

Washington University Law Review

Volume 89 | Issue 2

2011

Of Meat and Manhood

Zachary A. Kramer

Follow this and additional works at: http://openscholarship.wustl.edu/law_lawreview



Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287 (2011).
Available at: http://openscholarship.wustl.edu/law_lawreview/vol89/iss2/1

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Washington University Law Review

VOLUME 89

NUMBER 2

2011

OF MEAT AND MANHOOD

ZACHARY A. KRAMER*

[P]ity the male vegetarian who needs real courage and fortitude, as he is battered from all sides by the incomprehension and ridicule of the world around him.

—Barbara Ellen¹

You are what you eat. So make it a Hungry-Man. With a full pound of meat and potatoes, you can eat like a man and be full like a man.

—Hungry-Man Frozen Dinner Advertisement²

You don't even eat steak dude. At what point in time did you realize you were gay?

—Complaint, *Pacifico v. Calyon in the Americas*³

* Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. For helpful comments and suggestions at various stages of this Article's progress, I am grateful to Kelli Alces, Miriam Baer, Carlos Ball, Aaron Bruhl, Jack Chin, Adam Chodorow, Rhiannon Cornelius, Linda Demaine, Mike Dorff, Dave Fagundes, Mary Anne Franks, David Gartner, Andy Hessick, Carissa Hessick, RonNell Andersen Jones, Liz Kukura, Mike Lauro, Justin Marceau, Dan Markel, Steven Pinker, Corie Rosen, Cliff Rofksy, Betsy Rosenblatt, Mary Sigler, Judy Stinson, Doug Sylvester, and Chris Whytock. I am especially indebted to Carissa Hessick for her suggestions and encouragement at the early stages of this project, without which I never would have pursued this topic, and to Craig B. Haircuth for his invaluable research assistance. I am also grateful for the comments and suggestions I received when I presented earlier drafts of this Article at the Southern California Junior Faculty Workshop, the Rocky Mountain Junior Faculty Workshop at University of Utah, Prawfsfest Junior Faculty Workshop, and Arizona State's general faculty workshop and junior faculty workshop. Any and all mistakes are, of course, my own.

1. Barbara Ellen, *It Takes a Real Man to Say He Enjoys Tofu*, THE OBSERVER (England), July 27, 2008, at 11.

2. HUNGRY MAN TV COMMERCIAL, <http://www.youtube.com/watch?v=ZaPcBwmCtiM> (last visited Nov. 30, 2011).

3. Complaint at 5, *Pacifico v. Calyon in the Americas*, No. 100992-2009 (N.Y. Sup. Ct. Jan. 26, 2009).

TABLE OF CONTENTS

INTRODUCTION.....	288
I. CONTEXT	294
A. <i>The Fundamentals</i>	294
B. <i>The Boundaries of “Sex”</i>	296
1. <i>Sex</i>	297
2. <i>Gender</i>	298
3. <i>Beyond the Boundary: Sexual Orientation</i>	301
C. <i>Bootstrapping</i>	302
II. OF MEAT AND MANHOOD	305
A. <i>The Male Vegetarian</i>	305
B. <i>The Claim</i>	307
C. <i>Rereading the Claim</i>	308
1. <i>Meat and Manliness</i>	309
2. <i>Fruits</i>	310
D. <i>Bootstrapping Vegetarianism</i>	313
III. A NEW APPROACH	314
A. <i>Trait Neutrality</i>	314
B. <i>The Framework in Action</i>	316
C. <i>Concerns</i>	318
1. <i>Everything Is Sex Discrimination</i>	319
2. <i>Muddying Intent</i>	320
CONCLUSION	322

INTRODUCTION

In 2006, the fast food chain Burger King began airing a television advertisement for its new Texas Double Whopper, titled “Manthem.”⁴ The commercial featured a musical number, complete with elaborate choreography and intricate stunt work, sung to the tune of Helen Reddy’s classic song “I am Woman.”⁵ In the original version of the song, Reddy sings about female empowerment, famously declaring, “I am strong, I am invincible, I am woman.”⁶ The singer in Burger King’s man-minded version, by contrast, belts out that he is “way too hungry to settle for chick

4. Burger King, *Manthem/I Am Man* (2006) [hereinafter *Manthem*], available at <http://www.youtube.com/watch?v=v9e4QD1zm0Q>.

5. HELEN REDDY, *I Am Woman, on I AM WOMAN* (Capitol Records 1971).

6. *Id.*

food.⁷ Neither tofu nor quiche can satisfy his appetite; only the Texas Double Whopper will do.⁸ As he sings at the end of the song, “I am hungry, I am incorrigible, I am man.”⁹

Of course, the commercial is not meant to be taken too seriously. The last thing we would expect a ravenously hungry man to do is break into song about a hamburger. Nor would we expect him to be joined by hundreds of other hungry men on parade.¹⁰ And the sight gags are intentionally over the top—the parading men burn their underwear (instead of their bras), they overturn a minivan, and they punch each other in the stomach, all the while devouring their Texas Double Whoppers.¹¹ Yet the commercial works because it taps into a stereotype about the relationship between meat and manhood.

The idea that “real” men eat meat is firmly embedded in our culture.¹² For those men who are benefitted by the stereotype, eating meat serves as a confirmation of their manhood, a kind of marker of their privileged status as masculine men. This is not the case for men who do not eat meat. In our culture, a man who does not eat meat is often seen as insufficiently masculine.

Take Prince Fielder. Fielder plays first base for the Milwaukee Brewers.¹³ Standing five-foot-eleven inches tall and weighing 275 pounds,¹⁴ Fielder is one of the most powerful hitters in all of professional baseball. He is also vegetarian. According to a *New York Times* story

7. *Manthem*, *supra* note 4.

8. *Id.* (“Oh, yes I’m a guy, I’ll admit I’ve been fed quiche/Waive tofu bye bye, now it’s for Whopper beef I reach.”).

9. *Id.*

10. *Id.*

11. *Id.*

12. See CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* (20th anniversary ed. 2010); ALAN BEARDSWORTH & TERESA KEIL, *SOCIOLOGY ON THE MENU: AN INVITATION TO THE STUDY OF FOOD AND SOCIETY* (1997); JEREMY RIFKIN, *BEYOND BEEF: THE RISE AND FALL OF THE CATTLE CULTURE* (1992); Alan Beardsworth & Teresa Keil, *The Vegetarian Option: Varieties, Conversions, Motives, and Careers*, 40 SOC. REV. 253 (1992); C. Wesley Buerkle, *Metrosexuality can Stuff It: Beef Consumption as (Heteromascu) Fortification*, 29 TEXT AND PERFORMANCE Q. 77 (2009); Bettina Heinz & Ronald Lee, *Getting Down to the Meat: The Symbolic Construction of Meat Consumption*, 49 COMM. STUD. 86 (1998); Richard A. Rogers, *Beasts, Burgers, and Hummers: Meat and the Crisis of Masculinity in Contemporary Television Advertisements*, 2 ENVTL. COMM. 281 (2008); Jeffrey Sobal, *Men, Meat, and Marriage: Models of Masculinity*, 13 FOOD & FOODWAYS 135 (2005); Julia Twigg, *Vegetarianism and the Meanings of Meat*, in *THE SOCIOLOGY OF FOOD AND EATING: ESSAYS ON THE SOCIOLOGICAL SIGNIFICANCE OF FOOD* 18 (Anne Murcott ed., 1983); Barbara E. Willard, *The American Story of Meat: Discursive Influences on Cultural Eating Practice*, 36 J. POPULAR CULTURE 105 (2002).

13. See Prince Fielder Career Statistics, http://milwaukee.brewers.mlb.com/team/player.jsp?player_id=425902 (last visited Nov. 30, 2011).

14. *Id.*

about his vegetarianism, Fielder gave up eating meat after reading about and becoming “totally grossed out” by the treatment of cattle and chicken.¹⁵ As soon as his decision became public, fans and critics questioned whether Fielder’s game would suffer on account of his new diet.¹⁶ Although it goes unsaid, these concerns are based on a gender stereotype, namely, that athletes need to eat meat in order to be successful; they will become less athletic—and therefore less masculine—if meat is not part of their diet.¹⁷ Not surprisingly, Fielder has continued to be a strong hitter since becoming vegetarian. But the important point is not that Fielder proved he could be both a good hitter and a vegetarian, but rather that the *New York Times* covered his switch to vegetarianism. Indeed, that the paper even considered Fielder’s vegetarianism to be newsworthy is telling of the extent to which the relationship between meat and manhood is embedded in the fabric of our culture.

In this Article, I use the relationship between meat and manhood as a springboard to challenge the way in which employment discrimination law—more specifically, Title VII of the Civil Rights Act¹⁸—conceives of sex discrimination. The Article focuses in particular on what is perhaps the most transformative theory of sex discrimination—the gender-stereotyping theory of sex discrimination. The thrust of the gender-stereotyping theory is that an employer cannot discriminate against an employee for failing to conform to stereotypical gender expectations.¹⁹ The Supreme Court announced the theory in 1989, in the seminal case *Price Waterhouse v. Hopkins*.²⁰ In doing so, the Court ushered in a new wave of sex discrimination claims, shifting the focus of Title VII’s sex discrimination

15. Alan Schwarz, *Meat Is Out at Fielder’s Plate*, N.Y. TIMES, Apr. 27, 2008, <http://www.nytimes.com/2008/04/27/sports/baseball/27fielder.html>.

16. *Id.* Schwarz notes that Milwaukee is an especially meat-crazed city—with bratwurst reigning supreme—and that this love of meat permeates onto the ball field. According to Schwarz, during the sixth inning the Brewers stage the Sausage Race, “a spirited race among five humans dressed as different varieties of wiener product, from Italian sausages to chorizo; a tofu dog has yet to be invited.” *Id.*

17. See CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* 13 (1998).

18. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

19. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (announcing the gender-stereotyping theory); see also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (discussing the gender-stereotyping theory at great length).

