptable reasons cannot explain gender atypical behavior.\footnote{241} Accordingly, when masculine women who work in male dominated, high status careers appear before the courts as plaintiffs, they often do not trigger the lesbian schema because the alternate explanation of increased status is available. We cannot reach the same conclusion for effeminate men in low status jobs. Accordingly, the contrast between the outcomes in \textit{Price Waterhouse} and \textit{Smith} appears less confusing, although no more appropriate.

Further, the stronger the inference that the victim of sexual harassment is homosexual, the more difficult the case tends to be. In \textit{Dillon v. Frank},\footnote{242} fellow workers verbally and physically harassed a male postal employee, Dillon. Co-workers taunted Dillon, \textit{inter alia}, with “fag,” “Dillon sucks dicks,” and “Dillon gives head.”\footnote{243} Although the United State Postal Service and the court saw this as sexual orientation harassment, and thus, non-actionable under Title VII, Dillon specifically disavowed that foundation for his claim.\footnote{244} Analogizing his case to \textit{Price Waterhouse}, he couched his cause of action as “sex stereotyping,” classifying certain behavioral characteristics as appropriate for one sex, but not the other.\footnote{245} Dillon claimed that his co-workers abused him because he contravened their traditional gender expectations. Accordingly, like Ann Hopkins at \textit{Price Waterhouse}, he was a victim of sex stereotyping.\footnote{246}

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

\begin{quote}
We find this argument unpersuasive, primarily because he has not shown that his co-workers would have treated a similarly situated woman any differently. Dillon’s argument must presume that the abuse was either directed at his supposed homosexuality or at the specific sexual practices (such as anal sex or fellatio). … Dillon has not shown such unisexual oppression: he has not argued that a lesbian would have been accepted at the Center, nor has he argued that a woman known to engage in the disfavored sexual practices would have escaped abuse. See \textit{Porta v. Rollins Envtl. Serv.}, 654 F. Supp. 1275, 1279 (D.N.J. 1987)(graffiti alleging that “Judy sucks Bernie’s dick” part of sexual
\end{quote}
harassment claim). Without such a showing, his claim to have been discriminated against because he is a male cannot succeed.\(^{247}\)

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

…

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

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

Thus, the discussion of sexual stereotyping in *Price Waterhouse* does not support a holding that discrimination “on account of sex” was involved in this case.\(^{248}\)

The court misread Dillon’s citation to *Price Waterhouse*. He claimed that co-workers’ views of appropriate gender roles influenced their treatment and assessment of him. As was true with Ann Hopkins, gendered schemas provoked the disparate treatment. Thus, the doctrinal difference that his claim was sexual harassment and hers was refusal to promote is insignificant. While it was perhaps more obvious that Hopkins’s partners viewed her as unwomanly,\(^{249}\) the particular verbal abuse heaped on Dillon demonstrates that his co-workers saw him as unmanly.\(^{250}\) *Price Waterhouse* taught that gendered schemas generating different treatment of individuals in the workplace impose a term or condition of employment that members of the opposite sex do not suffer. This disparate treatment constitutes sex discrimination.\(^{251}\)

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

\(^{247}\) *Id.* at 70,105-08.

\(^{248}\) *Id.* at 70,108-09.

\(^{249}\) *Price Waterhouse*, 490 U.S. at 234-35.

\(^{250}\) See *infra*, notes 257 - 268, and accompanying text.

\(^{251}\) *Accord, Harris*, 114 S.Ct. at 372 (Ginsburg, J., concurring)(“The crucial issue is whether members of one sex are exposed to disadvantageous terms or conditions to which members of the other sex are not exposed.”).
Co-workers’ enforcement of their version of gender-appropriate workplace behavior links *Price Waterhouse* and *Dillon*. Indeed, the very irrelevance of gender-typicality to Dillon’s job increases its illegitimacy. After all, if Ann Hopkins truly were too abrasive to be promoted, that characteristic would be a relevant partnership criterion. A male postal worker’s effeminacy, on the other hand, is unrelated to his job performance. Accordingly, the Sixth Circuit’s reliance on the irrelevance of Dillon’s assumed behavior to the workplace is misplaced.

More significantly, the Sixth Circuit fundamentally misconstrued Dillon’s legal argument as the court’s counter-examples in the first quote illustrate. As *Oncale* noted, where there is direct comparative evidence of the different treatment of the sexes at work, there is proof of sex discrimination. In asking whether Dillon’s fellow employees would have treated a similarly situated female differently, one cannot simply examine the treatment of lesbians or women who perform fellatio. Naturally, if lesbians working for the Postal Service had been treated better than gay males, that would have been a clear case of sex discrimination. That was not Dillon’s allegation. Since no evidence was presented as to how their colleagues treated the lesbians working for the Postal Service, we will never be able to assess this method of proving Dillon’s case.

The court more correctly paid attention to the alleged discrimination, the abusive words “Dillon sucks dicks.” Nevertheless, it is too simplistic to inquire whether co-workers would have harassed a woman in a parallel manner, i.e., “Judy sucks Bernie’s dick.” As courts have recognized in other sexual harassment cases, “expressions such as ‘fuck me,’ ‘kiss my ass,’ and ‘suck my dick,’ are commonplace in certain circles, and more often than not, when used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference…”

Moreover, men and women play different roles in American society, and are sexually harassed in different ways. Verbal abuse registers differently according to the sex of the target. “Judy sucks...”

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252 See *Price Waterhouse*, 490 U.S. at 251 (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).
253 *Id.* at 252.
254 *Oncale*, 523 U.S. at 80-81.
255 *Cf.*, *DeSantis*, 608 F.2d at 331 (employer policy that treats alike men and women who prefer sexual partners of the same sex is not sex discrimination).
256 It is fairly safe to assume that they would not have been accused of fellating men. However, they may have been told to have sex with men, e.g., *Dawson*, 398 F.3d at 215; *Valadez*, 895 F. Supp. at 1011. The particular schema of lesbians changing their sexual orientation after sex with a man is discussed at note 127 and accompanying text.
257 *Dillon*, 58 Empl. Prac. Dec. at 70,105-08.
259 *Johnson v. Hondo*, Inc., 125 F.3d 408, 412 (7th Cir. 1997)
260 The debate surrounding the use of the “reasonable woman” or “reasonable person” standard in sexual harassment cases is premised on this distinction. *E.g.*, *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)(adopting the reasonable woman standard).
261 See, Eros DeSouza, Joseph Solberg, *Women’s and men’s reactions to man-to-man sexual harassment: does the sexual orientation of the victim matter?*, 50 *SEX ROLES* 623, 36-37 (2004)(men and women see sexual harassment differently); Accord, Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial
Bernie’s dick” can constitute sexual harassment because it reduces women to sexual beings and illustrates they are not workplace equals. However, it does not connote that Judy is less than a woman or acting inappropriately for her gender. “Dillon sucks dicks,” on the other hand, is less a statement describing his possible sexual activity than a slur on his manhood.

In the many same-sex sexual harassment cases where heterosexual men are perpetrators they always place their male victims in the receptive role in intercourse or the active role in oral sex. This is not coincidental. In some modern cultures and historically, men engaging in sex with other men were viewed differently depending on which role they assumed in sex, the insertive/male role or the receptive/female one. Real men are fellated; they do not perform fellatio. Real men penetrate; they are not penetrated. Moreover, concentrating on women’s sexuality in the workplace often signals that they are not equals with men. A man treating other men in a female sexual role also evidences this second-class status. Both are expressions of dominance and inequality towards others they perceive as not male enough to belong to the group. Thus, Dillon was separated from and excoriated by his fellow postal

*Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005)(the presence of women on appellate panels correlates to different outcomes in Title VII cases). *Cf.,* Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1383 (C.D. Cal. 1995)(the court contrasts the reactions to a hypothetical conversation about penis length that takes place between a man and a woman, two men or two women); see generally, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1494 (M.D. Fla. 1991)(sexual harassment claim based in part on pervasiveness of pornographic photos of nude women. Male employee testified that nude photos of women in the workplace were normal, photos of naked men “would be queer.”).


