Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII

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INTRODUCTION

Like many young women breaking into the working world, I spent some time and effort looking for mentors. I managed to find two significant ones. The first was a lesbian; the second was not. I mention this fact because, for the purposes of this article, it is the most important aspect of the two relationships.

My first mentor, Linda,¹ hired me for my first job out of college. She was my supervisor. Linda was an open lesbian; I was very young and still fairly confused about my own sexuality. I certainly was not out as a lesbian either to her or to my fellow workers. We worked closely together; she taught and shaped me and I soaked it all in. We became close emotionally as well, sharing lunches, occasional dinners, and confiding in one another about our lives outside of work. We spent a lot of time together. People noticed. My friends and colleagues asked me questions about the relationship. They were concerned about me. They warned me to be careful.

My second mentor, Harriet, hired me for a legal internship one summer while I was in law school. She too was my supervisor. I had graduated from college seven years earlier and was fairly settled about my sexuality. I most definitely was out as a lesbian to her, as well as to my co-workers and to anyone else who asked. We worked closely together; she taught and shaped me and I soaked it all in. We became close emotionally as well, just as Linda and I had. People noticed. My friends and colleagues began asking me if we were having an affair. I learned that her friends and colleagues were asking her about the relationship. They were concerned about her. They told her to be careful.

These two stories frame the problem explored below. These women were both in their early forties when I came into their lives, and I was considerably younger. They were both well-respected members of their professional communities and contributed extensively to my professional and intellectual development. They also became my good friends. Yet the two relationships produced opposite reactions from friends and colleagues. The relationship

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¹. The names of my supervisors have been changed for this article.

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between an apparently straight woman employee (me) and an openly lesbian employer (Linda) prompted warnings and concern for me. The relationship between an openly lesbian employee (me) and an apparently straight woman employer (Harriet) prompted warnings and concern for her.

It is possible that the friendships with both mentors might have turned sour eventually, and become so disruptive of my work that I would have felt forced to quit both jobs. Could it be that as a straight subordinate against Linda, a lesbian supervisor, I could have prevailed in a sexual harassment suit, but that as a lesbian subordinate against Harriet, a straight supervisor, I would not have stood a chance? The cases dealing with same-sex sexual harassment under Title VII over the past fifteen years suggest that those are exactly the outcomes I could expect.

Federal and state courts have adopted three approaches to the problem of same-sex sexual harassment: 1) Title VII does not apply; 2) Title VII does apply; and, 3) Title VII may apply in cases between persons of the same gender, but does not apply to the particular facts before the court. In other words, the courts are confused, and the law in this area seems poised to change. The media has focused increasingly on the problem of same-sex sexual harassment; the internet is abuzz with queries and stories about female

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2. "Same-sex sexual harassment" is used in this article to identify behavior that falls within the common legal understanding of sexual harassment, and that involves a plaintiff and harasser of the same gender. The term does not imply anything about the parties' sexual orientation.

3. 42 U.S.C. §§ 2000e et seq. (1988 & Supp. 1991). Unless otherwise noted, the cases referred to in this article arise under Title VII of the Civil Rights Act of 1964. The statute prohibits discrimination by an employer against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Id. at § 2000e-2(a)(1).

In 1973, the Supreme Court laid out a four-part test for establishing a prima facie case of employment discrimination under Title VII: (1) the plaintiff must belong to a group enumerated in the statute; (2) the plaintiff applied and was qualified for a job that the employer was trying to fill; (3) the plaintiff was rejected; and, (4) after the rejection, the employer continued to attempt to fill the position. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).


In addition to reporting on individual cases, newspapers have been running stories about the "growing problem" of same-sex sexual harassment. See, e.g., Susan Christian, Battle Against Same-Sex Harassment Comes Out of the Closet, L.A. TIMES, July 12, 1994, at 1 (calculating that such cases comprise five percent of workplace complaints, and noting that percentage might grow "as gays become more vocal"); Kim Clark, Man-to-Man Harassment in the Spotlight Today, BALTIMORE SUN, Sept. 28, 1995, at 1C (reporting that harassment suits brought by men against men are "increasingly common" and "an increasingly hot legal issue"); Michael Janofsky, Gay Worker Accuses Male of Harassing Him Sexually, N.Y. TIMES, Nov. 18, 1994, at A24 (describing rising number of complaints of same-sex sexual harassment and lack of clear cut legal solution); L.N. Sixel, Wrongs Without Remedy: Federal Laws Offer Little Relief From Same-Sex Harassment, HOUSTON CHRON. Sept. 17, 1995, at 1 (reporting that significant number of 160 harassment suits filed by men with EEOC in Houston between October 1994 and September 1995.
employees “harassed” by female bosses; more suits are being brought; there is disagreement in the district courts concerning whether and how Title VII should apply to same-sex sexual harassment. Federal courts of appeals are beginning to address these issues, suggesting at least the possibility that the Supreme Court will consider them as well.

The natural reaction of feminist, lesbian, queer theory, and progressive legal scholars and advocates seems to be to attempt to force same-sex sexual harassment cases into the ambit of Title VII’s protection against workplace discrimination. This Article argues, however, that Title VII as it currently stands is not the appropriate vehicle for remedying same-sex sexual harassment. Using the current statute would in fact create more problems than solutions.

On its face, Title VII does not prohibit sexual harassment. Rather, feminist legal theorists developed a cause of action based on Title VII’s prohibition against discrimination on the basis of gender. In addition, Title VII does not prohibit discrimination on the basis of sexual orientation.

The source of the were against other men); Thom Weidlich, Cases Drawing the Line on Same-Sex Harassing, NAT’L L.J., Feb. 13, 1995, at A9 (discussing spate of opinions handed down since late 1980s on sexual harassment of men by men).

5. Indeed, the number of cases has mushroomed even since I began work on this Article. As of the date of publication, a computer search for cases involving “homosexual or same-sex or same-gender sexual harassment” produced the following results: 19 cases since January 1, 1995; 3 cases between January 1, 1994 and December 31, 1994; and 10 cases total between January 1, 1980 and December 31, 1993.

6. See infra notes 76 and 83.

7. To date, only one court of appeals has ruled on this issue. See Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994) (holding that Title VII does not apply to same-sex sexual harassment). However, a number of appeals from district court decisions are pending. See, e.g., Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994), appeal docketed, No. 95-1209 (4th Cir. 1995). Judge Posner has commented on this issue as well. See Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7th Cir. 1995) (dictum) (“Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases.”). Baskerville has been called “the definitive opinion on Title VII sexual harassment.” Blozis v. Mike Raisor Ford, 896 F. Supp. 805, 806 (N.D. Ind. 1995) (Sharp., C.J.).