20. 490 U.S. 228 (1989).

project from formal sex segregation to more subtle forms of discrimination concerning how employees look and behave in the workplace.²¹

The gender-stereotyping theory has begun to stumble in recent years, however. Courts have grown increasingly suspicious of gender-stereotyping claims that they view as attempts to capture traits not protected under Title VII. The paradigm situation is discrimination against lesbian and gay employees. Courts uniformly agree that sexual orientation is not a protected trait under Title VII.²² Against this doctrinal backdrop, lesbian and gay employees have been bringing gender-stereotyping claims—as opposed to sexual orientation claims—as a means to combat the discrimination they face in the workplace. Yet courts have regularly rejected these claims, characterizing them as impermissible attempts to “bootstrap” protection for sexual orientation into Title VII.²³ The theory behind this bootstrapping logic is that these gender-stereotyping claims are not sincere sex discrimination claims, but rather a kind of litigation sleight of hand, a way for employees to create statutory protection where no such protection exists.²⁴

21. See Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1419–20 (2008) (discussing the shift from status to conduct in discrimination); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (refocusing discrimination law on patterns of interactions within the workplace); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 170 (2004) (discussing the shift from “ontological” discrimination to “trait” discrimination); see also KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 22 (2006) (describing the shift from first to second generation discrimination as “progress: individuals no longer needed to *be* white, male, straight, Protestant, and able-bodied; they needed only to *act* white, male, straight, Protestant, and able-bodied.”) (emphasis in original).

22. See, e.g., *Medina v. Income Support Div.*, N.M., 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections . . . do not extend to harassment due to a person’s sexuality.”); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (“Title VII does not . . . provide for a private right of action based on sexual orientation discrimination.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Title VII does not prohibit discrimination based on sexual orientation.”); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“Title VII does not prohibit harassment or discrimination because of sexual orientation.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“Title VII does not proscribe harassment simply because of sexual orientation.”); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”).

23. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221–23 (2d Cir. 2005); *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48, 50–51 (3d Cir. 2005); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1064–65 (7th Cir. 2003); *Desantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330–31 (9th Cir. 1979). Many courts have likewise adopted this reasoning in the context of transgender discrimination. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane v. E. Airlines*, 742 F.2d 1081, 1084–87 (7th Cir. 1984).

24. My use of “logic” is meant to correspond with Robert Post’s use of that term, in his classic work *Prejudicial Appearances*. See ROBERT C. POST, *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (2001). Like Post, I am seeking to challenge a particular logic

My goal in this Article is to show that this bootstrapping logic is faulty. The vehicle for critiquing it is a case study involving an ongoing lawsuit in which an employee has brought a discrimination claim against his former employer, alleging that the employer discriminated against him because he is vegetarian.²⁵ The employee's claim has two dimensions. First, the employee charges that his supervisor taunted him because of his vegetarianism, calling him, among other things, a "vegetarian homo."²⁶ Second, the employee alleges that the discrimination culminated in his being fired because of his vegetarianism.²⁷ In general, the thrust of the employee's claim is that he faced discrimination because he failed to conform to the stereotype that "real" men eat meat, putting him squarely within the confines of the gender-stereotyping theory.

The male vegetarian case study is especially useful because it highlights the messiness of modern sex discrimination law in two ways: first, in terms of how employees experience discrimination; second, in terms of how courts analyze sex discrimination claims. The male vegetarian's case is particularly messy because it involves three overlapping identity traits—vegetarianism, sexual orientation, and gender nonconformity. While two of these traits are not protected under Title VII (vegetarianism and sexual orientation),²⁸ the third—gender nonconformity—is not only protected under Title VII but also happens to be the basis for one of the most expansive theories of sex discrimination

that is embedded in discrimination law, namely, that outsider plaintiffs use the gender-stereotyping theory to bootstrap protection for unprotected traits. Similarly, in her work on fat rights and weight-based discrimination, Anna Kirkland builds on Post's work to develop a related understanding of the logics of discrimination. Kirkland uses what she calls the "logics of personhood" to tease out the various ways in which discrimination law talks about difference and how difference matters in particular cases. See ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* 2–24 (2008).

25. See Jose Martinez, *Wall Streeter Sues Employer over Vegetarian Taunts*, N.Y. DAILY NEWS, Jan. 29, 2009, http://www.nydailynews.com/money/2009/01/29/2009-01-29_wall_streeter_sues_employer_over_vegetar.html.

26. Complaint at 3–5, *Pacifico v. Calyon in the Americas*, No. 100992-2009 (N.Y. Sup. Ct. Jan. 26, 2009).

27. *Id.* at 7.

28. There is one context in which vegetarianism can almost serve as a protected trait, however. In the context of religious discrimination, vegetarian discrimination could give rise to an actionable discrimination claim, either because the employer failed to accommodate the employee's vegetarianism or because the employer based an employment decision on the employee's vegetarianism. In either situation, such a claim is possible because the courts define religion in terms of a status as well as a practice. Thus an employee's vegetarianism can be a part of an employee's religious practice, which means the practice is protected under Title VII. See, e.g., *Van Koten v. Family Health Mgmt., Inc.*, 134 F.3d 375 (7th Cir. 1998) (table) (involving an employee who, as a practicing Wiccan, alleged that he was discriminated against because of, among other things, his vegetarian diet).

available to employees under existing sex discrimination norms. Yet the male vegetarian will have a hard time convincing most courts that he faced discrimination because of sex and not because of either vegetarianism or sexual orientation, or some combination of the two. Faced with such a case, most courts would likely reject the case as bootstrapping simply because it involves unprotected traits. This Article proposes a more holistic approach to complex sex discrimination claims. The core of this new approach is that sometimes sex discrimination manifests as other forms of bias. In the male vegetarian's case, what may look like "vegetarian" or "sexual orientation" discrimination is really "sex" discrimination in the form of gender stereotyping.

In terms of its broader contribution, then, this Article seeks to develop a theory of unprotected traits in employment discrimination law. The flaw of the bootstrapping logic is that it gives too much weight to unprotected traits in the discriminatory causation analysis, allowing unprotected traits to overwhelm the aspects of an employee's claim that are based on protected traits. My new framework would render unprotected traits neutral for purposes of proving a discrimination claim. By neutral, I mean that an unprotected trait should neither give rise to an actionable discrimination claim nor spoil an otherwise actionable claim. Underlying this framework is a principle of trait equality: just as all protected traits are similarly situated with respect to proving a discrimination claim under Title VII, no unprotected trait—whether vegetarianism, sexual orientation, or that the employee roots against the Chicago Bears²⁹—should be worse off than all other unprotected traits when it comes to proving a discrimination claim.

This Article proceeds in three parts. Part I puts my argument in context by situating the bootstrapping logic more broadly in Title VII case law and sketching the contours of Title VII's prohibition on discrimination "because of" sex. Part II turns to the male vegetarian case study. After providing an account of the employee's case, the centerpiece of this Part is an alternative reading of the employee's discrimination claim. This alternative reading is built around the idea that discrimination is not always as it seems. While the employee's case may look like vegetarian—or even sexual orientation—discrimination, it is really a case of sex

29. *The Chicago Tribune* reported a story about a car salesman who was fired because he wore a Green Bay Packers tie to work the day after the Packers beat the Chicago Bears in the 2011 NFC Championship game. Dawn Rhodes & Ryan Haggerty, *Packers Necktie Gets Car Salesman Fired*, CHICAGO TRIB., Jan. 25, 2011, <http://www.chicagotribune.com/news/local/breaking/chibrknews-packers-necktie-gets-car-sales-01242011,0,7415617.story>.

discrimination in the form of gender stereotyping. Part III develops a new theory of unprotected traits in employment discrimination law. The thrust of this new framework is that unprotected traits should be neutral for the purpose of proving an actionable discrimination claim.

I. CONTEXT

This Part seeks to put sex discrimination law in context. This discussion has two basic goals. The first is to outline the scope of Title VII's prohibition on discrimination "because of" sex. Because the statute does not define "sex," the courts must determine the boundaries of this sex provision. And they have tended to interpret the provision narrowly, with the exception of the gender-stereotyping theory. The second goal is to develop an account of the bootstrapping logic. To that end, the discussion draws on the experiences of lesbian and gay employees who have sought to raise actionable gender-stereotyping claims, only to have those claims rejected on the grounds that sexual orientation is not protected under Title VII. Before turning to these issues, this Part opens with a brief discussion of the fundamentals of employment discrimination.

A. *The Fundamentals*

There are two central features of employment discrimination law. The first is that most traits are not protected under Title VII. American employment law is based on the at-will employment rule, in which employer and employee are equally free to terminate the employment relationship at any time and without cause.³⁰ Title VII imposes a limit on the at-will rule by identifying five traits as prohibited bases for employment decisions—race, color, religion, sex, and national origin.³¹ So long as they do not base an employment decision on one of these protected traits, employers are free to consider any other trait when making employment decisions. This is true of identity traits that are often quite salient in employment settings, such as an employee's socioeconomic

30. See *Payne v. The W. & Atl. R.R. Co.*, 81 Tenn. 507 (1884). *Payne* marked the first time an American court adopted the at-will rule. According to the *Payne* court, employers "may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Id.* at 519–20.

31. See 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race, color, religion, sex, or national origin.*") (emphasis added). The sex provision is, of course, the most important for purposes of this Article.

status or physical appearance, as well as identity traits that rarely factor into employment decisions, such as eye color or shoe size. Because most traits are fair game for employers to consider, employment discrimination law is conceived as a remarkably narrow enterprise.

The second feature of employment discrimination law—which works in conjunction with the first—is the discriminatory causation requirement. In order to state an actionable claim, an employee must prove that the alleged discrimination was “because of” a protected trait and not “because of” some other trait not protected under Title VII. For instance, say a male employee is passed over for a promotion in favor of a more qualified female candidate. To satisfy the causation requirement, the male employee must show that he was denied the promotion not because he was less qualified than the woman who ultimately secured the promotion, but rather because he is a man. In this sense, the discriminatory causation requirement provides a nexus between the challenged employment action (failure to promote) and the protected trait in question (sex).