263 Indeed, it may connote the opposite, that women are only good for sex. *Cf.,* E.E.O.C. v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35-36 (W.D.N.Y. 19940 (“Women are only good for fucking.”).


265 See, e.g., George Chauncey Jr., *Christian Brotherhood or Sexual Perversion?: Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, in *HIDDEN FROM HISTORY*: supra, note 82, at 297 (discussing the selective labeling of men engaged in homosexual activity as “straight” or “queer” by which sexual and gender role he assumed); C.A. Tripp, *The Homosexual Matrix* 125 (1975)(discussing ways men deny their homosexuality, including the assumption of the male role in homosexual activity to absolve that individual of homosexuality); Tomas Almaguer, *Chicano Men: A Cartography of Homosexual Identity and Behavior*, in *LESBIAN AND GAY STUDIES READER*, 256-258 (Henry Abelove, et al, eds 1993).

266 *Cf.,* Vickers, 453 F.3d at 763, (plaintiff alleges his harassers targeted him because of “those aspects of homosexual behavior in which the male participant assumes what [they] perceive as a traditionally female- or less masculine-role.”); id. at 763n.2 (“Vickers notes that he was only teased about giving, not receiving fellatio, and about receiving anal sex.”)

267 See note 40, *supra*, and cases and texts cited there.
workers because of maleness, or perceived lack of thereof. As the Supreme Court stated in *Price Waterhouse*, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

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

*Bibby* and *Dillon* also demonstrate that when gay persons (or persons perceived to be gay) are plaintiffs, courts have difficulty accepting the gender stereotyping rationale. In contrast, courts seem to have the easiest time accepting claims of same-sex sexual harassment through sex stereotyping when they believe that plaintiffs could not be gay, as in the harassment of heterosexual women or schoolchildren. For example, in *Doe v. City of Belleville*, plaintiffs, two sixteen-year old brothers, were employed as groundskeepers in the municipal cemetery. Male co-workers called J. Doe “fat boy” due to his weight, and his brother, H. Doe, “fag” or “queer” because he wore an earring. Much of H’s harassment consisted of calling him “fag,” “queer” and “bitch,” taunts to “go back to San Francisco with the rest of the queers,” and threats to take H. into the woods and sodomize him. One worker grabbed H’s testicles “to find out if [he was] a girl or a guy.” As the Seventh Circuit noted, no court would have had any difficulty finding that a woman in similar circumstances was subjected to sexual harassment.

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

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268 *Price Waterhouse*, 490 U.S. at 251.
271 Compare e.g., *Price Waterhouse*, 490 U.S. 228; *Adair*, 782 F. Supp. 558 with e.g., *Dawson*, 398 F.3d 211 (lesbian victim of harassment only stated claim based on sexual orientation and not gender stereotyping). But see, e.g., Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002)(lesbian stated a claim for gender-stereotyping, sexual orientation irrelevant).
273 *Doe*, 119 F.3d 563 (7th Cir. 1997).
274 *Id.* at 566-67.
275 *Id.* at 568.
Nevertheless, when a similar sexual harassment case involved an adult gay man, the very same epithets, “fag” and “bitch” and drag queen references were used by a different appellate panel of the Seventh Circuit only three years later to refer to sexual orientation and not to gender stereotyping.276

Interestingly, many of the men in these cases were viewed as gay or effeminate for wearing earrings.277 As Judge Kozinski noted in Jesperson v. Harrah’s Operating Company, Inc., “cultural norms change; not so long ago a man wearing an earring was a gypsy, pirate or an oddity. Today a man wearing body piercing jewelry is hardly noticed.” 278 He is no doubt correct about cultural shifts. But we should be careful to remember that our experiences and those around us may have disproportionate resonance only to us. This is the availability heuristic.279 Our experiences may idiosyncratically shape our schemas leading us to overstate the probability of our experiences’ occurrence in the world. One classic example is the comment attributed to Pauline Kael, late film critic for the New Yorker magazine. After Richard Nixon won 49 states, a landslide victory in the 1972 presidential race, Kael wondered: “How can that be? No one I know voted for Nixon.”280 Perhaps in the circles in which Judge Kozinski moves, earrings on men pass unnoticed. They apparently do not do so for the male plaintiffs in these cases.

B. The mechanics of schema theory

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

In the last decade, some lesbian and gay male plaintiffs have prevailed and have been able to have the courts resist the earlier distortions of the gay, cross-gender model.281 In Nichols v. Azteca Restaurant

276 Spearman v. Ford Motor Co, 231 F.3d 1080, 1086 (7th Cir. 2000) (references to “fag,” “bitch,” and “RuPaul RuSpearman” evidenced sexual orientation discrimination and not gender stereotyping). RuPaul is the name of a black, male drag queen and entertainer. Id. at 1083n2.

277 See, e.g., Doe, 119 F.3d at 556; Kay, 142 Fed. Appx. at 51; Strailey v. Happy Times Nursery School, (consolidated under the name DeSantis v. Pacific Tel. & Tel. Co.), 608 F.2d. 327 (9th Cir. 1979)(plaintiff teacher fired for wearing gender atypical earring to school).

278 Jesperson, 444 F.3 at 1118 (Kozinski, J., dissenting). Judging by the Federal Reporter, to pirate, gypsy and oddity, Judge Kozinski might have added homosexual or woman.


280 Quoted in John McCormick, When the press misses a story, THE CHICAGO TRIBUNE, Commentary, Zone C; p. 21 (Nov. 9, 2004).


This view would mean that every sexual orientation case is essentially a gender stereotype cause of action. Vickers v. Fairfield Med. Center, 453 F.3d 757, 764 (6th Cir. 2006)(“Ultimately, recognition of Vickers’ claim [that gay men are perceived to have traditionally female or less masculine sexual practices]
Enterprises, Inc., the sexuality of the plaintiff, Antonio Sanchez, is ambiguous. Although one Ninth Circuit concurrence in a subsequent case refers to Sanchez as gay, neither Nichols nor the accompanying unpublished memorandum opinion dealing with the claims of his female co-plaintiffs contain any mention of his sexuality. Nichols is the first case in which a possibly gay man may have prevailed on a Price Waterhouse, sex-stereotyping claim. The omission of Sanchez’s sexual orientation is significant given the history of losses by lesbian and gay plaintiffs when their sexuality surfaces in court.

Antonio Sanchez worked at two of Azteca’s restaurants in Washington and Oregon. The court stated, “Sanchez was subjected to a relentless campaign of insults, name-calling, and vulgarities. Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as “she” and “her.” Male co-workers mocked Sanchez for walking and carrying his serving tray “like a woman,” and taunted him in Spanish and English as, among other things, a “faggot” and a ‘fucking female whore.’” Sanchez prevailed on a Price Waterhouse, sex discrimination claim; the verbal abuse he suffered was cast in female terms and was based on the perception that he was effeminate. Accordingly, that harassment occurred because of sex. In Nichols, the ambiguity of Sanchez’s sexual orientation and the heavily gender-encoded epithets may have both combined to help the court resist the erroneous schema and its skewed perspectives.

We have already discussed how one aspect of schematic thinking is the tendency to edit facts to incorporate confirming information within the schema and reject disconfirming material as irrelevant or exceptional. One prime example is the treatment of Harry Kay by co-workers at Independence Blue Cross

would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed stand, as a all homosexuals, by definition fail to conform to traditional gender norms in their sexual practices.” As the Sixth Circuit in Vickers recognized, indeed, that is its point. Id. (“Vickers argued that the act of identification with a particular group [gays and lesbians] in itself, is sufficiently gender non-conforming that such an employee who so identifies would, by his very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim.”) As Professor Kramer correctly notes, however, most courts would not welcome that approach. (Kramer, Homosexuality and Title VII, supra, note 80, at 34 discussing that theory without specifically applying it to Vickers.)

