

1-1-2013

YOU'D BE OKAY IF YOU WEREN'T SO GAY: ENDING THE SPECIAL TREATMENT OF LGBT STUDENTS UNDER TITLE IX

Daniel B. Weddle

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Daniel B. Weddle, *YOU'D BE OKAY IF YOU WEREN'T SO GAY: ENDING THE SPECIAL TREATMENT OF LGBT STUDENTS UNDER TITLE IX*, 35 W. New Eng. L. Rev. 425 (2013), <http://digitalcommons.law.wne.edu/lawreview/vol35/iss2/5>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

YOU'D BE OKAY IF YOU WEREN'T SO GAY: ENDING THE SPECIAL TREATMENT OF LGBT STUDENTS UNDER TITLE IX

DANIEL B. WEDDLE

ABSTRACT

An illogical and cruel legal fiction has taken hold in the sexual harassment jurisprudence: Title IX, the statute specifically designed to prohibit harassment based upon sex, does not apply to harassment based upon sexual orientation. Although harassment based upon failure to fulfill gender stereotypes is considered discrimination based on sex, harassment based on sexual attraction to members of one's own sex is not discrimination based on sex. If you wonder how sexual attraction is not sex but effeminate characteristics are sex, you are not alone. This article critiques the legal fiction that leaves gays without protection from harassment that, if directed at a heterosexual, would clearly be prohibited under Title IX.

INTRODUCTION

Jesse Montgomery was a faggot—at least, that is what his peers said, daily.¹ For over eleven years Jesse was tormented by his classmates, much of the abuse inspired by his perceived sexual orientation.² He was called “faggott,” “fag,” “gay,” “Jessica,” “girl,” “princess,” “fairy,” “homo,” “freak,” “lesbian,” “femme boy,” “gay boy,” “bitch,” “queer,” “pansy,” and “queen.”³ In addition to being kicked and pushed down repeatedly, Jesse was subjected to threats and assaults “of a more sexual nature”.⁴

[A] student in his middle school choir class grabbed his legs, inner thighs, chest and crotch. He states that the same student grabbed his buttocks on at least five or six occasions. Later another student approached him and asked to see him naked after gym class.

1. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1084-85 (D. Minn. 2000).

2. *Id.* at 1084.

3. *Id.*

4. *Id.*

Plaintiff states that he experienced similar incidents when he was in high school. According to plaintiff, students in his ninth and tenth grade choir classes sometimes put their arms around him or grabbed his inner thighs and buttocks while calling him names targeted at his perceived sexual orientation. Plaintiff states that one of the students grabbed his own genitals while squeezing plaintiff's buttocks, and on other occasions would stand behind plaintiff and grind his penis into plaintiff's backside. The same student once threw him to the ground and pretended to rape him anally, and on another occasion sat on plaintiff's lap and bounced while pretending to have intercourse with him. Other students watched and laughed during these incidents.⁵

When he brought an action against the school under Title IX, the court dismissed his claims because "Title IX prohibits only discrimination based on sex and does not extend to any other form of invidious discrimination."⁶ Therefore, the court concluded, "[T]o the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these claims are not actionable and must be dismissed."⁷

In a case detailing hazing on a high school football team, however, allegations of behavior strikingly similar to that in *Montgomery* were considered sufficient to survive a motion to dismiss under Title IX.⁸ The court does not suggest the harassment was inspired by anti-homosexual animus, nor that the victim, John Roe, was gay or perceived to be gay.⁹ Under those facts, the court explained that "[a]lthough Title IX was not intended and does not function to protect students from bullying generally, the homophobic language used by the perpetrators appears to be part of a larger constellation of sexually-based conduct, which included assaulting Plaintiff [anally] with an air hose, exposing their genitalia, and grabbing his bare buttocks in the shower. Drawing the inferences in Plaintiff's favor, there remains a factual dispute on the issue of whether 'the conduct at issue relate[s] to gender.'"¹⁰

In other words, because John Roe was subjected to sexually charged abuse, his hazing could be interpreted to "relate to gender" and thereby satisfy Title IX's requirement that the conduct be sex based. Nearly identical sexual abuse directed at Jesse Montgomery, however, could not be interpreted to be based on sex because the abuse was

5. *Id.*

6. *Id.* at 1090.

7. *Id.*

8. *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008 (E.D. Cal. 2009).

