

# FABLES OF THE DECONSTRUCTION: THE PRACTICAL FAILURES OF GAY AND LESBIAN THEORY IN THE REALM OF EMPLOYMENT DISCRIMINATION

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*"Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justice's own view of sound social policy."*

*- Thurgood Marshall<sup>2</sup>*

## I. INTRODUCTION

The oppression which homosexuals and bisexuals have suffered in our society is unquestionable. Employment discrimination is one of the most pervasive and undesirable vehicles for this oppression. By denying individuals jobs, promotions or benefits based on their sexual orientation, American employers deny these individuals the full opportunity to pursue their chosen profession in a manner which the heterosexual majority takes for granted.

The seemingly obvious starting point for attacking this discrimination is Title VII of the Civil Rights Act of 1964.<sup>3</sup> Title VII prohibits certain forms of employment discrimination and, unlike the Constitution, applies to both private and public employers.<sup>4</sup> Because Title VII does not explicitly prohibit discrimination based on sexual orientation, the general strategy of gay rights advocates has been to argue that sexual orientation discrimination is a form of sex discrimination, a practice that Title VII does prohibit.<sup>5</sup>

Regardless of the social imperative one may feel to eradicate sexual orientation discrimination at all costs, the solution must be achieved through a reasoned statutory interpretation. As the above quote from one of the most liberal judges to sit on the Supreme Court indicates, our legal system mandates that broad social policy be dictated by Congress, not the courts.<sup>6</sup> While the court should be free to consider the policy ramifications of its decisions, it must do so within a

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1. Law Clerk, Judge Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit; J.D. 1997, B.A. 1993, University of Pittsburgh. I am extremely grateful to Martha Chamallas for her valuable insight, criticism and advice in the preparation of this Article. I would also like to thank Kathy Chess, Jodi Farschman, Gloria Song, Terri Stadmueller, and Aimee Widor for their comments and Theresa Schroeder for her constant support.

2. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 688 (1980) (Marshall, J., dissenting).

3. 42 U.S.C. § 2000e (1994).

4. *Id.*

5. See 42 U.S.C. § 2000e-2(a) (1994). This argument originated in the field of constitutional law, where the theorists hope to avail themselves of the heightened scrutiny that sex-based classifications receive under the Equal Protection Clause of the 14th amendment. *Infra*, Part III.

6. *Industrial Union Dep't*, 448 U.S. at 688.

limited framework.

This Article attacks the ability of current gay and lesbian legal theory to address employment discrimination in the private sector.<sup>7</sup> This article argues that Title VII, as written, does not satisfy the goal of workplace equality for homosexuals and bisexuals, either under its current conservative judicial interpretation or through more liberal proposals, which equate sexual orientation discrimination with sex discrimination.<sup>8</sup> The Article concludes that meaningful workplace equality for homosexuals can be achieved only by amending Title VII to prohibit discrimination based on sexual orientation.<sup>9</sup>

Part II of this Article briefly summarizes case law interpreting Title VII as not prohibiting sexual orientation discrimination. While some of the premises on which courts have relied in rejecting homosexuals' claims are baseless, the rejection of these premises does not mandate a contrary outcome. Rather, it narrows the debate to focus on the plain language of Title VII, specifically, the meaning of the term "sex."<sup>10</sup> Part III catalogues and summarizes the numerous recent theories which argue that sexual orientation discrimination is a form of sex discrimination. Part IV argues that while many of these theories provide a solid argument for Constitutional protection, they do not provide protection for homosexuals under Title VII. These theories fail to provide a model by which all homosexuals and bisexuals are protected. Part V concludes that statutory amendment is the only viable alternative.

## II. FAILURE IN THE COURTS: JUDICIAL REJECTION OF SEXUAL ORIENTATION DISCRIMINATION CLAIMS

Federal courts have generally been unwilling to provide protection from sexual orientation discrimination under Title VII.<sup>11</sup> To date, no federal court has recognized a cause of action for an individual who was refused a job, refused a promotion, or fired as a result of his or her sexual orientation. Homosexuals and bisexuals are the largest

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7. See *infra* Part II.

8. See *infra* Parts III & IV.

9. See *infra* Part V.

10. Title VII of the Civil Rights Act of 1964 provides, in relevant part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a) (1994) (emphasis added).

11. It is important to clarify at the outset that what I refer to throughout this article as "sexual orientation discrimination" does not include "same-sex harassment." Same-sex harassment clearly is prohibited by Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 66 U.S.L.W. 4172 (U.S. Mar. 4, 1998). However, same-sex harassment can occur regardless of the victim's sexual orientation and therefore is not "sexual orientation discrimination."

class of individuals who have been denied recovery by a federal judiciary which refuses to extend the definition of sex beyond traditional male and female gender classifications.<sup>12</sup>

This section examines the numerous explanations that courts have employed in refusing to expand the definition of sex discrimination under Title VII, particularly with regard to homosexuals. These explanations focus on statutory construction through the use of legislative history<sup>13</sup> and the "plain meaning" rule.<sup>14</sup> In addition to these traditional judicial tools, the courts have rejected all theories put forth by plaintiffs, including the "disparate impact" test<sup>15</sup> and the "but-for" test.<sup>16</sup>

After examining the judicially-offered explanations, I argue that most of these explanations are unfounded and that only a facial interpretation of "sex" remains as a viable reason for denying coverage under Title VII.

### *A. Judicial Explanations for Denying Recovery*

#### *1. Legislative Intent*

The most blatant rejection of Title VII protection for homosexuals was offered in *DeSantis v. Pacific Telephone & Telegraph Co.*<sup>17</sup> In *DeSantis*, four men and two women challenged a variety of adverse employment actions, including firing, failure to hire and harassment, which they alleged were based on their homosexuality.<sup>18</sup>

In denying the plaintiffs' cause of action, the Ninth Circuit first asserted that Congressional intent precluded a finding that Title VII protected homosexuals.<sup>19</sup> For this conclusion, the court relied on its decision just two years earlier in *Holloway v. Arthur Andersen*, which had denied Title VII protection to a transsexual.<sup>20</sup> There, the court

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12. Title VII coverage also has been denied to transsexuals. See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). Title VII also does not apply to men who were considered "effeminate." See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

13. See *infra* Part II.A.1.

14. See *infra* Part II.A.2.

15. See *infra* Part II.A.3.

16. See *infra* Part II.A.4.

17. 608 F.2d 328 (9th Cir. 1979).

18. *Id.* at 328-29.

19. *Id.* at 329. The court also notes that although several bills have been introduced to expand the Civil Rights Act to specifically include "sexual preference," none have become law. *Id.*

20. *Holloway*, 566 F.2d at 664.

argued that Title VII's prohibition of sex discrimination was meant only to protect women as a class.<sup>21</sup> The *Holloway* court also claimed to find support for its decision in the legislative history.<sup>22</sup> The court reasoned that because Congress rejected proposals to amend Title VII to include "sexual preference" it was compelled to keep a narrow definition of "sex."<sup>23</sup>

## 2. Plain Meaning

The second explanation used by the *DeSantis* court was that the plain meaning of "sex" in the statute prohibited a finding that homosexuals were protected.<sup>24</sup> The court noted that "words in a statute are to be given their ordinary meaning,"<sup>25</sup> and that on this basis, even the EEOC would deny protection to homosexuals.<sup>26</sup> This explanation is the one most often cited by courts which deny relief.<sup>27</sup> Interestingly enough, these courts generally fail to describe what exactly the ordinary meaning of "sex" is. Only the *Holloway* court has attempted to elaborate.<sup>28</sup>

## 3. Inapplicability of the Disparate Impact Theory

While most courts have adhered to the simple statutory interpretation justifications, the plaintiffs in *DeSantis* forced the court to address three additional theories of recovery. The first was recovery based on disparate impact, a judicially-crafted theory which the Supreme Court first recognized in the context of race discrimination.<sup>29</sup> The plaintiffs

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21. *Id.* at 662 (noting that the previous case agreed that "Title VII sex discrimination provisions were intended to place women on an equal footing with men"); see also *Sommers*, 667 F.2d at 750 ("[i]t is, however, generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunity for women").

22. *Holloway*, 566 F.2d at 662 (concluding an "individual's decision to undergo sex change surgery does not bring that individual . . . within the scope of Title VII"); see also *DeSantis*, 608 F.2d at 329.

23. *Holloway*, 566 F.2d at 662.

24. *DeSantis*, 608 F.2d at 329.

25. *Id.*

26. *Id.* at 330 n.3 (citing EEOC Dec. No. 76-75, (1976) Emp. Prac. Guide (CCH) ¶ 6495, at 4266) (noting that the EEOC definition limited protection to discrimination based on a person's "gender," not their "sexual practices").

27. See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise").

28. *Holloway*, 566 F.2d at 662 (noting that in enacting the statute, Congress considered only traditional ideas of sex).

29. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The *DeSantis* plaintiffs quoted a passage from *Griggs* which seemed to support an application in this context: "What is required by Congress (under Title VII) is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

claimed that there was a higher incidence of homosexuality in the male population than the female population, and that male homosexuals had a greater chance of being "discovered" by their employers than their female counterparts.<sup>30</sup> As a result, the plaintiffs argued, an explicit practice of sexual orientation discrimination was an invidious barrier to employment opportunities for men which could be challenged under the disparate impact model.<sup>31</sup>

Without denying any of the plaintiffs' assertions, the court defiantly refused to employ the disparate impact model as a theory of recovery. The court held that to allow recovery on this basis would amount to little more than "bootstrapping."<sup>32</sup> The court felt this bootstrapping would be a clear abrogation of Congressional intent and refused to impose a contrary judicial construction on the statute.<sup>33</sup>

#### 4. The "Formal" Argument

The next judicial explanation for denying recovery addresses what I refer to throughout this article as the formal, or "but-for," argument. The *DeSantis* plaintiffs argued that in taking adverse action against a male employee who had a male sexual partner, the employer treated him differently than it would treat a similarly-situated woman.<sup>34</sup> The court rejected this argument as nothing but another attempt to bootstrap homosexuals into protected status. The court stated that, in fact, men and women were treated exactly the same: either a man or a woman who had a same-sex sex partner would be subject to the same adverse employment action.<sup>35</sup>

The plaintiffs also argued that sexual orientation discrimination constituted impermissible discrimination against an employee based on the identity of his or her friends.<sup>36</sup> The court also rejected this ar-

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impermissible classifications." *DeSantis*, 608 F.2d at 330 (quoting *Griggs*, 401 U.S. at 431).

