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Note, Sex(ual Orientation) and Title VII

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SEX(UAL ORIENTATION) AND TITLE VII

INTRODUCTION

Alice, Bob, and Calvin are sixth year associates at a prestigious Wall Street law firm. All three are up for partnership, along with seven other candidates. The three have stellar records, and rank at the top of their associate class in terms of billable hours and the generation of business. After speaking with the candidates' colleagues and examining the candidates' records, the senior partners conclude that Alice, Bob, and Calvin are superior candidates. Yet the partners decide to vote against their admission to the partnership. Instead, the partners admit the other seven candidates.

Alice, Bob, and Calvin each inquire as to the basis for the rejection. Alice is told her "tough, macho" behavior, "lack of social graces," and "unladylike language" contributed substantially to her failure to attain acceptance into the partnership. Bob, on the other hand, learns that though his work is superior, the senior partners thought him "too soft," and wondered if he "has lace on his jockey shorts." Finally, Calvin is told that he was denied partnership for the simple reason that he is gay.

This hypothetical serves two purposes. First, it illustrates the multidimensional character of sex stereotyping—all three candidates were ostensibly denied partnership because they did not fit into the employer's stereotype of how "real" women and "real" men should behave. Second, it serves as a model to demonstrate the similarity between discrimination based on sex stereotyping and discrimination based on sexual orientation.

The law today treats these three victims of sex stereotyping quite differently. Women such as Alice have a meritorious cause of action under Title VII of the Civil Rights Act of 1964, which has been interpreted to prohibit employment discrimination based on sex stereotyping. It stands to reason that Bob also should have a valid discrimination claim, since his situation mirrors Alice's, although no court has yet addressed this issue. Calvin, on the other hand, does not have a cause of action under Title VII: courts have not read the statute to prohibit employment discrimination based on sexual orientation. This Note illustrates the contradiction between these two rules by demonstrating that discrimination based on sexual orientation is essentially discrimination based on sex stereotyping. Because of this similarity, the sex stereotyping analysis that has been used to extend substantial rights under Title VII to Alice, and potentially to Bob, should be extended to Calvin as well.

Part I of this Note traces the link between heterosexism and sexism by examining current theoretical approaches to gender. It suggests that heterosexism, in its reliance upon a binary gender system and traditional gender roles, perpetuates the subordination of women. It

also shows how the extension of Title VII protections to lesbians and gays will benefit women by undermining heterosexism and binary notions of gender, thereby furthering Title VII's broad social objective of eliminating the subordination of women in the workforce. Part I then discusses the legislative history of the sex discrimination provision in Title VII and addresses the role courts play in perpetuating sexism. Part II analyzes recent changes in employment law in detail. It examines the sex stereotyping cases under Title VII, specifically *Price Waterhouse v. Hopkins*,[1] and demonstrates how these cases serve as a judicial acknowledgement of the sexist practices that a binary gender system encourages. It then examines the Title VII cases, focusing on *DeSantis v. Pacific Telephone & Telegraph Co.*,[2] in which courts have refused to find sexual orientation discrimination violative of Title VII. Part III returns to Alice, Bob, and Calvin, and illustrates how sex stereotyping analysis could be applied to cases brought by lesbian and gay plaintiffs. It then addresses arguments that might be made for not extending Title VII's coverage and concludes that these arguments are not persuasive.

I. THE LINK BETWEEN HETEROSEXISM AND SEXISM

Discrimination against lesbians and gays simultaneously flows from and perpetuates traditional notions of appropriate sex roles. The elimination of such discrimination from the work environment would further a legitimate purpose of Title VII: ending sex discrimination in employment.

A. *The Binary Gender System*

The sanctioning of discrimination based on sexual orientation perpetuates the subordination not only of lesbians and gays but of women as well. This becomes clear when discrimination based on sexual orientation is understood as a subset of heterosexism. Heterosexism should not be confused with homophobia, which is the irrational fear and hatred of homosexuality and/or lesbians and gay men. Heterosexism, on the other hand, refers to institutionalized valorization of heterosexual activity. Heterosexism, like sexism, is supported by institutions—local, state, and federal law, as well as church, marriage, and the family.[3] It is reflected in the "unwritten requirement that those in power be married, the refusal of all states to allow same-sex couples to marry, and the pervasiveness of benefits and privileges available only to married peo-

1. 109 S. Ct. 1775 (1989).

2. 608 F.2d 327 (9th Cir. 1979).

3. See Wolfe, The Rhetoric of Heterosexism, *in* Gender and Discourse 199, 210–12 (A. Todd & S. Fischer eds. 1988); Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 195.

ple, or those in relationships which look like marriage."[4]

Heterosexism is based on traditional notions of sex, or rather of bipolar sexes, and is premised on the belief not only that there are two distinct sexes, but also that there are two distinct genders. Sex refers "to the biological aspects of a person such as the chromosomal, hormonal, anatomical, and physiological structure."[5] Gender, on the other hand, refers to characteristics traditionally labelled "masculine" and "feminine" and is a function of socialization, having social, cultural, and psychological components.[6] It is essential to the maintenance of heterosexism that these two genders are interpreted as being opposites and as being "naturally" attracted to one another.[7] As Gayle Rubin, a noted feminist theorist, has said, heterosexism relies on "a taboo against the sameness of men and women," "a taboo which exacerbates the biological differences between the sexes and thereby *creates* gender."[8]

Gender oppression results from the fact that this bipolar system insists on conformity to a bipolar view of gender and rewards those who do conform. Men and women are rewarded for presenting themselves and for being perceived as "real" men and "real" women.[9]

In actuality, however, gender does not naturally follow from sex. It is the mythical causal link between sex and gender that such postmodern feminists[10] as Simone de Beauvoir and Judith Butler have

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4. Leonard, A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption, 12 Women's Rts. L. Rep. 39, 42–43 (1990) (footnotes omitted).

5. L.W. Richardson, The Dynamics of Sex and Gender: A Sociological Perspective 5 (1977).

6. See C. Franklin, The Changing Definition of Masculinity 2 (1984).

7. See Wittig, One is Not Born a Woman, Feminist Issues, Winter 1981, at 47, 47–48. The "naturalness" of heterosexuality as opposed to bisexuality or homosexuality has been called into serious question by cultural historians. See, e.g., M. Foucault, The History of Sexuality 101 (1978); R. Scruton, Sexual Desire: A Moral Philosophy of the Erotic (1986).

8. Rubin, The Traffic in Women: Notes on the "Political Economy" of Sex, *in* Toward an Anthropology of Women 157, 178–80 (R. Reiter ed. 1975). In a similar vein, Monique Wittig, another feminist theorist, has written that the category of "sex" makes sense only in terms of a bipolar discourse on sex in which "men" and "women" exhaust the possibilities of sex and relate to each other as complementary opposites. For this reason, she maintains, the category of sex is always subsumed under the discourse of heterosexuality. Thus heterosexism presses an abstract dichotomization by sex on the natural diversity of humanity, ignoring variation within each group and reifying group differences as an attribute of persons. Wittig, supra note 7, at 50–53. Likewise, feminist Andrea Dworkin defines heterosexuality as the "ritualized behavior built on polar role definition." A. Dworkin, Woman Hating 174 (1974).

9. See, e.g., Butler, Variations on Sex and Gender, *in* Feminism as Critique 132 (S. Benhabib & D. Cornell eds. 1987).

10. Whereas traditional feminists accept commonality among women as both a given and a base from which change must come, postmodern feminists challenge the very idea of "women" itself. Postmodern feminists find the category "women" not only too reductive to describe the complexity of social identities, but by its reductivity a contributor to the very subordination feminists seek to expose. See, e.g., Gagnier, Feminist

sought to deconstruct. De Beauvoir, in formulating that "[o]ne is not born, but rather becomes, a woman,"[11] suggests that whereas one is born a particular sex, gender is culturally imprinted on that sex through social constructions.[12] Butler, in her reading of de Beauvoir, likewise sees gender as a cultural interpretation of sex.[13] She emphasizes how gender is imprinted through societal constraints:

> The social constraints upon gender compliance and deviation are so great that most people feel deeply wounded if they are told that they exercise their manhood or womanhood improperly. In so far as social existence requires an unambiguous gender affinity, it is not possible to exist in a socially meaningful sense outside of established gender norms.[14]

Because gender does not naturally follow from sex, but rather is culturally constructed, it stands to reason that we have a continuum of genders rather than only two distinct genders.[15] The binary concepts "man" and "woman," to use Andrea Dworkin's language, become "fictions, caricatures, cultural constructs."[16] 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.[17]

An important aspect of this bipolar gender system is that it polices

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Postmodernism: The End of Feminism or the Ends of Theory?, *in* Theoretical Perspectives on Sexual Difference 21, 24–26 (D. Rhode ed. 1990).

11. S. de Beauvoir, The Second Sex 267 (H.M. Parshley trans. 1989).

12. Many scholars have used similar arguments to deconstruct race as being a false signifier, a cultural construct politically used to subsume such issues as geography, culture, and oppression. See, e.g., Fields, Slavery, Race and Ideology in the United States of America, 181 New Left Rev. 95, 101–03 (1990).