9. *Id.* at 1027

10. *Id.*

inspired by his perceived sexual attraction to other boys.

It is beyond ironic that anti-gay animus can purge the sex-based taint from conduct that would be sex-based were it directed at a heterosexual student. Nevertheless, that interpretation is the one most courts have embraced.

The majority of courts have concluded that Congress did not intend to prohibit harassment based upon sexual orientation;¹¹ so when a child is bullied and abused because she is gay or perceived to be gay, Congress apparently intended to let the school look the other way and leave her to the mercy of brutal peers. If, on the other hand, her heterosexual female classmate is harassed in precisely the same manner, the same Congress intended to protect her from such abuse because she is being harassed on the basis of sex.

This special treatment for gay students under Title IX runs afoul of our most basic notions of fairness and justice. LGBT students are already accorded ugly forms of special treatment in most school settings: they are bullied at two to three times the rate of their heterosexual peers and bullied more severely, and their plights are virtually ignored by administrators and teachers.¹² The last thing LGBT students need is an interpretation of Title IX that denies them protection and remedies when schools ignore a hostile environment in which gays are mere sexual objects to be preyed upon and abused.

11. Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 406-07 (2012). As Professor Waldman explains,

[i]nitially, courts followed Title VII jurisprudence to analyze Title IX cases and found Title IX unavailable to gay students alleging discrimination on the basis of sexual orientation. Despite *Oncale v. Sundowner Offshore Services*, a seminal Title VII case in which the Supreme Court found that sexual harassment was still actionable even if the aggressor and victim were of the same sex, discrimination based on sexual orientation is still often unavailable to Title IX plaintiffs So, if sexual orientation claims are unlikely under Title IX, victims of antigay bullying are left to prove discrimination on the basis of gender or sex.

Id.

12. See Markus P. Bidell, *School Counselors and Social Justice Advocacy for Lesbian, Gay, Bisexual, Transgender, and Questioning Students*. 9 J. OF SCH. COUNSELING 4-5 (2011). The Gay, Lesbian, and Straight Education Network (GLSEN) conducted a nationwide survey of over 7,000 LGBT students in 2009. Almost 75% of the surveyed students heard remarks or names such as “fag, dyke, queer, and faggot,” while at school, and almost 61% felt unsafe at school. Further, about 85% were verbally harassed and nearly half were physically assaulted due to their sexual orientation or gender identity. GLSEN’s study also revealed that over half of the surveyed students experienced cyberbullying, irrespective of their sexual orientation or gender identity. Middle school students experienced more “LGBTQ-motivated verbal and physical harassment as well as physical assault” when compared to surveyed high school students. *Id.*

I. SEXUAL OBJECTIFICATION

Harassment based upon sexual orientation, after all, reduces the target to a sexual being and nothing more.¹³ The target is treated only in terms of her sexuality; the remainder of her personhood is ignored or denigrated. She is perceived in purely sexual terms and punished on the basis of that perception.

The District Court for the Northern District of California made that very point as early as 2000:

[T]he Court finds no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser's perception that he is a homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality, and is not distinguishable to this Court.¹⁴

Judge James captured the logic perfectly. Sexually charged abuse motivated by animus toward the target's sexuality is harassment based on sex, regardless of the orientation of that sexuality. Because harassment based upon sexual orientation frames the target as a sexual object, Title IX should be interpreted to prohibit that harassment in exactly the same way it prohibits any sexual harassment. Otherwise, LGBT students are abused not only by their peers, teachers, and school administrators; they are deprived of protection and remedy by a deeply illogical and unjust interpretation of the very statute that should protect them.

II. THE TITLE VII FALLACY

The notion that Title IX does not apply to anti-gay harassment is rooted in interpretations of Title VII,¹⁵ which is viewed as the guide for interpreting Title IX.¹⁶ According to those interpretations, the term "sex" was intended to encompass "traditional notions of sex," and

13. Martha Nussbaum, *Carr, Before and After: Power and Sex in Carr v. Allison Gas Turbine Division, General Motors Corp.*, 74 U. CHI. L. REV. 1831, 1833 (2007) ("'Sexual' harassment is . . . harassment in which the content concerns sexual relations, in which the woman is being treated as a sexual object, a person available for sexual overtures and likely sexual favors, in a way that is either extortionate . . . or intimidating . . . or both.'").