30. *DeSantis*, 608 F.2d at 330.

31. *Id.* It is undisputed that men, as a class, are protected under Title VII. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (allowing a sex discrimination claim by men for the denial of spousal health benefits); see also *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 279-80 (1976) ("Congress did not limit Title VII protections to only women or members of a minority group.").

32. *DeSantis*, 608 F.2d at 330. The court stated that even if the plaintiffs could show a disparate impact, it would not allow recovery: "Assuming that appellants can otherwise satisfy the requirement of *Griggs*, we do not believe that *Griggs* can be applied to extend Title VII protection to homosexuals." *Id.*

33. *Id.* at 330-31.

34. *Id.* at 331. That is, a female employee with a male sex partner would not be subject to similar adverse employment action.

35. *Id.*

36. *Id.* This argument was based on a similar position taken by the EEOC in the context of race discrimination: that discrimination against an employee based on the race of that em-

gument, pointing out that employees were free to have any friends they chose, whether male or female. Rather, it was the identity of the employees' sex partners which the employer found objectionable, and which resulted in the adverse employment action.<sup>37</sup>

### 5. *Effeminacy: Not a Protected Trait*

The final argument rejected in *DeSantis* was that at least one of the plaintiffs had been discriminated against based on his effeminate appearance.<sup>38</sup> The plaintiff claimed that he had been fired for wearing an earring to school, and that, in doing so, the employer had impermissibly stereotyped him in violation of Title VII.<sup>39</sup> The court rejected this theory, in light of its earlier interpretation of congressional intent and its narrow construction of the word "sex" in the statute.<sup>40</sup> The court stated that just as the prohibition against "sex" discrimination did not extend to discrimination based on sexual orientation, it also did not encompass discrimination based on an employee's effeminacy.<sup>41</sup>

### B. *Examining the Explanations*

Most of the judicial explanations for denying protection against sexual orientation discrimination under Title VII are easily assailable. Although these explanations may be unsound, their rejection does not provide affirmative support for the plaintiffs' claims of sexual orientation discrimination. In the end, both sides of the debate must confront the pivotal question of the meaning of "sex" in the statute.

The weakest explanation offered by the courts for denying coverage is the reliance on legislative history. As a general rule, reliance on legislative history is, at best, a questionable means of statutory interpretation.<sup>42</sup> This is particularly true in regard to subsequent legis-

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ployee's friends was a violation of Title VII. *Id.* (citing EEOC Dec. No. 71-1902, (1972) Empl. Prac. Guide (CCH) ¶ 6281; EEOC Dec. No. 71-969, (1972) Empl. Prac. Guide (CCH) ¶ 6193).

37. *DeSantis*, 608 F.2d at 331.

38. *Id.*

39. *Id.*

40. *Id.* at 331-32; see also *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (denying recovery to a man who claimed that he was denied employment based on his "effeminate" characteristics).

41. *DeSantis*, 608 F.2d at 332.

42. While legislative history is not totally irrelevant, over-reliance on it can be dangerous. See RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 203 (2d ed. 1996). Judge Aldisert states:

The difficulty lies in ascertaining what the legislature *intended* as distinguished from what is *said*. The task is somewhat akin to pinpointing the intent of a testator or the intent of disputing parties to a contract — except that when we seek to ascertain the intent of over 500 members of Congress, it is, as one judge once said in another context,

lative history, that is, the courts' reliance on failure to amend the statute to show that the statute did not cover the conduct in question in the first instance.<sup>43</sup> More importantly, the reliance on legislative history in the context of Title VII's sex discrimination provision is particularly misplaced. The prohibition against "sex" discrimination was added in a last minute attempt to defeat the bill.<sup>44</sup> Somewhat mysteriously, the courts that have denied an expansive coverage of the sex discrimination prohibition have relied on this fact to prevent coverage.<sup>45</sup> Yet on the basis of this disingenuous legislative history alone, it is hard to claim that Congress had any true intent as to the scope of coverage. While the legislative history explanation is flawed, its rejection does not provide a vehicle for granting coverage to homosexuals. All that can be said is that the legislative history is not instructive and can be of no guidance in deciding the ultimate question of whether Title VII prohibits sexual orientation discrimination.

The *DeSantis* court's rejection of the male plaintiffs' disparate impact argument is also unpersuasive. The court rejected this argument even though it was willing to assume that all the requirements of a disparate impact claim had been satisfied.<sup>46</sup> The court provided no real support for its bootstrapping argument. Instead, the court appears merely to have been engaged in an unreasoned refusal to provide the plaintiffs with any means for recovery. The bootstrapping argument is particularly weak in light of the fact that the disparate impact model is meant to provide a separate means of recovery, independent of the disparate treatment theory.<sup>47</sup> While the disparate

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'like nailing a jellyfish to the wall.'

*Id.* (quoting *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 444 (S.D. Ga. 1976)).

The Supreme Court recently "has been much more willing to ignore legislative history, has been slightly more reluctant to deviate from the apparent meaning of the statutory text, and has relied more heavily than before on structural arguments and canons of statutory interpretation." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990). For a particularly illustrative example of the pitfalls in relying on legislative history, see then-Judge Scalia's concurrence in *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 6 (D.C. Cir. 1985). Scalia makes his point by quoting from a floor debate between two senators in which one, the chairman of the committee from which the proposed bill originated, had no knowledge of who authored the committee report, had not read the report himself, and was unfamiliar with its contents. *Id.* at 7 n.1.

43. See *United States v. Price*, 361 U.S. 304, 313 (1960) (stating that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

44. 110 CONG. REC. 2577-84 (1964).

45. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (finding that the legislative history does not support a plaintiff's claim that Title VII was intended to prohibit sexual orientation discrimination). While this may be true, it can hardly be argued that the (lack of) legislative history is an explicit rejection of these plaintiffs' claims.

46. See *supra* note 15 and accompanying text.

47. See, e.g., *Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 112 (3d Cir. 1996) (describing the difference between the disparate treatment and disparate impact theo-



treatment model focuses on intentionally discriminatory employment practices, disparate impact focuses on subtler discrimination—practices which are facially neutral but discriminatory in application.<sup>48</sup> It is for this reason that the bootstrapping argument loses its appeal. By providing a separate means for recovery, the disparate impact model functions as a means for providing recovery where intentional disparate treatment cannot be proven. If courts were to dismiss all disparate impact claims as “bootstrapping,” when disparate treatment could not be shown, the disparate impact model would be of little or no use to plaintiffs in any Title VII case.

While the disparate impact theory was embarrassingly disposed of in *DeSantis*, there are a number of reasons why recovery under that theory would be unlikely. At a practical level, it would be particularly difficult for the plaintiffs to show a disparate incidence of homosexuality between men and women.<sup>49</sup> It would also lead to the anomalous result that Title VII provides protection for gay men, but not for lesbians.<sup>50</sup> In addition, disparate impact claims might run into the “mutable characteristics” roadblock, a mechanism by which courts have held that disparate impact is not available to challenge policies which implicate choice.<sup>51</sup> Finally, it has been argued by some commentators

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ries); *Lynch v. Freeman*, 817 F.2d 380, 382 (6th Cir. 1987) (stating, “Title VII . . . permits a plaintiff to base a claim of employment discrimination on two separate theories—disparate treatment and disparate impact”).

48. Paul N. Cox, *On a Blinded Impact Model: A Response*, 46 DEPAUL L. REV. 265, 279-80 (1997).

49. The fact that many homosexuals keep their sexual orientation a secret makes it almost impossible to compile the statistical evidence necessary to maintain a disparate impact claim. While one study indicated that 2.7% of men and 1.3% of women reported participation in same-sex activity, other studies have estimated the incidence of homosexuality among the male population at anywhere from 0.3% to 6.2%. Alan N. Yount, *Don't Ask, Don't Tell: The Same Old Policy in a New Uniform?*, 12 J. CONTEMP. HEALTH L. & POL'Y 215, 220 (1995). Without any concrete numbers to verify the percentage of gay men and lesbians in the general population, not to mention an employer's work force, it is hard to imagine how a group's adverse impact could be shown. But see Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 58-60 (1995) (maintaining that gay men could support a disparate impact claim for sex discrimination).

50. Admittedly, if men could establish a disparate impact claim, women in some jobs, if not most, would benefit. When a disparate impact can be shown, the plaintiff is entitled to an injunction against the use of the prohibited criterion. See 42 U.S.C. § 2000e-5(g)(1) (1994). Therefore, lesbians would benefit from an injunction which prohibited an employer from taking adverse action against homosexuals. The problem with this result is that lesbians would only be protected when they worked with gay men who were able (and willing) to bring the claim, almost certainly denying relief in many instances. Indeed, this “incomplete coverage” problem plagues all the theories proposing Title VII protection against sexual orientation discrimination. See also *infra* Part IV.

51. Language discrimination cases are the best example of this type of reasoning. Courts have denied national origin discrimination claims by bilingual groups challenging workplace “English-only” rules on the basis that compliance with the rule was a matter of “choice.” See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). Under this line of reasoning, employers presumably could discriminate based on

that disparate impact should not be available to men.<sup>52</sup> Thus, as in the case of legislative history, this explanation lends support to neither side of the debate.

The three remaining explanations—plain meaning, the formal argument, and the rejection of effeminacy—can be treated together because they all employ a “traditional” definition of “sex.” The traditional definition of sex refers to the biological distinction between males and females. As one court stated, “[t]he phrase in Title VII prohibiting discrimination based on sex . . . implies that it is unlawful to discriminate against women because they are women and against men because they are men.”<sup>53</sup> The plain-meaning explanation interprets the “traditional” definition of sex as being clear from the statutory text. Under the formal argument, certain adverse action may not be taken against a man (or woman) that would not be taken against a similarly - situated woman (or man). The effeminacy argument is rejected because it focuses on characteristics other than whether the individual is a man or a woman.<sup>54</sup>

Regardless of whether one ultimately considers these explanations to be persuasive, the traditional meaning of sex which underlies them has defined the debate over whether Title VII can provide a claim for sexual orientation discrimination. Even the arguments, described in Part IV, that a claim should exist do not challenge this traditional definition. The remaining relevant inquiry then becomes: is sexual orientation discrimination a form of discrimination based on “sex” within the meaning of Title VII? It is this question which the remainder of this article attempts to resolve.