13. Butler, supra note 9, at 128.

14. Id. at 132.

15. Just as we have a continuum of genders, we have a continuum of sexualities. Several studies have examined how sexual orientation exists on a continuum. See, e.g., A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 636–55 (1948); A. Bell & M. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 53–61 (1978); see also Dunlap, The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy, 30 Hastings L.J. 1131, 1131–32 (1979) (arguing that American legal system should not rest on "questionable premise" that there are only two possible classifications).

16. A. Dworkin, supra note 8, at 174.

17. The existence of a gender continuum has lead Butler to state, "Women is . . . a false substantive and univocal signifier that disguises and precludes a gender experience internally varied and contradictory." Butler, supra note 9, at 141. This continuum has also lead men's studies theorists to list as their goal "rewriting that deceptively simple word, 'man.'" Stimpson, Foreword to The Making of Masculinities at xiii (H. Brod ed. 1987). Perhaps Dworkin states it most succinctly: "The words . . . 'man' and 'woman' are used only because as yet there are no others." A. Dworkin, supra note 8, at 176. The terms "women" and "men" are used throughout this Note not because of their validity, but rather because, as cultural theorist Julia Kristeva has noted, these terms are necessary for political discourse. Kristeva, Women Can Never be Defined, *in* New French Feminisms 137, 137 (E. Marks & I. de Courtrivon eds. 1980).

behavior. Women who are heterosexual, feminine, demure, and deferential to men are rewarded, as are men who are heterosexual, masculine, competitive, and protective of women. This is sexism. Women who are not feminine or demure and men who are not masculine and competitive do not fit into a bipolar view of gender and receive fewer rewards. This too is sexism. Women and men who are not heterosexual challenge the very notion of a bipolar gender system and are thus socially punished and deemed anomalies.[18] This is sexism raised to the level of heterosexism.

A bipolar gender system not only oppresses other genders through their exclusion; it also oppresses the female gender it does recognize through prioritization. This prioritization, cultural theorists maintain, is due to the structure of phallocentric language. Civilization, in order to define the self, constructs things through their differences: light/dark, white/black, male/female are examples. Structuralists, expanding upon the research of anthropologist Claude Levi-Strauss and linguist Ferdinande de Saussure, point out the hierarchies implicit in this polarization approach to language. By creating opposites, society implicitly valorizes one object over another.[19] Dark becomes both not light and somehow less than light. Black becomes both not white and somehow less than white. And female becomes both not male and somehow less tban male.[20] Feminist theorist Monique Wittig sees the implicit power struggle that takes place in this prioritization of sex, and posits that the very discrimination of sex that takes place within a political and linguistic network presupposes, and hence requires, that sex remains dyadic. She maintains that the demarcation of sexual difference does not precede the interpretation of that difference, but that this

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18. Suzanne Pharr, a grassroots feminist organizer, has explained how this reward and penalty system functions to compel bipolar gender conformity and heterosexuality:

> It is not by chance that when children approach puberty and increased sexual awareness they begin to taunt each other by calling these names: "queer," "faggot," "pervert." It is at puberty that the full force of society's pressure to conform to heterosexuality and prepare for marriage is brought to bear. Children know what we have taught them, and we have given clear messages that those who deviate from standard expectations are to be made to get back in line. The best controlling tactic at puberty is to be treated as an outsider, to be ostracized at a time when it feels most vital to be accepted. Those who are different must be made to suffer loss. It is also at puberty that misogyny begins to be more apparent, and girls are pressured to conform to societal norms that do not permit them to realize their full potential. It is at this time that their academic achievements begin to decrease as they are coerced into compulsory heterosexuality and trained for dependency upon a man, that is, for economic survival.

S. Pharr, Homophobia: A Weapon of Sexism 17 (1988).

19. See Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1372 (1988).

20. "The second term of each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it." J. Derrida, Dissemination viii (B. Johnson trans. 1981) (quoted in Crenshaw, supra note 19, at 1373).

demarcation is itself an interpretive act laden with normative assumptions about a bipolar gender system. For Wittig, this bipolar, and thus hierarchical, approach to sex and gender is the foundation of sexism, or the belief that female is not only different from male, but also less than male.[21]

Heterosexism, then, in its reliance on a bipolar system of sex and gender, reinforces sexism in two ways. First, by penalizing persons who do not conform to a bipolar gender system and rewarding men and women who do, the heterosexist hegemony perpetuates a schema that valorizes passive, dependent women, thus contributing to sexism. Second, heterosexism reinforces sexism because it subordinates the female sex through its hierarchical polarity. Because heterosexism perpetuates sexism, the extension of substantial rights to lesbians and gays, who by definition challenge heterosexism and the concept of a binary gender system, would result in a challenge to sexism and to male power.

B. *Homosexuality, Heterosexism, and Male Power*

The link between heterosexism and sexism is also reflected in the patriarchal nature of heterosexism. Heterosexism uses the notion of opposite genders to promulgate marital and familial relationships.[22] Because traditional marital and familial relationships are patriarchal, they perpetuate the subordination of women. Gary Kinsman, a gay theorist, explains the interrelation this way:

> [H]eterosexual identity is tied to the shifting social organization of gender and patriarchal relations. Male heterosexual identity is bound up with the institutionalization of a particular

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21. Wittig, supra note 7, at 47–48. Wittig goes on to note that this bipolar, hierarchal approach to sex and gender is at its most pernicious in its seeming "naturalness." She writes,

> Sex . . . is taken as an "immediate given," a "sensible given," "physical features," belonging to a natural order. But what we believe to be a physical and direct perception is only a sophisticated and mythic construction, an "imaginary formation," which reinterprets physical features (in themselves as neutral as any others but marked by the social system) through the network of relationships in which they are perceived.

Id. Freedom from this bipolar and hierarchal view of gender, Wittig seems to suggest, cannot occur until we realize that the categories "men" and "women" are "political categories and not natural facts." Id. (footnote omitted).

22. Sociologist Muriel Cantor has hinted at how the media reinforces a heterosexist hegemony by encouraging marriage and female dependence upon men. She notes that the media, through magazines, romance fiction, and soap operas, construct women's sexual and social needs in ways that reinforce dependence upon men and that perpetuate gender inequality. Cantor argues that women accept these constructions because they provide substitute satisfaction for less attainable ideals. More specifically, she suggests that women's actual subordination creates the demand for fantasies to obscure this reality. See Cantor, Popular Culture and the Portrayal of Women: Content and Control, *in* Analyzing Gender 190, 195–205 (B. Hess & M. Ferre eds. 1987).

> form of masculinity and is associated with the daily practices of men in the gender division of labour: a class organization of masculinity that contains common features across class boundaries, shifting forms of family organization, the struggle for a family wage paid to the male breadwinner, male responsibility for "his" wife and children, and male control over women's bodies and sexuality. Add to this the redefinition of public and private which associated masculinity with the public spheres of the economy and politics, and trapped women in an increasingly privatized domestic sphere shorn of its previously "productive" dimensions. Patriarchal hegemony organizes an apparent unity of interests between men in different classes, as "real men" in opposition to the women of their classes whose subordination it actively organizes.[23]

Heterosexism thus perpetuates the subordination not only of lesbians and gays but also of heterosexual women. By directly sanctioning discrimination based on sexual orientation, a heterosexist hegemony indirectly sanctions discrimination based on sex. When heterosexism is viewed in this light as perpetuating the subordination of women, it is not surprising that lesbianism functions as a significant social category of the feminist movement. Lesbian relationships and lesbian sexuality become more than just an expression of love between women. They signify a political alternative, allowing women to free themselves from not only a heterosexual hegemony, but also by definition from a patriarchal one.[24]

Recognizing the patriarchal nature of heterosexism also is important to an understanding of the threat that homosexuality poses to the heterosexist hegemony. Homophobia alone might explain why a heterosexual would mind a lesbian or gay living next door. Homophobia does not, however, explain why a heterosexual would find offence in a lesbian or gay living at all. More specifically, homophobia does not and cannot explain why a heterosexual would want to criminalize gay activity, would object to a hate crimes bill that included lesbians and gays as a protected group,[25] or would maintain laws that perpetuate discrimination against lesbians and gays in employment, housing, and child

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23. G. Kinsman, The Regulation of Desire: Sexuality in Canada 44 (1987).

24. See Schneider & Gould, Female Sexuality: Looking Back into the Future, *in* Analyzing Gender, supra note 22, at 120, 122.

25. The Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) authorizes the collection of data on bias crimes. For several years, however, passage was blocked by legislators unwilling to include sexual orientation as a category in the Act. Representative William Dannemeyer of California and Senator Jesse Helms of North Carolina led efforts to exclude sexual orientation from the categories of biases, with the latter going so far as proposing to amend the bill by adding antigay language urging the enforcement of sodomy statutes and depicting homosexuality as a threat to families. See Moore, Hate Crimes, 21 Nat'l J. 1604 (1989); Stewart, Dannemeyer Suggests White House Policy Encourages Homosexuality, L.A. Times, July 1, 1989, at 28, col. 1.

custody.[26]

When one recognizes that homosexuality threatens male power, one can understand why homosexuality is anathema to the heterosexist hegemony. As sociologist Gregory Lehne points out, a male dominated society objects to male homosexuality because it is threatened by fragmentations in the male role that could lead to less male dominance, less male power.[27] But male dominated society also objects to female homosexuality. Adriene Rich argues that lesbianism challenges male dominated society by refuting the proposition that female sexuality exists only for the sake of male gratification.[28] She states that "men really fear . . . that women could be indifferent to them altogether, that men could be allowed sexual and emotional . . . access to women *only* on women's terms, otherwise being left on the periphery of the matrix."[29] By virtue of their anomalous status, both lesbians and gays endanger "the natural moral order of this society."[30] The suppression of lesbians, bisexuals, and gays thus is integral to the maintenance of the existing power imbalance between men and women.