8. See, e.g., Proposed Brief Amici Curiae of the Women’s Rights Project of the American Civil Liberties Union Foundation et al. at 3, Hopkins v. Baltimore Gas & Elec. Co. 871 F. Supp. 822 (D. Md. 1994), appeal docketed, No. 95-1209 (4th Cir. 1995) (arguing that “Title VII protects victims of sexual harassment regardless of the gender of the victim and the harasser” and that proper focus is not gender of those involved or harasser’s motivation but “effect of the conduct on the victim”).

I say the “natural” reaction because these groups share the common goal of protecting oppressed minorities—in this case, lesbians and gay men—from injustice and discrimination at the hands of the majority. If the victims of same-sex sexual harassment in the workplace are lesbians and gay men, then, it is natural for those opposed to such victimization to try to use Title VII—the main tool available to rid the workplace of discrimination—to protect lesbians and gay men. However, the victims of same-sex sexual harassment are not only lesbians and gay men. Indeed, they tend to be straight men and women accusing lesbians and gay men of harassing them. See infra notes 76 and 83.

9. See infra notes 14-22 and accompanying text.

10. I use the terms discrimination and harassment “on the basis of sexual orientation” to describe the universe of behavior that targets an individual because of his or her sexual orientation, that is, her or his homosexuality. Unlike the term “same-sex sexual harassment,” this term does imply something about a party’s sexual orientation. If a woman is claiming to be harassed based on her sexual orientation, this implies that she is a lesbian, or perceived to be a lesbian. By not providing protection for discrimination or harassment based on sexual orientation, Title VII explicitly does not protect gay men and lesbians from discrimination or harassment based on the fact that they are gay men and lesbians.
courts' inconsistency in applying Title VII to same-sex sexual harassment is the lack of doctrinal guidance for how to apply Title VII to sexuality, as distinct from sex or gender, and to sexual orientation. As a result, gay sexuality and straight sexuality have been treated differently in the workplace.

This article argues that the proper starting point is to provide protection for gay men and lesbians against discrimination and harassment. Until there is such protection, any attempt to use Title VII to regulate same-sex sexual harassment will intensify the privileging of one kind of same-sex interaction over another: straight subordinates will be protected from gay supervisors, while gay subordinates will not be protected from straight supervisors. The result will be increased tolerance not for expressions of gay and lesbian sexuality, but for expressions of heterosexism and homophobia in the workplace.

Part I of this article examines the development of the sexual harassment cause of action as a form of discrimination on the basis of gender. It argues that same-sex sexual harassment does not fit within the theory of traditional sexual harassment. Part II chronicles the courts' historical exclusion of discrimination on the basis of sexual orientation from Title VII's coverage.

11. Much has been written on the differences between these characteristics. Bennett Capers suggests that sex refers "to 'the biological aspects of a person such as the chromosomal, anatomical, hormonal, and physiological structure,'" I. Bennett Capers, Sexual Orientation and Title VII, 91 COLUM. L. REV. 1158, 1160 (1991) (quoting L. W. RICHARDSON, THE DYNAMICS OF SEX AND GENDER: A SOCIOLOGICAL PERSPECTIVE 5 (1977)), while gender refers to "characteristics traditionally labelled 'masculine' and 'feminine' and is a function of socialization, having social, cultural and psychological components," id. at 1160 (citing C. FRANKLIN, THE CHANGING DEFINITION OF MASCULINITY 2 (1984)). For different views on this issue, see SANDRA LIPSITZ BEM, THE LENSES OF GENDER (1993); Charlotte Bunch, Not for Lesbians Only, in BUILDING FEMINIST THEORY: ESSAYS FROM QUEST 67 (1981).

With regard to sexual orientation, much has been written to suggest that sexuality exists on a continuum. See, e.g., ALAN P. BELL & MARTIN WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 53-61 (1978); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 636-55 (1948); Mary C. Dunlap, The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy, 30 HASTINGS L.J. 1131, 1131-32 (1979). Janet Halley questions what the terms "heterosexual" and "homosexual" really describe:

I use the terms 'homosexuality' and 'homosexual'—and more tendentiously, the terms 'heterosexuality' and 'heterosexual'—without any implication that they accurately describe any persons living or dead. As I try to use them here, these terms describe rhetorical categories that have real, material importance notwithstanding their failure to provide adequate descriptions of any one of us.


12. Obviously the workplace is not the only place where gay sexuality is treated differently. The Supreme Court held in Bowers v. Hardwick, 478 U.S. 186 (1986), that the Constitution's guarantee of the right to privacy does not require protection for homosexual sodomy. Thus, the Supreme Court paved the way for statutes criminalizing homosexual sexual activity. See Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 54 U. CHI. L. REV. 648, 655 (1987).

For an overview of the "rights that lesbians and gays do not have," Capers, supra note 11, at 1165 n.26, see Developments in the Law—Sexual Orientation and the Law, 102 HARV. L. REV. 1508 (1989).

For a history of homosexuality, persecution of homosexuals, and attempts at liberation from such persecution, see JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980); DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1988).
Part III analyzes the cases that have addressed the issue of same-sex sexual harassment. Part IV examines other areas of sexuality that the state has the power to regulate. The article concludes that applying Title VII to same-sex sexual harassment would rely on and perpetuate society's commitment to regulate, if not to prohibit, any "abnormal" expressions of sexuality.13

I. TITLE VII IS ABOUT GENDER

In one of the most significant contributions made by feminist jurisprudence to mainstream legal thought, Catharine MacKinnon argued that sexual harassment was a form of gender discrimination.14 Using race discrimination as an analogy,15 she described sexual harassment as "situations of persistent verbal suggestion, unwanted physical contact, straightforward proposition, and coerced intercourse . . . [including] [i]nsult, pressure, or intimidation having gender as its basis or referent."16

The original cause of action for sexual harassment under Title VII was based on a prohibition against a quid pro quo interaction in which an employer...
demands sexual favors or a sexual relationship in exchange for job benefits, a promotion, or the job itself. As MacKinnon's description suggests, the cause of action has evolved to incorporate the concept of a hostile work environment—an atmosphere so charged with sexuality directed at a woman that she cannot work effectively. A hostile environment may be created by comments by colleagues or supervisors, "touching, posters or cartoons in the work area," or any "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker."

Such behavior is regulated by Title VII because the statute seeks to eliminate unequal gender-based treatment in the workplace. When a male supervisor or colleague creates an environment so focused on a woman's sexuality that she cannot do her job comfortably, he reinforces stereotypes about dominant and submissive sex roles, and he perpetuates the identification of women with sex. When a woman has to deal with the sexual pressures created by this environment, she is forced to focus her energy in ways that a man in her position would not have to do. Such a dissipation of her effort affects her ability to achieve the employment security and rewards that her male colleagues achieve. The workplace becomes an exaggerated reflection of the problem of inequality women suffer in society as a whole.

Courts rarely have spelled out this "inequality argument." Plaintiffs in sexual harassment cases generally have relied upon a "disparate treatment" argument: sexual harassment by a supervisor singles out women and holds

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17. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), is the classic quid pro quo case. The court of appeals reversed the district court and held that the employer's conduct did violate the Equal Employment Opportunity Act of 1972.