14. *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

15. See 42 U.S.C. §2000e-2 (2006).

16. *Id.*

alternative sexual orientations do not fit those traditional notions.¹⁷ In addition, multiple attempts to amend Title VII to include sexual orientation have failed; therefore, the interpretation must be consistent with congressional intent.¹⁸

This approach to the statute contains several logical flaws. First, nothing in the legislative history of Title VII requires such an approach; in fact, little legislative history exists at all because the language was inserted into Title VII as a failed attempt, on the day before the final vote, to defeat the Civil Rights Act, which was targeting racial discrimination.¹⁹ The Act passed with the prohibition on sex-based discrimination intact.²⁰ Given the nature of the incorporation of the language into the statute, no legislative history exists to indicate congressional intent.²¹

Despite that dearth of legislative history, the Supreme Court has been perfectly comfortable inferring a congressional intent to protect workers against sexual harassment²² and harassment based upon the target's failure to conform to gender stereotypes,²³ and those interpretations have been applied to Title IX.²⁴ Congress, of course,

17. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (explaining that “[g]iving the statute its plain meaning, this court concludes that Congress had only the traditional notions of ‘sex’ in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to *amend* the Civil Rights Act to prohibit discrimination against ‘sexual preference.’ None have been enacted into law.”).

18. *Id.*

19. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 171 (2009).

In a last minute attempt to defeat the legislation, a House Representative who opposed the bill proposed that the bill be broadened to include sex in the list of protected categories. The House Judiciary Committee did not hold a hearing on the amendment to add gender discrimination to Title VII and little discussion of the addition ensued. This effort to thwart the passage of Title VII was unsuccessful, and the bill passed with the inclusion of sex as a protected category. As a result, the legislative history of the sex discrimination portion of Title VII and the BFOQ defense is nearly nonexistent.

Id.

20. *Id.*

21. The Seventh Circuit concluded that the lack of legislative history demonstrates that the dearth of legislative history is precisely why “based on sex” should be limited to a traditional meaning: “The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment’s adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.” *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

22. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

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

24. See, e.g., *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952,

never actually considered either type of abuse when it enacted Title VII in 1964 or Title IX in 1972. The hostile environment theory was not even recognized by the Supreme Court until twenty-two years after the Civil Rights Act in *Meritor Savings*,²⁵ a 1986 Title VII case; and the theory did not make it into the Court's Title IX jurisprudence until ten years later in *Franklin* in 1996.²⁶ The theory would not be extended to peer-on-peer student harassment until *Davis v. Monroe* in 1999.²⁷ Even so, the Court has been comfortable finding such intent in the original enactment of Title VII and Title IX.²⁸

III. THE FAILURE TO CONFORM TO GENDER STEREOTYPES

A much more obvious and serious logical fallacy occurs in courts' contortions to find discrimination on the basis of failure to meet gender stereotypes while denying that Title VII and Title IX apply to discrimination on the basis of sexual orientation.²⁹ Splitting sexual

973 (D. Kan. 2005) (holding that gender stereotyping applies to student-on-student harassment under Title IX).

25. *Vinson*, 477 U.S. at 66-67 (“[C]ourts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).

26. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

Id. (quoting *Vinson*, 477 U.S. at 64).

27. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (concluding “that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of ‘discrimination’ actionable under the statute”).

28. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998).

[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the ‘terms’ or ‘conditions’ of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id.

29. Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 744 (2010). As Professor McGinley explains,

[i]t is possible, as a theoretical matter, to distinguish between discrimination based on sexual orientation and discrimination based on gender identity and expression The cases demonstrate that it is nearly impossible to distinguish between sexual stereotyping discrimination and sexual orientation discrimination because the means used to discriminate or harass are virtually identical, and even the harassers are

orientation from failure to conform to gender expectations ignores the fact that girls are expected to be sexually attracted to boys and vice versa, that heterosexual attraction is assumed by virtually everyone at a child's birth. If instead the child later identifies as gay, she will unquestionably be living in a manner contrary to society's general assumptions about men and women. Therefore, nothing could be more contrary to stereotypical notions of gender than sexual desire for one's own sex.³⁰

If Title IX prohibits discrimination based upon failure to fulfill gender expectations, its prohibition must logically extend to harassment for failure to fulfill the expectation of heterosexual orientation. Courts, however, routinely accept the notion that somehow sexual orientation is not a part of gender expectations. That notion requires intellectual and semantic acrobatics only a law professor could love.