One's first response might be that this view of homosexuality as a challenge to male power could explain why men would object to homosexuality, but not why women, also suppressed by heterosexism, would. Examination of this question requires a return to the ramifications of a heterosexist hegemony. Hegemony "unites the process of coercion and consent," and "occurs through the . . . naturalization of existing relations." It "includes the power to 'frame alternatives and contain communities, to win and shape consent so that the granting of legitimacy to the dominant classes appears not only "spontaneous" but natural and "normal." ' "[31] Hegemonic theory, then, would maintain that women participate in and consent to their own oppression.[32] Rich, in her critique of compulsory heterosexual orientation for women, calls

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26. For an excellent survey of the rights that lesbians and gays do not have, see Harvard Law Review, Sexual Orientation and the Law (1990) (originally published as Developments in the Law: Sexual Orientation and the Law, 102 Harv. L. Rev. 1508 (1989)).

27. Lehne, Homophobia Among Men, *in* The Forty-Nine Percent Majority: The Male Sex Roles 66, 77–78 (D. David & R. Brannon eds. 1976).

28. Rich, Compulsory Heterosexuality and Lesbian Existence, 5 Signs 631, 640–45 (1980).

29. Id. at 643.

30. Pearce, How to Be Immoral and Ill, Pathetic and Dangerous, All at the Same Time: Mass Media and the Homosexual, *in* The Manufacture of News: Social Problems, Deviance and the Mass Media 284, 287 (S. Cohen & J. Young eds. 1973).

31. G. Kinsman, supra note 23, at 32; see also A. Gramsci, Selections from the Prison Notebooks of Antonio Gramsci 80 n.49 (Q. Hoare & G. Smith eds. 1971) (discussing process of coercion and consent).

32. For analyses of the feminist movement's acquiescence to homophobia and heterosexism, see Leonard, supra note 4, at 39–40; A. Lorde, Age, Race, Class, and Sex: Women Redefining Difference, *in* Sister/Outsider: Essays and Speeches 114, 116 (1984).

this hegemony a complex system of forces that compels women to identify with men, to place male needs above their own, and to believe that heterosexuality and marriage are inevitable.[33] Hegemonic theory thus suggests that women consent and participate in the condemnation of different sexualities even though this condemnation serves to reinforce their own oppression.

One can understand why homosexuality is anathema to heterosexist society when one recognizes that "the homosexual does not threaten society by his actual behavior but rather by the symbolic significance of his acts."[34] Homosexuality contradicts the accepted characteristics of men and women, and the complementarity of the sexes. It functions as a challenge to a bipolar gender system, to heterosexuality,[35] and hence to a patriarchal culture that encourages the subordination of women.[36] Sylvia Law details this challenge by focusing on the secular opposition to homosexuality. Noting that this secular opposition rests on a defense of traditional ideas of family,[37] Law writes:

> Homosexual relationships cballenge dichotomous concepts of gender. These relationships challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other. Moreover, those involved in homosexual relations implicitly reject the social institutions of family, economic and political life that are premised on gender inequality and differentiation.[38]

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33. Rich, supra note 28, at 645–48.

34. Szasz, Legal and Moral Aspects of Homosexuality, *in* Sexual Inversion: The Multiple Roots of Homosexuality 124, 135 (J. Marmor ed. 1965).

35. See, e.g., J. Butler, Gender Trouble: Feminism and the Subversion of Identity 17 (1990).

36. The link between heterosexism and the oppression of women was recognized early by gay liberationists. For example, in 1970 a gay liberation paper declared: "We recognize that the oppression that gay people suffer is an integral part of the social structure of our society. Women and gay people are both victims of the cultural and ideological phenomenon known as sexism. This is manifested in our cultures as male supremacy and heterosexual chauvinism." Come Together, No. 49 (1970), cited in Carrigan, Connell & Lee, Toward a New Sociology of Masculinity, *in* The Making of Masculinities 63, 84 (H. Brod ed. 1987). Gay theorists argued that homosexual people were severely penalized by a social system that enforced the subservience of women to men and that promulgated an ideology of the "natural" differences between the sexes. Homosexuality served to contradict the accepted characteristics of men and women, and the complementariness of the sexes. See, e.g., Pleck, Men's Power with Women, Other Men, and Society: A Men's Movement Analysis, *in* The American Man 417, 424–28 (E. Pleck & J. Pleck eds. 1980).

37. Gay theorist Dennis Altman makes a similar argument, stating that "the polite form of homophobia is expressed in terms of safeguarding the family." D. Altman, The Homosexualization of America, the Americanization of the Homosexual 64 (1982); see also Senator Helms's objection to passage of the Hate Crimes Statistics Act in Moore, supra note 25, at 1604.

38. Law, supra note 3, at 196. Law supports her analysis in part by reviewing Bowers v. Hardwick, 478 U.S. 186 (1986), specifically the arguments made by the State of Georgia and the two groups that filed amicus curiae briefs in support of Georgia's right

Lesbians and gays, then, by the symbolic significance of their acts, threaten the bipolar gender system that perpetuates the subordination of women. The symbolic significance of their acts cannot be overstated. When lesbians and gays question a society that denies them the right to adopt children, they question a society that says it is a woman's place to raise children, a man's place to be the breadwinner, and both are needed to constitute a family. When lesbians and gays question a society that denies them the right to express their love physically, they question a society that says a woman's body is not her own, but is still the subject of governmental control. And lastly, when lesbians and gays question a society that denies them basic employment rights, they question a society that says, more than a quarter of a century after Title VII's enactment, a woman is worth only seventy cents for every dollar made by a man.[39]

C. *Title VII, Traditional Notions of Sex, and Sexism*

The need to confront heterosexism in order to eradicate sexism has far reaching implications for Title VII. Title VII provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[40]

Title VII originally was envisioned as prohibiting only employment discrimination based on race and national origin. Indeed, an examination of the House committee hearings on Title VII indicates that sex discrimination was never even mentioned, let alone contemplated.[41] Rather, the sex amendment to Title VII was proposed by Representa-

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to impose criminal sanctions on gay and lesbian sexual relations. Georgia asserted that "homosexual sodomy is the anathema of the basic units of our society—marriage and the family. To decriminalize or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely other alternative lifestyles." Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 37–38, *Bowers* (No. 85-140). The Rutherford Institute argued that if homosexual activity were allowed, "the very foundations of this society will he shaken. . . . [O]ur institutions are built on a foundation which is incompatible with such practices—i.e., monogamous marriage and the family unit." Brief of the Rutherford Institute, and the Rutherford Institutes of Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas, and Virginia, Amici Curiae, in Support of the Petitioner at 26, *Bowers* (No. 85-140).

39. See Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 409 (110th ed. 1990) (table 671); Parade: Women's Salaries Still Lag Behind Men's, PR Newswire, June 14, 1990 (available on LEXIS/NEXIS).

40. 42 U.S.C. § 2000e-2 (1988).

41. 110 Cong. Rec. 2567–84 (1964).

tive Howard Smith of Virginia, the principal opponent of the bill, just two days before the House sent the bill to the Senate.[42] Hoping the addition of sex would secure the bill's defeat, Representative Smith supported his amendment by stating that every woman should have the right to a "husband of her own."[43] His proposal, as one commentator put it, was a "stroke of misfired political tactics."[44] The amendment passed the House by a vote of 168 to 133.[45]

Not surprisingly, the Supreme Court has commented that "[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."[46] Justice Rehnquist, commenting on the scant legislative history, wrote in *Meritor Savings Bank v. Vinson*:[47]

> The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."[48]

Particularly in the area of sexual orientation, courts and commentators have relied as much on what was not said as on what was said in surmising the meaning of "sex" in Title VII. Nothing in the legislative history suggests that Congress considered whether the word "sex" encompassed sexuality or sexual practices. Faced with this absence in the legislative history and subsequent congressional refusal to amend the statute to include sexual orientation,[49] courts have read Title VII as

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42. Id. at 2577.

43. Id.; see Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L.J. 305, 310–11 (1968).

44. Kanowitz, supra note 43, at 312. One commentator, reviewing the "sex" amendment's less than auspicious beginnings, called the prohibition against sex discrimination "an accidental result of political maneuvering [rather] than . . . a clear expression of congressional intent to bring equal job opportunities to women." Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, 884 (1967). The New Republic even went so far as to call the amendment a "mischievous joke perpetrated on the floor of the House of Representatives." Sex and Nonsense, The New Republic, Sept. 4, 1965, at 10.

45. 110 Cong. Rec. 2584 (1964).

46. General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976).

47. 477 U.S. 57 (1986).