18. See, e.g., Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (holding that demeaning insults and propositions can constitute sexual harassment); see also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (holding that appellant made prima facie case showing of sexual harassment severe and persistent enough to constitute Title VII claim). The Supreme Court recognized this claim in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). In Meritor the Court recognized the existence of both quid pro quo and hostile work environment sexual harassment, and found that they were both prohibited by Title VII. Id. at 64-66. The Supreme Court recently affirmed the holding of Meritor in Harris v. Forklift Sys., 114 S. Ct. 367 (1993). For a helpful discussion of Meritor, see Jane L. Dolkart, Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards, 43 EMORY L.J. 151, 161-68 (1994).

19. LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 14-15 (1978). The EEOC Guidelines prohibit "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" in both quid pro quo and hostile workplace situations. EEOC Guidelines, supra note 14, at § 1604.11.

20. Judith Butler describes this identification as the "conflation of the category of women with the ostensibly sexualized features of their bodies." JUDITH P. BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 19 (1990).


22. See id. at 235. MacKinnon explains:

[Each incident of sexual harassment] reproduces, with very little personal variation, the inequitable social structure of male supremacy and female subordination which Titles VII and IX seek to eliminate in proscribing sex discrimination as a factor in employment and in education.

Far from being simply individual and personal, sexual harassment is integral and crucial to a social context in which women, as a group, are allocated a disproportionately small share of wealth, power, and advantages compared with men as a group.

Id.

23. MACKINNON, FEMINISM UNMODIFIED, supra note 14, at 107.
them to a different employment standard.\textsuperscript{24} Courts use a "but for" causation test to determine whether the behavior complained of was gender discrimination under Title VII: but for plaintiff's gender, would she have been treated the same way? If the answer is no, the court finds that Title VII has been violated. If the answer is yes, the court finds no violation.\textsuperscript{25}

Employing this reasoning, courts have found women liable for harassing men—but for his gender he would not have been harassed. While this result may seem counterintuitive, in light of the fact that the sexual harassment doctrine was designed to protect women, the "differences" approach which MacKinnon outlines alongside the "inequality" approach\textsuperscript{26} supports the result.\textsuperscript{27} The differences approach argues that a woman who has achieved a powerful position is capable of sexually harassing subordinate male employees, having assumed the "false consciousness" of a man. With power comes its trappings, one of which is the ability to sexually harass.\textsuperscript{28} Courts also have accepted the so-called "bisexual defense": if a supervisor has harassed both male and female subordinates, there has been no "but for" gender causation, and no gender discrimination has taken place.\textsuperscript{29}

\textsuperscript{24} See cases cited supra notes 17-18.

\textsuperscript{25} See Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("We note[] that in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?"); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In each instance, the legal problem . . . [is] the exaction of a condition which, but for his or her sex, the employee would not have faced."). For a useful discussion of the application of the but-for standard, see Peirce, supra note 3, at 1087-90.

\textsuperscript{26} For differentiation of these two approaches in MacKinnon's analysis, see supra note 14.

\textsuperscript{27} MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, supra note 14, at 203 ("By the logic of the differences argument, if a sexual condition of employment were imposed equally upon both women and men by the same employer, the practice would no longer constitute sex discrimination because it would not be properly based on the gender difference.").

\textsuperscript{28} See id. at 202. Here the differences approach reveals its lack of "radical" vision. See generally Patricia A. Cain, Feminism and the Limits of Equality, 24 GA. L. REV. 803, 831 (1990) ("Radical feminists complain . . . that to argue on the basis of women's similarity to men merely assimilates women into an unchanged male sphere. In a sense, the result is to make women into men."). Indeed, it is a common tactic of heterosexism and sexism to call women in positions of power "men" or "lesbians" in trying to maintain the patriarchal status quo. See, e.g., Michelle M. Benecke & Kirstin S. Dodge, Military Women in Nontraditional Fields: Casualties of the Armed Forces' War on Homosexuals, 13 HARV. WOMEN'S L.J. 215, 234 (1990) ("Calling servicewomen 'lesbians' is one way for servicemen to maintain their sense of masculinity when traditional gender distinctions based on job field begin to break down."); id. at 237 ("Another way to avoid demasculinization when a woman does a 'man's job' is to make her not a woman. Women who perform 'men's jobs' are 'classed as deviants' 'man-women' and 'lesbians.'") (footnotes omitted).

\textsuperscript{29} See, e.g., Barnes v. Costle, 561 F.2d at 990 n.55 (distinguishing but-for causation situation from situation involving "a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair" because in the latter case "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike"). But see Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994) (holding that district court erred in agreeing with defendant that superior's conduct was not sexual harassment because he consistently abused men and women alike); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (holding that "equal harassment of both genders does not escape the purview of Title VII in the instant case"). For a helpful discussion of this issue as it arose in Chiapuzio, see Kristi J. Johnson, Chiapuzio v. BLT Operating Corporation: What Does It Mean to Be Harassed "Because of" Your Sex?: Sexual Stereotyping and the "Bisexual" Harasser Revisited, 79 IOWA L. REV. 731, 739-46 (1994). The differences approach also supports the conclusion that "if a sexual condition of employment were imposed equally upon both women and men by the same employer, the practice would no longer constitute
While compelling on its face, if only for the apparent neutrality and administrative ease it provides, this argument risks sacrificing the end for the means. This "but for" analysis ignores the essence of the offensive behavior, which is the perpetuation of a disparate power structure between men and women, and the reduction of women to their sexual selves. Indeed, while the neutrality of a court's "but for" causation may look inviting, it is the very lack of neutrality that creates the sexual harassment. MacKinnon, reflecting ten years after the first case of sexual harassment had been litigated, writes:

Sexual harassment . . . inhabits what I call hierarchies among men: arrangements in which some men are below other men, as in employer/employee and teacher/student . . . . But it also happens among coworkers, from third parties, even by subordinates in the workplace, men who are women's hierarchical inferiors or peers. Basically, it is done by men to women regardless of relative position on the formal hierarchy.

Thus, sexual harassment was incorporated into Title VII because the universe of behavior known as sexual harassment constitutes disparate treatment on the basis of gender. The theory, by definition, relies on a heterosexual model of interaction. It becomes necessarily more difficult, if not entirely unworkable, when applied to a homosexual context. As MacKinnon aptly noted when developing the theory, "the problem with gay harassment is that it does not involve a difference between the sexes." The concerns that Title VII seeks to address in prohibiting sexual harassment simply are not present in a same-sex situation. The essence of a hostile work environment claim is that the behavior perpetuates disparities of power between men and women. This phenomenon does not occur when all the actors are the same sex. Recognizing this fact, the court in Goluszek v. sex discrimination because it would not be properly based on gender difference." MacKinnon, Sexual Harassment of Working Women, supra note 14, at 203.