Moreover, such a conclusion would call for a reversal of Medina v. Income Support Div., New Mexico, 413 F.3d 1131 (10th Cir. 2005), discussed at notes 90–91 and accompanying text, and Hamner v. St. Vincent Hosp. Health Care Center, Inc., 224 F.3d 701 (7th Cir 2000)(discussed at notes 176-179, and accompanying text. Neither of those cases contained any evidence that gender non-conformity played any part in the motive for the harassment in those cases. Both those cases properly decided that plaintiffs’ claims were based on sexual orientation and not sex-stereotyping – Medina on the basis of heterosexuality, Hamner on the basis of homosexuality.


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


See, e.g., Dawson, 398 F.3d 211; Bibby, 260 F.3d 257; Spearman, 231 F.2d 1080; Carreno, 54 Fair Empl. Prac. Cases (BNA) 81.

Id. at 870.

Id. at 874-75.
Specifically, the difference in the decisions of the District Court and the Court of Appeals reflects this selection principle. Harry Kay was employed by IBC as an analyst. His harassment began almost immediately after he changed jobs and changed floors at the IBC offices. His new co-workers left comments like “queer,” “faggot,” “fem” on his voicemail, posted an anonymous letter to Kay’s supervisor alleging that he had been “staring, glaring and mumbling comments at the men who passed by his desk” and Kay received a letter that said, “Stop staring at me in the bathroom and on the floor, you faggot.” There was also a petition in the restroom stating, “If you want this queer off the floor, sign here.”

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

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

The Court of Appeals affirmed the lower court, but on the ground that his claim was based on sexual orientation and not gender-stereotyping. In addition to the facts as related by the district court, the Third Circuit stated that the record contained multiple references to Kay’s sexual orientation. In his deposition Kay was asked why his co-worker may have mimicked a limp wrist, “Kay responded, “Well, maybe it was because [Foley] knows that [Butts] is gay. And anyone that hangs out with the gay men must be gay.”

Moreover, Kay had stated that he had been harassed based on sexual orientation when he filed

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290 Kay, 2003 U.S. Dist. LEXIS at *3-5.
291 Id. at *5. Again note the earring trigger. See, e.g., supra, notes 277 - 278, and accompanying text.
293 Id. at *17-18.
294 Id. at *23, *28-29
295 Kay, 124 Fed. Appx. at 49. Judge Rendell concurred, stating that she would have affirmed on the basis given by the district court and not resolved the gender-stereotyping/sexual orientation claim. Id. at 51 (Rendell, J. concurring).
296 Id. at 50. The labeling of one person as gay because he or she associates with a known homosexual is called an “associative stigma.” Belle Rose Ragins, John M. Cornwell, Janice S. Miller, Heterosexism in the Workplace: Do Race and Gender Matter?, 28 GROUP & ORGANIZATION MGT. 45, 49 (Sage Pub. 2003) (discussing ‘courtesy stigmas’ and citing Erving Goffman, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY, (New York 1974)); Gregory M. Herek & John P. Capitanio, “Some of my best friends:” 43
charges with the Pennsylvania Human Rights Commission and in his long-term disability benefits claim. The Third Circuit also added that the water cooler incident also included a statement by Bennett, “You are just so gay” as well as the “real man” remark. The appellate court stated that the gay chat-line flyer included the phrase: “GAY! GAY! GAY!” These accretions to the retelling of the factual record are small but significant for understanding both how schemas work and why the Third Circuit ruled as it did. Both the district court and the court of appeals are liberally editing information to fit their model of what happened in the case. They each extracted and retained certain information because it was useful to them and consonant with their schema for that case, and rejected information when it was not consistent, or no longer useful. Moreover, as each of their models was idiosyncratic, the other judges examining the same record did not share those schemas or those conclusions.

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

None of those additions provide significant new information. After all, both courts’ versions contained facts supporting either perspective on the workplace conduct. For example, both courts noted the telephone line was for a gay chat service, the District Court mentioned that the phone number was 1-800-FREE-GAY, while the Court of Appeals included the line, “GAY! GAY! GAY!” Moreover, although the water cooler epithet ‘gay’ in the context Bennett employed it may have been a reference to Kay’s assumed sexual orientation, it could also have signified “lame,” “useless” or “bad.”

Instead the additions reinforced the particular decisions that the courts made on the case. What is noteworthy is the increased


Id. at 50-51.

Accord, Brower and Nurius, supra note 5 at 14(discussing schema theory generally).

Accord, Id. at 14-15.


emphasis on those facts that support the courts’ eventual conclusions on sexual orientation or gender stereotyping, and de-emphasis on those aspects that contradict that decision. This is classic schema editing and one of the major mechanisms by which schemas work in legal decision-making.303

The tendency to ignore contradictory facts and boost the importance of those that support a particular schema is also evident in Dawson v. Bumble & Bumble.304 Dawn Dawson described herself as a “lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman.”305 Specifically, she generally wore leather pants and a denim jacket on the job, sported a mohawk hairstyle and wore neither feminine jewelry, perfume nor makeup.306 Dawson was employed by Bumble & Bumble, a high-end hair salon in Manhattan, as a stylist trainee and hair assistant.307 The salon itself contended if there were a ‘norm’ for Bumble employees, it would be the norm of non-conformance.308 The district court noted that the salon’s employees “embod[ied] many lifestyles and sexual preferences and reflect[ed] varying physical appearances, overall looks, and different manners of hair dress and clothing.”309 While Dawson worked at the salon, her fellow employees included several lesbians and gay men, a bisexual, a female-to-male transsexual, and a pre-operative male-to-female transsexual.310 Dawson was not reticent about her sexuality and would sometimes refer to herself as a “dyke.”311

After Bumble & Bumble terminated her, Dawson sued claiming discrimination on the bases of sex, sex stereotyping, and/or sexual orientation in violation of Title VII, and New York state and local law.312 Dawson alleged that she was harassed about her appearance and “that she should act in a manner less like a man and more like a woman.”313 Her co-workers teased her and called her “Donald” instead of “Dawn” in front of colleagues and customers. She was also harassed about her sexuality. She was accused of “wearing her sexuality like a costume”314 and once told she needed to have sex with a man.315 Both the

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303 This schematic filtering of facts is not unique to courts in Title VII cases. For examples in completely different legal areas, see e.g., Saia v. New York, 334 U.S. 558 (1948)(compare Justice Douglas’s factual statement in the majority opinion, id. at 559, with Justice Frankfurter’s dissent, id. at 562-63 (First Amendment); VanValkenburgh v. Lutz, 106 N.E. 2d 28 (NY. Ct. App. 1952)(compare Justice Dye’s factual description, id. at 29-30, with Justice Fuld’s dissent, id. at 31)(adverse possession).
304 Dawson v Bumble & Bumble, 398 F.3d 211 (2nd Cir. 2005).
305 Id. at 213. (Quoting Dawson’s complaint at 7, found in Dawson v. Bumble & Bumble, 246 F. Supp. 2d 301, 313 (S.D.N.Y. 2003).
306 Dawson, 398 F.3d at 221-22. The court stated that the salon found her clothing acceptable work attire, and that a stylist there gave Dawson her mohawk. Id.
307 Dawson, 398 F.3d at 213.
308 Id. at 214
309 Dawson, 246 F. Supp. 2d at 310.
310 Dawson, 398 F.3d at 214.
311 Id.
312 Id. at 213.
313 Id at 215.
314 Id.
315 Id.; Dawson, 246 F. Supp. 2d. at 329; According to Dawson’s deposition, she was told “You know what you need, Dawn, you need to get fucked.” Dawson, 246 F. Supp. 2d at 308. Although probably not a significant difference in the minds of the deciding judges who may not have understood the contextual nuances, the courts’ version is more explicitly about heterosexual sexual activity than the statement.
district court and the Second Circuit found that she had not stated a claim based on sex or gender stereotyping, but that her claim was based on sexual orientation and not covered by Title VII.\footnote{Dawson, 398 F.3d at 223; Dawson, 246 F. Supp. 2d at 314-18.}