48. Id. at 63–64 (citations omitted).

49. See, e.g., Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 97th Cong., 2d Sess. 1–2 (1982); Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong., 2d Sess. 6–7 (1980).

limited to "traditional notions" of sex[50] and thus have refused to find a prohibition against employment discrimination based on sexual orientation within the Act.[51] These courts maintain that the sole purpose of the sex provision was "to remedy the economic deprivation of women as a class" and "to place women on an equal footing with men."[52]

The Equal Employment Opportunity Commission (EEOC), conflating sex and gender in the process, also limits Title VII's coverage to traditional notions of sex. According to the EEOC, "sex," as defined for the purposes of Title VII, refers to "a person's gender, an immutable characteristic with which a person is born." Furthermore, homosexuality is a "condition . . . relate[d] to a person's sexual proclivities or practices, not to his or her gender."[53]

But the broad remedial purpose that courts have read into Title VII[54] is not served when the EEOC and courts limit its coverage to

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50. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661–62 (9th Cir. 1977) (after purporting to interpret statute's "plain meaning," court concluded "that Congress had only the traditional notions of 'sex' in mind").

51. See infra notes 79–93 and accompanying text.

52. *Holloway*, 566 F.2d at 662; accord Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4–5, reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2140–41.

53. EEOC Dec. No. 76-75, EEOC Dec. (CCH) ¶ 6495, at 4266 (Mar. 2, 1976); accord Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091–92 (5th Cir. 1975). The EEOC's language suggests that its interpretation of Title VII is based on the assumption that gender is sex, or at the very least that there is a one-to-one correlation between gender and sex. The fallacy and repercussions of this assumption are discussed supra notes 5–17 and accompanying text.

54. Courts have repeatedly read into Title VII a broad remedial purpose. For example, in Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976), the Supreme Court found that Title VII had the broad remedial purpose of prohibiting "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Likewise, in Ende v. Board of Regents of Regency Univs., 757 F.2d 176, 183 (7th Cir. 1985), the court quoted Shultz v. American Can Co.-Dixie Prods., 424 F.2d 356, 360 (8th Cir. 1970), which stated:

> The [Equal Pay] Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.

The *Ende* court then indicated that Title VII had a similar broad purpose; see also County of Washington v. Gunther, 452 U.S. 161, 178–80 (1981) (sex-based wage discrimination claims not restricted to equal pay for equal work).

A broad purpose was also read into Title VII when it was amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1988)). The PDA was enacted in response to the Supreme Court's narrow reading of the sex provision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), in which the Court held that a disability-benefits plan that did not cover pregnancy-related disabilities was gender-neutral because it applied to both sexes equally. When the Court came across a similar fact pattern several years later, it acknowledged that the PDA had read into Title VII broad remedial goals and adopted the liberal approach of the dissent in *Gilbert*. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987).

"traditional notions" of sex. More specifically, the subordination of women in the workplace will continue as long as a binary gender system exists and requires that women conform to accepted notions of femininity. By limiting Title VII to traditional notions of sex, courts do not further congressional objectives, but rather give legitimacy to a system that rewards men and women who conform to bipolar definitions of gender.[55] In short, courts perpetuate the very subordination that Title VII was designed to eliminate.

Courts can best further Title VII's purpose by reading the Act as protecting not just two genders, but the continuum of genders, by extending Title VII coverage to lesbians and gays. The extension of substantial rights to lesbians and gays who subvert the very notion of a bipolar gender system results in a challenge to the current system of rewards and penalties that favors masculine, independent, protective, and heterosexual males and feminine, dependent, passive, and heterosexual females. Other persons receive fewer rewards or face penalties depending on how far they stray from accepted gender definitions. A successful challenge to this system would transform the workplace into something less radical: Women and men would no longer receive fewer rewards or face penalization on the basis of their nonconformance to gender expectations. Rather than a workplace in which entrance and advancement is dependent on one's conforming to gender expectations, the workplace would be one in which entrance and advancement is more dependent on one's merit. Not a radical workplace, but rather the type of workplace envisioned by Congress in enacting Title VII.

II. THE SEX STEREOTYPING CASES

As of yet, courts have not extended Title VII protections to lesbians and gays. They have, however, taken steps in challenging the bipolar gender system by reading Title VII as prohibiting discrimination based on sex stereotypes.

A. *Sex Stereotyping and Its Relation to the Binary Gender System*

Sex stereotyping is a two-step process of categorization and attribution.[56] First, individuals are categorized into groups (male and female, white and black, young and old). Second, certain traits are attributed to these individuals by virtue of the group into which they have been categorized. Numerous psychologists have documented the

55. The role courts play in perpetuating gender expectations has been detailed by Joan Williams. Although Williams focuses on a particular case, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988), her analysis is equally applicable to other cases. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 816–20 (1989).

56. Ruble, Cohen & Ruble, Sex Stereotypes: Occupational Barriers for Women, 27 Am. Behav. Scientist 339, 340 (1984).

prevalence of these stereotypes.[57] Psychologists have demonstrated that stereotypes concerning males and females often become normative in nature;[58] beliefs about the attributes of men and women become beliefs about the appropriate and desirable behavior for men and women. More specifically, it has been demonstrated that ratings of the ideal woman and man parallel those of the typical woman and man.[59] This finding suggests that people tend to think that women and men ought to differ in many of the ways in which they are perceived to differ. Furthermore, the same trait is often viewed differently depending on the group membership of the individual.[60] For example, a trait such as assertiveness that might be positively evaluated in a male might be negatively evaluated as "hard-nosed" in a female.[61] Sex stereotyping is particularly harmful to individuals who do not conform to the normative ideal of a man or woman.

Consequently, normative sex stereotyping both is informed by and informs a bipolar gender system. Sex stereotyping is informed by a bipolar gender system in that sex stereotyping relies on the concept of binary genders to categorize individuals as men and women. In turn, normative sex stereotyping informs the bipolar gender system in its meting of rewards. By defining what attributes "real" men and "real" women should have, a bipolar gender system thus becomes capable of rewarding males who present themselves as "real" men and females who present themselves as "real" women.

B. *Sex Stereotyping in the Workforce*

Normative sex stereotyping helps to explain the barriers faced by women, and to a lesser extent men, to equal employment. These barriers exist on several levels. First, women and men seeking jobs not traditional to their sex face opportunity barriers. A woman pursuing an occupation traditionally held by men may encounter employers who, either wrongly or rightly, assume that certain characteristics, such as aggressiveness, competitiveness, dedication, and emotional detachment, are necessary for successful job performance.[62] An employer

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57. See, e.g., J. Spence & R. Helmreich, Masculinity and Femininity: Their Psychological Dimensions, Correlates, and Antecedents 109–29 (1978); Bem, The Measurement of Psychological Androgyny, 42 J. Consulting & Clinical Psychology 155–62 (1974); Ruble, Sex Stereotypes: Issues of Change in the 1970s, 9 Sex Roles: A Journal of Research 397–402 (1983).

58. J. Spence & R. Helmreich, supra note 57, at 112.

59. Id. at 120–23.

60. See R. Merton, Social Theory and Social Structure 475–90 (1949).

61. This kind of stereotyping is precisely what occurred in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); see infra notes 74–78 and accompanying text.

62. Studies indicate that men who evaluate women in certain occupations apply stereotypes that tend to discriminate against women. See, e.g., Rosen & Jerdee, Influence of Sex Role Stereotypes on Personnel Decisions, 59 J. Applied Psychology 9, 13–14 (1974); Ruble, Cohen & Ruble, supra note 56, at 344–51.

may therefore refuse to hire or promote the female candidate on the erroneous belief that women do not possess these characteristics, or that these characteristics are incompatible with traits such as cooperativeness, sensitivity, and submissiveness that are considered to be attractive in women.[63] Not surprisingly, the female candidate finds herself in a catch-22 situation. If she conforms to bipolar gender definitions of femininity, she may be thought of as lacking the requisite traits for the traditionally male occupation.[64] If she does not conform to bipolar gender definitions, however, she risks being denied the job or not promoted because she is perceived as unpleasant, overly aggressive, and uncooperative, and thus unwomanly.[65]

Sex stereotyping raises similar barriers for men seeking equal employment. A male candidate seeking a position traditionally held by women may find that he is not hired or promoted because the employer assumes either that men do not possess the requisite characteristics or that such characteristics are undesirable in men.[66] Like the female candidate in the scenario above, the male candidate finds himself caught between conforming to bipolar definitions and being denied the job because he lacks the requisite traits for the traditionally female position, or possessing the requisite traits but offending the bipolar gender system in the process, subsequently being denied the job because he is deemed weak, too sensitive, or effeminate.

Second, sex stereotyping functions as a "big brother" in the workforce by policing behavior in all occupations, including occupa-

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63. L. Larwood & M. Wood, Women in Management 32–37 (1977).

64. See Prather, Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions, 15 Am. Behav. Scientist 172, 172–73 (1971); see also Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1165 (9th Cir. 1984) (female probationary police officer terminated because her supervisor felt officer's femininity would cause problems), aff'd on rehearing, 804 F.2d 1097 (1986) (per curiam); Thorne v. City of El Segundo, 726 F.2d 459, 462 (9th Cir. 1983) (female applicant denied position of police officer because of supervisor's stereotyped notions about the physical abilities of women), cert. denied, 469 U.S. 979 (1984).

65. See Note, Permissible Sexual Stereotyping Versus Impermissible Sexual Stereotyping: A Theory of Causation, 34 N.Y.L. Sch. L. Rev. 679, 680 (1989). The Supreme Court recognized this problem in *Price Waterhouse*: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they don't. Title VII lifts women out of this bind." Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1791 (1989).