30. While the differences approach that MacKinnon outlines supports the "but-for" analysis, the resultant perpetuation of a disparate power structure between men and women is precisely the sort of more deeply rooted problem to which MacKinnon's inequality argument is addressed. See MacKinnon, Sexual Harassment of Working Women, supra note 14, at 5 ("The inequality approach . . . sees women's situation as a structural problem of enforced inferiority that needs to be radically altered."). MacKinnon notes that a troubling feature of the differences doctrine is that it "presumes a symmetry of power between the sexes, when women have been subordinate as well as distinct." Id. at 221. See also id. at 192 ("To take the differences approach requires temporary suspension of the fact that the sexes are substantively unequal, not just different, a fact which calls into question the appropriateness of presuming equality in order to measure disparity."). Despite its ideological flaws, though, the differences approach can be used to show that sexual harassment is sex discrimination and thus "can be a useful corrective to sexism." Id. at 4.

32. MacKinnon, Sexual Harassment of Working Women, supra note 14, at 204.
33. See supra notes 20-22 and accompanying text.
Smith refused to apply Title VII to the hostile work environment claim of a male plaintiff against a group of male co-workers.\textsuperscript{34}

The Goluszek court held that, despite the offensiveness of the behavior alleged,\textsuperscript{36} “the defendant’s conduct was not the type of conduct Congress intended to sanction when it enacted Title VII.”\textsuperscript{37} The type of conduct Title VII does sanction is that “stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.”\textsuperscript{38} Since Goluszek was a man working in an environment dominated by men, the court rejected his argument that, as a male, he was treated as inferior. The court stated, “In fact, Goluszek may have been harassed ‘because’ he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace.”\textsuperscript{39}

Goluszek’s harassers were other men. They derived their power over him from their seniority and his eagerness to be accepted by them, not by virtue of their gender. Outside of the workplace, they were all on an equal footing; the only power the harassers had was that they were higher in the workplace hierarchy. Outside of the workplace, Goluszek and his buddies could easily have turned around and created the same sexualized atmosphere with the same result. Goluszek’s inability to concentrate on his work was the result of unfair workplace distractions—comparable to a situation in which a colleague is rude to him, does not like him, or singles him out for mean treatment. There was no inherent power imbalance, no perpetuation of the sexualization of women by men, no reflection of the victim’s lower economic and social status. The court found that the case was essentially about boys being boys and, as often happens in such cases, somebody ended up getting hurt. But the somebody here was a boy too. So the behavior was not \textit{discrimination} prohibited by Title VII.\textsuperscript{40}

The theory of sexual harassment developed by MacKinnon could support the conclusion that that behavior was \textit{discrimination} because her theory suggests that those in positions of power—women or men—can and do create hostile work environments for those in positions of relatively little power. MacKinnon reaches this conclusion by arguing that women constantly are and

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  \item \textsuperscript{34} 697 F. Supp. 1452 (N.D. Ill. 1988).
  \item \textsuperscript{35}  Id. at 1456.
  \item \textsuperscript{36} The complaint alleged that a number of machine operators questioned Goluszek about his love life, told him he needed to “get married and get some of that soft pink smelly stuff that’s between the legs of a woman,” and suggested that he go out with another female employee because she “fucks.” \textit{Id.} at 1453.
  \item \textsuperscript{37} \textit{Id.} at 1456.
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id.} In so reasoning, the court implicitly rejected previous courts’ “wooden application of the verbal formulations created by the courts.” \textit{Id.}
  \item \textsuperscript{40} For many years, the “boys will be boys” argument shielded heterosexual men from accusations of sexual harassment against women, as courts saw such behavior as merely a normal expression of male heterosexuality. What MacKinnon did was demonstrate that allowing these boys to be boys flew in the face of Title VII’s commitment to free the workplace of gender discrimination.
\end{itemize}
always have been subordinate to men.\textsuperscript{41} Taken to its logical end, this view argues that, even when men are not there, women who have assumed traditional male power roles behave like men.\textsuperscript{42} This traditional theory when applied to an all-woman situation not only ignores women who don't define themselves as heterosexual, but also rejects the possibility that with each other women have an existence separate and distinct from their relationships with men. Lesbians, for example, exist at least in part outside the sphere of men, and hence out from under their domination. By denying such an existence, MacKinnon's theory of sexual harassment, premised as it is on the "fact" that all women are constantly and always subordinate to men, denies an essential part of the lesbian experience.\textsuperscript{43}

Mary Dunlap, a lesbian, confronted MacKinnon on her subordination theory:

\begin{quote}
I am not subordinate to any man! I find myself very often contesting efforts at my subordination—both standing and lying down and sitting and in various other positions—but I am not subordinate to any man! And I have been told by Kitty MacKinnon that women have never \textit{not} been subordinate to man. So I stand here an exception . . . .\textsuperscript{44}
\end{quote}

In making this claim, Dunlap was not asserting that she was stronger than other (straight) women, nor was she denying that in society as a whole men have greater power than women. She simply was offering her own "experiential reality"\textsuperscript{45} in contrast to the reality that MacKinnon had attributed to all women. Patricia Cain has explained that the statement was one which

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\item \textsuperscript{41} Isabel Marcus et al., Feminist Discourse, Moral Values, and the Law—A Conversation, 34 BUFF. L. REV. 11, 71 (1985).
\item \textsuperscript{42} Ellen C. DuBois has made this point. See id. at 70 (questioning MacKinnon's subordination/domination framework and arguing that it is circular reasoning to conclude that if a woman is on top then she is male). See also MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, supra note 14, at 202 (arguing that under differences approach, women in positions of power have "succeeded to the forms of power which traditionally have been the province of men . . . . [They have] also succeeded to that aspect of sex role that has been peculiarly male cultural behavior . . . .").
\item \textsuperscript{43} A common criticism of radical or "dominance" theorists like MacKinnon is that they tend to ignore lesbian experience. See Patricia Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN'S L.J. 191, 202-04 (1989). Cain's view is that MacKinnon responds to claims that the lesbian reality is different from a heterosexual woman's by asserting that "exceptions do not matter." \textit{Id.} at 202. "It does not affect her theory that all women are not always subordinated to men. Thus, for MacKinnon, lesbian experience of non-subordination is simply irrelevant." \textit{Id.} In Ruthann Robson's view, MacKinnon goes further, arguing that lesbians "cannot do otherwise than appropriate male values." Ruthann Robson, Incendiary Categories: Lesbians/Violence/Law, 2 TEX. J. WOMEN & L. 1 n.3 (1993). Robson argues that "for MacKinnon, sexuality may be 'so gender marked that it carries dominance and submission with it, whatever the gender of its participants.'" \textit{Id.} (quoting CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 142 (1989)).
\item \textsuperscript{44} Marcus et al., supra note 41, at 75. MacKinnon subsequently described Dunlap's statement as a "stunning example of the denial of gender." MACKINNON, FEMINISM UNMODIFIED, supra note 14, at 305 n.6.
\item \textsuperscript{45} Cain, supra note 43, at 212.
\end{itemize}
Dunlap “felt compelled to make because MacKinnon’s description of ‘what is’ had continued to exclude Dunlap’s reality.”