Yet the discrimination causation requirement is by its very nature an imprecise tool for identifying and remedying discrimination. With respect to the discriminatory causation requirement, employment discrimination law evaluates discrimination from the perspective of the discriminator rather than the victim of discrimination. Because few discriminators are careless enough to speak openly about their discriminatory motives,³² Title VII’s discriminatory causation standard is designed to peer into the mind of the discriminator to determine if the discriminator took the challenged employment action “because of” a protected trait. Ill-equipped to read a discriminator’s mind, courts have instead developed a system of evidentiary frameworks that are designed to focus a court’s inquiry into whether the employer took the challenged employment action “because of” a protected trait.³³ While they are no doubt helpful in ferreting out discrimination, these evidentiary frameworks are not foolproof. Thus, it is important to remember that without an explicit statement admitting

32. *Cf.* *Suggs v. ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228, 1231 (6th Cir. 1996) (involving a situation where the manager told an employee that it was “time to show that a man could run the operation better”); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 896 (9th Cir. 1994) (involving a situation where the employer actually said that “the only people you will be seeing running the lines will be men; there will be no more women hired”).

33. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (announcing a burden-shifting framework for considering evidence in disparate treatment cases); *see also* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (concluding that plaintiffs do not have to raise direct evidence of discrimination in order to obtain a mixed-motive jury instruction).

discriminatory intent, it is nearly impossible to know with certainty whether an employer has engaged in unlawful discrimination.

B. *The Boundaries of “Sex”*

Now consider the more specific matter of how courts have interpreted the scope of Title VII’s “sex” provision. The legislative history of Title VII’s sex provision—more specifically, the absence of legislative history—looms large in sex discrimination jurisprudence.³⁴ The conventional wisdom is that a few days before the House of Representatives was set to vote on the bill that would become the Civil Rights Act, Representative Howard Smith, the Chairman of the House Rules Committee and a staunch opponent of the Civil Rights Act, offered the sex amendment as a means to prevent the bill from coming to a vote.³⁵ Although Smith’s attempt to kill the bill ultimately failed, the House did not have sufficient time to debate the substance of the sex provision, which means that courts have no substantive legislative history to guide them as they interpret this portion of the Act.³⁶ As a result, courts tend to interpret the sex provision narrowly.³⁷ It is worth noting that the conventional wisdom is not without its critics. In recent years, scholars have challenged the conventional wisdom as oversimplified and even historically inaccurate.³⁸ Yet these critiques have fallen on deaf ears as

34. For a thorough account of the passage of the Civil Rights Act, see CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

35. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 11, 14 (3d ed. 2001).

36. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (relying on the legislative history of the “sex” amendment in interpreting Title VII); *Barnes v. Costle*, 561 F.2d 983, 986–88 (D.C. Cir. 1977) (same); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1090–91 (5th Cir. 1975) (en banc) (same).

37. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976) (holding that Title VII’s “sex” provision does not protect against discrimination on the basis of pregnancy). Congress responded to *Gilbert* by passing the Pregnancy Discrimination Act of 1978, which amended Title VII to protect female employees on the basis of pregnancy. See *Pregnancy Discrimination Act of 1978*, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)); see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–87 (7th Cir. 1984) (citing the lack of legislative history as a reason to exclude transgender employees from protection under Title VII); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (noting that judicial interpretation of the “sex” provision is frustrated by its lack of positive legislative history).

38. See Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997) (arguing that the “sex” amendment was the product of complex political struggles involving the black civil rights movement and the women’s rights movement); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–25 (1995) (situating the “sex” amendment in the larger sex equality movement).

courts have largely ignored these critiques in favor of the conventional view.

I. Sex

Title VII protects employees against discrimination in their capacity as men and women.³⁹ This is a status protection, most often understood in terms of biology. The critical question in these sorts of disparate treatment cases is whether the employer took the challenged employment action solely because the employee happens to be male or female. For instance, consider the classic case of *City of Los Angeles, Department of Water and Power v. Manhart*.⁴⁰ There, the Department administered its own system for retirement and disability benefits, rather than engage a private insurance company for the payment of benefits.⁴¹ Because women, on average, tend to live longer than men, the Department required female employees to make greater monthly contributions to its pension fund than male employees.⁴² And because monthly pension contributions were withheld from employees' paychecks, female employees took home less pay than their similarly situated male coworkers.⁴³ The case made its way to the Supreme Court, where the Court rejected the Department's program on the grounds that it discriminated against individual female employees "because of" sex.⁴⁴ According to the Court, the Department could not force an employee to make extra pension contributions solely because she was a woman.⁴⁵

The *Manhart* Court's view of sex turned on biological status. The only thing that mattered to the Department, for purposes of making pension contributions, was whether an employee was female or male. It did not matter whether the employee was sick or healthy, whether she herself had a long life expectancy, or whether she planned to stay with the Department until she retired. Because she was a woman, the Department required her

39. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII prohibition on sex discrimination protects men as well as women) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)).

40. 435 U.S. 702 (1978).

41. *Id.* at 704–05.

42. *Id.* at 705 (“The cost of a pension for the average retired female is greater than for the average male retiree because more monthly payments must be made to the average woman. The Department therefore required female employees to make monthly contributions to the fund which were 14.84% higher than the contributions required of comparable male employees.”).

43. *Id.*

44. *Id.* at 710–11.

45. *Id.*

to make more payments into the system than a similarly situated man would have to make. Employment discrimination scholars often refer to these types of claims as either status discrimination or first generation sex discrimination claims.⁴⁶

2. Gender

Title VII's prohibition against sex discrimination extends beyond biological status to protect against discrimination targeted at an employee's gender. Whereas "sex" refers to an employee's biological status, "gender" in this usage refers to cultural expressions of masculinity and femininity. The protection against gender discrimination dates back to the Supreme Court's groundbreaking opinion in *Price Waterhouse v. Hopkins*.⁴⁷ In *Price Waterhouse*, Ann Hopkins was denied partnership despite having accumulated an impressive work record in her five years with the firm.⁴⁸ Although the feedback relating to Hopkins's work performance was uniformly strong,⁴⁹ the reviews of her "interpersonal skills" were less than glowing.⁵⁰ Some of the partners described Hopkins as overly aggressive and abrasive, and there was a concern that she treated the support staff disrespectfully.⁵¹ Yet many of the partners' reviews smacked of gender bias.⁵² One partner described Hopkins as "macho,"⁵³ while another suggested she should take "a course at charm school,"⁵⁴ and yet another said that she "overcompensated for being a woman."⁵⁵ The most egregious comment, however, came from Hopkins's mentor at the firm, who had the unfortunate task of informing Hopkins of the partners'

46. See Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1419–23 (2008); see also Yuracko, *supra* note 21, at 169–70 (2004) (referring to status discrimination as "ontological" discrimination); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001).

47. 490 U.S. 228 (1989).

48. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233–34 (1989).

49. For instance, the partners in Hopkins's office issued a joint statement, describing her as "an outstanding professional' who had a 'deft touch,' a 'strong character, independence and integrity.'" *Id.* at 234. In particular, they cited the two years of work she did to secure a \$25 million contract with the Department of State, calling it "an outstanding performance," which she did "virtually at the partner level." *Id.* at 233.

50. According to the Court, "Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her 'interpersonal skills.'" *Id.* at 234–35.

51. *Id.* at 234.

52. *Id.* at 235 ("There were clear signs . . . that some of the partners reacted negatively to Hopkins' personality because she was a woman.").

53. *Id.*

54. *Id.*

55. *Id.*

decision.⁵⁶ Advising Hopkins as to how she could improve her chances for partnership in the future, he said she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁵⁷

Hopkins responded by suing Price Waterhouse under Title VII of the Civil Rights Act.⁵⁸ The thrust of Hopkins’s claim was that the firm allowed gender stereotyping to seep into—and ultimately cloud—its review of her partnership application. A novel claim for its time, Hopkins argued that she lost her partnership bid not because she was a woman, but because she engaged in behavior that the firm’s partners did not think was appropriately feminine. Endorsing this more nuanced kind of sex discrimination claim, the Supreme Court concluded, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁵⁹ More generally, the Court held that an employer violates Title VII’s prohibition against sex discrimination if the employer penalizes employees for failing to conform to stereotypical gender expectations about how men and women are supposed to present themselves in the workplace. As the Court put it, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”⁶⁰

In terms of its mechanics, a gender-stereotyping claim unfolds in three steps. The first is what I call the employee’s “anchor gender.” A person’s anchor gender consists of the gender expectation commonly associated with the person’s sex. For instance, a man’s anchor gender is masculinity, whereas a woman’s anchor gender is femininity. In terms of the broader implications of the theory, anchor gender corresponds with the employer’s stereotypical gender expectations. The second step of the gender-stereotyping claim is what I call “expressive gender.” Whereas the anchor gender tracks cultural stereotypes about men and women, expressive gender refers to the employee’s idiosyncratic gender expression—that is, the gender expression the employee actually performs in the workplace.

56. *Id.* In her book, Hopkins describes herself as the “most ardent admirer” of her mentor, Tom Beyer. See ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* 118 (1996). Elsewhere in the book she says this of Beyer’s advice: “For more than three years I had worked almost exclusively for Tom. I knew him very well. If it got results, he could have cared less if a consultant attended a business meeting in Bermudas and tennis shoes. Tom’s counsel was nonsense.” *Id.* at 148.

57. *Price Waterhouse*, 490 U.S. at 235.

58. *Id.* at 232.

59. *Id.* at 250.

60. *Id.* at 251.

The expressive gender component of the theory establishes the employee's gender variance. The third and final step in the theory concerns the discriminatory relationship. In order to state an actionable gender-stereotyping claim, the employee must demonstrate that the employer took the challenged employment action because the employee's expressive gender did not correspond with the claimant's anchor gender.