66. See, e.g., Diaz v. Pan Am. World Airways, Inc., 311 F. Supp. 559, 563 (S.D. Fla. 1970), rev'd, 442 F.2d 385 (5th Cir. 1971) (airline refused to hire male flight attendants, relying on belief that males do not have necessary qualities to perform nonmechanical functions and that females are better at "providing reassurance to anxious passengers, giving courteous personalized service, and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations"), cert. denied, 404 U.S. 950 (1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 293 (N.D. Tex. 1981).

tions that are not traditional to one sex.[67] The reward and penalization schema promulgated by the binary gender system reaches all facets of employment. Regardless of the occupation, men are still required to be "real" men and women are required to be "real" women. For example, normative sex stereotyping dictates that men should not assume domestic obligations or be family oriented. As a result, even though many employers now offer paternity leave, few men accept the offer.[68] Men and women who do not conform to stereotypes of "real" men and "real" women receive fewer rewards in the form of favorable reviews and promotions. Men and women who by their very existence challenge normative stereotypes face ostracism and penalization in the form of demotions or dismissals.

Finally, normative sex stereotyping and the binary gender system perpetuate the subordination of women by channeling women to lower paying, gender-stratified jobs.[69] As one commentator has noted:

> Children respond to signals about desirable masculine and feminine roles at very early ages. For many individuals, career decisions are less the product of informed and independent preferences, than of preconceptions about "women's work," shaped by media images, popular stereotypes and role models. Despite substantial progress over the past decade, the legacy of Dr. Dick and Nancy Nurse lives on in muted form: Some professions still appear too "unfeminine" for many women's tastes.[70]

C. *Sex Stereotyping and* Price Waterhouse v. Hopkins

Over the years, courts have recognized that the binary gender system, largely through sex stereotyping, functions to subordinate women.

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67. This is illustrated by the recent controversy surrounding an employment policy adopted by the Cracker Barrel Old Country Stores restaurant chain. Cracker Barrel implemented a policy banning the employment of "homosexuals or men with feminine traits." The company policy read: "It is inconsistent with our concept and values, and is perceived to be inconsistent with those of our customer base, to continue to employ individuals in our operating units whose sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our society." See Homosexual Rights Group Announces Boycott of Restaurant Chain for Alleged Anti-Gay Policy, Daily Lab. Rep. (BNA) No. 46, at A-6 (Mar. 8, 1991). As a result of the implementation of the policy, at least nine lesbian and gay employees were fired. Although the company purported to rescind the policy after the policy was publicized, it was unclear whether the terminated employees would be reinstated. See Bunch, City Pension Fund Puts Gay Firings on Chain's Menu, Newsday, Mar. 20, 1991, at 21.

68. "The perception persists that men who assume equal domestic obligations have 'lace on their jockey shorts.' " Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1184 (1988) (quoting Dads Ignore Paternity Leave, S.F. Examiner, June 14, 1984, at C12).

69. Most employed women work in sex-segregated, lower paying jobs. See Chamallas, Expanding the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs, 1984 Ill. L. Rev. 1, 22–23.

70. Rhode, supra note 68, at 1182.

In the area of employment law, these courts have sought to redress the harm by reading Title VII to prohibit discrimination based on sex stereotyping.

The origins of the present prohibition of sex stereotyping in employment decisions may be seen as an outgrowth of the bona fide occupational qualification ("BFOQ") cases of the early 1970s. In *Dothard v. Rawlinson*,[71] for example, the employer refused to hire women as security guards for a male prison, maintaining that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. Although the Supreme Court ruled in favor of the defendant, finding that sex in this fact pattern was a BFOQ, the Court made it clear that absent such extenuating facts, " 'romantic paternalism' "—specifically, sex stereotyping—was impermissible under Title VII.[72]

Dothard and similar BFOQ cases[73] made it clear that an employer could not make adverse employment decisions by relying on the assumption that all women conform to a certain stereotype and therefore no woman could efficiently perform the job. Rather, the employer was obligated to give each female applicant an opportunity to demonstrate that she diverged from the stereotype and was suitable for the job.

Beyond *Dothard*, courts realized that there were situations in which candidates were discriminated against not because they were assumed to conform to certain stereotypes, but rather because they did not conform to certain stereotypes. The most recent Supreme Court decision articulating a prohibition of sex stereotyping in employment decisions when a candidate does not conform to certain bipolar gender definitions is *Price Waterhouse v. Hopkins*.[74]

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71. 433 U.S. 321 (1977).

72. Id. at 335 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)). The Court concluded that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." Id. at 333.

73. Cases in which employment decisions based on stereotyped assumptions about employees were found to constitute Title VII violations include Fadhl v. City & County of San Francisco, 741 F.2d 1163 (9th Cir. 1984); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983).

74. 109 S. Ct. 1775 (1989). An earlier decision that involved discrimination against a candidate who did not conform to stereotypes is Hishon v. King & Spalding, 467 U.S. 69 (1984). In *Hishon*, the plaintiff was denied a promotion because "she just didn't fit in." The plaintiff maintained that she did not fit in only because she questioned the employer's practice of having a bathing suit competition among its female summer associates. See Stewart, Are Women Lawyers Discriminated Against at Large Law Firms?, Wall St. J., Dec. 20, 1983, at 1, col. 1. The district court held that partnership decisions were not covered by Title VII and dismissed Hishon's sex discrimination claim. *Hishon*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980). The Eleventh Circuit affirmed the district court's ruling. *Hishon*, 678 F.2d 1022, 1025–26 (11th Cir. 1982). The only issue before the Supreme Court was whether the complaint established a claim under Title VII. Upon ruling that it did, the Court remanded for trial on the merits. *Hishon*, 467 U.S. at 78–79. No trial occurred, and a settlement was reached between Hishon and the

In 1982, Ann Hopkins and eighty-seven male candidates applied for admission as partners in Price Waterhouse, one of the nation's largest accounting firms. Despite the fact that Hopkins had generated more business for the partnership and billed more hours than any of the other candidates, she was not invited to join the partnership. Rather, she and seventeen male candidates were placed on a one-year "hold." The following year, all of the male candidates placed on the one-year hold were renominated, but Hopkins was not. She was told that her rejection was based on her difficulties in "interpersonal skills"—most particularly her aggressive, tough, "macho" behavior.[75]

After resigning from the accounting firm, Hopkins instituted a lawsuit alleging that Price Waterhouse had violated Title VII by permitting stereotyped notions of women and appropriate "female" behavior to play a significant role in the denial of her partnership application. The district court agreed, finding that the promotion decision had been impermissibly influenced by sex stereotyping in the partnership evaluation process, but refused to direct that Hopkins be promoted, concluding that Hopkins had failed to prove that she had been constructively discharged.[76] The Supreme Court later reversed the district court's liability determination, concluding that Price Waterhouse was held to a higher standard of proof than the court deemed appropriate in Title VII cases.[77]

Although ostensibly the focus of *Price Waterhouse* was the appropriate standard of proof in mixed motive cases, the case is also important for its unequivocal affirmation that employment discrimination based on sex stereotyping is prohibited by Title VII. Indeed, Justice Brennan's opinion took the impermissibility of sex stereotyping as a given, stating that "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[78]

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law firm. Dullea, Women Win the Prize of Law Partnership, N.Y. Times, Feb. 25, 1985, at B5, col. 2.

75. In particular, one reviewer said "[Hopkins] may have overcompensated for being a woman." Another suggested that she needed to take a "course at charm school." She was referred to as "a lady using foul language." A reviewer even stated that Hopkins initially came across as "macho." One who defended her said, "she had matured from a tough-talking, somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady partner candidate." Finally, Hopkins was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1116–17 (D.D.C. 1985).

76. Id. at 1122.

77. 109 S. Ct. at 1795 (plurality opinion).

78. Id. at 1791. The plurality also stated that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 1790–91. Implicit in this reasoning is the acknowledgement that sex stereotyping involves the imposition

Implicit in this reasoning is the acknowledgment that bipolar gender definitions function as barriers to women in equal employment. Because Hopkins did not conform to gender expectations, she was denied partnership. Yet had she conformed to gender expectations by being passive, dependent, or nurturing, she may have been denied partnership for not having the requisite characteristics for the position. Indeed, had Hopkins complied with gender expectations, she may not have entered the accounting field at all, but rather, like many women, would have been directed toward a gender-stratified profession. By reading Title VII to prohibit sex stereotyping, *Price Waterhouse* is a significant step in redressing the opportunity barriers and gender stratification that result from a binary gender system.

D. *The Sexual Orientation Cases*

Unfortunately, while *Price Waterhouse* and other sex stereotyping cases challenge the binary gender system, thus discouraging some sexist employment practices, these cases do not challenge the heterosexist hegemony on which this binary gender system is founded. Thus, while courts have been willing to find discrimination based on sex stereotyping violative of Title VII, courts have been reluctant to reach a similar conclusion regarding discrimination based on sexual orientation.[79]

The leading case holding that Title VII does not prohibit employment discrimination based on sexual orientation is *DeSantis v. Pacific Telephone & Telegraph Co.*[80] In *DeSantis*, lesbian and gay plaintiffs brought a civil rights action claiming that their employers or former employers

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of one set of standards upon women and a different set of standards upon men, which was found violative of Title VII in Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam). The Court also had stated in previous decisions that sex stereotyping discrimination came under the rubric of sex discrimination. " '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.' " Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)); accord Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 481–84 (8th Cir. 1984); Skelton v. Balzano, 424 F. Supp. 1231, 1235 (D.D.C. 1976).