The gender stereotype theory found its genesis in the Supreme Court's *Price Waterhouse* decision, in which a female employee was denied a promotion because she did not satisfy management's notions of femininity.³¹ Although Amy Hopkins was praised for her integrity, creativity, and hard work, she was denied a promotion to partner in part because she could be "abrasive" and "macho" in her dealings with other employees.³² Hopkins was advised that she should dress in a more feminine manner and take a charm school course in order to be more

likely unaware of their exact motivations.

Id.

30. William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 536-37 (2011) (The Sixth Circuit, in *Vickers v. Fairfield Medical Center*, "announced that 'all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices' and therefore, 'recognition of [the plaintiff's] claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.'").

[M]en are socially expected to be physically attracted to women, and women to men. But gay men and lesbian women, because of their gender nonconforming affectional choices, do not conform to the stereotypical norms of how men and women should associate themselves intimately. And discrimination or harassment based on their gender nonconforming behavior is impermissible irrespective of the cause of the behavior, whether it be gender expression or affectional preferences Although discrimination or harassment against gay men and lesbian women's nonconforming affectional preference is a natural extension of discrimination on the basis of gender stereotypes, courts have sidestepped the issue either by recharacterizing claims or by limiting the gender-stereotyping framework to effeminate men and masculine women, regardless of their sexual orientations.

Id.

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

32. *Id.* at 235.

“ladylike.”³³ The Court concluded that Price Waterhouse management had impermissibly based its decision upon stereotypical notions of femininity in violation of Title VII.³⁴

Courts latched onto the *Price Waterhouse* logic to conclude that when, for example, males were harassed for behaving in a “feminine” manner, they were being singled out for harassment because of sex in the same way Amy Hopkins had been punished for not conforming to stereotypical gender expectations.

The Eighth Circuit’s explanation in *Schmedding*³⁵ is typical of the courts’ use of the Price Waterhouse logic to get at harassment with a sexual orientation component. The Eighth Circuit begins by pointing out that the complaint referred to the plaintiff having been taunted for being perceived to be homosexual and that such allegations could be confusing to the district court because they suggest the harassment was based upon the plaintiff’s sexual orientation.³⁶ The plaintiff, however, successfully countered that the point of the allegations was not that the perceived homosexuality inspired the harassment but that the anti-gay comments were designed to denigrate his masculinity.³⁷ The court concluded that

[a]lthough Schmedding’s use of the phrase “perceived sexual preference” may have been somewhat misleading . . . in light of the confusion over the meaning of that phrase, and Schmedding’s willingness to amend the complaint so as to delete it, the best recourse is to remand the case to the district court with instructions that plaintiff be allowed to amend his complaint and proceed with the case.³⁸

In other words, Schmedding’s lawyer fell into a pleading trap: by truthfully describing the motivation for the harassment as hostility to Schmedding’s perceived sexual orientation, the complaint very nearly failed under Title IX.³⁹ Some fast-talking about “confusing” phrasing

33. *Id.* at 256.

34. *Id.* at 258.

35. *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864-65 (8th Cir. 1999).

36. *Id.*

37. *Id.*

38. *Id.* at 865.

39. *Id.* See also Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment As Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 212 (2005) (noting that dismissing claims of sexual orientation discrimination because the complaint did not plead discrimination on the basis of gender stereotyping “highlight[s] both the pleading traps created by disaggregating the two concepts and the gap in the law created by lack of coverage for sexual orientation. Neither court reached the merits of the sex-

and “an effort to debase [Schmedding’s] masculinity” through false accusations of homosexuality saved the day.⁴⁰ So long as the harassment could be characterized, however implausibly, as based on something other than sexual orientation, the complaint could survive. Schmedding’s lawyer, of course, had to amend the complaint to remove the confusion.

Rather than aiding in the search for the truth, this sort of legal fiction obscures reality in order to align the pleadings and the fact finding with a bizarre notion of gender stereotyping.⁴¹ It demands that everyone in the litigation suspend disbelief and pretend that effeminate behavior in men is about gender, but homosexual orientation is not. The court’s logic ignores the elephant in the room and forces the plaintiff to do the same if he wishes to proceed with his case.