As the original gender-stereotyping claimant, Ann Hopkins provides perhaps the best example of how the gender-stereotyping theory works in action. The first step is the easiest: because Hopkins was a woman, her anchor gender was femininity.⁶¹ We can also glean from the partners' comments about Hopkins's behavior and appearance that Price Waterhouse expected its female employees to conform to a feminine standard by wearing makeup, styling their hair, and dressing femininely, as well as being polite, quiet, and passive in their interactions with colleagues.⁶² Hopkins's expressive gender, by contrast, fell on the more masculine side of the gender spectrum. She did not dress or look the part, nor did she shy away from confrontation. The last step in the analysis concerns the discriminatory relationship. Because Price Waterhouse based its partnership decision on the discrepancy between Hopkins's anchor gender (femininity) and expressive gender (masculinity), they discriminated against her "because of" her sex, in violation of Title VII.⁶³

The critical inquiry in gender-stereotyping cases is whether the employer has penalized the employee for not living up to the employer's stereotypical gender expectations. Thus the gender-stereotyping theory pits the discrimination claimant against a hypothetical male or female, a heuristic rather than an actual person.⁶⁴ As a result, the name of the game for employees in gender-stereotyping cases is to paint a clear picture of both the employer's gender expectations and the specific ways in which the employee departs from these expectations. The downside to this

61. Of course, it is also possible to imagine a case where a female employee's anchor gender is masculinity rather than femininity, though I am not aware of such a case. For instance, imagine a workplace where gender nonconformity is the norm for female employees. In such a situation, a female employee's anchor gender would be masculinity, and she would have to express femininity in order to state an actionable claim. Thus the important point is that the anchor gender concept—as well as the whole gender-stereotyping enterprise—is largely driven by the norms of a particular workplace. Many thanks to Chris Whytock for his thoughts on this point.

62. *Price Waterhouse*, 490 U.S. at 235.

63. *Id.* at 237.

64. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 779–91 (2011) (discussing how gender-stereotyping analysis does not require a claimant to provide comparative evidence of how the employer treated an actual employee).

analysis, however, is that the theory tends to reify the most extreme stereotypes about men and women.⁶⁵

3. *Beyond the Boundary: Sexual Orientation*

Unlike sex and gender, courts have been unwilling to extend Title VII's sex provision to reach discrimination claims based on sexual orientation.⁶⁶ In general, courts have concluded that because Congress did not have sexual orientation in mind when it passed the Civil Rights Act in 1964, the only way to prohibit sexual orientation discrimination is to pass a new statute either as an amendment to Title VII or as a stand-alone bill.⁶⁷ Since the 1970s, Congress has regularly considered various bills that would expand federal law to cover discrimination based on sexual orientation.⁶⁸ The current version of this proposed legislation is the Employment Non-Discrimination Act (ENDA).⁶⁹ If enacted, ENDA would substantially alter the landscape of employment discrimination law, as it would provide a remedy for employees who face discrimination because of their sexual orientation. In the meantime, lesbian and gay employees are limited to relief under applicable state and local antidiscrimination statutes.⁷⁰

65. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009). The plaintiff in *Prowel* alleged that he was harassed by his coworkers because he failed to conform to the stereotypical vision of manhood that permeated his workplace, which he described as follows:

[B]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn't drink gin and tonic. Just you know, all into football, sports, all that kind of stuff, everything I wasn't.

Id. at 287. In earlier work, Liz Glazer and I argue that this is also potentially problematic for transgender employees, as the theory often requires them to self-identify as a sex that conflicts with their sense of self. See Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009).

66. This discussion does not focus on the transgender cases in large part because transgender employees, though not uniformly successful, have had more success than lesbian and gay employees in pursuing remedies under Title VII's sex provision. See Glazer & Kramer, *supra* note 65, at 656–58 (highlighting the successes of transgender employees). This lends support to Professor Taylor Flynn's thesis, in an influential essay, that the transgender cases will transform sex discrimination jurisprudence for the benefit of lesbian and gay employees. See Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 100 COLUM. L. REV. 392 (2001).

67. The model, in this respect, is the Americans with Disabilities Act, which was put forth as a stand-alone law rather than as an amendment to Title VII. See Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2006).

68. See Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149–87* (John D'Emilio et al. eds., 2000) (documenting the history of ENDA and its predecessors).

69. Employment Non-Discrimination Act, S. 811/H.R. 1397, 112th Cong. (2011).

70. According to a recent study from the Williams Institute, an academic think tank on sexual orientation law and public policy, twenty-one states, plus the District of Columbia, prohibit

C. *Bootstrapping*

Within this doctrinal landscape, lesbian and gay employees have sought to raise sex discrimination claims under Title VII in the form of gender-stereotyping cases. The thrust of these cases is that the employees faced discrimination in their capacity not as gay people, but as gender-nonconforming men and women. These are, at their core, sex discrimination cases, premised on the idea that the plaintiffs faced discrimination because they failed to conform to their employers' expectations of how men and women are supposed to look and act. Yet the courts have viewed these cases in a very different light. Courts consistently reject gender-stereotyping claims brought by lesbian and gay employees on grounds that sexual orientation is not a protected trait under Title VII.⁷¹ Rather than sincere sex discrimination claims, courts view these cases as nothing more than attempts to bootstrap protection for sexual orientation into Title VII.

Dawn Dawson's case provides a perfect example.⁷² Dawson worked as a hair assistant and stylist trainee at Bumble & Bumble, a high-end salon in New York City.⁷³ Bumble & Bumble "strives for the avant garde and extols the unconventional,"⁷⁴ encouraging its employees to experiment with their style.⁷⁵ Yet Dawson stood out among the eclectic staff.⁷⁶ Her

employment discrimination on the basis of sexual orientation (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia). See THE WILLIAMS INSTITUTE, *Analysis of Scope and Enforcement of State Laws and Executive Orders Prohibiting Employment Discrimination Against LGBT People*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 15–10 (2009). Only twelve states, plus the District of Columbia, prohibit transgender discrimination, as well. *Id.* Many more municipalities prohibit sexual orientation discrimination.

71. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221–23 (2d Cir. 2005) (Dawson II); *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48 (3d Cir. 2005); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003); *Desantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330–31 (9th Cir. 1979).

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

73. *Id.* at 213.

74. *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 311 (S.D.N.Y. 2003) (Dawson I).

75. *Id.* at 310.

76. The District Court made much of the diverse cast of characters that made up Bumble & Bumble's workforce, noting that the salon's employees "embody many lifestyles and sexual preferences and reflect varying physical appearances, overall looks, and different manners of hair dress and clothing." *Id.* During her tenure at the salon, Dawson's coworkers included many lesbians and gay men, a bisexual person, a female-to-male transsexual person, and a pre-operative male-to-female transsexual person who was transitioning on the job at the time of the relevant events. *Dawson II*, 398 F.3d at 214.

coworkers teased her regularly during her almost two years at the salon. They said that she “[wore] her sexuality like a costume”⁷⁷ and that she “needed to have sex with a man.”⁷⁸ They called her “Donald” in front of clients.⁷⁹ And they suggested that she should act more like a woman and less like a man.⁸⁰ Ultimately, Dawson was fired as a hair assistant and removed from the stylist training program.⁸¹ When Dawson’s supervisor told her of this news, the supervisor said that Dawson would never get a stylist position outside New York City because her appearance and demeanor would frighten people.⁸²

Dawson brought a sex discrimination claim against Bumble & Bumble, alleging that she was harassed and terminated from the training program because she was 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.”⁸³ She alleged that her “overall appearance is more like a male than a female”⁸⁴ and that “many people think that I look less like a female and more like a male.”⁸⁵ To flesh out her claim, Dawson alleged, “her outward appearance does not conform to the traditional expectations of the way a woman would look,” citing her clothes (leather pants and jean jacket), her haircut (a mohawk), and her lack of feminine jewelry, perfume, and makeup.⁸⁶

Dawson made no attempt to hide her sexuality during the litigation, and that decision ultimately proved fatal to her case.⁸⁷ Rejecting her claim, the court held that the discriminatory comments were directed at Dawson’s homosexuality rather than her gender nonconformity.⁸⁸ As such, she could

77. *Id.* at 215.

78. *Id.* One coworker said this in even more graphic terms: “You know, what you need, Dawn, you need to get fucked.” *Dawson I*, 246 F. Supp. 2d at 307.

79. *Dawson II*, 398 F.3d at 215.

80. *Id.*

81. *Id.* at 214.

82. *Id.* at 215–16.

83. *Id.* at 213.

84. *Id.* at 221.

85. *Id.*

86. *Id.*

87. In a section titled, “Don’t Plead It Unless You Need It,” a litigation manual about representing sexual minorities in discrimination cases advises, “When bringing a gender stereotyping claim under Title VII, it is almost never a good idea to affirmatively plead or introduce evidence of a plaintiffs’ [sic] sexual orientation. It does not help the case and can seriously damage it.” Justin M. Swartz et al., *Nine Tips for Representing LGBT Employees in Discrimination Cases*, 759 PRACTICING L. INST.: LITIG. 95, 103 (2007).

88. *Dawson II*, 398 F.3d. at 217–20.

not state an actionable claim under Title VII.⁸⁹ The court did not stop there, however. Addressing the bootstrapping logic head on, the court explained that gender-stereotyping claims brought by “avowedly homosexual plaintiff[s]” raise problems for adjudicators because “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”⁹⁰ To emphasize the point, the court added, “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.”⁹¹

Although the court is right that the line separating gender norms and sexual orientation is at best blurry, the court’s response to this blurriness is problematic. The bootstrapping logic dodges the substance of the employee’s claim by adopting a zero tolerance approach: if a claim makes any mention of homosexuality, then it is a sexual orientation claim and must fail.⁹² And because the cultural stigma attached to homosexuality is so overwhelming, the deck is stacked against lesbian and gay employees who seek to raise gender-stereotyping claims, as courts tend to view their sex discrimination claims through the lens of homosexuality.⁹³

For courts that view gender-stereotyping claims by lesbian and gay plaintiffs as a bootstrapping tactic, homosexuality is operating as what sociologists call a “master status.” A master status is a stigmatized trait that tends to overshadow all other aspects of a person’s identity.⁹⁴ Once a court identifies an employee as gay or lesbian, the court makes itself hyperaware of the employee’s homosexuality, thereby enabling the employee’s homosexuality to swallow all other aspects of the employee’s identity. We see this in Dawn Dawson’s case when the court talks about

89. *Id.* at 217–18 (holding that “to the extent she is alleging discrimination based upon her lesbianism, Dawson cannot satisfy the first element of a prima facie case under Title VII”).