### III. THE CASE FOR COVERAGE: THEORIES THAT DISCRIMINATION BASED ON SEXUAL ORIENTATION IS A FORM OF SEX DISCRIMINATION

A wealth of recent scholarship argues that sexual orientation discrimination is sex discrimination. While the judicial rejection of Title

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sexual orientation, because one's sexual orientation is a matter of choice. While the latter assertion is very debatable and well beyond the scope of this Article, it is easy to imagine judges being receptive to the argument. Cf. Craig M. Bradley, *The Right Not To Endorse Gay Rights: A Reply To Sunstein*, 70 IND. L.J. 29, 38 (1994) (arguing that the ability to show that homosexuality is an “immutable” characteristic could improve gay rights advocates' chance for success).

52. See Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 368 (1983) (finding that “[w]hite males, both historically and at present, have not been victimized on the basis of group characteristics. There is thus little need to use disparate impact theory on their behalf . . .”).

53. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

54. See generally 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 divergence of individuals from the gender expectations of their sex).

VII protection against sexual orientation discrimination alone would have justified this work, the movement originated as a response to the Supreme Court's decision in *Bowers v. Hardwick*.<sup>55</sup> *Bowers* held that a Georgia sodomy statute did not violate a homosexual man's right to privacy under the Due Process Clause of the Fourteenth Amendment.<sup>56</sup>

While most contemporary legal articles have some unique aspects, this article groups the theories which they present into three general categories.<sup>57</sup> The first is the feminist approach. This theory argues that sexual orientation discrimination reinforces traditional sex roles and leads to the subordination of women. The second theory is the formal argument. Although the formal argument is nothing more than the "but-for" test, which the courts have seemingly rejected, it has recently been given new life by the Hawaii courts. In addition, this theory is reinforced by an analogy to anti-miscegenation laws, which are no longer constitutionally permissible. Finally, a number of different theories argue that sexual orientation discrimination is based on unfounded stereotypes and categorizations. These theories argue that sexual orientation discrimination is based on unsubstantiated stereotypes of sexual identity, and that the legality of sexual orientation discrimination creates a loophole by which employers may discriminate based on impermissible sex stereotypes.

#### A. *The Feminist Approach*

The feminist approach to sexual orientation discrimination was imported into legal scholarship by Professor Sylvia A. Law in a response to the *Bowers* decision.<sup>58</sup> Although the theory was designed as an argument for constitutional protection and did not address Title VII, it is still quite relevant.<sup>59</sup> First, because the crux of the theory is that sexual orientation discrimination is a form of sex discrimination,<sup>60</sup> it proposes an answer to the ultimate question in this article. Second, many subsequent theorists have relied on Professor Law's work, including those who specifically address Title VII.

The feminist approach begins with the premise that homosexual

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55. 478 U.S. 186 (1986).

56. *Id.* at 189.

57. While I feel I have given an accurate summary of each of the theories discussed in this Part, the length of this Article prevents a full discussion of any one article or theorist.

58. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187. Law's approach is one which is more established in other disciplines.

59. *Id.*

60. *Id.* at 230-31.

conduct is despised because it challenges our culture's traditional gender roles, roles with a hierarchical bias against women.<sup>61</sup> Although this connection is evident to some individuals, the argument merits some explanation for those not familiar with feminist theory.<sup>62</sup>

From the dawn of the republic, societal and institutional forces have created a dichotomous American family.<sup>63</sup> This dichotomy resulted in the subordination of women, and was relatively unchallenged until the early nineteenth century.<sup>64</sup> Professor Law describes the nature of the subordination as follows: "Traditional concepts of gender cast man as strong, woman subservient; man as not responsible for family care, woman as nurturant; man as sexually aggressive, and woman as passive victim, whether virgin or whore. These social meanings ascribed to gender shape our ideas about who we are."<sup>65</sup>

One result of this dichotomy is the economic disempowerment of women. Because of their pre-ordained role as care-givers, the traditional model prevents women from achieving success in the work place, success which a man is rewarded for achieving.<sup>66</sup> Such barriers to employment opportunity are the precise evil that Title VII is de-

61. *Id.* at 196. Professor Law refers to this cultural phenomenon as "heterosexism"—"[t]he pervasive cultural presumption and prescription of heterosexual relationships—and the corresponding silencing and condemnation of homosexual erotic, familial and communitarian relations. . . ." *Id.* at 195. As Catharine MacKinnon argues, "[w]e have had enough of the glorification of this heterosexuality, this erotization of dominance and submission, while woman-centered sexual expression is denied and stigmatized." CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 29 (1987). The feminist approach is based on a similar denial and stigmatization of homosexual sexual expression.

62. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234 (1994) (stating that homosexuals may be stigmatized due to their non-traditional sex roles).

63. See Law, *supra* note 58, at 197-204 (stating that this dichotomy creates a sex-based distinction between those roles which are exclusively male and those which are exclusively female).

64. Law, *supra* note 58, at 197-204. But even in the late nineteenth century, courts were denying women employment opportunities believed to be violations of the women's role, as determined by natural law. See, e.g., *In re the Motion to Admit Miss Lavinia Goodell to the Bar of this Court*, 39 Wis. 232, 245 (1875) ("[A]ll life-long callings of women, inconsistent with [the] radical and sacred duties of their sex . . . are departures from the order of nature; and when voluntary, treason against it").

65. Law, *supra* note 58, at 208.

66. See Law, *supra* note 58, at 208-09. Professor Law illustrates how the traditional model continues, even today, to disadvantage women in the workplace:

Under the normal prevailing arrangements of market and family, the woman pays a price for the warmth, support and legitimacy of [the traditional] family: she subordinates her capacity to achieve and contribute in the public world to the nurturing needs of children, parents and men. Multiple cultural messages, and the material reality of women's second-class position as wage workers, define the search for a husband as the central goal of women's lives. Even today most people believe that a successful marriage demands that the man be older, stronger, smarter, and better paid than the woman.

*Id.*

signed to destroy.<sup>67</sup>

Emphasizing the purpose of subordinating women, Law analogizes the argument to sexual orientation discrimination. Much of the disapproval of homosexual conduct has been attributed to the threat it poses to the perpetuation of male dominance. For example, gay men's participation in homosexual conduct is seen as an abrogation of the dominant role to which men are entitled and expected to uphold.<sup>68</sup> In order to preserve the male - dominant role, our society has created a sub-dichotomy separating heterosexual and homosexual men, punishing the gay man for his deviance from the traditional model.<sup>69</sup>

Although lesbians do not violate the traditional model as egregiously as their male counterparts, the analogy still has a place for them. Lesbianism may not pose a direct threat to male power, because lesbian sexuality does not require individual males to relinquish their dominant role. Nonetheless, lesbians can be seen as in-subordinates who deny men sexual gratification, the only purpose for which female sexuality exists under the traditional model.<sup>70</sup>

By deviating from the traditional model, homosexuals are seen as jeopardizing the integrity and vitality of the traditional family.<sup>71</sup> Because the traditional family is a primary mechanism of female subordination, any deconstruction of its legitimacy is a threat to male supremacy. In this way, the proponents of the feminist approach conclude, sexual orientation discrimination furthers the ultimate goal of sex discrimination: maintenance of the traditional model.

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67. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 272 (1987) (stating that the goal of Title VII is to eliminate discrimination in employment) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)); see also I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1185 (1991) (noting the broad remedial purpose of Title VII).

68. See Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, in *THE AMERICAN MAN* 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980) (noting that gay men are not perceived to be "real men").

69. See *id.* (stating that this sub-dichotomy symbolizes for all of society the rankings of masculinity between those who are powerful - heterosexual men - and those who are not - homosexual men). This sub-dichotomy accounts for a high level of adolescent homophobia, particularly present in males, who realize that homosexuality is viewed as "a metaphor for the failure to live up to the expectations of one's gender." Koppelman, *supra* note 62, at 235.

70. See Koppelman, *supra* note 62, at 236 (explaining that lesbians can be seen as defying traditional sexual models).

71. See Law, *supra* note 58, at 210 (noting that homosexuals who are comfortable and happy with their lives may cause heterosexuals to question whether their own sexuality is inevitable, innate, a matter of personal choice, or "the socially comfortable course of least resistance").

*B. The Formal Argument and the Miscegenation Analogy*

This part will summarize two interrelated theories: the formal argument and the miscegenation analogy. The formal argument presents a doctrinal framework through which sexual orientation discrimination may be recognized as sex discrimination. The analogy to the historic miscegenation prohibition provides policy-based support for the formal argument and reinforces the feminist approach.

The formal argument, as previously stated, is quite simple: If conduct by an employee is the basis for adverse action taken by an employer, and the same conduct if engaged in by a member of the opposite sex would not result in a similar adverse employment action, then the employer is discriminating based on sex.<sup>72</sup> In other words, it is impermissible for an employer to fire a man for having a male sex partner, when a woman with a male sex partner would not be subject to a similar adverse action.<sup>73</sup> The formal argument has never been accepted in a Title VII discrimination suit.<sup>74</sup> *DeSantis v. Pacific Telephone & Telegraph Co.* seems to have set the tone by rejecting this argument.<sup>75</sup>

Nevertheless, the argument that sexual orientation discrimination is a form of sex-based discrimination made its way back to the forefront of the debate in the Hawaii Supreme Court's decision in *Baehr v. Lewin*.<sup>76</sup> Although *Baehr* was a constitutional case, its discussion is relevant to defining sex discrimination under Title VII.<sup>77</sup> In *Baehr*, three same-sex couples challenged Hawaii's denial of marriage licenses to them solely because they were in same-sex relationships.<sup>78</sup>

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72. See Koppelman, *supra* note 62, at 208 (analyzing how discrimination against gays is a version of sex discrimination).

73. See Koppelman, *supra* note 62, at 208 (If "Ricky" is fired because of sexual activities with "Fred" but "Lucy" would not be fired if she did exactly the same things with "Fred," then "Ricky" is facing sexual discrimination); see also 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, 25-26 (1995) (arguing that recognition of sexual orientation discrimination is compelled by existing anti-discrimination doctrines because, among other things, one's sexual orientation is established by one's sex, in relation to the sex of his or her beloveds).