This same legal fiction has bled into Title IX jurisprudence and forces plaintiffs to engage in the same double talk to find a remedy when school officials have allowed other students to torment those plaintiffs because of their sexual orientation. In *Montgomery*, for example, the court reasoned that “to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, [the] claims are not actionable and must be dismissed.”⁴² The court, however, “[found] important” the fact that plaintiff’s peers had begun harassing him as early as kindergarten.⁴³

stereotyping claim because the plaintiffs had failed to include it in their original arguments.”).

40. *Schmedding*, 187 F.3d at 865.

41. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., dissenting) (noting the absurdity of the fiction stating: “[t]o impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true—effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism. To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.”).

42. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

43. *Id.* The court reasoned that “it is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be ‘homosexual’ or ‘heterosexual.’” *Id.* Rather, the court found it “much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.”

As in *Schmedding*, the *Montgomery* court was forced to find a way around the elephant in the room in order to find a viable cause of action. The harassment in each case was fueled by animus toward homosexual orientations, but the harassment had to be artificially characterized otherwise, although nothing about the acts had changed at all. Perhaps, in fact, it would be more accurate to say neither court finds a way around the elephant; each paints it a new color and calls it a different animal.

The argument could be made, of course, that had the plaintiffs been “men’s men” the distinction would hold water. The problem with that reasoning is that it requires the belief that a homosexual orientation is consistent with stereotypical notions of masculinity. It requires the belief that exhibiting effeminate characteristics is not what men are expected to do, but that having sex with other men is what “real men” are expected to do, as imagined by society. If that were true, James Bond would seduce male agents and leave them gazing lovingly at him as he disappears out the door to dispatch an international villain.

Sexual orientation harassment should have been swept into Title VII and Title IX prohibitions as an unavoidable consequence of the *Price Waterhouse* decision. The *Price Waterhouse* Court concluded that, while Congress had never considered the question that Amy Hopkins’s case raised, Congress intended discrimination based on sex to have a broad enough meaning to cover gender stereotyping.⁴⁴ Once the Court accepted that premise, the question about sexual orientation was answered. Congress undoubtedly did not consider the question of sexual orientation when passing either Title VII or Title IX, but a proscription against harassment based upon sexual orientation is at least as plausible as an implied prohibition against harassment based upon a failure to conform to gender stereotypes.

None of this is to say that the gender stereotyping theory has no place. Under the right facts, it makes perfect sense. In *Theno*, for example, Dylan Theno’s abusers did not believe he was gay, even though they sometimes used anti-gay epithets against him.⁴⁵ The court rightly concluded that “plaintiff was harassed because he failed to satisfy his peers’ stereotyped expectations for his gender because the primary objective of plaintiff’s harassers appears to have been to disparage his

Id. For these reasons, the court concluded that plaintiff’s complaint “plead facts that would support a claim of harassment based on the perception that he did not fit his peers’ stereotypes of masculinity.” *Id.*

44. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-42 (1989).

45. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 964 (D. Kan. 2005).

perceived lack of masculinity.”⁴⁶

The court’s logic is unassailable under these facts; it recognizes Dylan Theno’s punishment by his peers for his failing to conform to gender stereotypes just as Amy Hopkins was punished for an alleged lack of femininity. Title IX should be interpreted to apply in such a case, because the harassment is unquestionably about sex. The point, however, is that harassment based upon an anti-gay animus is as much about gender stereotyping as is harassment based upon a rumor about masturbation. Strikingly, in fact, the *Theno* court compares the accusations of masturbation to labeling a child as a homosexual.⁴⁷ In both cases, the harassment is based upon the child’s failure “to meet his peers’ stereotyped expectations of masculinity.”

Every child in the country knows that calling an adolescent boy a faggot is perhaps the most effective and popular way to call his manhood into question. Only courts seem unclear on the notion. As the reasoning in *Theno* reveals, of course, the courts know it as well as the children.