90. *Id.* at 218 (internal quotes and citations omitted).

91. *Id.* (internal quotes omitted) (citing *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

92. This zero-tolerance approach is reminiscent of the so-called “one-drop” rule in the old racial classification cases. See Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1737 (1993). For example, Homer Plessy, the plaintiff in *Plessy v. Ferguson*, was one-eighth black and seven-eighths white. Thus, under Louisiana’s blood quantum law at the time, Plessy was deemed to be a Black person and therefore subject to the railroad’s rule about segregated railcars. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

93. As I have argued in earlier work, this is not a concern for heterosexual employees, as courts never view their gender-stereotyping claims through the lens of heterosexuality. Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205 (2009).

94. See WAYNE H. BREKHUS: PEACOCKS, CHAMELEONS, CENTAURS: GAY SUBURBIA AND THE GRAMMAR OF SOCIAL IDENTITY 11 (2003); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 819–20 (2004); Stephen C. Ainsley et al., *Stigma Reconsidered*, in THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 1, 6 (Stephen C. Ainsley et al. eds., 1986).

the difficulty that arises when “avowedly homosexual” employees raise gender-stereotyping claims.⁹⁵ The court is, in effect, marking lesbian and gay employees as “homosexuals.” Once the employees are ascribed with the homosexual master status,⁹⁶ the court cannot help but view their gender-stereotyping claims through the lens of their homosexuality. Thus the court automatically leaps to the conclusion that the employees are trying bootstrap protection for sexual orientation. My goal in the remainder of the Article is to develop an alternative approach to these complex gender-stereotyping claims.

II. OF MEAT AND MANHOOD

Although most pronounced in the lesbian and gay cases, the bootstrapping logic is a feature of employment discrimination law generally. After all, the key ingredient of the bootstrapping logic is an unprotected trait, which need not always be sexual orientation. My goal in this Part is to critique the bootstrapping logic in a fresh light as a means to show why employment discrimination law needs to develop a new approach to dealing with unprotected traits. The centerpiece of this critique is a case study involving a male plaintiff who has brought a discrimination claim against his former employer. The case rests on a theory of vegetarian discrimination. As we will see, however, the employee’s claim is actually more nuanced than that, involving the interplay of three interconnected traits (sex, vegetarianism, and sexual orientation), two of which are not protected under existing employment discrimination norms (vegetarianism and sexual orientation).

A. *The Male Vegetarian*

Ryan Pacifico worked as a trader for Calyon in the Americas, a subsidiary of the French firm Credit Agricole, one of the largest retail banking groups in the world.⁹⁷ Pacifico worked at Calyon for less than

95. See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).

96. This is a product of the relational nature of social interactions, as developed by the work of sociologist Erving Goffman. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) (comparing interpersonal relations to a theatrical performance); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2–5 (1963) (developing a relational account of stigmatized social identities). Though it was published some time ago, Goffman’s work on stigma remains the authoritative account of the subject of stigma and social identity.

97. Complaint at 1, *Pacifico v. Calyon in the Americas*, No. 100992-2009 (N.Y. Sup. Ct. Jan. 26, 2009).

three years.⁹⁸ Though things started out great for Pacifico at Calyon,⁹⁹ his job took a turn for the worse when his supervisor, Robert Catalanello, learned that Pacifico was a vegetarian. From then on Catalanello subjected Pacifico to a steady barrage of taunts, insults, and demeaning antics. The bulk of the harassment aimed to belittle Pacifico by equating vegetarianism with homosexuality. He called Pacifico “gay,”¹⁰⁰ “homo,”¹⁰¹ and “vegetarian homo.”¹⁰² He scheduled business meals at steakhouses and burger joints so Pacifico would not be able to eat anything.¹⁰³ When a concerned coworker inquired as to what Pacifico would eat at a steakhouse, Catalanello said, “Who the fuck cares? It’s his fault for being a vegetarian homo.”¹⁰⁴ And during a later conversation about steakhouses, Catalanello mocked Pacifico, saying “You don’t even eat steak dude. At what point in time did you realize you were gay?”¹⁰⁵

Catalanello also picked on Pacifico because of his athleticism. While Pacifico was showing his coworkers a picture of himself participating in a triathlon, Catalanello approached the crowd, pointed at the picture and said, “That’s you? Those are some pretty gay tights. Figures you’d like them.”¹⁰⁶ Upon noticing a triathlon magazine on Pacifico’s desk, Catalanello said to the other traders, “Look everybody, Ryan brought in his homo magazine again for everyone to see.”¹⁰⁷ There were also times when Catalanello belittled Pacifico’s work performance in front of the entire staff.¹⁰⁸ On one particular occasion, when Pacifico hesitated before setting a price for a large trade of rare currency, Catalanello said, “Get a set of balls and make a price. Don’t always be such a homo.”¹⁰⁹

Pacifico’s tenure at Calyon ended abruptly. After calling in sick one day, an employee from Calyon’s human resources department called

98. *Id.* at 2, 7.

99. *Id.* at 2 (alleging that Pacifico “received satisfactory scores on all of his employment evaluations” and “he always met and exceeded his trading goals”).

100. *Id.* at 4.

101. *Id.*

102. *Id.*

103. *Id.* at 4–5. Preparing for a celebration lunch for the traders, Catalanello said, “I’m only ordering burgers. If you don’t eat meat, too bad. I don’t care.” *Id.* at 5.

104. *Id.* at 4.

105. *Id.* at 5.

106. *Id.* at 3.

107. *Id.* at 5.

108. *See id.* at 6 (involving a situation where Catalanello yelled at Pacifico after he traded for a loss). Pacifico contends that, in this situation, he followed the industry standard and the loss was out of his control because the currency went up after he conducted the sale.

109. *Id.* at 5.

Pacifico to fire him.¹¹⁰ The stated reason for the termination was that Pacifico failed to increase risk in his trades and to cooperate with management's orders.¹¹¹

B. *The Claim*

Pacifico filed a discrimination claim against Calyon, alleging that he was harassed and ultimately fired because he is vegetarian and because he was perceived to be gay.¹¹² Rather than seek redress under Title VII, Pacifico sued under New York's state and municipal human rights laws.¹¹³ This was a strategic decision. Unlike Title VII, New York law protects employees against discrimination on the basis of sexual orientation.¹¹⁴ The specific nature of Pacifico's claim is that he faced discrimination not because he is actually gay, but rather because his coworkers wrongly perceived him to be gay.¹¹⁵ As a news account of the case notes, Pacifico is in fact heterosexual and married, and he and his wife served steak at their wedding in 2010.¹¹⁶

My interest in Pacifico's case has less to do with the particulars of his state law claim—which appears strong on its face—than with the broader implications of the discrimination he faced in the workplace and why it poses a fundamental challenge to existing sex discrimination norms. On a doctrinal level, there is a clear strategic advantage in framing Pacifico's claim as one of sexual orientation discrimination, for doing so enables Pacifico to raise an actionable discrimination claim under state law. But there is a larger phenomenon at work in Pacifico's case, which Pacifico's lawyer captured well when he said the following to a reporter: “They associated being a vegetarian with being gay. It's a ridiculous male stereotype that only real men eat meat.”¹¹⁷ Pacifico's case is as much about gender stereotyping as it is about sexual orientation discrimination, if not more so. As I argue below, vegetarianism and sexual orientation merely served as proxies for the real reason Catalanello and others discriminated

110. *Id.* at 7.

111. *Id.*

112. *Id.*

113. See N.Y. EXEC. LAW § 296; N.Y.C. HUMAN RIGHTS LAW, N.Y.C. ADMIN. CODE tit. 8.

114. N.Y. EXEC. LAW art. 15, § 296(1); N.Y.C. HUMAN RIGHTS LAW, § 8-107(1)(a)–(d).

115. Complaint at 8, *Pacifico v. Calyon in the Americas*, No. 100992-2009 (N.Y. Sup. Ct. Jan. 26, 2009).

116. Martinez, *supra* note 25.

117. *Id.*

against Pacifico—he failed to conform to their idea of how a “real” man is supposed to look and act.

C. *Rereading the Claim*

This part offers an alternative reading of Pacifico’s case. This reading is built around the idea that sex discrimination—indeed, all types of invidious discrimination—often manifest as other forms of discrimination. Sometimes a discriminator says one thing and means another thing. In the case of gender-stereotyping claims, a discriminator may target an employee’s status not because of the status itself, but rather because of the gender norms associated with such a status. In such a situation, the employee’s status acts as a proxy for gender stereotyping. Ryan Pacifico’s case provides a useful illustration of how this process plays out in practice. While it may look like sexual orientation or vegetarianism discrimination, the discrimination faced by Pacifico is really sex discrimination in the form of gender stereotyping.

This discussion proceeds in two parts. The first part focuses on the relationship between manliness and meat eating. It argues that Catalanello viewed Pacifico’s vegetarianism as a proxy for effeminacy. The second part focuses on the relationship between food and cultural attitudes about homosexuality. It is not a coincidence that “fruit” is a common antigay slur used to demean gay men,¹¹⁸ nor is it a coincidence that Catalanello started to harass Pacifico as soon as he learned that Pacifico was vegetarian. For Catalanello, the easiest way to belittle Pacifico—and perhaps the most harmful way do so in their particular workplace setting—was to call him gay. By doing so, Catalanello was relying on the stereotype, which is deeply rooted in our culture, that gay men are “fairies” and “sissies” and altogether not manly men.¹¹⁹

118. See Patrick McGann, *Eating Muscle: Material-Semiotics and a Manly Appetite*, in *REVEALING MALE BODIES* 88, 83–99 (Nancy Tuana et al. eds. 2002); see also Buerkle, *supra* note 12, at 82 (noting McGann’s discussion of “fruit” as a homophobic slur).