79. See, e.g., DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329–31 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978); cf. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085–86 (7th Cir. 1984) (rejecting claim that discrimination against transsexuals constitutes sex discrimination), cert. denied, 471 U.S. 1017 (1985); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661–62 (9th Cir. 1977) (same).

80. 608 F.2d 327 (9th Cir. 1979). The circuit court consolidated three separate cases involving employment discrimination based on sexual orientation. In *Strailey v. Happy Times Nursery School, Inc.*, the appellant claimed that the nursery school fired him because he wore a small gold ear-loop to work prior to the commencement of the school year. Appellants in *Lundin v. Pacific Tel. & Tel. Co.* claimed that they were subject to numerous insults from coworkers and were fired because of their lesbian relationship. *DeSantis* involved male plaintiffs at the same company who claimed antigay harassment forced them to quit or refuse to accept their jobs. Id. at 328–29.

discriminated against them in employment decisions because of their sexual orientation. The plaintiffs raised several arguments. First, they claimed that in prohibiting employment discrimination on the basis of "sex," Congress meant to include discrimination on the basis of sexual orientation. Second, they argued that since sexual orientation discrimination disproportionately affects men, sexual orientation discrimination becomes sex discrimination under disparate impact analysis. Finally, the plaintiffs alleged that the defendants had violated Title VII by interfering with the plaintiffs' freedom of association and by applying different employment criteria for men and women.[81]

The court rejected the claim that sexual orientation discrimination was implicit in Title VII's language prohibiting sex discrimination. Relying on an earlier decision, *Holloway v. Arthur Andersen & Co.*,[82] the court found that the plain meaning of the word "sex" and Congress's subsequent rejection of sexual preference amendments indicated that sex discrimination "applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference."[83] The court did not address the argument that any statutory interpretation of the sex provision in Title VII is problematic in light of the evidence that "sex" was added to defeat the bill.[84]

The court also rejected the plaintiffs' disparate impact theory. The court stated that disparate impact analysis is used by courts to further congressional goals of protecting certain groups. Because Congress did not intend to protect homosexuals, the court reasoned, disparate impact analysis should not be available to gay men "as an artifice to 'bootstrap' " Title VII protection "under the guise of protecting men generally."[85] Despite a partial dissent, which asserted that the plaintiffs should be allowed to invoke the disparate impact theory,[86] the majority

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81. Id. at 331. One plaintiff also argued that his employer's reliance on a stereotype—"that a male should have a virile rather than effeminate appearance"—violated Title VII. The court summarily dismissed the contention. Relying on *Smith v. Liberty Mut. Ins. Co.* and *Holloway v. Arthur Andersen & Co.*, the court held that "discrimination because of effeminacy, like discrimination because of homosexuality . . . does not fall within the purview of Title VII." *DeSantis*, 608 F.2d at 332. For an in-depth discussion of this argument, see infra notes 95–108 and accompanying text.

82. 566 F.2d 659 (9th Cir. 1977).

83. 608 F.2d at 329–30 (footnote omitted). The court also found persuasive two EEOC decisions concluding that the word "sex" in Title VII was intended by Congress to refer to a person's gender and not to sexual practices. Id. at 330 n.3; see EEOC Dec. No. 76-67, EEOC Dec. (CCH) ¶ 6493 (Mar. 2, 1976) (applicant refused employment because of homosexual tendencies); EEOC Dec. No. 76-75, EEOC Dec. (CCH) ¶ 6495 (Mar. 2, 1976) (former employee refused reemployment because of homosexuality).

84. See supra notes 41–44 and accompanying text.

85. 608 F.2d at 330.

86.

> My point of difference with the majority is merely that the male appellants in their *Griggs* claim are not using that case "as an artifice to 'bootstrap' Title VII protection for homosexuals under the guise of protecting men generally."

concluded that "[a]doption of this bootstrap device would frustrate congressional objectives . . . . It would achieve by judicial 'construction' what Congress did not do and has consistently refused to do on many occasions."[87] The majority's reasoning is particularly problematic in light of the fact that courts have allowed other plaintiffs to "bootstrap" their claims of illegal employment discrimination.[88]

The plaintiffs also argued that because the EEOC had previously ruled that discrimination against an employee because of the race of the employee's friends is prohibited by Title VII,[89] discrimination against an employee because of the sex of the employee's friend is also prohibited. Without addressing the race analogy, the court concluded that the discrimination at issue was not based on the sex of the friend but rather the type of friendship involved.[90]

Their claim if established properly, would in fact protect males generally. I would permit them to try to make their case and not dismiss it on the pleadings.

Id. at 333–34 (Sneed, J., concurring in part and dissenting in part) (citation omitted).

87. Id. at 330.

88. As pointed out in Note, Title VII and Private Sector Employment Discrimination Against Homosexuals, 22 Ariz. L. Rev. 94, 100–01 (1980), courts have allowed short and lightweight persons, convicted criminals, garnishees, and arrestees to use race or sex to "bootstrap" claims of illegal employment discrimination. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 328–29 (1977) (holding invalid height and weight requirements for prison guards); Green v. Missouri Pac. R.R., 523 F.2d 1290, 1298–99 (8th Cir. 1975) (holding invalid policy of refusing employment to persons convicted of crime other than minor traffic offense); Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 496 (C.D. Cal. 1971) (holding invalid policy of discharging employee whose wages had been garnished several times); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding invalid policy of excluding from employment persons arrested but not convicted for offenses other than minor traffic violations), aff'd in part, vacated in part, 472 F.2d 631 (9th Cir. 1972).

Several commentators have written extensively on how disparate impact analysis could be applied in cases alleging employment discrimination based on sexual orientation. See, e.g., Siniscalco, Homosexual Discrimination in Employment, 16 Santa Clara L. Rev. 495, 506–10 (1976); Note, Challenging Sexual Preference Discrimination in Private Employment, 41 Ohio St. L.J. 501, 505–08 (1980) [hereinafter Ohio Note]. However, a disparate impact theory would present difficulties for the plaintiffs in satisfying the burden of proof. Id. at 506. Other problems with applying disparate impact analysis exist. Its application would rely on the perhaps spurious assumption that the percentage of gays in the male population is greater than the percentage of lesbians in the female population. Any concession that sexual difference may be more prevalent in one sex than the other, and any further participation in rendering bisexuals invisible, may have dangerous repercussions for the lesbian and gay community, which need to be examined before disparate impact analysis is applied. As the law stands now, an employer could avoid disparate impact liability by simply firing lesbians. "Though the disparate impact theory is grounded in a search for protection of gay civil rights, encouraging harassment of gay women and heterosexual women who [may be mistaken for lesbians] is not the way to establish gay people's rights in private employment." Id. at 507.

89. See, e.g., EEOC Dec. No. 71-1902, EEOC Dec. (CCH) ¶ 6281 (1971); EEOC Dec. No. 71-969, EEOC Dec. (CCH) ¶ 6193 (1970).

90. *De Santis*, 608 F.2d at 331; see also Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 Yale L.J. 145, 154–60 (1988) (noting similarity between rationales used to uphold miscegenation laws and sodomy laws).

Finally, the plaintiffs asserted that they were discriminated against in light of case law holding that an employer may not use different employment criteria for men and women. They maintained that if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners. This different treatment, they argued, was made impermissible in *Phillips v. Martin Marietta Corp.*[91] But the court dismissed this reasoning: "[W]hether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes."[92] Interestingly, the implication of this reasoning is that an employer who disfavors gay males and not lesbians may be in violation of Title VII.[93]

III. Sex Stereotyping Analysis and Sexual Orientation

The judicial exemption of sexual orientation from Title VII's ban on sex discrimination results in unfairness and inconsistency when applied. Uniform application of Title VII would further the legislative intent underlying that provision, while respecting the statutory text.

A. *Application of Sex Stereotyping Analysis*

The application of sex stereotyping analysis to lesbian, bisexual, and gay plaintiffs can be demonstrated by returning to the hypothetical case with which this Note began.

Alice, who is told that her "tough, macho" behavior, "lack of social graces," and "unladylike language" contributed substantially to her failure to attain acceptance into the partnership and that she might benefit from a "course at charm school," clearly has a cause of action under Title VII. Her fact pattern duplicates that of Ann Hopkins in *Price Waterhouse*.[94] The employer here, much like the employer in *Price Waterhouse*, permitted stereotyped notions of women and appropriate "female" behavior to play a significant role in the denial of her partnership application. Should she meet the appropriate burdens of proof, the employer will be found liable for violating Title VII.

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91. 400 U.S. 542, 544 (1971) (per curiam).

92. *De Santis*, 608 F.2d at 331.

93. This conclusion would be consistent with decisions indicating in dicta that while sexual harassment is actionable against a heterosexual, gay, or lesbian defendant, it is not actionable against a bisexual defendant who harasses both men and women. See Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); Wright v. Methodist Youth Servs., 511 F. Supp. 307, 310 (N.D. Ill. 1981); Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc) (finding result that "only the differentiating libido runs afoul of Title VII" bizarre), aff'd sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); see also M. Player, Employment Discrimination Law 250 (1988) (criticizing view that there may not be action against bisexual harasser).

94. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

Bob was also a superior candidate, but was denied admission to the partnership because the senior partners thought him a little too soft—"not exactly wimpish," but soft. Something about his mannerisms bothered them. The partners also found it strange that Bob was thirty-five and still single. In short, the senior partners suspected that Bob might be "one of them." Bob is then told that he should "butch it up a little," and maybe date a secretary or something.

Bob's legal position is more problematic than is Alice's. While courts thus far have prohibited discrimination against Alice on sex stereotyping grounds, they have not yet prohibited discrimination against Bob, relying on the belief that Title VII's coverage does not include discrimination based on effeminacy. In *Smith v. Liberty Mutual Insurance Co.*,[95] for example, the Fifth Circuit found that there was no unlawful discrimination when an employer refused to hire a male applicant because the employer considered the applicant effeminate.[96] There was no indication that the applicant was in fact gay. The court noted that the employer's decision was simply based on the display of characteristics inappropriate to plaintiff's sex.[97]

But just as clearly as Alice was a victim of sex stereotyping, Bob (and the *Smith* plaintiff) was a victim of such stereotyping. In short, the employer declined to admit Bob to partnership because he was compassionate, sensitive, and "soft," thus not fitting into the employer's definition of what a "real" man should be. Furthermore, just as the employer in *Price Waterhouse* would not have denied Ann Hopkins partnership had Hopkins been male, the employer in this situation would not have denied Bob partnership had Bob been female.

Presumably the authority of *Smith v. Liberty Mutual Insurance Co.* is questionable after *Price Waterhouse*; a court today should apply sex stereotyping analysis to find that tbe employer's decision against Bob was based on impermissible sex stereotyping and thus prohibited by Title VII.[98] To have a meritorious claim, Bob must provide direct evi-

95. 569 F.2d 325 (5th Cir. 1978).

96. Id. at 328.

97. Id. at 327. The court also relied on Willingham v. Macon Tel. Publishing Co., 482 F.2d 535 (5th Cir. 1973), vacated en banc, 507 F.2d 1084 (5th Cir. 1975), in which different grooming standards for males and females were not found violative of Title VII because the standards were not based on immutable characteristics or a legally protected right. Id. at 1091–92. For a critique of the implicit assumption that sexual orientation is a "mutable proclivity or practice analogous to a decision one makes regarding the length at which he will wear his hair," see Note, Civil Rights—Title VII and Section 1985(3)—Discrimination Against Homosexuals, 26 Wayne L. Rev. 1611, 1616 (1980).

98. Although there is no case to date in which a plaintiff has won on the theory that sex stereotyping amounted to a hostile work environment, reasoning along this line also suggests that lesbians and gay men may also be able to bring actions under a hostile work environment theory. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that sexual harassment constitutes form of sex discrimination prohibited under Title VII).

dence[99] that comments involving sex stereotypes were made, and that these stereotypes were relied upon in the employment decision.[100]

Sex stereotyping analysis remains problematic, however, if the employer alleges that Bob was fired because he is gay[101] because cases such as *DeSantis* have specifically held that discrimination based on sexual orientation is not actionable under Title VII.[102] Thus the partnership could defend the charge of employment discrimination based on impermissible sex stereotyping by asserting that the employment decision was based on Bob's sexuality.[103] In other words, the firm could maintain that Bob was denied partnership not because he is compassionate, sensitive, and "soft," but because he engages in same sex activity. The employer would thus argue that decisions holding that discrimination based on sexual orientation is not prohibited insulate the firm from liability.

Should the employer raise this defense, the court should apply the mixed motive analysis that is used when an employer has considered both legitimate and illegitimate factors in making an employment decision. Under *Price Waterhouse*, once Bob has demonstrated by direct evi-

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99. In disparate treatment cases, the plaintiff can state a cause of action either by providing direct evidence that sex was a factor in the employer's employment decision, or by creating an inference of impermissible motivation by establishing a prima facie case using the analytical model developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the plaintiff can create an inference of impermissible motivation by establishing the following: (i) the plaintiff belonged to a group protected by Title VII, (ii) the plaintiff applied and was qualified for a job for which the employer was seeking applicants, (iii) despite those qualifications plaintiff was rejected, and (iv) after plaintiff's rejection, the position remained open and the employer continued to seek applicants with plaintiff's qualifications. Id. at 802. Establishment of a prima facie case creates a presumption of illegal motivation. The plurality in *Price Waterhouse* left open whether sex stereotyping analysis would be available in cases when no direct evidence is available. 109 S. Ct. at 1791 (plurality opinion).

100. Cohen, *Price Waterhouse v. Hopkins*: Mixed Motive Discrimination Cases, the Shifting Burden of Proof, and Sexual Stereotyping, 40 Lab. L.J. 723, 727 (1989). The *Price Waterhouse* Court refused to determine exactly what would constitute adequate proof of sex stereotype discrimination, thereby leaving it to the lower courts to decide on a case by case basis. 109 S. Ct. at 1791 (plurality opinion).

101. This contention can be read as already placing a heavy burden on the employer, who, absent an admission from the employee, would in most cases not know the employee's sexual persuasion, but rather surmise it from the employee's mannerisms, which constitutes the very sex stereotyping that Title VII prohibits. An admission of homosexuality after the adverse employment decision, for example, in depositions, should be given little weight since information ascertained after an adverse employment decision cannot possibly justify that decision.

102. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979).

103. Even without evidence of Bob's sexuality, the employer may assume Bob is gay because Bob does not conform to the normative stereotype of a "real" man. Similar assumptions are made with women. "All women who depart too far from the accepted image of 'female' are potentially subject to lesbian-bashing, regardless of their sexuality. Women who dress too mannishly, women who are unreceptive to male advances, women who highly value their female friends—all risk being disparaged and discriminated against as lesbians." Leonard, supra note 4, at 44.

dence[104] that the employer allowed gender to play a "motivating part" in an employment decision, the burden would shift to the partnership to prove with "objective evidence" that the adverse employment action would have been taken even in the absence of the impermissible motivation, and therefore that the discriminatory animus was not the cause of the adverse employment action.[105] Because the partnership has the difficult burden of proving by a preponderance of the evidence that its decision was based on a legitimate reason,[106] the scales are tipped in Bob's favor. Unless the employer is able to meet its burden, the employer will be found liable for Title VII violations.

Finally, consider the situation of Calvin. The firm maintains that Calvin was fired for the sole reason that he is gay. He is told that everyone assumed he was straight until the firm's Christmas party a few months ago. After all, Calvin had always "acted like one of the guys" and looked and seemed "normal" and was the star player on the firm's baseball team. But then, at the Christmas party, Calvin brought his roommate, a guy. "Somebody saw you hugging him underneath the

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104. The plurality opinion in *Price Waterhouse* leaves unclear whether a similar burden shifting would occur when no direct evidence is proffered. Should the plaintiff rely instead on the inference of impermissible motivation by establishing a prima facie case, it seems likely that courts would rely on the paradigm of *McDonnell Douglas* and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The *McDonnell Douglas/Burdine* paradigm establishes that once the plaintiff has made a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the decision that was made. If the defendant carries that burden, the plaintiff must then show that the proffered reason was a mere "pretext" for discrimination. Under this paradigm, the burden of persuasion remains at all times with the plaintiff. See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1801 (1989) (O'Connor, J., concurring). Thus, in a pretext case, the plaintiff's burden is considerably greater than it would be in a mixed motive case.

105. 109 S. Ct. at 1791–92 (plurality opinion).

106. Because the justices could not concur in just how much the burden should shift in mixed motive cases, Justice Brennan's plurality opinion on burden shifting is tenuous at best:

> As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moveover, proving "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Id. (citing Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979), quoting Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1315 (5th Cir. 1977)).

mistletoe." Were it not for his same-sex activity, Calvin would substantially comply with bipolar gender expectations.

Application of sex stereotyping analysis to Calvin suggests that he, like Alice and Bob, was dismissed for impermissible reasons. The firm refused to extend partnership to Calvin not because he was underqualified, but solely because he does not conform to their stereotype of what a "real" man should be:[107] normative sex stereotyping requires that men be not only aggressive, independent, and competitive, but also heterosexual.[108] In short, the only difference between Bob and Calvin is that whereas Bob does not comply at all with bipolar gender definitions, Calvin complies with all factors except one. Both Calvin and Bob were denied partnership because they do not comply completely with the employer's stereotype of how "real" men should behave.

The fact that Calvin, like Alice and Bob, was denied partnership because of impermissible sex stereotyping becomes even clearer when Calvin is told that everyone at the firm assumed Calvin was straight because he "acted like one of they guys," seemed "normal," and was the star of the firm's baseball team. Everyone assumed he was straight, that is, until someone saw him hugging his male roommate at the firm's Christmas party. Calvin does not comply with a normative sex stereotype: "real" men do not show affection toward men, do not hug men. He was denied partnership because he does not conform to the employer's normative stereotype of how "real" men behave. This would be true even had Calvin been caught having sex with his roommate in the cloakroom at the Christmas party. This is not to say that the firm could not legitimately deny him partnership for behaving unprofessionally at a firm function. Rather, should the firm refuse Calvin partnership solely because he engaged in same-sex activity, the firm would be engaging in impermissible sex stereotyping, refusing him partnership because "real" men do not have sex with men.

An approach that considers Calvin to be a victim of impermissible sex stereotyping likewise revises the analysis concerning Bob. Mixed motive analysis is no longer available to the employer in Bob's case, because both motives of firing an employee because he is effeminate and of firing an employee because "real" men do not engage in same-sex activity are based on the employee's perceived noncompliance with normative stereotypes and are therefore illegitimate.