Once the statute was interpreted broadly to include causes of action no one in Congress would have imagined in 1964 or 1972, nothing in the language of the statute requires that it be interpreted to exclude harassment based upon sexual orientation. Nevertheless, courts have held fast to that exclusion, even in the face of *Oncale*, which swept same-sex harassment into Title VII’s prohibitions.⁴⁸ To justify that exclusion, courts point to Congress’s failure to amend Title VII to explicitly include sexual orientation.⁴⁹

IV. FAILURE TO AMEND TITLE VII

The failed attempts to add sexual orientation to Title VII should not be the indicator of congressional intent because it is the intent of the Congress that enacted the statutes that is at issue, and nothing indicates a positive intent to exclude anti-gay discrimination. The view of a future

46. *Id.* at 965 (citations omitted). The court also concluded that plaintiff’s harassers’ crude drawings depicting him as a masturbator, “when combined with arguably related crude name-calling, reflects that plaintiff’s harassers believed that he did not conform to male stereotypes by *not* engaging in such behavior at school, i.e., that he did not act as a man should act.” *Id.* at 972. Based on these findings, the court held that the plaintiff had raised a genuine issue of material fact about whether his harassment was based on sex. *Id.*

47. *Id.* at 972.

48. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

49. *See, e.g.,* *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). (“Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret ‘sex’ to include sexual orientation.”) *Id.* (citations omitted).

Congress is relevant only if it takes positive action to amend the statute, not if it fails to do so.⁵⁰

The failure to amend may leave the interpretation intact; but until the Supreme Court speaks, the lower courts are not bound to perpetuate that interpretation and should not require Congress to prove that it does not wish to leave gays unprotected while their heterosexual peers are protected against precisely the same acts.

V. ORIGINAL INTENT OF THE 1972 CONGRESS

In addition, it is perverse to imagine that a Congress intending to protect children against sex discrimination in educational programs would have reached such patently cruel and inconsistent conclusions. The nation may have been largely unwilling to approve of homosexuality in 1972, but it seems unlikely that the typical member of Congress would have deliberately decided to protect heterosexual students from harassment and abuse and, at the same time, refused to prevent that abuse of students who were gay. In other words, it is unlikely that members of Congress would have believed any child should go to school to be beaten and abused by his peers. Some members may have been so callous, but assuming a majority of legislators would countenance such cruelty attributes that callousness to the likes of Edward Kennedy, Shirley Chisholm, and George McGovern. It requires the assumption that Congress would deliberately decide that if a child could demonstrate he was being harassed because he failed to conform to stereotypical notions of masculinity, he could demonstrate that he was suffering discrimination on the basis of sex. If he could demonstrate only that he was being harassed because he was gay, he could find no remedy under Title IX.

Let's review that logic. Step 1: a boy who is behaving in an effeminate manner is failing to conform to stereotypical notions of masculinity. Step 2: a boy who is engaging in sexual acts with another

50. Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GENDER 209, 243-44 (2012). Professor Schwartz enumerates the problems of inferring legislative intent based on legislative inaction as follows:

First, Congress is a discontinuous decision maker, and the intent that should be relevant (if any) is the intent of the Congress that actually enacted the legislation. Second, Congress is a collective decision maker, making it very difficult to determine exactly what the intent of Congress is when it fails to do something. Third, the structure of Congress makes it far more likely that something will not happen than that it will, making it hard to infer affirmative intent from Congress's failure to pass a proposed statute.

Id.

boy is not failing to conform to stereotypical notions of masculinity. Step 3: Congress intended to protect the first boy from persecution because no child should be picked on for being effeminate. Step 4: Congress did not intend to protect the second boy because any boy who identifies as gay deserves what he gets. Step 5: Congress never actually thought those thoughts; but given the opportunity, it would have.

The logic ignores another inescapable contradiction. Anyone who would have allowed a child to be harassed for being gay would also have allowed the child to be harassed for being effeminate. Anyone who would act to stop a child from being abused because he was effeminate would act to stop the same abuse if it were based upon his being gay. Therefore, once the Court decided that a majority of Congress would not tolerate harassment for effeminate characteristics, it effectively said that the same majority would not tolerate harassment for being gay.