One of the major weaknesses that both courts had with Dawson’s claim was the inability to separate out gender-atypicality from sexual orientation. Specifically, the courts had problems with understanding Dawson’s claims; she had difficulty articulating those claims; and the co-workers who engaged in this behavior may not have separated those two bases for liability. This confusion should not surprise us. Schemas are cognitive images that enable us to classify a lot of information in compact paradigms by using prototypical features. They tend to be unarticulated and informal.\footnote{See, David E. Rumelhart, Schemata and the Cognitive System, in 1 HANDBOOK OF SOCIAL COGNITION, 161, 166 (Robert S. Wyer, Jr. & Thomas K. Srull, eds. 1984).} Further, this process occurs semi-automatically, with a relative lack of awareness.\footnote{Id.; Langer, supra, note 5.} We sort and classify information through schemas with little recognition of the fact that this triage is taking place.

Naturally, schemas serve as shortcuts both for people with limited experience with a particular situation and also those who have a lot of experience. But more experience is not necessarily better. Indeed the more experience we have, the more ingrained our schema may be. It may be more sophisticated or nuanced, but it does not necessarily have to be so. Accordingly, your schema may be very different than mine even though we are relating to the same object, situation or person.

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

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

Dawson reports in her deposition. That statement may have referred to a need to relax, to have sexual activity generally, or to lesbian sexual activity specifically with sex toys. See generally, Doggy Style, April Fool’s Issue: GW: You need to get FUCKED, GWHATCHET.COM (an independent student newspaper of George Washington University, Washington, DC) (issue date April 1, 2006), available at http://media.www.gwhatchet.com/media/storage/paper332/news/2006/04/01/Opinions/April.Fools.Issue.GW.You.Need.To.Get.Fucked-1765364.shtml (last accessed June 1, 2008)(using term as synonym for relax or have sexual relations generally); Patcondell, A Video Response to Osama, Comments section to video, (“AaronTX21 middle eastern men just need to get fucked and they will calm down...they have so much built up sexual frustration and so much backed up cum that they need to release.”), available at http://www.youtube.com/watch?v=uoG8ZHHHvYk (last accessed June 1, 2008)(using phrase for sexual relations generally); Dan Savage, Reuse or Recycle?: For lesbians, sex toys die with the relationship. Is it different for heteros?, LA WEEKLY (CALIFORNIA) (Feb. 14, 2008) (discussing the use of dildos by lesbian couples for penetrative sex).
that she was a victim of sexual discrimination because she is a lesbian who refuses to conform to gender norms. […]

As a threshold matter, because the borders are so imprecise, it is not evident exactly what conduct by Bumble Dawson claims as the gravamen of the claims she asserts on sex or gender grounds, as opposed to what actions she bases on sexual orientation or sexual stereotyping. Moreover, insofar as Dawson relies on a basis of discrimination that seems to be founded on her status as member of a subset, "a lesbian who does not conform to gender norms," the theory she essays is not readily definable. It suggests that the offender presumably would classify lesbians into types and distinguish between forms of discrimination so that the misconduct could then be parsed between actions prompted by animus based strictly on sex and sexual stereotyping, as opposed to those motivated instead only by sexual orientation or affiliations. In other words, under Dawson's hypothesis, Bumble would practice disparate treatment by kinds of homosexuality, discriminating against an admitted lesbian who looks and behaves more like a man than like a woman, and presumably not against another lesbian known to be openly gay but who does not display her sexual preference by any visible expression or appearance. (3)

---(3)[footnote] At her deposition Dawson was asked whether "it's your view that you were discriminated against simply because you were a lesbian or whether being a lesbian would have been okay, it was being a lesbian combined with not conforming to gender norms that caused a problem?" She replied: "Yes, the latter answer." In a similar vein, she testified that in her view it was acceptable at the Salon for a male to be gay as long as he appeared like a heterosexual male, but not if he looked effeminate.20

As this passage demonstrates, the court's schema of lesbians is that they all gender-identify in the same way. Thus, it simply does not capture one of the classic tropes of lesbian identity, the butch/femme dichotomy.321 At one end of the gender spectrum is the butch, a lesbian who rejects traditional feminine roles, trappings and behaviors, opting instead for more traditionally masculine characteristics.322 At the other end of the gender spectrum is the femme.323 The term “Lipstick Lesbian” denotes a modern variation, fashioning an identity that may be described as ultra-feminine since it stresses prototypically feminine dress

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319 Dawson, 246 F. Supp. 2d at 311 (internal citations omitted).
320 Id. at 311, n.3 (internal citations omitted).
321 See, e.g., Valdes, supra note, at 104-06 and the sources cited at notes 281-284; Emily Q. Shults, Sharply Drawn Lines: An Examination Of Title IX, Intersex, And Transgender, 12 CARDOZO J.L. & GENDER 337, 341 (2005). The historical trope is so engrained in the larger gay community that it can be used modernly with very little regard for its original referents. E.g., Readers’ comments on blog post, (original posting dates 30 May 2008 07:53 am, 1:35 pm), http://andrewsullivan.theatlantic.com/the_daily_dish/2008/05/obama-and-clint.html, and http://andrewsullivan.theatlantic.com/the_daily_dish/2008/05/obama-and-cli-1.html#more (last accessed 5/31/08).
322 See generally, Elizabeth Lapovsky Kennedy & Madeline Davis, "They Was No One to Mess With": The Construction of the Butch Role in the Lesbian Community of the 1940s and 1950s, in THE PERSISTENT DESIRE: A FEMME-BUTCH READER 45, 62 (Joan Nestle ed., 1992); soyon im, Gender Warriors, SEATTLE WEEKLY, June 22, 2000, Cover Story, at 26).
323 See, e.g., Danae Clark, “Commodity Lesbianism,” in THE LESBIAN AND GAY STUDIES READER, 188-194 (Henry Abelove, Michele Aina Barale, David M. Halperin eds. (Routledge London 1993)) (discussing butch/femme iconography in advertising and how the two aesthetics are shown in dress and fashion.)
and behavior. The salon in *Dawson* had a high concentration of sexual minorities. We would expect that the workers in that non-traditional workplace to be aware of, and to incorporate more sophisticated gender gradations within the schema of lesbians and gay men than would the model of sexual orientation normally used by some members of the federal judiciary. Consequently, the district judge may not have been able to comprehend how Bumble may “practice disparate treatment by kinds of homosexuality, discriminating against an admitted lesbian who looks and behaves more like a man than like a woman, and presumably not against an admitted lesbian known to be openly gay but who does not display her sexual preference by any visible expression or appearance.” Such gender-based distinctions within the class of lesbians may not have registered within the judge’s more basic schema of homosexuality and gender. Nevertheless, that the judge’s model cannot encompass a gendered distinction within sexual orientation expression does not mean that that may not have been part of the workplace culture or that it was not integrated within Dawson’s or her former co-workers’ schema of lesbians and gay men.

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

We have already made the connection between traditional modes of legal analysis and precedential reasoning and schema matching. The Second Circuit’s opinion in *Dawson* also illustrates that aspect of schema theory. In discussing precedent on gender stereotyping claims, the appellate court cautioned, “[w]hen utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that ‘stereotypical notions about

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325 Accord, Benoit Denizet-Lewis, *supra*, note 324 (discussing the distinctions among butch lesbians, femme lesbians, lipstick lesbians, and others who defy quick categorization.).

326 *Dawson*, 246 F. Supp. 2d. at 311, n.3 (internal citations omitted). See text at *supra*, note 320.