74. Searches of various Westlaw databases uncovered no case in which a homosexual employee, claiming sexual orientation discrimination as the basis for an adverse employment action, won a Title VII unlawful firing or failure to hire or promote case on any theory.

75. 608 F.2d 327, 331 (9th Cir. 1979) (finding that Title VII does not apply to homosexuals because, regardless of the employee's sex, the employer will not hire or promote any person who engages in sexual activity with a person of the same sex).

76. 852 P.2d 44 (Haw. 1993).

77. The constitutional provision in question in *Baehr* is strikingly similar to the language of Title VII. The Hawaii Constitution provides: "No person shall . . . be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5 (1978) (emphasis added).

78. *Baehr*, 852 P.2d at 48-50 (recounting the challenges).

In concluding that a sex-based classification existed, the Supreme Court of Hawaii relied on the plain language of Article I § 5 of the Hawaii Constitution.<sup>79</sup> Because Hawaii required that marriage be between a man and a woman, it was deemed to be regulating "access to the status of married persons . . . on the basis of the applicants' sex."<sup>80</sup> The court ruled that because discrimination based on "sex" was prohibited by the Hawaii Constitution, the denial of the marriage licenses was subject to strict scrutiny.<sup>81</sup> The case was remanded for a determination of whether the State had a compelling interest in prohibiting same-sex marriages.<sup>82</sup>

The key to the decision in *Baehr* is its reliance on the plain language of the Hawaii Constitution, which, unlike the United States Constitution, explicitly prohibits discrimination based on "sex." Presumably, it was this express textual language that was responsible for the imposition of a higher level of scrutiny upon sex-based discrimination than that which has been promulgated by the United States Supreme Court. This understanding of *Baehr* supports the argument that sexual orientation discrimination can be a form of sex discrimination within the traditional understanding of the concept. Because of the language similarity between the Hawaii Constitution and Title VII,<sup>83</sup> the argument has at least some vitality in the context of private employment discrimination.

The typical response to this argument has been to claim that no disparate treatment has actually taken place. Rather, similarly - situated male and female employees are being treated equally because either is subject to an adverse employment action if he or she has a same-sex sexual partner.<sup>84</sup> While this response has a certain intellectual appeal, it is called into question by the analogy between laws dis-

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79. See *id.* at 60 (stating that the Hawaii Constitution prohibits discrimination by the state on the basis of gender).

80. *Id.*

81. *Id.* at 67.

82. *Id.* at 68. On remand, the trial court held that the State had failed to demonstrate a compelling interest that could justify the prohibition. 65 U.S.L.W. 2399 (Dec. 17, 1996). Therefore, the ban violated the Hawaii Constitution. *Id.* The Supreme Court of Hawaii affirmed without comment. *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

83. HAW. CONST. art. I, § 5.

84. See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979). This was also the position taken by the dissent in *Baehr*, 852 P.2d at 71 (Heen, J., dissenting). Even some writers who argue that sexual orientation discrimination is sex discrimination admit to this weakness in the formal argument. See, e.g., Marc 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, 634 (1992) (noting that sex discrimination and sexual orientation discrimination are not completely analogous because they do not involve precisely the same behavior, i.e., one involves homosexuality and the other does not).

criminating against homosexuals and anti-miscegenation laws.

The analogy between anti-miscegenation laws and sexual orientation discrimination provides support for both the formal argument and the feminist approach. The support for the formal argument is found in the Supreme Court's decision in *Loving v. Virginia*.<sup>85</sup> *Loving* involved a challenge by a Negro woman and a white man to Virginia's anti-miscegenation statutes.<sup>86</sup> The couple claimed that the law, which prohibited whites from marrying non-whites,<sup>87</sup> violated the Equal Protection Clause of the Fourteenth Amendment.<sup>88</sup> Virginia argued that the statute was constitutional because it treated whites and blacks the same: neither was permitted to marry a person of the other race.<sup>89</sup> In rejecting this argument, the Supreme Court said that the so-called "equal application" of the statute did not immunize it from attack.<sup>90</sup> Rather, the Equal Protection Clause was implicated by virtue of the statute's facial race classification.<sup>91</sup>

Under the miscegenation analogy, the argument that sexual orientation discrimination is sex discrimination follows from the *Loving* decision. The Hawaii Supreme Court relied heavily on *Loving* when it determined that the requirements of the Hawaii marriage statute were sex-based.<sup>92</sup> Acceptance of this argument rests on the recognition that the same physical conduct<sup>93</sup> is proscribed for one sex, but not the other, notwithstanding the fact that the conduct is the same. The established critique of this argument requires the critic to construct an abstract category of conduct: "homosexual sex."<sup>94</sup> But this is essentially the argument the Court rejected in *Loving*. It was not enough for Virginia to claim that members of both races were prohibited from "miscegenating." The Court instead focused on the

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85. 388 U.S. 1 (1967).

86. *Id.* at 2-3.

87. *Id.* at 6.

88. *Id.* at 2. U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

89. See *Loving*, 388 U.S. at 7 (describing Virginia's argument that equal protection of the law is insured because persons of each race are equally penalized if individuals enter into an interracial marriage).

90. *Id.* at 9.

91. See *id.* at 9, 11 (stating that "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race").

92. See *Baehr v. Lewin*, 852 P.2d 44, 61-63 (Haw. 1993) (describing the parallels between the two cases).

93. Of course, this begs the question of when two sets of physical conduct can be classified as "the same." The manner in which one chooses to characterize the conduct will determine whether one accepts the validity of the argument.

94. Koppelman, *supra* note 62, at 211-12.



physical act of marrying a white person: whites were permitted to do it while blacks were not.<sup>95</sup>

The miscegenation analogy also bolsters the feminist approach. Both focus on the subordination of a traditionally disadvantaged class of people. In the case of anti-miscegenation laws, the disadvantaged class was African-Americans. The *Loving* Court was quick to recognize this, noting that the racial classifications of Virginia's anti-miscegenation statutes were clearly intended to maintain white supremacy.<sup>96</sup> In the case of homosexuality, the disadvantaged class is women; homosexual discrimination is intended to maintain male superiority. Andrew Koppelman describes the analogy as follows:

Implicit in both taboos are the premises—incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty, degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status, it is acceptable to do it, and others (men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them.<sup>97</sup>

Because courts were unwilling to accept that anti-miscegenation laws treated members of all races equally, they should not be willing to accept the same argument in the context of sexual orientation discrimination.

### C. The Sex-Stereotyping Theories

A final group of theories are all based, at least in part, on the notion that sexual orientation discrimination is a by-product of sex-stereotyping, which is currently prohibited by Title VII.<sup>98</sup> Because of

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95. See Koppelman, *supra* note 62, at 212. Koppelman criticizes the abstraction from the physical conduct which he deems necessary to defeat the formal argument:

The man who is engaged in cunnilingus is doing exactly the same things with exactly the same part of his body, and doing them to the same body parts of the other, as the lesbian. The genitalia of the person performing an act of oral sex are simply not involved in the act, except to the extent that someone's insistence makes them so. And what is sex discrimination but the insistence on the salience of genitalia always, in every context . . . ?

*Id.* Koppelman believes that this argument, if accepted, would provide individuals discriminated against because of their sexual orientation a cause of action for sex discrimination. *Id.*

96. *Loving*, 388 U.S. at 11.

97. Koppelman, *supra* note 62, at 236. Strikingly, the similar idea behind anti-miscegenation laws was that white supremacy was challenged by the penetration of white women by black men.

98. The assertion that sex-stereotyping is per se a violation of Title VII is clearly disputed. Nevertheless, this is the argument of the theorists on which this part focuses. See *infra* Part III.C.1.

this, sexual orientation discrimination is a form of sex discrimination. The first theory is a purely doctrinal argument which relies on the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*.<sup>99</sup> In many ways this theory resembles the initial work of the feminist approach, challenging the insistence that women behave in a socially-appropriate manner. The other two theories are much more complex, but find a similar link to Title VII doctrine. Mark Fajer's pre-understandings theory asserts that, on a societal level, sexual orientation discrimination is based on three inappropriate pre-understandings about homosexuals.<sup>100</sup> Francisco Valdes' conflation theory argues that society has constructed a method of categorization which inevitably links sexual orientation discrimination to what we commonly consider sex discrimination.<sup>101</sup> While both of these theories break new ground and are more complex than the pure doctrinal argument, they are similarly applied in the context of Title VII.

### 1. *The Hopkins Analogy*

In *Hopkins*, a Price Waterhouse accountant was denied promotion to partner despite the fact that her performance was equal, if not superior, to her male counterparts who were promoted.<sup>102</sup> Negative comments made by Hopkins' superiors indicated that they did not believe that she was "feminine" enough.<sup>103</sup> For example, Hopkins was referred to as "macho" and told that she should take "a course at charm school."<sup>104</sup>

In finding that Hopkins had been the victim of sex discrimination, the Court held that she had been the victim of impermissible sex-stereotyping:

[W]e are beyond the day when an employer could evaluate employees by assuming that they matched the stereotype associated with their group, for "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>105</sup>

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99. 490 U.S. 228 (1989).

100. Fajer, *supra* note 84, at 511.

101. Valdes, *supra* note 73, at 25-26.

102. *Hopkins*, 490 U.S. at 231-33.

103. *Id.* at 236 (indicating that Hopkins was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.").

104. *Id.* at 235. Hopkins was criticized for having an aggressive personality, a trait that is not only tolerated but encouraged in male employees. *Id.*

105. *Id.* at 251 (quoting *Los Angeles Dep't of Water v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

In doing so, the Court for the first time recognized the "mixed-motivation" framework for proving a cause of action under Title VII.<sup>106</sup>

Several commentators have seized on *Hopkins* as a model for providing protection for homosexuals and bisexuals under Title VII. They argue that many gay and lesbian employees are treated adversely because they fail to conform to societal gender norms.<sup>107</sup> These arguments tend to focus on gay men,<sup>108</sup> arguing that there is no sustainable distinction between discrimination against a woman because she is "too macho" and discrimination against a man who is too effeminate: "He is, in effect, Hopkins in drag."<sup>109</sup> Because adverse employment actions taken against him result from impermissible sex-stereotyping, he, like Hopkins, should be entitled to relief under Title VII.