VI. GENDER-BASED NATURE OF HARASSMENT BASED ON SEXUAL ORIENTATION

It is inescapable that harassment on the basis of sexual orientation is inextricably tied to gender. In other words, discrimination on the basis of sexual orientation is actually relational discrimination, a theory of discrimination that has long been accepted in Title VII jurisprudence in the context of race and national origin.⁵¹

Similarly, in the context of sexual orientation, when a female is bullied because she is a lesbian, she is being targeted because of “her sex (female) in relation to her sexual relationships with others (female). Therefore, her claim for discrimination on the basis of her sexual orientation is necessarily a claim that she is being discriminated against on the basis of her sex when viewed in relation to others.”⁵² A structurally consistent interpretation of Title VII would compel applying the relational discrimination theory to the interpretation of “sex,” given that “sex” is listed as parallel to these characteristics in Title VII’s

51. *Id.* at 211. Professor Schwartz explains that relational discrimination cases interpret “Title VII’s otherwise ambiguous language protecting against discrimination ‘because of such individual’s [protected characteristic]’ as a robust phrase that takes into account human interactions and relationships, as opposed to a narrow understanding limited to an individual’s protected characteristic viewed in isolation.” *Id.* In the context of race and national origin, relational discrimination occurs “any time an employer discriminates against an individual because of his or her interracial relationship; that employer is necessarily considering the race of the individual employee, viewed relationally to the other person in the relationship, in making that determination.” *Id.*

52. *Id.* at 248.

relevant statutory language, which prohibits discrimination “because of such individual’s race, color, religion, sex or national origin.”⁵³

In the same way, Title IX’s language, “based on sex,” should be understood from the standpoint of relational discrimination. When a girl is bullied because she is a lesbian, she being bullied because her relationships with other members of her gender are unacceptable, in the same way a white student’s relationship with a black student might be unacceptable and a cause for harassment.⁵⁴ No one would doubt the harassment directed at the latter couple was harassment based on race, because the animus is directed at the child’s willingness to engage in an interracial relationship, a relationship the harasser believes is contrary to proper racial behavior; nor should anyone doubt that harassment of a lesbian couple is harassment based on sex, because the animus is directed at the girl’s willingness to engage in a same-gender relationship, a relationship the harasser believes is contrary to proper behavior by the female gender.⁵⁵

In addition, harassment based upon sexual orientation is also inevitably based upon gender because in the real world harassment based upon sexual orientation is virtually always harassment based upon LGBT orientation. While heterosexual students are certainly sexually harassed, they are seldom harassed for being heterosexual. Only when a student is not heterosexual is she vulnerable to harassment because of her sexual orientation. Therefore, it would be more accurate to refer to such harassment as what it is—harassment on the basis of a sexual orientation that is inconsistent with the target’s gender.⁵⁶

Many would object that a homosexual orientation is not inconsistent with a person’s gender, but the reality is that most consider it to be so, and therein lies the motivation for harassment. Most people believe that each gender should be attracted to the other; were that not the case, harassment based upon sexual orientation would not exist. When a person identifies as LGBT, that person has defied accepted gender roles, and any harassment based upon that defiance is premised on the person’s gender and the expected sexual orientation of that gender.

Under both *Price Waterhouse’s* gender stereotype theory and *Ray’s* sexual object theory, harassment based upon sexual orientation is harassment based upon gender. But for the target’s gender, the

53. *Id.* at 247.

54. *Id.* at 249.

55. *See id.*

56. *Id.* at 248.

harassment would not have occurred; the harassment is, therefore, entirely about gender, whether it is directed at a person who fails to conform to gender expectations or at a person who is being defined entirely in terms of her sexuality because that sexuality diverges from what is typical of the person's gender. Viewing it otherwise requires ignoring what everyone understands to be true not only about how society views alternative sexual orientations, but also about why those orientations are targeted for harassment.

CONCLUSION

The legal fiction that has driven Title IX jurisprudence regarding harassment based on sexual orientation is more than simply illogical and blind: it is cruel. Its effects are real for children who are subject to brutalization by their peers and abandonment by their elders. Whatever the niceties of statutory interpretations that exclude protection for these children, those niceties cannot justify the perverse choice that compels adults to pretend sexual orientation is not about sex while every adolescent bully and every LGBT target know better.

Federal courts should boldly and unapologetically slap that fiction down. If Congress disagrees, let it say so plainly; let it proclaim before the nation's voters that LGBT school children deserve no protection from peer-on-peer abuse in the nation's schools. Until then, the courts should assume that Congress has always been made up of adults who know at least as much about sex as the nation's children. If Congress turns out to be less informed than adolescents and no more compassionate than the worst of school yard bullies, courts can be forgiven for having expected better from the nation's elected leaders.