This analysis is, of course, problematic under existing case law. While the fact patterns of Alice and Bob clearly fall under the scope of *Price Waterhouse*,[109] Calvin's situation may be closer to that of the plain-

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107. Similar arguments are suggested in Harvard Law Review, supra note 26, at 71; Ohio Note, supra note 88, at 505–08.

108. See supra notes 56–70 and accompanying text.

109. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); see supra notes 75–78 and accompanying text.

tiffs in *DeSantis*.[110] Also, Calvin's fact pattern falls into the ambit of what courts and Congress have repeatedly refused to do, include sexual orientation as a protected category in Title VII. None of this, however, negates the fact that the employer permitted stereotyped notions of men and appropriate "male" behavior to play a significant role in the denial of Calvin's partnership application, or that Calvin, like Alice and Bob, was discriminated against because he does not conform to certain binary gender expectations.

This is not to suggest that courts should rewrite Title VII to include lesbians, bisexuals, and gays as a protected group. Rather, because discrimination based on sexual orientation is essentially discrimination based on sex stereotyping, courts should apply the same analysis to lesbians, bisexuals, and gays that they currently apply to people who comply with bipolar gender definitions in their sexual orientation. Courts must rethink their previous decisions denying protection to lesbians and gays and acknowledge the assumptions underlying their decisions and the social codes on which they rely.

B. *Countervailing Considerations*

Until courts extend Title VII protection to individuals like Calvin, the binary gender system and the heterosexist hegemony on which patriarchal values and sexism are founded will continue to exist, thereby frustrating the congressional goal of ending the subordination of women in the work force. Because courts have limited Title VII to address only discrimination based on "traditional notions of 'sex,' "[111] Title VII has not transformed the workplace into one of sexual equality, as was the statute's purpose. More than a quarter of a century after Title VII's enactment, women continue to be discriminated against and continue to occupy second-class status in the workforce. Statistics indicate that the problem today[112] is the same as that acknowledged by Justice Douglas nearly two decades ago: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[113] Courts can and should work to alleviate this problem by reading Title VII as prohibiting not just sex stereotyping for those who substantially comply with bipolar gender definitions, but also as prohibiting all sex stereotyping, including stereotyping that affects les-

110. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (1979); see supra notes 79–92 and accompanying text.

111. See supra note 50.

112. Chamallas, supra note 69, at 22–23; Rhode, supra note 68, at 1178–81; Torrey, Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females, 64 Wash. L. Rev. 365, 368 (1989).

113. Kahn v. Shevin, 416 U.S. 351, 353 (1974).

bians, bisexuals, and gays.[114]

There are several counterarguments to this proposition. First, opponents would argue that reading Title VII to prohibit discrimination based on sexual orientation would contravene the legislative intent of the provision.[115] But courts can most effectively further the legislative intent, that Title VII pursue the broad remedial goal[116] of eliminating the subordination of women in the workforce, by challenging the bipolar gender system and the heterosexist hegemony that feeds this subordination. A statute that protects only women who fit into a bipolar definition of women (heterosexual, feminine, passive, dependent) and men who fit into a bipolar definition of men (heterosexual, masculine, competitive, protective) serves only to perpetuate sex discrimination, not eradicate it. Courts will further the legislative purpose of Title VII best by extending protection to those who do not fit into this bipolar definition such as competitive women, as in *Price Waterhouse*, and those who challenge this bipolar definition by their very existence such as gay males, as in *DeSantis*.[117]

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114. Any rights won by lesbians and gays in the workplace will benefit all women by helping to eradicate a binary gender system that perpetuates a schema in which women receive lower wages and are encouraged to enter gender-stratified jobs. In this respect, lesbian and gay plaintiffs may be better than heterosexual women plaintiffs in the furtherance of women's rights in the workplace. This situation would duplicate the present advantage male plaintiffs have in furthering women's rights. For an analysis of the success of male plaintiffs over female plaintiffs, see Cole, Strategies of Difference: Litigating for Women's Rights in a Man's World, 2 Law & Inequality 33, 34 (1984).

115. For a discussion of the essentially nonexistent legislative history, see supra notes 41–52 and accompanying text.

116. See supra note 54.

117. An additional counterargument contends that a judicial extension of Title VII's coverage would conflict with the principle of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–44 (1984), that, when a statute is silent or ambiguous with respect to the question at issue, courts generally should defer to reasonable agency interpretations of the statute. Yet this argument ignores the Supreme Court's conclusion that the EEOC is not entitled to the same deference as other government agencies. As Justice Rehnquist pointed out in General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976),

> Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regnlations which under the enabling statute may themselves supply the basis for imposition of liability.

EEOC guidelines thus are only interpretive rules meant to have the " 'power to persuade, if lacking the power to control.' " Id. at 142 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). This limited deference to EEOC interpretations has been reiterated in the post-*Chevron* cases of Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 n.6 (1986) and Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986).

Moreover, *Chevron* does not require courts to defer to agency interpretations if those interpretations are arbitrary and capricious. 467 U.S. at 844. The EEOC's inter-

Likewise, the counterargument that extending protection to lesbians, bisexuals, and gays would amount to judicial activism[118] and would require an overruling of previous decisions is also unpersuasive. This argument ignores Title VII's broad purpose of eliminating the subordination of women in the work force. Because the extension of substantial rights to lesbians and gay men would help to undermine this subordination by subverting the binary gender system and heterosexist hegemony that perpetuate the subordination, this extension of rights is fully consistent with Congress's goals in enacting Title VII. Judicial activism should not be restrained when it is in furtherance of legislative intent.[119] Indeed, it is arguable that given the law's role in propagating a binary gender system and establishing cultural assumptions,[120] the courts are obligated to redress this harm by judicially active means.[121]

Finally, as demonstrated above, Title VII can be read as prohibiting employment discrimination based on sexual orientation without a drastic rereading of Title VII, or an imaginary inclusion of the words "sexual orientation" after the word "sex" in the statute. This does not entail the extension of basic employment rights to lesbians and gays as lesbians and gays per se, but rather the extension of rights to lesbians and gays as women and men who may be victims of impermissible sex stereotyping. Courts can extend substantial protection to lesbians, bisexuals, and gays by simply extending sex stereotyping analysis to sexual orientation cases.

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pretations of the sex provision in Title VII are exactly that, arbitrary and capricious: the EEOC has interpreted Title VII to permit discrimination based on sexual orientation, see supra note 83, but to prohibit discrimination based on sex stereotyping, see, e.g., 29 C.F.R. § 1604.2 (1990). Yet discrimination based on sexual orientation is discrimination based on sex stereotyping. Thus, the EEOC has rendered two inconsistent interpretations, which generally could be accepted for purposes of *Chevron* as arbitrary and capricious and thus not entitled to judicial deference. See P. Strauss, An Introduction to Administrative Justice in the United States 266–67 (1989).

118. Several courts have used the doctrine of judicial restraint to limit the scope of Title VII. For example, in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), the Seventh Circuit noted that Congress, not the courts, must decide whether to expand the classes of people protected by a particular statute. The court stated that only Congress was empowered to determine whether to include "the untraditional and unusual within the term 'sex' as used in Title VII" because "[o]nly Congress can consider all the ramifications to society of such a broad view." Id. at 1086.

119. Judicial activism has also been used to read Title VII as protecting women with preschool age children, unwed mothers, and married women. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam); Jacobs v. Martin Sweets Co., 550 F.2d 364, 370–71 (6th Cir.), cert. denied, 431 U.S. 917 (1977); Sprogis v. United Air Lines, Inc. 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971); Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184, 1187 (W.D. Pa. 1971), vacated, 414 U.S. 970 (1973).

120. See supra note 55.

121. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 745 (1971); Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55, 102–24.

CONCLUSION

The Supreme Court has held that Title VII prohibits discrimination based on sex stereotyping. At the same time, several circuit courts have read Title VII not to prohibit discrimination based on sexual orientation. Yet a frank comparison of these two rules demonstrates their inconsistency and supports the notion that discrimination based on sexual orientation is essentially discrimination based on sex stereotyping. Based on the synthesis of sex stereotyping discrimination and sexual orientation discrimination, courts can extend substantial employment rights to lesbians and gays without a radical rewording of Title VII: sex stereotyping analysis should apply to everyone, without any need to carve out an exception for certain groups.

By extending sex stereotyping analysis to lesbians and gays, courts can substantially further Title VII's broad legislative purpose of eradicating the subordination of women in the workforce. As the discussion of current gender theory demonstrates, the binary gender system now rewards and penalizes women and men in accordance with how well they conform with this gender system; men who are competitive, aggressive, and independent and women who are demure, passive, and dependent are rewarded. This reward schema reinforces gender stratification in the workforce and the barriers that exist for women in higher management and power jobs. Extending rights to lesbians and gays, however, would subvert this schema of rewards and penalties. Because lesbians and gays by definition undermine the notion of a binary gender system, extension of rights to them would challenge the reward/penalization schema as it now operates, transforming the workplace into one in which men and women no longer receive fewer rewards or face penalization on the basis of their nonconformance to bipolar gender definitions. This would further not only the implicit objectives of *Price Waterhouse v. Hopkins*, but also the explicit objectives of Title VII.

I. Bennett Capers