That reality—an individual, experiential reality free from male domination—exists for women in a workplace environment that is free of men. Power dynamics among women are different from those between men and women, whether or not the women are lesbians. Male bosses, or male work colleagues, carry with them “socially constructed power, privilege, and credibility, as well as physical power.” In an environment such as that described by Dunlap, “the power dynamics are not necessarily as clear and entrenched.” Rather than being socially constructed, the power dynamics between female bosses and female employees, or between female colleagues, have their source within the workplace.

Frances Olsen has remarked that antidiscrimination law “obscures for women the actual causes of their oppression.” Insisting on the neutrality of the word “sex” in Title VII does just that. Sexual harassment is about male subordination of females—a power dynamic unique to that interaction. Suggesting that it simply is about treating people on the job differently “because of their sex” obscures the essence of the offensive behavior: the socially constructed power differential that exists between men and women. Moreover, if we insist that “harassment” of women by women on the job is a form of gender discrimination because the women harassers have assumed positions of male superiority, we serve only to entrench our subordination and deny any alternative reality we might experience free from our relationships with men. In short, by seeking to call same-sex sexual harassment gender discrimination, we are denying that women exist apart from men, as women.

II. TITLE VII IS NOT ABOUT SEXUAL ORIENTATION

At the same time that courts were expanding Title VII’s prohibition against employment discrimination on the basis of gender to include sexual harassment, they were refusing to read the same statute broadly enough to prohibit discrimination on the basis of sexual orientation. Title VII does not protect gay men and lesbians from discrimination in the workplace. Title VII thus offers no doctrinal basis to prohibit same-sex sexual harassment. Reading the statute to encompass such a prohibition would perpetuate an atmosphere

46. Id. Cain describes that different “experiential reality” by asking “how would you feel about this [important love] relationship if it had to be kept utterly secret?” Id. at 207. She further describes the difference by asking readers to consider “the plight of lesbians and gay men who risk the loss of job and family by speaking the truth about their lives.” Cain, supra note 28, at 846.

47. Tamara Packard & Melissa Schraibman, Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening our Ties to One Another, 4 UCLA WOMEN’S L.J. 299, 312 (1994).

48. Id.

of homophobia in the workplace, while providing no protection for the victims of such an atmosphere.\textsuperscript{50}

Title VII bans discrimination on the basis of race, religious creed, color, national origin, or sex.\textsuperscript{51} In \textit{Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.},\textsuperscript{52} lesbian and gay male employees who had been either terminated or denied promotions challenged, under California law, Pacific Telephone's alleged policy of discrimination on the basis of sexual orientation. They argued that the California equivalent of Title VII, the Fair Employment Practices Act,\textsuperscript{53} prohibits all discrimination in employment on any basis other than bona fide occupational qualification, and that the categories enumerated in the statute—race, sex, creed, color, national origin, etc.—were illustrative rather than restrictive. In rejecting this argument, the court held that the statute on its face "provides no support whatever for the position that \textit{every} form of job discrimination [including that based on sexual orientation] . . . is prohibited."\textsuperscript{54}

Moreover, courts have not beeninclined to read beyond the face of the statute to interpret the prohibition against discrimination on the basis of gender to mean anything other than "to place women on an equal footing with men."\textsuperscript{55} Specifically, in \textit{DeSantis v. Pacific Telephone & Telegraph Co.}, the Ninth Circuit held unequivocally that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."\textsuperscript{57} As far as the courts are concerned, then, Title VII does not prohibit discrimination on the basis of sexual orientation.\textsuperscript{58}

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\textsuperscript{50} See Packard and Schraibman, \textit{supra} note 47, at 304 (making related argument with respect to antipornography laws).
\textsuperscript{51} For the relevant text of Title VII, see \textit{supra} note 3.
\textsuperscript{52} \textit{Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.}, 135 Cal. Rptr. 465, 468 (1977).
\textsuperscript{53} That statute provides, in pertinent part:

It shall be an unlawful practice, unless based upon a bona fide occupational qualification . . .

(a) For an employer because of the race, religious creed, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

\textsuperscript{54} \textit{Gay Law Students Ass'n}, 135 Cal. Rptr. at 468.
\textsuperscript{55} Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).
\textsuperscript{56} 608 F.2d 327 (9th Cir. 1979). In this case, male and female homosexuals brought civil rights actions claiming that their employers or potential employers had discriminated against them because of their homosexuality: they were not hired, not promoted, harassed on the job because of their homosexuality. They argued that Title VII's prohibition against discrimination on the basis of sex includes sexual orientation. In the alternative, they argued that they could establish that discrimination against homosexuals disproportionately affects men and is, thus, under a disparate impact theory, discrimination on the basis of sex.
\textsuperscript{57} \textit{Id.} at 329-30 (footnote omitted).
\textsuperscript{58} There are numerous arguments made to the effect that Title VII should prohibit such discrimination. Full coverage of those arguments is beyond the scope of this article, but for an introduction to the issues, see Samuel A. Marcosson, \textit{Harassment on the Basis of Sexual Orientation: A Claim of Sex}
It should come as no surprise that courts have been just as unequivocal in finding that harassment on the basis of sexual orientation is not sexual harassment prohibited by Title VII's prohibition against discrimination on the basis of gender. In Carreno v. IBEW Local No. 226, Carreno, a gay man, alleged that he was subjected to constant sexual harassment by his male co-workers, such as being called “Mary” and “faggot,” and having his genitals and buttocks caressed, among other physical assaults. Noting that the issue was “whether a homosexual male may recover under Title VII” for harassment by “co-workers who disapprove of his homosexual lifestyle,” the court held that Carreno had failed to plead a prima facie case for discrimination under the statute because the harassment he complained of was not based on his gender.

The Sixth Circuit was quick to follow suit. The plaintiff in Dillon v. Frank was a man perceived to be gay by his co-workers. He alleged extensive physical and verbal harassment, such as being subjected to verbal and written taunts of “fag,” “Dillon sucks dick,” and “Dillon gives head,” as well as physical assaults. Dillon argued that Title VII’s prohibition against discrimination “because of sex” means “because of anything relating to being male or female,” and held that Title VII prohibits only discrimination “based on being male or female.” The court found that the hostile work environment plaintiff complained of was based not on his being male, but rather on his co-workers’ vehement “disapproval” of plaintiff’s “alleged homosexuality.” Thus, the court concluded, such actions, “although cruel,” are not prohibited by Title VII.