327 *Dawson*, 246 F. Supp. 2d. at 311, n.3.

how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII."329

Note two points about this passage. The court states that problems arise because perceptions of sexual orientation and gender role conformity blend into each other. That insight is true; indeed it is a significant part of the schema for lesbians and gay men – that they engage in cross-gender behavior. However, the court prefaces its argument with the statement that “avowed homosexuals” raise specific problems for bench officers judging gender-stereotyping claims. But of course, that conflation is equally true with closeted homosexuals. Indeed, mere gender atypicality often leads to perceptions of homosexuality.330 And without more explicit workplace disclosure of an employee’s sexual orientation, gender atypicality may be all co-workers have on which to decode a fellow worker’s sexuality.331 Within the lesbian and gay male schema the boundaries between sexual orientation and gender are permeable; sexuality equals cross-gender characteristics and vice-versa.

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

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

If that schema underlies Title VII doctrine, where does that leave lesbians and gay men? They should not be out at work because the courts will not remedy the resulting harassment– either because it is non-actionable sexual orientation discrimination, or because it is gender discrimination that the courts will misread.332 But hiding one’s sexuality imposes significant costs on gay people;333 costs not imposed on heterosexuals, who may be as open about their sexual orientation as they wish.334 Moreover, this argument is reminiscent of claims that gay men and lesbians deserve mistreatment by being visible. 335

329 Dawson, 398 F.3d at 218.
330 See, e.g., supra, notes 197 - 204, and accompanying text.
331 For a discussion of the ways in which visibility of sexual orientation affects lesbians and gay men, see generally, Brower, Of Courts And Closets, supra, note 215; Brower, Multistable Figures, supra note 296
333 See, e.g. Brower, Multistable Figures, supra, note 296, at 145n.11 – 146n.14, and accompanying text.
334 See, id. at 146n.16 – 147n.18, and accompanying text.
335 The idea that openly gay people deserve negative treatment is common. See, e.g., Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (after a mock rape by male students, gay middle school boy fled to his principal's office. Principal's response was "that 'boys will be boys' and told [the complaining student] that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."); Ed Bradley, 60 Minutes: Don't Ask, Don't Tell: Law Regarding Homosexuals in the Military (CBS television
Additionally by using the term “bootstrapping,” the court strongly suggests that open lesbians and gay men are seeking to game the system, to transform an impermissible cause of action (sexual orientation) into a permissible one (gender-stereotyping) by surreptitiously transforming one argument into another. The court reinforces the inference that gay people are somehow cheating and being deceptive by following this statement with a quotation from an employment law treatise and a law review article, both cautioning lesbian and gay plaintiffs that they risk having courts misattribute gender claims to sexual orientation if sexuality is raised.\(^{336}\) The original context of both secondary sources make judges the subjects and gay people’s claims the objects of distortion; judges will misconstrue gay plaintiffs’ claims. The Second Circuit’s opinion reverses the subject and object. By calling this misattribution “bootstrapping,” the court transforms the advice that lesbians and gay men need to be careful that courts don’t destroy their causes of action, into advice on how to manipulate innocent judges. Thus, the Second Circuit starts out looking at these cases with a jaundiced eye – unsurprisingly Dawson loses.

Schema theory also elucidates the mechanisms predicting that outcome. Social schemas lead us to quickly and efficiently catalog people or legal problems. When we encounter a person or an issue of first impression, we enlist schemas to develop appropriate responses. Our schema inclines us to attribute a range of beliefs to that person or event, and we attach subsequent interpretations consistent with those impressions. Thus, our “good student” schema tells us that that person does well in school, is prepared for class, writes and speaks well, etc. We may also attach negative characteristics to an otherwise positive schema; good student may also signify socially inept or sycophantic. Additionally, we can anchor feelings and emotions to that schema. If we see friendliness as a component of good student, we will feel friendly towards someone who is a good student. If we are feeling friendly towards someone, it is easier to see that person as a good student.\(^{337}\) Finally, if we associate sycophantism with good students, when such a student is in our office, we may be overly attentive to any hint that he or she is trying to curry favor. We can become suspicious or mistrusting of a new individual, simply because something about them resonates with components of our schema.\(^{338}\) Accordingly, once the court associates cheating and gaming the system with openly gay or lesbian plaintiffs and their gender-stereotyping causes of action, it is not unusual that those plaintiffs lose and that non-gay plaintiffs win.\(^{339}\)


\(^{337}\) Brower and Nurius, supra note 5 at 14.

\(^{338}\) Accord, Jantz v. Muci, 759 F. Supp. 1543, 1545 (D.Kan. 1991)(Non-gay teacher fired for “homosexual tendencies” because teacher reminded supervisor’s secretary of her husband “whom she believed to be gay.”)

\(^{339}\) The court discusses two successful gender-stereotyping cases, Price Waterhouse, in which Ann Hopkins is not viewed to be a lesbian. See infra, notes 180–186 and accompanying text. And Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2nd Cir 2004)(young mother working as a school psychologist allowed to bring sex discrimination claim under 42 U.S.C. § 1983). In neither case do the courts accuse those women of bootstrapping.
Dawson also increases the burden on gay or lesbian plaintiffs in these cases. The court stated that a claim of non-conformity to gender stereotypes can be made in two ways: (1) through behavior or (2) through appearance.\(^{340}\) The court then held that Dawn Dawson met neither of those methods.\(^{341}\) Even assuming that the court’s structure is appropriate,\(^{342}\) the court’s method ignores how schemas actually work. For heterosexuals, this model works fine. A gender non-conforming woman like Ann Hopkins can show that others saw her appearance (partner suggested that she “wear makeup, have her hair styled, and wear jewelry”)\(^{343}\) or her behaviors (aggressive or abrasive, she needed to take a “course in charm school”)\(^{344}\) as inappropriate for her sex. Moreover, because the courts harbor no cross-gender beliefs about heterosexual married women they can objectively assess that appearance or behavior. But because the lesbian or gay male schema conflates sexual orientation and gender non-conformity, the harassment is often expressed in both ways as in Doe v. City of Belleville.\(^{345}\) Remember that the Seventh Circuit in Doe viewed the harassment victim as heterosexual, thus the schema of gay men as effeminate did not affect the court’s perception of the case. Nevertheless, Doe’s co-workers equated effeminacy with homosexuality. Doe’s appearance in wearing an earring and being slightly built, triggered harassment that took an anti-gay form: “fag,” “queer,” “bitch,” “go back to San Francisco with the rest of the queers,” and threats to sodomize him in addition to other, more gender policing remarks, “are you a boy or a girl?”\(^{346}\)

However, with openly gay men or women, the lesbian or gay male schema of cross-gender behavior may be triggered both for co-workers and judges. The court’s insistence on either behavior or appearance effectively means that open lesbians or gay men who are outwardly gender conforming can never win their cases, even if they are treated as though they are gender atypical on the job. If they conform to gender stereotypes by behavior or appearance and if they are harassed, the court will read any harassment that hints at traditional gender role enforcement as bootstrapping on sexual orientation because they are not visibly cross-gendered in appearance or behavior. Gender nonconforming lesbians or gay men like Dawn Dawson, on the other hand, will also lose as the courts will read their gender claims as inextricably linked to sexual orientation. Their gender nonconformity will be reformulated as sexual orientation. In contrast, heterosexual plaintiffs will prevail\(^ {347}\) since the courts do not have a schema of heterosexual sexual orientation and gendered behavior; their sexual orientation recedes\(^ {348}\) and we are left

\(^{340}\) Dawson, 398 F.3d at 221.
\(^{341}\) Id. at 221-23.
\(^{342}\) That model is not consistent with prior Title VII doctrine. The classic “sex-plus” cases frequently involved social relationships (marriage, parenting, etc.) and not just physical appearance and behavior. So too did the cases finding race discrimination against whites who were involved in interracial friendships, alliances, or romances. See, Noah Zatz, Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity, 77 IND. L.J. 63 (2002).
\(^{343}\) Price Waterhouse, 490 U.S. at 325.
\(^{344}\) Id.
\(^{345}\) Doe, 119 F. 3d 561.
\(^{346}\) Id. at 566-67.
\(^{347}\) E.g., Price Waterhouse, 490 U.S. 228; Adair, 82 F. Supp. 558; Dick, 397 F.3d 1256; Doe, 119 F. 3d 563.
\(^{348}\) See, e.g., Kramer, supra at.
with gender policing. Thus, although courts sometimes state that it would have made no difference to Ann Hopkins’s gender-stereotyping case if she had been a lesbian.\footnote{See, e.g., Bibby, 260 F.3d at 261; Heller, 195 F. Supp. 2d at 1224.} As \textit{Dawson} makes clear, that promise may often ring hollow.