119. See RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 22–23 (1988) (discussing the stereotype of gay men as “fairies” and “sissies”); Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 *GEO. L.J.* 1, 3 (1992) (referring to the “ultimate” gender stereotype that gay men are by definition effeminate); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 *CAL. L. REV.* 1, *passim* (1995).

1. *Meat and Manliness*

Pacifico worked on Wall Street, a stronghold of machismo culture, and Pacifico's firm seemed to fit that mold. On numerous occasions the firm's masculine culture revealed itself in conversations about where and what to eat. For instance, Catalanello frequently rewarded his team with food, either by taking them to eat at a steakhouse¹²⁰ or by ordering in lunch.¹²¹ Knowing full well that Pacifico was vegetarian, Catalanello purposely sought to punish Pacifico by refusing to order anything but meat for work-related meals: "I'm only ordering burgers. If you don't eat meat, too bad. I don't care."¹²²

Catalanello's attitude about Pacifico's vegetarianism—that is, his animosity toward Pacifico's vegetarianism—is rooted in a gender stereotype about manliness. Meat eating is closely connected to manliness.¹²³ As philosopher Michael Allen Fox writes, "Meat is masculine food, powerful food; to be a 'real man' in our culture is to eat meat—lots of it, and the redder the better."¹²⁴ Because we associate meat with manhood, vegetarian men transgress a gender boundary that is tethered to notions of men's food and women's food. And because they forego what our culture deems to be men's food, vegetarian men are seen as weak and insufficiently masculine.¹²⁵ In fact, gender bias toward vegetarian men is closely related to, and often bleeds into, bias directed at women and gay men.¹²⁶

The work of Carol Adams, a prolific feminist scholar, bears on this point. In her classic book, *The Sexual Politics of Meat*,¹²⁷ Adams develops what she calls a "feminist-vegetarian critical theory."¹²⁸ For Adams, there is a strong connection between meat eating, which she views in terms of species oppression, and the subjugation of women.¹²⁹ According to

120. Complaint at 4–5, *Pacifico v. Calyon in the Americas*, No. 100992-2009 (N.Y. Sup. Ct. Jan. 26, 2009).

121. *Id.* at 5.

122. *Id.*

123. Sobal, *supra* note 12, at 137 ("Animal flesh is a consummate male food, and a man eating meat is an exemplar of maleness.")

124. MICHAEL ALLEN FOX, *DEEP VEGETARIANISM* 27 (1999).

125. *See* Buerkle, *supra* note 12, at 81–83.

126. *See* ADAMS, *supra* note 12, at 44–49 (discussing the links between meat and patriarchy); Sobal, *supra* note 12, at 141 ("Vegetarianism provides an identity that transgresses masculinity in Western societies, with the wholesale rejection of the male icon of meat-eater associated with women's, wimpy, or even gay identities.")

127. ADAMS, *supra* note 12.

128. *Id.* at 166–68.

129. *Id.* at 13–14.

Adams, “[m]eat eating is an integral part of male dominance; vegetarianism acts as a sign of dis-ease with patriarchal culture.”¹³⁰ Because they choose to eat women’s food instead of men’s food, vegetarian men effectively shed their privilege as masculine men.¹³¹ In doing so, vegetarian men expose themselves to the scorn of those for whom meat eating is a critical marker of masculinity. By refusing to eat meat, Adams argues, “a man is effeminate, a ‘sissy,’ a ‘fruit.’”¹³²

We can see this dynamic at work in Pacifico’s case. Catalanello picked on Pacifico because he thought that Pacifico did not eat what a “real” man is supposed to eat. According to Catalanello’s worldview, a man is expected to be masculine and one way in which he should express his masculinity is by eating meat. Catalanello targeted Pacifico because he did not live up to this standard. To put this in terms of a discriminatory causation analysis, Catalanello harassed Pacifico not because Pacifico is vegetarian, but because Pacifico was not sufficiently masculine. The key here is that vegetarianism acts a proxy for effeminacy. While there is no question that the case may look like vegetarian status discrimination, the real culprit is a pernicious stereotype about men who do not eat meat.

2. *Fruits*

There is more to the story, however. Antigay slurs and putdowns also played a significant role in harassment suffered by Pacifico. True, the words “gay” and “homo” are not intrinsically harmful labels. But in the context in which Catalanello used these words, he certainly meant it to demean Pacifico. And it is telling that Catalanello used food as a springboard to attack Pacifico’s manliness, as food often serves as a powerful metaphor for our cultural attitudes about manliness and sexuality.

In his work on the morality of gay rights, philosopher Richard Mohr demonstrates that gendered and homophobic slurs are often rooted in stereotypes about food.¹³³ According to Mohr, slurs like “fruit” demean gay men not only by associating them with the low status of women in our society,¹³⁴ but also by suggesting that gay men “have betrayed their

130. *Id.* at 167.

131. *Id.* at 38 (“Men who become vegetarians challenge an essential part of the masculine role.”).

132. *Id.*

133. RICHARD D. MOHR, *THE LONG ARC OF JUSTICE: LESBIAN AND GAY MARRIAGE, EQUALITY, AND RIGHTS* 78–82 (2005).

134. *Id.* at 79. According to Mohr, “Women are chiefly referred to in slurs by designations of animal species (bitch, beaver, cow, fish, vixen, pussy, shrew), by terms which assimilate women to

socially assigned gender-status.”¹³⁵ To support his case, Mohr contrasts the image of the “real” man, who is by his very nature heterosexual, with that of gay men.¹³⁶ Of “real” men, Mohr writes, “Their antipode down at the bottom of the human heap is vegetable existence—pansies, fruits, *and* the physically challenged, who, like gay men, also are typically denoted and demoted with vegetative slurs.”¹³⁷ And vegetative slurs are powerful, Mohr argues, because “vegetables don’t do anything.”¹³⁸ Mohr’s point takes on a whole new meaning when we consider the emergence of the new “caveman diet,” whose adherents eschew fruits and vegetables in favor of copious amounts of meat and vigorous exercise in an attempt to replicate the dietary and living habits of prehistoric man.¹³⁹

Catalanello did not actually have to call Pacifico a “fruit” in order to challenge his manhood. By taking aim at Pacifico’s dietary preferences, Catalanello was engaging in a familiar practice by which heterosexual men try to make other heterosexual men seem insufficiently masculine.¹⁴⁰ In her book *Dude, You’re A Fag*, sociologist C.J. Pascoe documents the ways in which high school-aged boys construct their masculinity through the use of hyper-sexualized idioms.¹⁴¹ According to Pascoe, “Boys lay claim to masculine identities by lobbing homophobic epithets at one another.”¹⁴² Pascoe’s research demonstrates that words like “fag” or “homo” often have more to do with gender than sexual orientation. She cites one boy as saying, of the word “fag,” “It doesn’t even have anything to do with being gay.”¹⁴³ In fact, one of the students Pascoe interviewed told her that although he and his friends use the word “fag” liberally, they would not

immature animals and children (chick, doll, babe, baby, girl), or which reduce women to the body parts by which their animality differs from that of males (cunt, gash, beaver, pussy, bag, muff, rack). Note that there are no corresponding derogatory terms for males in contemporary culture.” *Id.* at 81. Mohr’s point, though well taken, is overstated. After all, we certainly use animalistic terms to describe men. For instance, both “stud” and “hoss” are terms used to describe horses as well as manly men. But the difference is that these terms are generally used as positive descriptions of men, whereas the animalistic terms for women are uniformly derogatory in nature.

135. *Id.* at 79.

136. *Id.* at 79–81.

137. *Id.* at 81 (emphasis in original).

138. *Id.*

139. See Joseph Goldstein, *The New Age Caveman and the City*, N.Y. TIMES, Jan. 10, 2010, at ST 1.

140. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 448–50 (2000); see also Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 37–40 (2010).

141. C.J. PASCOE, DUDE, YOU’RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL (2007).

142. *Id.* at 5.

143. *Id.* at 57.

direct it at a homosexual peer.¹⁴⁴ Pascoe argues, instead, that the boys are using these slurs to assert their own gender dominance: “The lack of masculinity is the problem, not the sexual practice or orientation.”¹⁴⁵

Nor should we dismiss this behavior as something only young boys do to one another. In her work on sexual harassment law, Vicki Schultz discusses the prevalence of antigay sentiments in cases of male-on-male sexual harassment.¹⁴⁶ According to Schultz, “Because many heterosexual men regard any failure to conform to their own preconceived notion of masculinity as a sign of homosexuality—and homosexuality as a failure to conform to their preconceived notion of masculinity—such harassment frequently includes antigay sentiments.”¹⁴⁷ This is precisely what is going on in Pacifico’s case. There is nothing to suggest that Catalanello—or others at the firm—actually thought Pacifico was gay. After all, Pacifico married his wife during his time at the firm, and there is no allegation that he tried to hide his wedding or, for that matter, his heterosexuality from his coworkers. Instead, Catalanello called Pacifico “gay” and “homo” because this is an easy and, unfortunately, all too common way for one heterosexual man to call into question another heterosexual’s man masculinity. For Catalanello, sexual orientation—specifically, homosexuality—is acting as a proxy for what is really going on in Pacifico’s case: sex discrimination, in the form of gender stereotyping. Catalanello thought Pacifico was less of a man because of his vegetarianism, so he treated him as though he were gay.¹⁴⁸

144. *Id.*

145. *Id.* at 59.

146. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1774–89 (1998).

147. *Id.* at 1776–77; see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

148. There is a robust literature on lesbian and gay men as gender transgressors. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991); Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465.