_DISCRIMINATION UNDER TITLE VII_,
In both *DeSantis* and *Carreno*, the plaintiffs were victims of same-sex sexual harassment. The only reason they lost is that they were gay or perceived to be gay. Carreno's lawyer apparently knew the landscape of Title VII jurisprudence well enough not to allege that Carreno had been harassed on the basis of his sexual orientation, knowing that such a cause of action would fail after *DeSantis* and its progeny. That strategy made no difference to the court. Since the record clearly showed that Carreno was gay, the court found that his sexual orientation was the impetus for his harassment. Therefore, the court concluded that the harassment and discrimination were based on sexual orientation, and thus were not actionable under Title VII.

Given these decisions, if courts decide to extend Title VII's protection to victims of same-sex sexual harassment, courts will have to ask which kind has occurred: harassment based on sexual orientation or harassment based on gender. Plaintiffs who are gay or appear to be gay will lose because the court will view their harassment as "based on sexual orientation" and therefore not covered by Title VII. Plaintiffs who are straight or appear to be straight will win because the court will view their harassment as "based on gender" and therefore covered by Title VII.

To be clear, whether or not Title VII should prohibit discrimination on the basis of sexual orientation is irrelevant to this Article's argument. If Title VII did protect gay men and lesbians from workplace harassment, the analysis of whether same-sex sexual harassment should be prohibited by that statute would be very different. But Title VII provides no such protection. Further, it does not appear that courts or legislatures are eager to extend Title VII's protection to gay men and lesbians at any time soon. As long as Title VII excludes homosexuality as a protected category, any attempt to use Title VII to regulate some same-sex interaction in the workplace will send a dangerous mixed message: it is okay to make a workplace miserable for a dyke or a faggot, or for someone who looks or acts like a dyke or a faggot, but it is not okay to make a workplace miserable for a straight man or woman, or for someone who looks or acts like a straight man or woman. That message is unacceptable.

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66. *Carreno*, 1990 WL 159199 at *3. "While the plaintiff has expressly stated that he is not asserting discrimination based on sexual preference, the undisputed facts indicate that the plaintiff was not harassed because he is a male, but rather because he is a homosexual male." *Id*.

67. Gay rights activists and legal scholars alike argue that Title VII should be read to include such discrimination. See supra note 58.

68. As Adrienne Rich has cautioned, feminist theory that "contributes to lesbian invisibility or marginality is actually working against the liberation and empowerment of woman as a group." Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 647-48 (1980). Rich argues that "it is not enough for feminist thought that specifically lesbian texts exist. Any theory or cultural/political creation that treats lesbian existence as a marginal or less 'natural' phenomenon, as mere 'sexual preference,' or as the mirror image of either heterosexual or male homosexual relations, is profoundly weakened thereby." *Id* at 632. For another take on lesbian marginalization, see Ruth Colker, *The Example of Lesbians: Posthumous Reply to Professor Mary Joe Frug*, 105 HARV. L. REV. 1084, 1086 (1992) ("[C]ertain women have always been excluded from the category 'female' to facilitate the socialization of other women as female. Lesbians . . . are one example of women who traditionally have been excluded"
III. REGULATING SEXUALITY

The traditional theory of sexual harassment as gender discrimination, combined with Title VII jurisprudence that excludes protection for gay men and lesbians in the workplace, would seem to dictate that courts throw out all claims of same-sex sexual harassment. Courts, however, have not been deterred by the doctrinal inconsistency of using Title VII to prohibit same-sex sexual harassment. In applying Title VII to such situations, the courts have relied on society’s notion of “normal” sexuality and stereotypes about lesbians and gay men.69

The hostile work environment doctrine grew out of the theory that it was discrimination against women to create a highly sexualized work atmosphere because such an atmosphere creates terms and conditions of employment that are different for men and women. This theory differs from the traditional theory of gender discrimination. Saying that all women can't be plumbers because they are women is discrimination against all women. Sexual harassment involves the sexual characteristics of the particular person being harassed; it is discrimination against a particular woman by a man (or men) who focuses on her as a sexual being rather than as an employee.70

Put another way, by prohibiting sexual harassment, Title VII prohibits discrimination on the basis of (hetero)sexuality. But Title VII does not prohibit discrimination based on homosexuality. In order to find same-sex sexual harassment actionable, then, a court would have to determine which kind of sexuality was the basis of the discrimination. If based on heterosexuality, the harassment would be actionable; if based on homosexuality, it would not be actionable.

Imagine the following workplace environment: A group of straight women are sitting around on their coffee or lunch break chatting about their boyfriends and husbands. One describes a date she had over the weekend. She didn't sleep with him, but he wanted her to. She doesn't know if she's really that attracted to him. They fooled around, but when it came down to getting out the condom, she just wasn't that into it. The other women nod sympathetically and describe

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69. Such reliance by courts on their own views of homosexuality in order to decide cases is hardly new, or confined to the area of sexual harassment. Much has been written on how the Bowers decision, refusing to extend the constitutional right to privacy to protection for “homosexual sodomy,” reflected the Supreme Court’s homophobia. See, e.g., Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 VA. L. REV. 1721, 1770 (1993) (characterizing the Bowers decision as Court’s “exercise of homophobic power”); Stoddard, supra note 12, at 655 (arguing that “utter lack of reasoning in the majority’s opinion... strongly suggests that the explanation lies in the emotional response of five justices to the subject matter underlying the case as they perceived it, or rather, as they reconstituted it: the subject of homosexuality”); Kendall Thomas, The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806 (1993) (arguing that Bowers reflects “homophobic ideology”); Brett J. Williamson, Note, The Constitutional Privacy Doctrine after Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process, 62 S. CAL. L. REV. 1297, 1327 (1989) (arguing that Hardwick outcome was due to “thinly veiled prejudice on the part of the majority”).

70. Marcosson, supra note 58, at 32-33.
similar situations they've encountered. One jumps in with her own weekend activities—just the opposite. She went out with the hottest guy and could not wait to get him home and into bed. And once she got him there, she was not disappointed: he was as good as he looked. The women laugh encouragingly. The conversation continues in the same vein, all about men, all about sex with men. A highly sexualized atmosphere. One of the women—either in the circle but not participating or out of the circle but within earshot—is a lesbian. She feels excluded and alienated by all this sex talk about men—by this expression of sexuality in the workplace.

Now imagine the same workplace environment, but the sexual orientation of the group is reversed. The women in the circle are lesbians. They are laughing and chatting about their girlfriends and partners. One describes a really cute girl she picked up over the weekend and went home with her but didn’t spend the night—hopes she’ll call because she had an amazing body and promised to be great in bed. Another talks about her break-up with her girlfriend after walking in on her having sex with another woman in their bed. Another asks if everyone is going to “Girls Night” at the local gay bar; a couple nod enthusiastically, but some say “no, you always see the same old things—we want to find some new young ones.” The woman outside the circle, the straight woman, feels alienated and excluded from all this sex talk about other woman.

These hypotheticals describe relatively mild scenarios, extreme versions of which appear in the confused landscape of same-sex sexual harassment caselaw. Three cases with remarkably disparate outcomes illustrate the point.