The *Hopkins* analogy suffered a judicial setback in *Dillon v. Frank*.<sup>110</sup> In *Dillon*, the Sixth Circuit rejected a sexual harassment claim by a homosexual man formerly employed by the United States Postal Service.<sup>111</sup> The employee was subjected to derogatory remarks, graffiti, and was also physically beaten.<sup>112</sup> In denying the employee a Title VII cause of action, the court rejected the analogy to *Hopkins*.<sup>113</sup> First, *Hopkins* was based on an "explicit" decision (failure to promote), whereas *Dillon* involved a series of harassing incidents which eventually caused the employee to resign.<sup>114</sup> Second, Hopkins faced a Catch-22: in order to succeed at Price Waterhouse, she was forced to be aggressive; because she was aggressive, she was denied promo-

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106. 490 U.S. 228 (1989). The mixed motivation framework was embodied in the 1991 amendments to the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2(m) (1994) (declaring that an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

107. See Capers, *supra* note 67, at 1180 (describing how a "soft" man suffered from discrimination because his employer did not think he acted like a "real" man).

108. The likely reason for this is that discrimination against the "macho" (lesbian) woman is directly addressed in *Hopkins*. Presumably, Hopkins' sexual orientation was irrelevant to Price Waterhouse's liability.

109. Case, *supra* note 54, at 33. See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (holding that failure to hire an effeminate man was not "sex" discrimination under Title VII). But see Capers, *supra* note 67, at 1180 (stating that the holding in *Liberty Mutual* is seriously in doubt in light of *Hopkins*).

110. *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992) (reported as Table Case at 952 F.2d 403).

111. *Id.* at \*2.

112. *Id.* at \*1.

113. *Id.* at \*15. Dillon argued that he was not deemed "macho" by his co-workers, and that this stereotyping led to his verbal abuse. *Id.*

114. *Id.*

tion.<sup>115</sup> According to the court, no similar Catch-22 existed for Dillon.<sup>116</sup>

*Dillon's* handling of *Hopkins* is not very compelling. The *Dillon* court's decision does not do away with the *Hopkins* rationale, but simply limits it to situations where an employer fails to hire, promote or discharges an employee based on sex stereotypes. Further, its reliance on the Catch-22 reasoning is puzzling. Proscribed, discriminatory conduct should not be permitted simply because the targeted individual has an alternative, "acceptable" route of behavior. Although the *Hopkins* court mentioned the Catch-22, it was not the basis of its decision; rather, it was the belief that requiring conformance with sex stereotypes is inconsistent with Title VII.<sup>117</sup>

## 2. The Pre-Understandings Theory

Marc Fajer also argues that sexual orientation discrimination is a form of sex discrimination resulting from a non-gay "pre-understanding."<sup>118</sup> According to Fajer, the inability to understand homosexuals has three elements: (1) sex as lifestyle;<sup>119</sup> (2) the inappropriateness of gay issues for public discussion;<sup>120</sup> and (3) cross-gender stereotypes.<sup>121</sup>

The sex as lifestyle pre-understanding is problematic on a number of levels. First, the assumption of promiscuity is empirically unfounded. Sylvia Law argues that not only is this assumption unfounded, but in many cases it is actually contrary to reality.<sup>122</sup> Popular

115. *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*15 (6th Cir. Jan. 15, 1992).

116. See *id.* Although it failed to explain this statement, presumably the court meant that Dillon was not required to be effeminate in order to keep his job at the Postal Service.

117. 490 U.S. 228, 251 (1989).

118. Fajer prefers the word "pre-understanding" because it refers to a belief that is more positive and open to change than words such as "stereotype" or "prejudice." Fajer, *supra* note 84, at 524 n.65. See *id.* (explaining that "pre-understanding" is the process by which a person brings their own set of beliefs to a situation, without personal experience or knowledge of the truth).

119. See Fajer, *supra* note 84, at 537-38 (stating that the sex-as-lifestyle pre-understanding is based on a belief that sexual activity is at the core of, and indeed the only reason for, a homosexual identity, and that those who oppose this "lifestyle" assume that it is predatory, promiscuous and sex-obsessive); see also Law, *supra* note 58, at 218 (arguing that implicit in this pre-understanding is the notion that the homosexual has rejected the traditional, patriarchal family which his or her detractors are so eager to defend).

120. See Fajer, *supra* note 84, at 570 (showing that where society assumes that heterosexuality is appropriate for public discussion, homosexuality is viewed as a private matter).

121. See Fajer, *supra* note 84, at 607 n.550 (noting that many people assume lesbians are "like men" and that gay men are "like women").

122. See Law, *supra* note 58, at 218 (noting that lesbians, in particular, are less likely than heterosexual men to engage in sexual activity outside the context of a committed relationship).

belief notwithstanding, many homosexuals are involved in committed relationships, founded on love, not sex. These relationships may include any or all of the elements of a traditional heterosexual marriage, including raising children.<sup>123</sup>

Secondly, this pre-understanding equates homosexual identity with participation in homosexual sex.<sup>124</sup> Fajer argues that this categorization results in an impermissible overlapping of two separate groups of individuals:<sup>125</sup> individuals who may self-identify as "homosexual," yet never have engaged in homosexual sex,<sup>126</sup> and others who have participated in same-sex sexual activity, yet do not self-identify as homosexual.<sup>127</sup> The failure to distinguish these two groups of people perpetuates ill-conceived stereotypes.<sup>128</sup>

The second pre-understanding, that non-gay issues are inappropriate for public discussion, is widely shared by heterosexuals, even many who support gay rights. Many heterosexuals subscribe to the view that "it's nobody's business what a person does in their own bedroom."<sup>129</sup> This view leads to a fear among heterosexuals that public discussion of these issues may lead them to be mistakenly branded as homosexual.<sup>130</sup> Among those who view homosexuals with animosity, the public discussion of gay issues is seen as "flaunting."<sup>131</sup>

Prohibiting public discussion of "gay" issues denies homosexuals the freedom to enjoy the amenities of every day life, which most heterosexuals take for granted. Heterosexuals are unaware that they

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123. See Fajer, *supra* note 84, at 546 (explaining that gay men seek love and commitment, dispelling the lifestyle understanding).

124. Fajer, *supra* note 84, at 548.

125. Fajer, *supra* note 84, at 549.

126. This group may include individuals who only fantasize about homosexual activity, individuals who have had an epiphany regarding their homosexual identity but have yet to, and will not for some time, act on this identity, and individuals who are homosexual, yet celibate. See Fajer, *supra* note 84, at 547-49.

127. This group may include individuals who only have experimented with homosexual sex and heterosexual men who commit same-sex rape. See Fajer, *supra* note 84, at 548.

128. Fajer, *supra* note 84, at 546.

129. I certainly have heard, and continue to hear, this statement from many heterosexuals who are sincere supporters of homosexual rights. This view is espoused by many gay rights supporters in the public sphere as well. President Clinton, a supporter of homosexual rights, subscribes to this view. It is embodied in his administration's "don't ask, don't tell" policy regarding gays in the military. See *Defense Bill With Gay Policy Change is Signed*, THE TIMES-PICAYUNE, Nov. 20, 1993, at A14 (reporting the Clinton Administration's new policy regarding gays in the military). The dissenting justices in *Bowers v. Hardwick* also took this view. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (stating that at the core this case is "the right to be let alone") (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

130. BRIAN MCNAUGHT, GAY ISSUES IN THE WORKPLACE 52-54 (1993).

131. See Fajer, *supra* note 84, at 571 (suggesting that even those who do not admit feeling animosity towards homosexuals, still see public discussion of gay/lesbian issues as "flaunting").

"flaunt" their sexual orientation because public discussion of heterosexuality is so ingrained in our culture so as to be normative.<sup>132</sup> For instance, the ability to be seen publicly with one's partner, at least without worrying about being discovered, is a right that heterosexual couples rarely need to think about. On the other hand, homosexuals are unable to talk at the office about their time outside of work, a staple of office conversation among heterosexuals discussing their wives, boyfriends, or children. More importantly, the stifling of public discussion prevents homosexuals from receiving the same employment considerations or benefits as heterosexuals.<sup>133</sup> These benefits are not merely financial ones, such as health benefits. Rather, they include a host of less tangible considerations, such as coordinating vacation schedules or accommodating transfer requests so that a homosexual employee may spend time with, or be in the same geographic location as, his or her partner.<sup>134</sup>

The first two pre-understandings are necessary to fully understand Fajer's argument, and are useful in crafting a constitutional argument against sex-stereotyping. But, it is through the final pre-understanding, the cross-gender stereotype, that the connection is made to Title VII doctrine. The cross-gender pre-understanding reflects a belief among heterosexuals that all homosexuals conform to models of behavior which are normally associated with the other sex.<sup>135</sup> While this pre-understanding does not in itself add much to the claim that sexual orientation discrimination is a form of sex discrimination, it is important in that it can be linked to two of the other arguments discussed in this part of the article. First, the disapprobation which follows from cross-gender stereotyping is inextricably related to the preservation of gender norms, the key to the subordination theory.<sup>136</sup> Second, this cross-gender pre-understanding amounts to discrimination based on impermissible sex stereotypes, and provides an undesirable loophole for sex discrimination. Under this theory, impermissible cross-gender stereotyping leads Fajer back to *Hopkins*, which he believes provides a basis for arguing that sexual

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132. See Fajer, *supra* note 84, at 602-05 (noting that advertisements are just one example of how heterosexuality is pervasive in every aspect of society).

133. MCNAUGHT, *supra* note 130, at 51.

134. MCNAUGHT, *supra* note 130, at 51.

135. See Fajer, *supra* note 84, at 611 (explaining that heterosexuals tend to assume that one man in a homosexual relationship "plays" the woman and one woman in a lesbian relationship "plays" the man).