D. Bootstrapping Vegetarianism

The lesson of Pacifico's case is that sex discrimination sometimes manifests as other forms of discrimination—in this case, as a hybrid of vegetarian and sexual orientation discrimination. In this respect, Pacifico's case reveals a fundamental limitation of Title VII's discriminatory causation analysis: the mismatch between the legal regulation of discrimination and the lived experience of discrimination. Discrimination law is categorical in nature, dividing traits into discrete boxes. As Pacifico's case demonstrates, however, the lived experience of discrimination is messy, often involving a mixture of intersecting traits, some of which may even be proxies for other traits. Faced with a discrimination law regime that favors simplicity, courts tend to be suspicious of complex sex discrimination cases. Rather than dig into the substance of these complex cases, courts opt instead for an easy out—the bootstrapping logic.¹⁴⁹

If Pacifico were to pursue a remedy under Title VII, he would surely fall victim to the bootstrapping logic. His chances of convincing a court that he faced actionable sex discrimination, and not vegetarian or sexual orientation discrimination, are slim at best. Given the current state of sex discrimination law, Pacifico's claim is likely to go nowhere because the discriminator in his case called him “gay” and “vegetarian homo.” Because these words refer to traits that are not protected under Title VII, most courts will view these cases through the lens of the bootstrapping logic. The problem with the bootstrapping logic is that it gives too much weight to unprotected traits in the discriminatory causation analysis, enabling these traits to spoil what would otherwise be actionable sex discrimination claims. The root cause of the problem here is that courts have not developed a sophisticated way to synthesize discrimination cases involving multiple layers of discriminatory intent. My goal in the remainder of this Article is to propose a new framework to sharpen Title VII's antidiscrimination project, one that is particularly attuned to the interplay between protected and unprotected traits in sex discrimination law.

149. I discuss this phenomenon in great detail in an earlier work. See Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersections*, 7 GEO. J. GENDER & L. 31 (2006).

III. A NEW APPROACH

The bootstrapping logic runs counter to one of the core principles of modern sex discrimination jurisprudence. This principle holds that, in enacting Title VII's sex provision, "Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes."¹⁵⁰ First announced by the Seventh Circuit in 1971, this principle has served as the foundation for a number of important innovations in sex discrimination law,¹⁵¹ including the Supreme Court's announcement of the gender-stereotyping theory in *Price Waterhouse v. Hopkins*.¹⁵² The bootstrapping logic stands as a limit on this principle, preventing Title VII's sex provision from stamping out gender stereotypes that implicate unprotected traits, such as the stereotype at work in Ryan Pacifico's case. In this Part, I propose a doctrinal fix that will better enable sex discrimination law to capture gender-stereotyping claims that implicate unprotected traits. The thrust of this claim is that unprotected traits should be neutral for purposes of proving a discrimination claim. In practice, this means that an unprotected trait should neither serve as the basis for an actionable claim nor spoil an otherwise actionable claim.

A. Trait Neutrality

The heart of statutory antidiscrimination law is the distinction between protected and unprotected traits.¹⁵³ Indeed, the distinction between protected and unprotected traits is one of the main differences between statutory antidiscrimination law and constitutional equality jurisprudence. Although existing constitutional norms single out certain traits for special protection,¹⁵⁴ all traits receive at least *some* level of protection under the

150. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (emphasis added).

151. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (holding that same-sex sexual harassment claims are actionable under Title VII); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (holding that Title VII covers hostile environment sexual harassment cases); *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (establishing the standards, in an early and important case, for a status-based sex discrimination claim). Note that these are just a few citations from Supreme Court opinions. A Westlaw search uncovered hundreds of citations of this principle by appellate and district courts.

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

153. *See infra* Part I.A (discussing Title VII's treatment of protected and unprotected traits).

154. The Court has used some form of heightened scrutiny—whether strict or intermediate—in reviewing race, national origin, alienage, sex, and nonmarital parentage. *See Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Oyama v. California*, 332 U.S. 633 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *United States v. Virginia*, 518 U.S. 515 (1996) (sex); *Trimble v. Gordon*, 430 U.S. 762 (1977) (nonmarital parentage). Conversely, the Court has denied

rational basis test.¹⁵⁵ Statutory antidiscrimination law, by contrast, is far more limited in scope. It seeks only to protect discrimination aimed at a small handful of protected traits. Traits that fall outside the protective umbrella receive no protection whatsoever, making them fair game as a basis for an employment decision. The dominant tradition in American employment law is at-will employment.¹⁵⁶ In an at-will regime, employers and employees are equally free to terminate the employment relationship at any time and without cause.¹⁵⁷ Because it imposes a limit on the at-will employment, statutory antidiscrimination law is designed to be a decidedly narrow undertaking.

Even though they are crucial to the inner-workings of statutory antidiscrimination law, we have no theory of unprotected traits. And in the absence of a workable theory, the bootstrapping logic has stepped into the void. The bootstrapping logic promotes a skewed view of unprotected traits, treating them as landmines in the discriminatory causation analysis, armed to explode the employee's claim at the slightest mention of an unprotected trait. This approach gives unprotected traits more weight in the discriminatory causation analysis than they deserve. The mere presence of an unprotected trait in a case should not preclude a court from digging into the substance of the employee's claim. Ultimately, the critical question in a discrimination case is whether there is a nexus between the challenged employment action and a protected trait. The problem with bootstrapping logic is that it prevents courts from even considering whether that nexus exists in a given case.

This is not to say that unprotected traits should be able to serve as the basis for an actionable discrimination claim. My proposal is that unprotected traits be treated as neutral for purposes of proving a discrimination claim. By neutral, I mean that they should neither serve as the basis for an actionable claim nor spoil an otherwise actionable claim.

heightened protection to other traits. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (mental disability); *Mass Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (per curiam) (age); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (indigency).

155. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). We can see this at work, for instance, in *Romer v. Evans*, where the Court struck down under the Equal Protection Clause a Colorado constitutional amendment that prohibited any level of state government from creating antidiscrimination protection for sexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996).

156. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, 83 CORNELL L. REV. 105 (1997); Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53 (2007); Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

157. See *Payne v. The W. & Atl. R.R. Co.*, 81 Tenn. 507 (1884).

Such an approach is more consistent with the structural design of statutory antidiscrimination law, as it renders unprotected traits irrelevant to the critical inquiry of whether the alleged discrimination targeted a protected trait. The goal of this approach is to assimilate the complexities of the lived experience of discrimination into the rigid categories of existing employment discrimination doctrine. At a time when discrimination is becoming increasingly hard to categorize, it is all the more necessary to stay focused on the central purpose of statutory antidiscrimination law: stamping out discrimination based on protected traits. My approach prevents the bootstrapping logic from frustrating this task.

B. The Framework in Action

This new approach is not entirely foreign to sex discrimination law. A few courts have adopted reasoning similar to my proposed approach, though without formally identifying it as such.¹⁵⁸ This part will describe one such case in the hope of bolstering my proposal that unprotected traits should be neutral for purposes of proving a discrimination claim. The case involves a transgender employee who brought a gender-stereotyping claim against his former employer.¹⁵⁹ The case is especially instructive here because the court engaged in a rigorous discussion about the different parts of the employee's identity and how those parts affected the substance of the employee's sex discrimination claim.

The employee in the case was Jimmie Smith, a lieutenant in the Salem Fire Department, in Salem, Ohio.¹⁶⁰ Smith was suspended after informing the department that he was transitioning from male to female and, as a part of that process, would soon begin dressing in women's clothing and taking on an otherwise feminine appearance in the workplace.¹⁶¹ Rather than fire Smith directly, the department hatched a plan to get Smith to quit of his

158. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (allowing a transgender plaintiff to raise an actionable gender-stereotyping claim); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (holding that an employee's status as transgender does not preclude the employee from raising an actionable sex discrimination claim); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) (permitting a gay employee to raise an actionable gender-stereotyping claim); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (same).

159. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

160. *Id.* at 568.

161. *Id.* Although Smith ultimately transitioned from male to female, I will use the male pronouns "he" and "him" throughout this part. I realize doing so may seem insensitive to Smith's wishes. That is certainly not my intent. I have chosen to use male pronouns because they are more consistent with Smith's theory of discrimination, namely, that he was discriminated against because he was a man expressing a female gender identity.

own accord.¹⁶² The department planned to order Smith to undergo three separate psychological evaluations, thinking that he would either resign or refuse to undergo the evaluations, in which case they could fire him for insubordination.¹⁶³ Upon hearing of the department's plan, Smith hired a lawyer, who contacted the department to discuss Smith's situation.¹⁶⁴ The department suspended Smith shortly after he hired the attorney.¹⁶⁵

Smith brought a gender-stereotyping claim against the department, alleging that the department discriminated against him because he failed to conform to stereotypical expectations about how a man should look and act.¹⁶⁶ In a break from a long line of cases holding that transgender employees cannot raise actionable sex discrimination claims,¹⁶⁷ the court held that Smith's transgender status did not preclude him from raising an actionable sex discrimination claim.¹⁶⁸ More specifically, the court concluded that *Price Waterhouse* had "eviscerated" the earlier transgender cases.¹⁶⁹ Framing Smith's case in terms of sex discrimination rather than transgender discrimination, the court asserted that, after *Price Waterhouse*, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."¹⁷⁰ Nor did it matter, according to the court, that Smith was transgender:¹⁷¹ "Sex stereotyping based on a person's gender non-

162. *Id.* at 568–69.

163. *Id.* at 569.

164. *Id.*

165. *Id.*

166. *Id.* at 570–71.

167. *See, e.g.,* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1 1975 WL 302 (D.N.J. Sept. 10, 1975); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975).

168. *Smith*, 378 F.3d at 574–75.

169. *Id.* at 573.

170. *Id.* at 574.

171. *See id.* In its discussion of Smith's claim, the court goes on to demonstrate the faulty thinking of the bootstrapping logic:

[T]he man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of . . . sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.