In *Hart v. National Mortgage & Land Co.*, a male plaintiff testified that he had been subjected to genital-grabbing, attempted mounting, sexually suggestive gestures, and crude remarks by a male co-employee. Hart explicitly testified that he did not believe that his alleged harasser wanted to have sex—engage in homosexual activities—with him. The court granted the employer’s motion for summary judgment, finding that there was no harassment based on gender. The court appeared to assume that a straight male would not sexually harass another man because to do so would be to behave contrary to that man’s asserted sexuality. Even if Hart’s allegations were true, the court seems to presume that because the alleged harasser did not appear to want to have sex with the plaintiff, he must have acted with no intent to sexually harass—that is, with no *homosexual* intent. This is another

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71. 235 Cal. Rptr. 68 (Cal. App. 3d. 1987). This case was brought under California’s Title VII equivalent. For the relevant text of California’s statute, see *supra* note 53.
72. *Id.* at 70.
73. *Id.*
74. *Id.* at 71.
75. *Id.*
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“boys will be boys” case. The statute prohibiting discrimination on the basis of gender doesn’t apply.76

On almost exactly the same facts, Joyner v. AAA Cooper Transportation77 produced a different result. Joyner alleged that his supervisor placed his hands on Joyner’s “private parts” and asked him to engage in homosexual activities.78 In addition, two other employees testified to similar accounts of homosexual encounters with the terminal manager.79 It seems that the entire case hinged on these facts. The court determined that because Joyner was a male, subjected to unwelcome sexual harassment, and “since the evidence established the terminal manager’s homosexual proclivities, the harassment of which Joyner complained was based upon sex” and thus actionable under Title VII. Here we have an expression of sexuality that is implicitly homosexual; we have evidence of the homosexual proclivities of the supervisor. Therefore, this alleged harasser would do these things because he is a homosexual. This behavior is something worse than “boys will be boys”—it is an actual expression of homosexuality in the workplace. That expression is not acceptable under Title VII.

In Parrish v. Washington National Insurance Co.,80 the court evaluates both scenarios. A male plaintiff, whom the court described as “presumably heterosexual,” alleged unwelcome and “apparently homosexual” advances by his male supervisor. There was no evidence that the supervisor was homosexual, and the record contained evidence to the contrary.81 The court thus found that Parrish’s claims were not actionable under Title VII. The court continued, however, to note that “If a plaintiff complains of unwelcome homosexual advances, the offending conduct is based on the employer’s sexual preference and necessarily involved the plaintiff’s gender, for an employee of the non-preferred gender would not inspire the same treatment.”82 Based on


78. Id. at 539.
79. Id. at 539 n.2.
80. 1990 WL 165611 (N.D. Ill. Oct. 16, 1990) (finding that Title VII applies to homosexual advances, but that alleged harasser’s behavior did not rise to level of harassment).
81. Id. at *3 n.2.
82. Id.
the same alleged behavior, a straight perpetrator does not engage in sexual harassment because he is not expressing his sexuality towards the plaintiff; a gay perpetrator does engage in sexual harassment because he is expressing his sexuality towards the plaintiff.  

As noted above, these cases are obviously extreme versions of the hypotheticals described. That is why they ended up in the courts. But they are not unrelated to those hypotheticals. They represent the extremes of acceptable and unacceptable sexual conduct in the workplace. On the one extreme is heterosexual expression, which is clearly not actionable under Title VII. On the other extreme is homosexual expression, which is clearly actionable under Title VII. By making such determinations, these cases create an atmosphere in the workplace that threatens any expression of homosexuality, including what was described in the hypothetical, while allowing—if not encouraging—expressions of heterosexuality, like that described in the hypothetical. In this way, applying Title VII to cases of same-sex sexual harassment continues to privilege one form of sexuality—heterosexuality—over another—homosexuality.  

83. Indeed, courts have become even more explicit in spelling out this rationale. See, e.g., Quick v. Donaldson Co. 895 F. Supp. 1288, 1294 (D. Iowa 1995) (refusing to apply Title VII in case with straight harasser and stating that “heterosexual male to male harassment may present issues different from homosexual male to male sexual harassment.”).

In the same-sex sexual harassment cases that hold Title VII does apply, the courts for the most part find liability explicitly based on the homosexuality of the alleged harasser; that is, a gay supervisor harasses an employee of the same gender as an expression of his homosexuality in a way that a straight employer harassing an employee of the same gender would not. In the case of gay harassers and straight plaintiffs, courts reason that but for the gender of the plaintiffs, they would not have been harassed. This reasoning—which is difficult to contest—creates an impossible situation for gay men and lesbians in the workplace, and essentially tells them to keep their sexuality at home. It tells them, in other words, to stay in the closet. The following cases deal specifically with a same-sex sexual harassment situation and rule that Title VII does apply. Unless otherwise noted, the alleged harassers in these cases were gay.


84. An argument could be made that a less sinister and discriminatory explanation exists for the different results of these cases. Simply put, the “boys will be boys” cases are cases of hostile work environment sexual harassment and the cases in which liability is found are quid pro quo cases. Because hostile work environment cases don't fit so clearly into a sex discrimination rubric—it's harder to prove “but for gender” causation than in a quid pro quo case—liability is harder to come by, regardless of the gender of the various players. So, the argument goes, we are comparing apples and oranges: we should
IV. PROTECTION AT WHAT PRICE?

Part II of this article showed that courts do not use Title VII to protect gay plaintiffs, or plaintiffs who appear gay. That is, because of the courts' explicit and consistent refusal to apply Title VII to cases of harassment or discrimination on the basis of homosexuality, while the rhetoric of sexual harassment law suggests that employees are protected from harassment which targets their sexuality, they are in reality protected only from harassment which targets their heterosexuality. By the same token, Part III of the Article showed that courts do use Title VII to hold gay alleged harassers, or alleged harassers who appear gay, liable for same-sex sexual harassment. That is, the universe of same-sex sexual harassment cases reveals that if a gay man and a straight man are charged with same-sex sexual harassment for the same conduct, only the gay man will be held liable under Title VII. Thus, Title VII is a double-edged sword for lesbians and gay men: as plaintiffs, they fall outside the universe of its protection, while, as alleged harassers, they fall squarely within its universe of liability.

In order to be eligible for protection, then, plaintiffs and harassers must conform to the legal system's idea of "normal" sexuality and sexual interaction: heterosexuality. In providing protection for expressions of normal sexuality in the workplace, the legal system by definition privileges heterosexuality while denigrating homosexuality.1

As a result of the legal system's heterosexism,6 efforts by lesbians to fit into the law's universe of protections often come with the very high price of sacrificing a lesbian identity free from heterosexist norms. Because the legal system posits heterosexual relationships as the norm, "'being' lesbian" is "always a kind of miming, a vain effort to participate in the phantasmatic

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1 See Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 HARV. L. REV. 1045, 1062 (1992) ("By directly or indirectly penalizing conduct that does not conform to a particular set of sexual behaviors, legal rules promote a model of female sexuality; this model is characterized by monogamy, heterosexuality, and passivity.").