Although similar to \textit{Dawson, Rene v. MGM Grand Hotel}\footnote{Rene v, MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002)(en banc), cert. denied, 538 U.S. 922 (2003).} illustrates different mechanisms of schema theory and builds upon now familiar ones. Medina Rene was an openly gay man employed as a butler by the MGM Grand Hotel in Las Vegas. His male supervisor and co-workers subjected him to daily harassment consisting of “being grabbed in the crotch and poked in the anus, being forced to look at pictures of naked men having sex while his co-workers looked on and laughed, his co-workers caressed, hugged, whistled and blew kisses at him, and called him ‘sweetheart’ and ‘Muneca.’”\footnote{Rene, 305 F.3d at 1207 (quoting Rene’s brief on appeal) (“muñeca” is Spanish for “doll” \textit{Id.} at 1207n.2, Said to a girl, it has a figurative meaning of “babydoll” or “cutie” http://www.urbandictionary.com/define.php?term=muneca (last accessed June 1, 2008), M.F. Jones-Reid & Elizabeth Reid, SPANISH LINGO FOR THE SAVVY GRINGO, 170 (Sunbelt Publications 2003); \textit{Accord, Rene}, 305 F.3d at 1068 (Pregerson, J., concurring)(quoting Rene that muñeca was “a word that Spanish men will say to Spanish women.”).} Rene stated that he was harassed because he was gay, but also filed a complaint with the Nevada Equal Rights Commission that he “was discriminated against because of his sex, male.”\footnote{Id. at 1064.}

It may seem odd that Rene said that his harassment was for being gay, but that he filed a sex discrimination claim under Title VII. However, judges are not the only ones with schemas for lesbians and gay men that include gender atypicality, the individual actors in the cases may also have that schema.\footnote{Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)(“Centola never disclosed his sexual orientation to anyone at work. His co-workers made certain assumptions about him, assumptions informed by gender stereotypes. For example, they placed a picture of Richard Simmons "in pink hot pants" in Centola's work area. Without placing too fine a point on it, Richard Simmons "in pink hot pants" is hardly what most people in our society would consider to be a masculine icon. Certainly, a reasonable jury could interpret this picture, unaccompanied by any text, as evidence that Centola's co-workers harassed him because Centola did not conform with their ideas about what "real" men should look or act like. […] Although Centola never disclosed his sexual orientation to anyone at work, if Centola's co-workers leapt to the conclusion that Centola "must" be gay because they found him to be effeminate, Title VII's protections should not disappear.”) \textit{Doe}, 119 F. 3d 561, 556-67} As we saw in \textit{Dawson}, the schema that judges may have about homosexuality may be different from those held by the individuals in the case. \textit{Rene} illustrates that insight as well as that the protagonists in these cases may have models where gender and sexuality intertwine.

On reflection it seems clear that many of the harassers in same-sex cases maintain a schema of homosexuality conflating it with gender-atypicality. A quick glance back at the cases already discussed show that sexual orientation and gender-enforcement language often appear simultaneously: \textit{Doe v. City of Belleville} (“queer,” “fag,” “go back to San Francisco with the rest of the queers,” “are you a boy or a girl?”),\footnote{Doe, 119 F. 3d 561, 556-67} \textit{Kay v. Independence Blue Cross} (“gay” gay chat line, male plaintiff told that his wearing an
earring to work meant he was not a “real man”),

Nichols v. Azteca Restaurant Enterprises, Inc. (“faggot,” male plaintiff teased for carrying his serving tray “like a woman,” male plaintiff called “she” and “her”),

Prowel v. Wise Business Forms, Inc. (“faggot,” “fag,” male plaintiff called “Rosebud” “Princess” “Did you see Rosebud sitting there with his legs crossed, filing his nails”),

Dawson v. Bumble & Bumble (“dyke attitude,” lesbian named Dawn called “Donald”),

Heller v. Columbia Edgewater Country Club (“fag,” “homo,” comments to lesbian plaintiff “Oh, I thought you were the man,” “I thought you wore the pants,” “faggy shoes” as a reference to a woman wearing men’s shoes).

Lesbian or gay plaintiffs also may have internalized this aspect of the schema about homosexuality. While initially surprising, it should not be. Gay people grow up in the same society that their heterosexual siblings do and are exposed to the same cultural influences. Social scientists have noted the persistence of this schema, even among gay people. If the schema exists for some lesbian and gay persons then we can understand a facet of these cases that often puzzles courts: why plaintiffs themselves make inconsistent statements as to the reasons they believe they were harassed, sometimes stating gender-non-conformity and other times sexual orientation. The schema equivalency explains Dawn Dawson’s statement in her deposition when she was asked to distinguish clearly between sexual orientation and gender reasons as a basis for her termination. “Dawson remarked that it was both ‘because

Kay, 142 Fed. Appx. 48, 50-51
Nichols, 256 F.3d 864, 870
Dawson, 398 F.3d 211, 224, 215.
Heller, 195 F. Supp. 2d 1212, 1217.
See, e.g., Steve Rothaus, BAND OF BRUTHAZ: The challenges facing gay black and Hispanic men, THE MIAMI HERALD, July 21, 2007, Lifestyle section (describing the cultural influences about masculinity and homosexuality in the African-American and Latino communities);
See, e.g., Isay, supra, note 133, at 49 (one adolescent did not believe he was really gay because the only media images of gay men portrayed them as effeminate.); accord, Monika Kehoe, LESBIANS OVER 60 SPEAK FOR THEMSELVES, 46-47 (1989)(discussing one woman’s dislike of the term “lesbian” as connoting image of women trying to act like men.); richard goldstein, The Myth of Gay Macho, VILLAGE VOICE (NEW YORK, NY), July 2, 2002, Cover story, at 59 (complaining about the pull of gender conformity and the status it confers within the gay male community); Benoit Denziet-Lewis, The Regular Guys; They follow sports, wear flannel shirts, smoke, drink, belch, and make crude jokes. Oh, one other thing. They’re gay., SF WEEKLY (SAN FRANCISCO, CA), June 21, 2000, Features, (describing a social group, “The Regular Guys” composed of gay men who epitomize traditional American masculinity). Others have noted the ingrained nature of this perception. Stephen Morin and Ellen Garfinkle, Male Homophobia, 34 J. SOC. ISSUES, 29, 42-43 (1978) at 42-43 (relating amazement of some male therapists at the apparent masculinity of men in gay bars – more masculine than the therapists’ own self-perceptions); David McWhirter and Andrew Mattison, The Male Couple: How Relationships Develop, 246 (1984) (detailing group of blue collar gay men, firemen, telephone linemen, construction workers, who drink beer and watch sports on TV, as though the existence of such men were an anomaly.)
See, e.g., Centola, 183 F. Supp. 2d at 411; Dawson, 246 F. Supp. 2d at 317; Rene, 305 F.3d at 1077 (Hug, J. dissenting).
the two are not different." Remember that Dawson’s own schema of the interaction between sexuality and gender may have been much more nuanced and sophisticated than the courts’ model of those same characteristics.