136. See Fajer, *supra* note 84, at 616 (noting that the deviation from gender norms challenges the "strict dichotomy between male and female"); see also *supra* Part III.A.

orientation discrimination is a form of sex discrimination.<sup>137</sup>

### 3. *The Conflation Theory*

The conflation theory attempts to prove the fallacies of current legal doctrine through examination of the terms "sex," "gender" and "sexual orientation." Francisco Valdes argues that the terms have distinct meanings, and that the courts' conflation of them has resulted in the mistreatment of sexual orientation discrimination claims.<sup>138</sup> Valdes first defines the three terms: "sex" is determined by an individual's biological characteristics, i.e. genitalia; "gender" refers to the characteristics which define one's cultural and social behavior; and "sexual orientation" refers to one's affectional preferences.<sup>139</sup>

According to Valdes, these three terms are conflated in a triangular manner with each bearing some relation to the others. The conflation of "sex" and "gender" is commonplace: most people do not differentiate between the two, and the law accepts this conflation as a "truism."<sup>140</sup> The conflation of "gender" and "sexual orientation" results from the fact that gender is composed of both a social and a sexual dimension, with sexual orientation inseparably tied to the sexual dimension.<sup>141</sup> Finally, the conflation of "sexual orientation" and "sex" results from the fact that sexual orientation is necessarily defined by reference to one's physical partner.<sup>142</sup>

137. Fajer, *supra* note 84, at 638-39.

138. See Valdes, *supra* note 73, at 23 (stating that "[t]he conflation . . . undermines the efficacy of both legal rules and legal processes").

139. Valdes, *supra* note 73, at 20-23. See also Case, *supra* note 54, at 9-18 (discussing all three terms, but focusing particularly on the differences between "sex" and "gender"). Interestingly, Professor Case notes that leaders of the feminist movement are partly responsible for the conflation between "sex" and "gender." Particularly, she notes that, as an attorney, Ruth Bader Ginsburg preferred to use the word "gender" when litigating "sex" discrimination claims, because "the word 'sex' may conjure up improper images of what occurs in porno theaters." *Id.* at 9-10.

140. Valdes, *supra* note 73, at 12-13. Some courts are beginning to pick up on the distinction. Professor Case points out, with some surprise, that Justice Scalia has recognized the distinction, stating recently that "[t]he word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female as masculine is to male." Case, *supra* note 54, at 11 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting)). Some would argue that even the distinction which Justice Scalia makes is incomplete because "there is not a female gender and a male gender, but rather female genders and male genders. Furthermore, these female and male genders are not mutually exclusive, but rather overlap." Capers, *supra* note 67, at 1161.

141. See Valdes, *supra* note 73, at 13-14 (illustrating this point by noting the link between derisive terms such as "queers" and "dykes" (sexual orientation) and "sissies" and "tomboys" (gender)). By pointing out the derisive stereotypes often imposed by these terms, this argument reinforces the existence of what Marc Fajer refers to as the "cross-gender" pre-understanding. See also *supra* notes 110-12 and accompanying text.

142. Valdes, *supra* note 73, at 16. This resembles the "formal argument." See *supra* Part III.B.

Valdes argues that the result of this triangular conflation is that discrimination based solely on sexual orientation can never exist. Rather, discrimination based on sexual orientation must also be based on either gender or sex.<sup>143</sup> Because both sex and gender discrimination are impermissible under current doctrine,<sup>144</sup> all sexual orientation discrimination must also be prohibited.<sup>145</sup>

As a practical matter, by maintaining the legality of sexual orientation discrimination, the current doctrine allows employers to avoid liability for discrimination which is currently prohibited (i.e., sex or gender discrimination) merely by claiming that their decisions were really based on the employee's sexual orientation.<sup>146</sup> It is here where the relation to sex-stereotyping is seen. As Valdes describes the term, *gender* discrimination is what the court outlawed in *Hopkins*. What he would call *sex* discrimination has traditionally been prohibited.<sup>147</sup> Under Valdes' conflation triangle theory, *Hopkins* would provide full coverage and would assure that all forms of sexual orientation discrimination—whether also sex discrimination, gender discrimination, or both—are prohibited under Title VII.<sup>148</sup>

#### IV. THE VOID IN THE PROPOSED THEORIES

While each of the theories in part III makes a relatively strong case that sexual orientation discrimination is a form of sex discrimination, and has gone relatively unchallenged in the academy, I will show that none presents a theory by which *all* homosexuals and bisexuals are protected against employment discrimination. Any theory in which only some, or even most, homosexuals and bisexuals are protected under Title VII is intellectually unsatisfactory. Even advocates for homosexual and bisexual rights have acknowledged the illogic of partial coverage.<sup>149</sup> A theory which does not provide complete coverage

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143. See Valdes, *supra* note 73, at 167 (noting that courts are often oblivious to the connection between discrimination based on sexual orientation and stereotypical views on "gender").

144. *Id.* See *United States v. Virginia*, 518 U.S. 515 (1996); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

145. Valdes, *supra* note 73, at 17.

146. Case, *supra* note 54, at 58. See also Valdes, *supra* note 73, at 24 (stating, "[t]he bottom line of the doctrinal status quo is that courts can and do (re)characterize sex and gender discrimination as sexual orientation discrimination virtually at will"). For example, assume that Anne Hopkins was openly gay. If Price Waterhouse had chosen to deny her partnership for this reason, that decision would not give rise to a cause of action under current Title VII doctrine. In this way, Price Waterhouse could avoid liability for its impermissible stereotyping simply by recharacterizing its decision.

147. In this context, sex discrimination refers to discrimination against a woman because she is a woman.

148. Valdes, *supra* note 73, at 12 (explaining the three-pronged theory).

149. One commentator has called the doctrine which allows a bisexual to sue for harass-



only perpetuates the oppression of homosexuals.<sup>150</sup> Moreover, a theory of partial coverage legitimizes the belief that sexual orientation discrimination is somehow more socially acceptable than other forms of group-biased discrimination—i.e., race and gender. Certainly no one would suggest that a theory which provided coverage for only *some* African-Americans or *some* women who were subject to adverse employment actions was acceptable.<sup>151</sup>

Some may argue that the demand for complete coverage is impractical.<sup>152</sup> Because complete coverage is politically impossible to achieve at this time, any amount of Title VII coverage for sexual orientation discrimination is desirable. This argument is unacceptable for three reasons. First, providing a partial solution alleviates much of the political pressure necessary to achieve a complete solution. Congress will not be driven to solve a politically divisive problem which it feels is being adequately addressed by the judiciary. Second, acceptance of a system of partial coverage, while beneficial to some homosexuals and bisexuals, is too inconsistent with the principles of equal and fair application of the laws to be desirable. Finally, the inability to fashion any complete theory of relief for sexual orientation discrimination under Title VII is the best evidence that the statute is not meant to address it.

The judicial treatment of same-sex harassment cases has demonstrated the morass that can be created by partial coverage. Tradition-

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ment in the workplace, but not for discharge, a "joke." Ruth Colker, *A Bisexual Jurisprudence*, 3 L. & SEXUALITY 127, 136 (1993). Any doubts that this in fact is the state of the law were resolved by the Supreme Court's recent decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 66 U.S.L.W. 4172 (U.S. Mar. 4, 1998) (recognizing a cause of action under Title VII for same-sex harassment). *But see* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 328, 329 (holding there is no cause of action for adverse employment actions taken on account of sexual orientation).

150. The scholars whose theories are critiqued in this Article would probably dispute the assertion that the theories provide incomplete coverage. For example, Valdes believes that the conflation argument provides complete coverage because it proves that sexual orientation discrimination is inseparable from other forms of actionable discrimination. *See supra* Part III.C.3. Nonetheless, this part attempts to show why these theories would not provide complete relief.

151. Admittedly, not all blacks receive the same coverage under Title VII. *See* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995). Flagg proposes a hypothetical in which one black woman, Yvonne, suffers adverse employment action for which she probably has a Title VII remedy, while her sister, Keisha, suffers adverse employment action for which she likely has no remedy. *Id.* at 2009-14. However, this is not a problem of incomplete coverage, but rather a problem of proof. Undeniably, if Keisha's employer admitted that she failed to promote her because she was black, a cause of action would exist. The point of this article is to illustrate that, even under the proposed theories of recovery, there are situations in which an employer could expressly state that an adverse employment action was taken because of the employee's sexual orientation, and yet coverage would still be denied. *Id.*

152. *See* *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that Congress neither intended nor considered that Title VII would apply to anything other than the traditional concept of sex).

ally, no cause of action was recognized for same-sex harassment.<sup>153</sup> As some courts began to allow some forms of same-sex harassment claims, they were not able to agree on a workable test that provides any type of complete or consistent coverage.<sup>154</sup> One court even drew a distinction based on sexual orientation, denying a claim where both the harasser and harassee were heterosexual members of the same sex.<sup>155</sup> Only time will tell whether the Supreme Court's recent recognition of a cause of action for same-sex harassment<sup>156</sup> will alleviate these problems and result in a coherent framework for deciding same-sex harassment cases.

Having decided that only a complete theory of recovery is intellectually and practically satisfactory, this part argues that because none of the theories afford complete relief under Title VII, they should be rejected by the courts. First, while some of the arguments, particularly the sex stereotypes argument, are satisfactory in the constitutional context, they are much more problematic in the context of a statute with expressly defined classifications. Second, the sex and gender differences within the larger group of homosexuals and bisexuals prove quite troublesome to the traditional roles argument and the miscegenation analogy. Third, a few unique situations demonstrate additional problems in the traditional roles and the formal arguments. Fourth, the sex-stereotyping argument is merely a normative explanation without sound doctrinal support. Finally, the failure of the formal argument proves fatal to the conflation triangle.

#### *A. Problems Outside the Constitutional Context*

Most of the arguments for protection against sexual orientation discrimination were fashioned with the Constitution in mind.<sup>157</sup> Interestingly, at least one argument which provides a persuasive basis for constitutional protection actually detracts from the argument that

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153. See *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (holding that a male had no cause of action for same-sex harassment because the harassment was not intended to create an "anti-woman" environment).

154. Hope Eastman, *Same-Sex Harassment: An Issue in Search of a Supreme Court Ruling*, PLI LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, Oct. 1995, at 9.

155. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (holding that the employee did not have a Title VII sex discrimination claim, that the Equal Protection Clause does not extend to same sex harassment, and that supervisors were not liable under § 1983).

156. *Oncale v. Sundowner Offshore Servs., Inc.*, 66 U.S.L.W. 4172 (U.S. Mar. 4, 1998).