Id.

conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.’¹⁷²

The *Smith* court’s analysis is instructive as to how a court should approach Ryan Pacifico’s discrimination claim. Much like transgenderism in *Smith*’s case, vegetarianism is not an isolated status, but rather a “label” identifying the cause of Pacifico’s gender nonconformity. It is, in other words, a proxy for effeminacy. Like the framework I have proposed in this Article, the *Smith* court’s approach renders the proxy trait neutral for purposes of assessing the causation question in the underlying sex discrimination claim. The advantage of such an approach is that it charts a path for a court to make good on the principle, discussed above, that Title VII’s sex provision seeks to capture the *entire spectrum* of disparate treatment of men and women flowing from gender stereotypes.¹⁷³ Existing sex discrimination norms fall short of this principle because courts have generally failed to understand that an employee can be transgender or gay or vegetarian and still be a gender nonconformist. My new framework improves on existing norms, as it offers a way for sex discrimination law to consider multiples axes of discriminatory intent. When a court considers a gender-stereotyping claim, the court should judge the claim based not on the plaintiff’s identity, but on whether the alleged discrimination was motivated by stereotypical gender expectations.

C. Concerns

Before concluding the Article, this part responds to two anticipated critiques of the argument presented thus far. The first claims that my trait neutrality framework expands the scope of the gender-stereotyping theory far beyond what Congress intended for the sex provision—so far, in fact, that it transforms all discrimination into sex discrimination. The second critique argues that my argument—including both the alternative reading of Pacifico’s claim and the trait neutrality framework—makes the question of discriminatory intent too complicated, rendering the discriminatory causation requirement an unreliable evaluation of whether an employer has engaged in unlawful discrimination.

172. *Id.* at 575.

173. *See supra* note 150 and accompanying text.

1. *Everything Is Sex Discrimination*

The first concern charges that my trait neutrality approach takes the gender-stereotyping theory far beyond what Congress intended the scope of Title VII's sex provision to cover. This concern is rooted in cultural attitudes about gender. Because gender norms are such a dominant force in our culture, gender has become a prism through which we can view nearly every behavior or trait. My project exploits the cultural predominance of gender norms by permitting unprotected traits to serve as a proxy for gender. And if there is no limit on which unprotected traits can serve as a proxy for gender, then every behavior or trait can be read through the lens of gender, which means that every adverse employment action is sex discrimination. If taken to this extreme, the gender-stereotyping theory will eventually swallow the at-will employment rule.

This is an important point, as it suggests that we need a concrete limit on the reach of the gender-stereotyping theory. It is certainly true that my argument makes it possible for Title VII's sex discrimination provision to capture more discriminatory harms than are currently recognized under existing sex discrimination norms. To the extent that this is a concern, however, the source of the problem lies not with my framework, but rather with the gender-stereotyping theory itself. When the Court created the gender-stereotyping theory in *Price Waterhouse*, it articulated the theory in the broadest of terms. The Court did not propose any limits on the reach of the theory, nor did it suggest that the theory should bend to any overriding principles of justice. If anything, the Court's formulation is too simple in its breadth: an employer cannot punish an employee for engaging in behavior that does not conform to the employer's stereotypical gender expectations.¹⁷⁴

My goal in this Article is not to chart new terrain for the gender-stereotyping theory, but rather to apply the theory to a class of cases that should already fall within its scope. The bootstrapping logic imposes an

174. Indeed, the breadth and apparent simplicity of the Court's analysis probably explains why scholars have developed such differing accounts of the gender-stereotyping theory. Compare Mary Anne C. Case, *supra* note 19 (arguing that the gender-stereotyping theory is best understood as imposing an equality demand for male and female employees), with Yuracko, *supra* note 21 (rejecting Case's equality view of gender stereotyping in favor of a trait neutrality approach). Other scholars have argued that we should scrap the existing gender-stereotyping theory altogether. See, e.g., Meredith M. Render, *Gender Rules*, 22 YALE J. L. & FEMINISM 133 (2010) (proposing a rule-based approach to generalizations about the sexes). Other scholars have sought to bring order to the chaotic stereotyping jurisprudence. See, e.g., Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011) (developing a framework to fit *Price Waterhouse* and its progeny in a larger context about harmful comments in the workplace).

arbitrary limit on the gender-stereotyping theory, thereby precluding whole groups of employees from seeking relief under Title VII because they belong to social groups organized around traits that are not protected under the statute. If we are going to continue allowing employees to raise gender-stereotyping claims, then we must accept that the theory is exceptionally broad in scope, capturing a wide universe of discriminatory harms. It is certainly worth considering that the gender-stereotyping theory, as first articulated in *Price Waterhouse*, sweeps too far in its scope. Such an inquiry is, however, beyond the scope of this Article.

2. *Muddying Intent*

The second potential critique focuses on Title VII's discriminatory intent requirement. More specifically, this critique charges that my argument—including both the alternative reading of Pacifico's claim and the trait neutrality framework—muddies the discriminatory intent analysis, making it too easy for a court to find a violation of Title VII. The thrust of this critique is that my argument transforms unprotected status discrimination—in this case, vegetarianism and/or sexual orientation—into actionable sex discrimination by substituting my view of what happened in the case for the discriminator's actual intent. To support this critique, one might argue that a court should not look beyond the actual words used by the discriminator, as they provide the best lens into the mindset of the discriminator at the time of the challenged employment action. At its core, this critique challenges the veracity of gender proxies as evidence of discriminatory intent. It reasons that we should trust and rely on the words used by a discriminator as the best indicator of the discriminator's motivations. Another way of framing this critique is to say that courts should not use proxies to substitute a presumed intent for the discriminator's actual intent.

As with the first critique, this concern has more to do with the nature of employment discrimination law in general than with the specifics of my project in this Article. The problem with this critique is that it expects too much and too little from employment discrimination law's discriminatory causation analysis. Unless a discriminator openly admits to engaging in unlawful discrimination, it is nearly impossible to determine what a discriminator's actual intent was in a given case. The discriminatory intent requirement is, at best, a useful tool for flushing out bad motives in discrimination cases. At the same time, even though it is saddled by this inherent evidentiary limitation, the discriminatory causation analysis is

nevertheless capable of weeding out when a trait is being used as a proxy for another form of discrimination.

Take age discrimination.¹⁷⁵ As part of their causation inquiry in age discrimination cases, courts routinely consider the question of whether an employer's proffered reason for a challenged employment action is really a proxy for age discrimination.¹⁷⁶ For instance, say that the employer refuses to hire a potential employee because she is "overqualified" for the open position.¹⁷⁷ One account of the employer's intent is that this decision was based on the potential employee's qualifications. This would be a legal basis for making an employment decision because employee qualification is not a protected trait under existing discrimination norms. An alternative account of the employer's intent is that the employer is using the potential employee's qualifications as a proxy to screen out older employees, which would be an illegal basis for making an employment decision.¹⁷⁸ A court's job in this case would be to weigh these competing accounts of the employer's intent, taking into account the facts uncovered during litigation.

That proxies have proved manageable in age discrimination cases suggests that they can also work in sex discrimination cases. Thus there is no reason to think that gender proxies will water down the discriminatory intent requirement. Moreover, thinking of discriminatory intent in terms of proxy traits will actually sharpen a court's causation analysis, providing a new tool courts can use to ferret out gender bias. In the face of the already hard task of determining whether a challenged employment action was

175. Age discrimination is not prohibited by Title VII, but by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–633(a) (2006). The ADEA tracks Title VII's coverage in large part; the only critical difference, for purposes of this Article, is that the only trait protected under the statute is age, which captures employees who are forty and older. *Id.*

176. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (holding that firing an employee before the employee's retirement plan vests is analytically distinct from age discrimination, though not foreclosing that other age-related traits can serve as a proxy for age discrimination); *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296 (7th Cir. 2002) (involving situation where employer prepared a "justification" for layoff of employee who had "skills suited to the 'pre-electronic' era and that he would have to be brought 'up to speed' on 'new trends of advertising with electronic means'"); *Taggart v. Time Inc.*, 924 F.2d 43 (2d Cir. 1991) (involving situation where employer rejected a potential employee on grounds that he was "overqualified" for the advertised position).

177. *Taggart*, 924 F.3d at 45.

178. The court in *Taggart* ruled this way, concluding that being overqualified "is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old." *Id.* at 47. Other courts have come to the same conclusion. *See EEOC v. D.C., Dep't of Human Servs.*, 729 F. Supp. 907, 915 (D.D.C. 1990) (finding that "overqualified" and "overspecialized" are buzzwords for "too old"); *Vaughn v. Mobil Oil Corp.*, 708 F. Supp. 595, 601 (S.D.N.Y. 1989) (finding that the use of "overqualified" suggested that the employee was capable of assuming another position at the company).

“because of” sex, gender proxies are a constructive device for not only better describing the lived experience of discrimination, but also capturing a wider universe of discriminatory harms.

CONCLUSION

Sex discrimination law is at a crossroads. While Title VII has done much to combat formal sex discrimination, the gender-stereotyping theory—perhaps the most transformative theory of sex discrimination—has stalled in recent years, a casualty of the bootstrapping logic. This Article uses the cultural relationship between meat and manhood to critique the central premise of the bootstrapping logic, namely, that an unprotected trait can overwhelm an otherwise actionable sex discrimination claim. In place of the bootstrapping logic, this Article proposes a new theory of unprotected traits built around the idea that unprotected traits should be irrelevant for purposes of proving an actionable discrimination claim. As such, an unprotected trait should neither serve as the basis for an actionable claim nor spoil an otherwise actionable claim. Yet courts should not ignore unprotected traits entirely, as unprotected traits often serve as proxies for protected traits. Ultimately, courts should undertake their causation analysis in a holistic fashion, recognizing that discrimination is messy, often involving a mixture of protected and unprotected traits.

In terms of a broader contribution, this Article lays the foundation for a more expansive conversation about the future of sex discrimination law. Workplaces have become increasingly diverse in recent years, as more and more social groups have become visible through social movements.¹⁷⁹ The cost of such diversity, however, is that these groups are often the target of bias and discrimination. Given the emergence of these new social groups and the structural limits of existing employment discrimination norms, there is a very real possibility that sex discrimination law may be nearing its breaking point. My hope is that this Article will serve as a jumping-off point for a larger discussion about the future of sex discrimination law, specifically with respect to the capacity of the gender-stereotyping theory to capture new manifestations of gender bias.

179. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003) (arguing that the workplace has become a critical site of social cooperation among a diverse workforce); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–48 (2011) (discussing the emergence of new identity groups through social movements).