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

Q. And in this note he’s teasing you about the way you walk and he whistles at you like a woman; is that right?

A. Right. Like a man does to a woman.

Q. And that's what you report on the third page of Exhibit 39 as well, that Elisio [a co-worker] is whistling at you as a man does to a woman?

A. Correct.

…..

Q. Was he whistling at you you think to make fun of you because you were gay?

A. Yes. Of course. The way he looked at me, you know, and winked his eye. Come on.

For Judges Hug and Pregerson, this colloquy evidenced that Rene held a schema of sexual orientation and gender that was like their own, a comparatively undifferentiated model. For Judge Hug, sexual orientation and gender are coextensive; therefore the important fact is that Rene was harassed because of his sexual orientation. For Judge Pregerson, sexual orientation and gender are completely separate; therefore the key fact in the testimony is that Rene’s colleagues whistled at him like a man does to a woman.

But as a gay man, Rene’s own model of sexuality and gender appears to have been more differentiated similar to Dawn Dawson’s. In another section of his deposition, Rene refers to another worker who had harassed him. He stated, “He’s skinny. He is not masculine like I am.” For Judge Hug, this comment demonstrated that Rene’s claim could not be based on gender stereotyping because Rene himself believed he was masculine and gender conforming. Therefore, he presented no evidence of gender role enforcement and had no Title VII cause of action. Of course, as a doctrinal matter, Judge

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364 *Dawson*, 246 F. Supp. 2d at 317; *see also*, id. at 318 (“Finally, in concluding her testimony, Dawson was asked once more whether she felt that not having been promoted to the razor class was discriminatory on the basis of her sexuality ‘in that they needed straight men and very feminine looking women.’ She responded: ‘A. Yeah, that’s what I mean by sexuality.’ ‘Q. Because of your being a lesbian, that didn’t confirm [sic] to gender norms?’ ‘A. Correct.’”)(internal citations and formatting omitted).

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

366 *Id.*

367 *Id.*
Pregerson’s response to Judge Hug is correct. The question is not what Rene thought of his masculinity or femininity, but what his harassers believed and how they acted.  

Nevertheless, Rene’s testimony can remind us of a truth about schemas, that they vary with individuals and that models we have about our own group are different and more nuanced than those we hold about outsiders.  

Like Dawson, Rene may distinguish between genders within both sex and sexual orientation. Both effeminate and masculine gay men exist in his schema. Indeed, Rene’s comment about his co-worker not being as masculine as himself may refer to the fact that he sees himself belonging to a masculine gay male cohort. Consequently, he cannot understand why his skinny colleague would harass him for being feminine or womanly. For Rene, masculinity is linked to body morphology. After all, as he described his co-worker, “He’s skinny. He is not masculine like I am.” Thus, while Rene might agree that gender and sexuality overlap, he does not agree with his co-workers that they do so in his case.

It is not uncommon for gay men to have a schema of sexual orientation that distinguishes between masculine gay men and effeminate ones. Often, too, there is a status difference between the two groups, with more masculine men having higher rank than more effeminate men. The loss of status that comes with being perceived as less masculine mirrors traditional heterosexual roles and appears to be part of Rene’s schema of gender and sexual orientation. Thus, he can mirror traditional gender roles within an untraditional sexual orientation schema. Unlike his harassers, he does not automatically equate effeminacy with gayness. Thus, he can make the distinction between his being gay and being womanly. His distinction, like Dawn Dawson’s, is about gender within homosexuality. Unfortunately for Rene, his harassers do not make that distinction. For them, even the skinniest straight man is more masculine than an openly gay man like Rene simply because that man is heterosexual.

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

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368 Id. at 1069n.2 (Pregerson, J., concurring).
369 See, supra, notes 128-130, and accompanying text.
370 See, e.g., Benoit Denziet-Lewis, The Regular Guys; They follow sports, wear flannel shirts, smoke, drink, belch, and make crude jokes. Oh, one other thing. They’re gay., SF WEEKLY (SAN FRANCISCO, CA), June 21, 2000, Features, (describing a social group, “The Regular Guys” composed of gay men who epitomize traditional American masculinity); Richard Goldstein, The Myth of Gay Macho, VILLAGE VOICE (NEW YORK, NY), July 2, 2002, Cover story, at 59) (complaining about the pull of gender conformity and the status it confers within the gay male community); Richard A Kaye, Not Your Average Bear; a subculture of hefty, hirsute gay men is attracting the attention of academics and social critics, LA TIMES (CA), Feb. 4, 2007, Editorial Pages Desk, Part M, at 6, (discussing the bear subculture in gay male life; one complaint that it has begun to mimic masculine stereotypes and internal stratification based on appearance, etc.).
371 There were five separate opinions of the en banc panel in Rene, the opinion of the court by Judge William Fletcher [Rene, 305 F.3d 1061(joined by Judges Pregerson, Trott, Thomas, Graber, Fisher, Berzon)] three separate concurrences by Judges Pregerson, [Id. at 1068 (joined by Judges Trott and Berzon).] Graber, [Id. at 1069 (Graber, J., concurring).] and Fisher, [Id. at 1070 (Fisher, J. concurring).] and a dissent by Judge Hug [Id. at 1070 (joined by Judges Fernandez, T.G. Nelson, and Chief Judge
5. Empirical lessons and conclusion

As the Seventh Circuit perceptively noted,

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

In truth the rigid compartmentalization that Title VII doctrine requires is the root of all these issues and contributes to why schematic analysis distorts legal reasoning. The law requires strict separation between sexual orientation and gender; litigants and judges are forced to classify in ways that social scientists often do not and that empirical research shows people generally may not. Rather than be atomized into distinct categories, many social science research studies show that racial bias is often linked to sex and sexual orientation prejudice and discrimination; the categories are mutually reinforcing and not rigidly separate. Accordingly, the legal constructs of Title VII that require sharp classifications between

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372 Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065n.5 (7th Cir. 2003)(quoting Doe v. City of Belleville, 119 F.3d at 593)(internal citations and formatting omitted.).


race, color, ethnicity, sex, gender, sexual orientation, etc. may necessitate distinctions that are often counter-factual to the way in which people behave or do not capture the differentiations that some individuals make.

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

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

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376 *Id.* at 1217-18, 1228.


378 *Id.* at 231.

379 *Id.*

men often mean that we misattribute and blur distinctions between categories, or we make distinctions not shared by others.

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

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381 See, e.g., Loren J. Chapman, Illusory Correlation in Observational Report, 6 J. VERBAL LEARNING & VERBAL BEHAV. 151, 151 (1967)(discussing “illusory correlation:” “the report by observers of a correlation between two classes of events which, in reality, (a) are not correlated, or (b) are correlated to a lesser extent than reported, or (c) are correlated in the opposite direction from that which is reported.”); Loren J. Chapman & Jean P. Chapman, Illusory Correlation as an Obstacle to the Use of Valid Psychodiagnostic Signs, 74 J. ABNORMAL PSYCHOL. 271 (1969) (explaining how practicing psychologists trained in diagnostics failed to report valid correlations and reported invalid correlations between male homosexuality and Wheeler-Rorschach signs. Moreover, untrained observers replicated the experts’ illusory correlations).

382 Doe, 119 F.3d 563.

383 Eros DeSouza, Joseph Solberg, Women’s and men’s reactions to man-to-man sexual harassment: does the sexual orientation of the victim matter?, 50 SEX ROLES 623, 32-34 (2004)(the scenario stated:

Dear University Hearing Panel:

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

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

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

Sincerely,

John XXXXXX.) Id. at 38 (Appendix). Cf., Doe, 119 F.3d at 567.
The study authors found a significant correlation between the victim’s sexual orientation and respondents’ perceptions of harassment – more respondents found harassment when the victim was gay than when he was not.\(^{384}\) Schema theory states that people seek explanations for events consistent with their schemas.\(^{385}\) Accordingly, if more respondents found that the exact same facts constituted sex harassment when the victim was homosexual, gay male sexuality must often be a trigger or explanation for harassment because it is consistent with the schema of sexual orientation, of harassment or both.