157. See Fajer, *supra* note 84, at 638 (stating that "[o]ne concern with the gender-based argument is that . . . it is rooted in the Equal Protection Clause"). Sylvia Law's argument is also rooted in constitutional analysis, focusing itself as an attack on *Bowers v. Hardwick*, 478 U.S. 186 (1986). See Law, *supra* note 58; see also Koppelman, *supra* note 62, at 285 (discussing the obligations of equality of ordinary citizens).

sexual orientation discrimination is a form of sex discrimination. This problem plagues the pre-understandings theory.

By exposing and attempting to eradicate non-gay pre-understandings, Marc Fajer makes a good case for heightened scrutiny under an equal protection analysis. By demonstrating how homosexuals have been victimized by these pre-understandings, the Court may finally understand the unjustified subordination of homosexuals in our society and declare them to be a suspect or semi-suspect class.

It is only by conforming to these pre-understandings that a homosexual might receive sex-based protection under Title VII. Take for example the cross-gender pre-understanding, which Fajer relies upon to craft his Title VII argument.<sup>158</sup> If the cross-gender pre-understanding is wrong, then homosexuals who do not conform to this pre-understanding might be denied sex-stereotyping discrimination claim under *Hopkins*. For example, assume that a gay employee is in most respects "one of the guys": he drinks and plays cards with the other men at work and is the MVP of the softball game at the annual company picnic. If this MVP were to announce his homosexuality to his employer, he could be fired with no viable cause of action. The cross-gender pre-understanding, created to support sex discrimination claims by homosexuals, does not hold in this case. It is, therefore, not an available argument to support the employee's cause of action. The employee was not fired for his failure to conform to gender stereotypes, but simply because of his sexual orientation.

One response to this argument is that the sex-stereotyping argument is still available in the case of the "masculine homosexual": by participating in homosexual rather than heterosexual sex, the employee has failed to completely satisfy societal expectations of what a "real man" is.<sup>159</sup> The problem with this response is that it waters down the cross-gender pre-understanding to nothing more than a version of the formal argument: plaintiff was discriminated against because he has a male sex partner; a female would not have been discriminated against for the same reason. If this is all that is left of the cross-gender pre-understanding, it is not itself a distinct, viable theory.<sup>160</sup>

A second response is that an individual plaintiff need not conform to the stereotype because the protection is class-based. As this argument goes, as long as the individual is a member of a protected class,

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158. See *supra* notes 110-12 and accompanying text.

159. Capers, *supra* note 67, at 1183.

160. For a discussion of why the formal argument itself is not viable, see *infra* Part IV.D.

he is protected from the discriminatory acts based on his status as a class member, regardless of whether or not he possesses those characteristics which generally subject class members to hostile treatment.<sup>161</sup> For example, "[s]uppose a woman who is very combat-worthy is prevented from joining a combat unit in the military, although everyone recognizes that she is a first-class warrior."<sup>162</sup> This woman would most likely have a successful equal protection claim, notwithstanding the fact that she does not conform to the negative stereotype that would normally prevent a woman from obtaining such a position, namely that she is weak and timid.

The critical difference for individuals attempting to bring sexual orientation discrimination claims under Title VII is in how the class is defined. Under the proposed theory of recovery, it is not individuals discriminated against due to sexual orientation who are protected, but rather individuals discriminated against because of sex. Discrimination against a woman because she is a woman is presumptively sex-based, within the traditional meaning of the word "sex."<sup>163</sup> On the other hand, an individual who is the victim of sexual orientation discrimination must show that the harm she has suffered was from a sex-based classification. It is only by conforming to the cross-gender pre-understanding that she is able to do so. As a result, Fajer's cross-gender pre-understanding theory provides incomplete coverage to victims of sexual orientation discrimination under Title VII.

In the larger societal scheme of things, debunking the myths which the pre-understandings perpetuate, goes a long way toward societal understanding and integration of homosexuals and bisexuals. One price of this gain is the (welcome) admission that homosexuality is not inherently "sex-based," and, therefore, that the pre-understandings do not provide a basis for a Title VII claim.

The feminist approach and the miscegenation analogy were also primarily fashioned as constitutional arguments. Because they demonstrate the subordination of homosexuals, they are persuasive in the constitutional context as a means of providing a separate, heightened protection for homosexuals. However, as the next subpart points out, these arguments are plagued by the difference between gay men and lesbians.

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161. Martha Chamallas, Comments on Previous Draft (Jan. 2, 1997) (on file with author).

162. *Id.*

163. See *supra* note 37 and accompanying text.

*B. Gender and Sex Differences Among Homosexuals*

The problem with the feminist approach and the miscegenation analogy is the somewhat incongruous situation that, while they are most persuasive in their argument to protect gay men, it is only lesbians who actually fall within the so-called protected class.

Gay male sex is the most significant affront to the traditional gender norms of our society.<sup>164</sup> As a result, the taboo against gay male sex is much more crucial to the miscegenation analogy and the deviation from gender roles than is lesbian sex.<sup>165</sup> Yet the theory behind these arguments is that sexual orientation discrimination is a form of sex discrimination because it perpetuates the subordination of women. It seems odd that a gay man could go to court to argue that he has suffered a wrong which continues the subordination of women. In fact, it is questionable whether he would even have standing to bring such a claim.<sup>166</sup>

The likely response to this problem is that racism, sexism, and heterosexism are interlocking systems of subordination which work together to support white male privilege.<sup>167</sup> The oppressed classes can only achieve true equality by eviscerating all of these forms of discrimination.<sup>168</sup> While this may be true, it does not answer the question of whether sexual orientation discrimination is a form of sex discrimination under Title VII. While the interlocking systems theory exposes the need to eradicate all forms of oppression, the legal sys-

164. This is because in the heterosexual construction of gay male sex, one man must allow himself to be dominated, thus abrogating his role as a dominator, a role that is crucial to the maintenance of male superiority. See *supra* notes 50-51 and accompanying text.

165. See Koppelman, *supra* note 62, at 236 (stating that "[i]n the same way that black male-white female intercourse was the paradigmatic act that the miscegenation taboo prohibited, male sodomy is the paradigmatic act that the homosexuality taboo prohibits").

166. As one commentator has argued:

[If the claim is that] laws disadvantaging homosexuals discriminate against women, then a woman should bring the suit. But no woman would be able to sue for an injury so uncertain and diffuse as, "These laws tend to maintain male superiority." While homosexual males who wish to challenge [such laws] can obviously satisfy the 'injury in fact' criterion, they will have a difficult time arguing that they have standing to protest a law whose only improper effect is to discriminate against women.

Bradley, *supra* note 51, at 37.

Homosexual women may be better suited to satisfy the standing requirement. But if only women are able to bring such claims, the anomaly of partial coverage results. Under this scenario, we are left with the odd statutory interpretation that Congress created a cause of action for lesbians and bisexual females, but not for gay men or bisexual males.

167. See Joan C. Callahan & Dorothy E. Roberts, *The Sesquicentennial of 1848: Seneca Falls Women's Rights Convention: American Women's Unfinished Quest For Legal, Economic, Political, and Social Equality*, 84 Ky. L.J. 1197, 1203 (1995-1996) (addressing certain features that all feminist views share, particularly that one cannot hope for the elimination of one system of subordination without accomplishing the elimination of others).

168. *Id.*

tem must provide a mechanism by which each form can be addressed. For example, a statute prohibiting only race discrimination could not be said to give a cause of action to a white woman who was discriminated against because of her sex. The action was not based on race, even if it had the ancillary effect of perpetuating racism. In the same way, discrimination against a gay man may help to perpetuate the subordination of women and racial minorities. However, Title VII requires that the discrimination be *based on* race or sex in order for it to be actionable.

Ultimately, the desire to disrupt traditional gender norms in our society provides only a normative justification, but not a solid legal argument for proscribing discrimination based on sexual orientation under Title VII.<sup>169</sup> Because of the incongruity which this argument presents in its practical application, it is difficult to conclude that sexual orientation discrimination is a form of sex discrimination.

*C. The "Sexual Orientation Loophole" - A Normative, But Not A Doctrinal, Justification*

One reason supporting the sex-stereotyping argument is that the legality of sexual orientation discrimination creates a loophole by which employers can justify sex-stereotyping, which is otherwise impermissible under *Hopkins*.<sup>170</sup> While this is a reasonable explanation for why discrimination based on sexual orientation *should* be covered by Title VII, it is not an argument that sexual orientation discrimination is a form of sex discrimination. In essence, this is merely a problem of proof that pervades all types of Title VII cases. Employers often rely on reasons to explain their actions which, while objectionable or maybe even illegal, do not fall within the scope of Title VII protection.<sup>171</sup> The plaintiff can still prevail if she convinces the fact-finder that sex stereotyping was the real reason for the ad-

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169. Koppelman acknowledges as much in the conclusion of his article. He argues that "any state action that discriminates against lesbians and gay men solely because they are gay is impermissible." Koppelman, *supra* note 62, at 285. This is the constitutional argument. Beyond this he points only to a "moral and civic duty" to destigmatize homosexuality. *Id.*

170. See *supra* Part III.C.1.

171. Cf. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (holding that an employer's justification for firing an employee, while illegal under ERISA, is not a violation of the Age Discrimination in Employment Act); see also *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992) (reported as Table Case at 952 F.2d 403) (noting that Title VII proscribes "only specified discriminatory actions" and listing a number of discriminatory or objectionable reasons which are not prohibited). Another good example is nepotism. While many might find nepotism an objectionable justification for an adverse action taken against a minority or a woman, it does not prove race or sex discrimination. But see *Lewis v. University of Pittsburgh*, 725 F.2d 910, 927 (3d Cir. 1983) (Adams, J., dissenting) (arguing that nepotism may be the basis for a disparate impact claim in a traditionally segregated work environment).

verse action and that the sex stereotyping resulted in disparate treatment.<sup>172</sup> Proving that the employer is lying is only part of this burden of proof, but it is a step in the right direction.<sup>173</sup> To say that the employer may explain away unlawful discrimination through an equally objectionable but unproscribed reason is only to say that the case is like many other employment discrimination cases. It is not, in and of itself, a reason why sexual orientation discrimination is sex discrimination.

#### *D. The Unexplained Cases and the Defeat of the Formal Argument*

This part suggests a few unexplained situations which challenge the ability of the proposed alternatives to provide a remedy for sexual orientation discrimination. The situations may be rare, but they are real possibilities, if they do not exist already. Moreover, they prove that the proposed theories, in particular the formal argument, are unable to provide complete relief.