Additionally, students who believed that enforcement of traditional masculine gender roles constituted harassment were more likely to find a hostile environment in the scenario.\(^{386}\) We might restate that finding: when respondents’ harassment model included gender-policing, they more easily matched the scenario to their schema.\(^{387}\) Concomitantly, seeing harassment through gender-policing on these facts implies that the victim had or was seen to have gender-atypical characteristics.

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

Indeed, the cases discussed earlier in this article demonstrate this truth. If a judge’s sex discrimination schema truly includes workplace policing of gender-stereotypes, then she is more likely to find that harassment even in same-sex situations.\(^{388}\) On the other hand, if a judge’s gender-stereotyping schema is that lesbians and gay men attempt to use it as a bootstrap to sneak in an impermissible claim, then prototype-matching for actionable harassment will set aside the gender explanation when a gay or lesbian plaintiff is present.\(^{389}\) Thus it will be extraordinarily difficult for homosexual harassment victims to win their cases, because the judge’s model of harassment is distorted. Finally, a schema of homosexuality that includes cross-gender behavior exacerbates this harassment model of cheating gay plaintiffs. The combination of both of those distortions means that the judge will seek to explain workplace conduct

\(^{384}\) DeSouza & Solberg, supra note 383, at 37.  
\(^{385}\) See, supra, at notes 119-117, and accompanying text.  
\(^{386}\) DeSouza & Solberg, supra note 383, at 36. The same pattern was true, albeit to a lesser degree, for students whose schema of sex harassment encompassed lewd comments. \textit{Id}.  
\(^{387}\) Cf., prototype matching discussion, supra, at notes 64 - 66, and accompanying text.  
\(^{388}\) See, e.g., \textit{Nichols}, 256 F.3d at 874-75; \textit{Doe}, 119 F.3d at 580-83; \textit{Heller}, 195 F. Supp. 2d at 1224; \textit{Centola}, 183 F. Supp. 2d at 410.  
\(^{389}\) See, e.g., \textit{Dawson}, 398 F.3d at 218; \textit{Vickers}, 453 F.3d at 764; Samborski v. W. Valley Nuclear Servs., 2002 U.S. Dist. LEXIS 12745, 2002 WL 1477610, at *3 n.11 (W.D.N.Y. 2002) (stating in dicta that although "being called a 'lesbian' [may be] based not on a perception of true sexual orientation, but rather as a means of denigrating a person because of sexual stereotype," plaintiff's gender stereotyping claim is "somewhat undermined" to the extent that it rests upon being called a lesbian).
consistent with that amalgamation: a gender-atypical lesbian or gay man is trying to pass a sexual orientation claim off as gender discrimination. Thus, she is likely not to find gender-conformity policing but sexual orientation harassment.\footnote{390}

Moreover, if lesbians and gay men have different schemas of interactions between sexual orientation and gender than do their harassers or the judges who must decide these cases, then we will have a difficult time harmonizing the disparate views of these persons – leaving each participant puzzled or unsatisfied by the decisions of the others.\footnote{391} Judges will have difficulty accepting plaintiffs’ testimony; plaintiffs will be unsure why they were harassed; and harassers will blend sexual orientation with gender. Consequently, cases will be inconsistent and under-theorized.

Conversely, as we have seen in the desire-based harassment decisions, the model of same-sex sexual harassment can be easily prototype-matched with traditional opposite-sex desire cases. Plaintiffs succeed when persons of the same sex harass them.\footnote{392} Although these situations are more quickly assimilated into traditional harassment models, the lesbian and gay male schema still has a significant effect on judicial decisions; when the schema of lesbians and gay men as sexual predators intersects with desire-based sexual harassment, heterosexual plaintiffs win those cases when they are harassed by homosexuals – even if the court has to misread a fact pattern to fit it within the desire-based model.\footnote{393} This skewing of categories leaves precedent hard to follow and contradictory.

The problem is that law requires clear distinctions. Title VII in particular requires neat categorization of sexuality and gender and sex. On the other hand, social cognition strongly suggests that we may not truly be able to classify those characteristics cleanly\footnote{394} or that we can only classify them idiosyncratically depending on our underlying schemas. That tension is exacerbated because legal doctrine assumes that people are aware of, and can access and understand their cognitive processes. Schema theory stands in contradistinction to both those two premises underlying Title VII doctrines.\footnote{395} Thus it provides an alternate explanation for the behavior of the individual actors in these cases and of the judges who decide them. It also demonstrates why complete consistency and clarity in legal doctrine is an expectation in which we are fated to be disappointed.

\footnote{390} Compare Rene, 305 F.3d at 1077-78 (Hug, J., dissenting), with, id. at 1068-69 (Pregerson, J., concurring); compare Kay, 142 Fed. Appx. at 50-51, with, Kay, 2003 U.S. Dist. LEXIS at *14-18. Note that in other legal areas, the conflation of gender atypicality and sexual orientation may assist gay petitioners. E.g., Alex Roth, Gay man granted political asylum; Basis of ruling said to make it a first, THE SAN DIEGO UNION-TRIBUNE (CA), August 25, 2000, News at A-3, (cross-dressing gay man granted political asylum, since gender-atypicality was an innate part of his personality).

\footnote{391} See the courts’ incomprehension of plaintiffs’ testimony in both Dawson and Rene. See supra, notes, 363-368, and accompanying text.

\footnote{392} See, e.g., Fredette, 112 F.3d at 1507; Yeary, 107 F.3d at 447-48.

\footnote{393} See, e.g., Dick, 397 F.3d at 1265-66; Wrightson, 99 F.3d at 139-144.

\footnote{394} Lawyers’ use of history also suffers from the need to neatly discover answers to historical questions when historians see history completely differently. See, H. Jefferson Powell, Rules for Originalists, 73 VA. L. REV. 659, 660-661 (1987)(lawyers and historians approach the historical record differently, employ different methods, and seek different things from it.).

\footnote{395} See, e.g., Brower & Nurius, supra note, at 5; Krieger, supra, note 5 at 1188 (discussing empirical research in cognitive psychology showing stereotyping as automatic and unconscious).
What we can do is recognize the limitations that schemas impose on legal doctrine and on participants in the judicial system. Judges who are aware of how social cognition works can understand why the people before them in court may seem inconsistent or think in ways that the judges find unusual or incomprehensible. The judge herself may appreciate that her perceptions of events are also shaped by schemas and do not simply chronicle what has occurred. She should also realize that her perspective will not necessarily be consistent with others’ explanations for those same events. As in this article’s opening mini-quiz, if we know that our thought process is filtered unconsciously through our schemas of persons or events, that knowledge can make us mindful of cognitive processes and more open to alternative explanations or answers. Of equal importance, jurists and legal scholars may recognize that the sharp classifications Title VII demands and the jurisprudential consistency we prefer must be tempered with a more realistic acceptance of the limits of doctrine in capturing reality.

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

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

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396 Social cognition research reveals that awareness alone will not change schemas or behavior. It is a necessary precondition for change, but not sufficient. Rather, the schema has to cease to be functional, to stop working in real terms for the individual who holds it. See, e.g., Stein, supra, note 5, at 162 (For example, when the college valedictorian needs to accommodate her “naturally smart and effortlessly successful” self-schema to her mediocre first semester law school grades.); see also, Brower and Nurius, supra note 5, at 94 (Social science practitioners’ schema-motivated bias not significantly reduced by mere desire to change or awareness); Bransford, et al., supra, note 5, at 1078-89 ( mere awareness of the presence of a schema is insufficient to modify it. Neither good intentions, nor admonitions not to use preexisting schemas are adequate.); see generally, Salovey and Singer, supra, note 5, at 372 (discussing the goals of cognitive restructuring therapies).