##### *1. The Pro-Woman, Anti-Homosexual Environment*

Imagine the Hometown School, a private school for grades K-12 in Hometown, Pennsylvania. Hometown has a female principal and a faculty which is 65% female (in an area where the teaching labor force is 55% female). In this school, women are department heads in Physical Education and Industrial Arts, curriculum areas usually dominated by men. In fact, the National Organization of Women Workers has recently given Hometown its blue ribbon award, which is bestowed upon those few employers nationwide who provide exceptional employment opportunities for women.

In the fall of 1995, ten teaching positions opened at Hometown, resulting in the hiring of five men and five women. Paul and Dan, two men with superior credentials who were denied positions, stopped by to see Anne, the Hometown principal, to ask why they were not hired. Anne said that although the hiring committee (which Anne heads and of which five of seven members are women) thought that Paul and Dan would both make excellent teachers, it ultimately decided not to hire them because they are openly gay.

This hypothetical demonstrates a major flaw in the feminist approach. Under this argument, the discrimination against Paul and Dan arguably perpetuates a system in which men are dominant and

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172. *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*21 (6th Cir. Jan. 15, 1992).

173. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (holding that plaintiff's disproof of employer's asserted reason for adverse employment action does not mandate judgment for the plaintiff).

women are inferior.<sup>174</sup> This does not describe the reality at Hometown, however, because Hometown has been a pioneer in the promotion of women from their traditional roles as caretakers and homemakers. In this situation, the feminist approach is unhelpful. If women continue to make progress in employment, and homosexuals do not, the appeal of the feminist approach will become even weaker.

One possible response to this hypothetical is that it ignores the problems of society as a whole. Although women may have achieved equality in Hometown, they continue to be oppressed in society at large. Under the feminist approach, the heterosexism at Hometown perpetuates the societal oppression of women.<sup>175</sup> While this response may be theoretically true, the action is too attenuated from the alleged harm to provide a claim for relief. Title VII holds employers liable only for discrimination which they commit, not that which is committed by other employers.<sup>176</sup> The subordination theory does not provide Paul and Dan with a cause of action.

## 2. *The Gay Prison Guard*

After his rejection at the Hometown School, Paul decides to apply for a job as a prison guard at the Maximum Risk Correctional Institution. Maximum Risk is an all-male facility that houses many of Pennsylvania's hardened and most violent criminals. The job requires great physical strength, which is needed to maintain order among these dangerous inmates. This is no problem for Paul; in fact at 6'2", 225 lbs., he can bench press 450 lbs. After an interview and strength test, the warden at Maximum Risk informs Paul that although he is an ideal physical specimen, Maximum Risk does not hire gay prison guards. Many of the male guards are quite homophobic, and the warden feels that the hiring of openly gay guards would be detrimental to staff cohesion and effectiveness.

Stunned, Paul decides to try a different attack than he did with the Hometown School. He marches off to court armed with the formal argument—he was not hired because he has a male sex partner. If he was a woman, he would not have been denied the job.

This hypothetical demonstrates a weakness with the formal argument. The problem for Paul is that being male is a bona fide occupa-

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174. See *supra* Part III.A.

175. See *supra* Part III.A.

176. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (stating that "in the context of disparate treatment, the ultimate issue [is] whether the *defendant* intentionally discriminated against the plaintiff.") (emphasis added). As for disparate impact, this article has already shown why that is not a viable theory by which homosexuals may bring a Title VII sex discrimination claim. See *supra* notes 25-28 and accompanying text.



tional qualification for a job at Maximum Risk - females are not hired because of the dangers the sex offenders in the prison may present to them.<sup>177</sup> Therefore, a similarly - situated woman—one with a male sexual partner, would not have gotten the job either. Paul has not been denied the job because of sex.

### 3. *The Shunned Bisexual*

Having had enough heterosexism for one lifetime, Paul and Dan decide the only way for an openly gay man to be employed is to employ himself. They open a restaurant and begin the process of hiring a staff. Among their new employees are many (at least outwardly) heterosexuals. Needing to hire one more waiter they interview Joe, who after ten years of serving customers at New York's finest restaurants, has decided to return to the bucolic peacefulness of his rural Pennsylvania hometown. The problem is that Joe is a bisexual, and Paul and Dan despise bisexuals.<sup>178</sup> They refuse to hire Joe.

This hypothetical exposes another problem with the formal argument. Joe was not denied a job based on sex. A female bisexual would have been denied the job as well.<sup>179</sup> Combined with the previous hypothetical, this one demonstrates the ultimate failure of the formal argument. It attempts to proscribe action which is taken for a reason other than sex, that is sexual orientation. Undoubtedly Joe, Paul and Dan would have been protected had the statute under which they sued prohibited discrimination based on sexual orientation.

### *E. Breaking the Legs of the Conflation Triangle*

The failure of the formal argument is fatal to the conflation of sex, gender and sexual orientation and its conclusion that sexual orientation discrimination is always based on either sex or gender discrimi-

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177. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (deciding an action in which women sued an Alabama prison which refused to hire them as correctional officers). *Id.* at 321. The court found that because of the possibility that sex offenders in the prison may attempt to sexually assault the women officers, causing them bodily harm and increasing the possibility for unrest at the facility, being male was a "bfoq" to the job of corrections officer. *Id.* at 335-37.

178. See Colker, *supra* note 149, at 131 (describing how the disclosure of her bisexuality led to ostracization by many segments of the lesbian and gay rights communities).

179. Generally speaking, bisexual discrimination, while more problematic than homosexual discrimination, may still be covered under the formal argument. One could argue that if a heterosexual discriminates against a bisexual man, the disapproved conduct is only sexual conduct with a man, not sexual conduct with members of both sexes. Thus, a bisexual woman is not similarly situated because her disapproved of conduct is sexual conduct with a woman. While I find this argument a bit questionable, the defeat of the formal argument is really unquestionable in the hypothetical I have posed - Joe truly was discriminated against because of sexual conduct with both sexes.

nation, both of which are illegal. The third leg of the conflation—between sex and sexual orientation—results from the fact that sexual orientation is defined by reference to one's partner.<sup>180</sup> This is little more than a restatement of the formal argument, which having failed, cannot support this leg of the conflation triangle. Without this leg of the triangle, the argument that sexual orientation discrimination is always either sex or gender discrimination must also fail. Therefore, full protection for discrimination based on sexual orientation can only result from an independent justification, not from this incomplete connection to other illegal activity.

### V. CONCLUSION

The proposal that Congress should amend Title VII to prohibit discrimination based on sexual orientation is not a radical, novel, or disputed argument among those who support homosexual and bisexual rights. Rather, this article means to focus attention on such an amendment as the only principled solution—a solution which provides true equality while maintaining a commitment to reasonable statutory interpretation.

The solution is within reach. The Senate only recently rejected a "sexual orientation" amendment to Title VII by a 50-49 margin, and a push is being made to reintroduce the legislation.<sup>181</sup> In addition, advances toward homosexual equality are being made on almost all levels of society. The Supreme Court recently handed down its first pro-homosexual rights decision.<sup>182</sup> Nine states<sup>183</sup> and many localities<sup>184</sup> have passed statutes or ordinances which specifically ban discrimination based on sexual orientation. Private corporations are now providing financial benefits for homosexuals that are provided to all employees.<sup>185</sup> Most importantly, public support for a ban on sexual

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180. See *supra* note 138 and accompanying text.

181. *Federal Gay Rights Legislation is Reintroduced in House, Senate*, 66 U.S.L.W. (July 1, 1997). In addition to its direct attempt to provide a federal remedy for sexual orientation discrimination, this legislation has also had the ancillary effect of "generat[ing] awareness of gay rights as a civil rights issue on the part of the mainstream civil rights community," and its enactment "would also public awareness of the change." Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 995 (1997).

182. See *Romer v. Evans*, 116 S. Ct. 1620 (1996) (invalidating a Colorado constitutional amendment that prohibited legal protection for homosexuals).

183. CAL. LAB. CODE § 1102.1 (1989); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); HAW. REV. STAT. § 378-2 (Michie 1994 & Supp. 1996); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1996); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1997); N.J. STAT. ANN. § 10:5-12 (West 1993 & Supp. 1996); R.I. GEN. LAWS § 28-5-7 (1995); VT. STAT. ANN. tit. 21 § 495 (1995); WIS. STAT. ANN. § 111.36 (West 1988 & Supp. 1996).

184. See, e.g., DENVER, COLO. REV. MUN. CODE, art. IV, § 28-92 (1991).

185. See, e.g., Cathleen Ferraro, *Tower Offers Benefits to Same-Sex Partners*, SACRAMENTO BEE,

orientation discrimination in employment is overwhelming.<sup>186</sup>

The movement should be united. Reliance on abstract theories which provide less than complete relief, while an interesting intellectual pursuit, ultimately distracts from the goal of true equality. An amendment may not be immediately forthcoming, but the more complete and honest results which it promises, justify the wait and demand that nothing less be accepted.

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Mar. 8, 1988, at E1; Veronica Fowler, *Firms Act To Protect Gay Workers; More and More Iowa Employers Are Prohibiting Discrimination Against Homosexuals in the Workplace*, DES MOINES REG., Feb. 28, 1993. In addition, an attempt by Baptists to boycott the Walt Disney Company because of its decision to grant same-sex benefits has been largely unsuccessful. STAR-LEDGER (Newark, N.J.), Mar. 22, 1998, at 8.

186. According to one published report, polls show that 84% of Americans support a ban on job sexual orientation discrimination. *Senate Should Try Again on Job Discrimination Bill; Having Come So Close on Banning Bias, It Shouldn't Give Up*, PORT. PRESS HERALD, Sept. 16, 1996, at A4. Even many well-known conservatives support such a bill. See, e.g., Barry Goldwater, *Job Discrimination Against Gays Bad for Business, Principles of Liberty*, THE NEWS TRIB. (Tacoma, WA), July 18, 1994, at A7. I do not mean to suggest that public support for gay rights is without limits. The public seems to have drawn a line between rights in employment and the right to marry. Congress' enactment of the Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C), indicates that the public in certain circumstances maintains a disdain for homosexual conduct. See Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 323 (arguing that the Defense of Marriage Act is an act of blatant discrimination against a group of disfavored individuals which "promotes bigotry").