6 Bennett Capers cautions that:

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.

Capers, supra note 11, at 1159.
plentitude of naturalized heterosexuality." Ruthann Robson calls this the "domestication" of lesbian existence, when the values of the dominant, legal, society become "so internalized that they are considered to be common sense." When this happens,

The barbed wire enclosures seem to exist for our protection rather than our restriction. We attempt to argue ourselves into legal categories so that we can be protected, not noticing how such categories restrict our lesbianism.

In contemplating whether or not Title VII should be used to prohibit same-sex sexual harassment, we would do well to draw lessons from other areas of sexual interaction where state regulations have worked universally to the detriment of homosexuality. Three examples of such domestication—or attempts at domestication—outside the immediate field of Title VII provide important warnings to those who seek to expand its "protection" to victims of same-sex sexual harassment.

First, there is a strong movement afoot to legalize gay and lesbian marriage. The argument, on a practical level, is that by forcing our way into society's most hallowed institution, we will force society to respect us or, at the very least, we will start to reap the many economic and legal benefits of that institution. On a more theoretical level, Nan Hunter argues that "the impact [of lesbian and gay marriage] will be to dismantle the legal structure of gender in every marriage," due to "its potential to expose and denaturalize the historical construction of gender at the heart of marriage."


Judith Butler offers a similar criticism of the construction of "the category of women as a coherent and stable subject . . . [that] achieve[s] stability and coherence only in the context of the heterosexual matrix." BUTLER, supra note 20, at 5.

Martha Minow argues that "feminist analyses have often presumed that a white, middle-class, heterosexual, Christian, and able-bodied person is the norm behind 'women's' experience. Anything else must be specified, pointed out." Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. OF LEGAL EDUC. 47, 56 (1988). By making this presumption . . .

But at what price? The only gay and lesbian relationships that would achieve legal recognition would be the long-term, monogamous, stable, “just-like-heterosexual” ones. Therefore, this (very narrowly defined) legal recognition of lesbian relationships “forces lesbian partners into potentially damaging attempts to calibrate their lives to conform to heterosexual models.” This is domestication at its worst: the dominant society sets out its hierarchy of relationships, at the top of which is Marriage. Rather than determining the value of our relationships on our own terms, we are led by the carrot of “Legalized Gay and Lesbian Marriage” to accept the heterosexual hierarchy and seek desperately to climb to the top.

Second, in the area of lesbian mothers seeking custody of their children, the legal system’s privileging of one “kind” of lesbian over another is brutally apparent. Ruthann Robson describes a court’s denial of overnight visitation to a lesbian because the evidence showed she was an “active homosexual” with multiple partners. Robson decries the “violence” of the court’s opinion by noting that the “clinical word ‘homosexual’ is inflamed with other sexual transgressions such as ‘active’ and ‘several’ partners. Thus, [this lesbian] is exiled even from the ‘good homosexual’ category that some courts have employed” to provide protection for the “monogamous and discreet ‘homosexuals.’”

Third, the issue of domestic violence between lesbian partners offers another example of domestication. Robson, a leading voice in the movement to confront the issue of lesbian battering, has noted that “to successfully use


91. Ruthann Robson & S.E. Valentine, Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory, 63 TEMP. L. REV. 511, 537 (1990); see also Elvia R. Arriola, Gendered Inequality: Lesbians, Gays and Feminist Legal Theory, 9 BERKELEY WOMEN’S L.J. 103, 117 (“[G]ay sexuality is typically cast in opposition to the sexual norm of a heterosexually-dominant culture.”).

92. For a more in-depth discussion of lesbian identity versus heterosexual norms, see Butler, supra note 87, at 13. Butler argues that the negative constructions of lesbianism as a fake or a bad copy can be occupied and reworked to call into question the claims of heterosexual priority. . . . Understood in this way, the political problem is not to establish the specificity of lesbian sexuality over and against its derivativeness, but to turn the homophobic construction of the bad copy against the framework that privileges heterosexuality as origin, and so ‘derive’ the former from the latter.

93. Robson, supra note 43, at 14 (discussing court’s denial of overnight visitation to lesbian mother in Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992)).

a defense based on being battered, a woman must be the stereotypical good wife." 95 And to determine who the batterer is, courts have to determine which lesbian is the male, or "the male-identified lesbian." 96 So even if the record shows—or should show—otherwise, courts protect the lesbian partner who most easily and comfortably fits into the legal system's idea of a "wife" against the lesbian partner who remains firmly outside the legal system's idea of a woman. When a court can't figure out who is who—let's say they're both femmes or butches—it issues "mutual restraining orders," rather than listen to the women tell their stories. 97

Based on these examples, we can conclude that we have a legal system that is or may be willing, grudgingly, to provide protection for lesbians who are: (1) "just like us," that is, in stable, long-term, relationships; (2) inactive, that is, involved with only one partner, and preferably not sexually; or, (3) "good wives," that is, identifiable as functioning in the traditionally female role within relationships. Thus, using Title VII to "protect" for lesbians from workplace harassment from other women is a risky proposition, subject to dangerous backfire. 98 It would privilege those lesbians who looked and acted straight, were monogamous and discreet, and had long hair and make-up. Implicitly, the protection would not extend to those lesbians who were not all of the above: the "active" lesbians with "several partners" who failed to conform to a heterosexist view of "feminine." 99 The result would be that if a court is confronted with a "clearly lesbian" plaintiff against a "clearly straight" alleged harasser, chances are that the plaintiff's case will not come under Title VII's ambit. If, however, the court is faced with the reverse scenario—a "clearly straight" plaintiff against a "clearly lesbian" alleged harasser—the court will likely find that Title VII applies. If the court can't

95. ROBSON, LESBIAN (OUT)LAW, supra note 94, at 160.
96. See Robson, Lavender Bruises, supra note 88, at 572-73.
97. See id. at 579-80 (discussing "mutual restraining orders"). Angela West describes heterosexist assumptions about roles and relationships which prevent incidents of lesbian battering from being prosecuted as domestic violence cases. She relates a case in which a desk officer had described the two women in a battering situation as "roommates." West guesses "that the officer's assumption was based on the fact that [the victim] was a very attractive, feminine woman, the kind who 'could get a man.'" West, supra note 94, at 258
98. This potential for backfire exists in all attempts "outsider" groups make to get "inside." As Janet Halley has remarked in discussing the argument over whether homosexuality is an immutable characteristic, "the distinctive and broad effects of litigation, in particular its power to normalize in law and culture any definitions of homosexuality and homosexuals it adopts, must be measured against the exiguous need for a doctrinal argument that defines who we are in ways that some of us object to and cannot, and will not, conform to." Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503, 529 (1994).
99. As Nancy Polikoff cautions in her critique of the attempt to legalize gay and lesbian marriage, such an agenda will require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages [and] values long-term monogamous coupling above all other relationships. . . . I fear that the very process of employing that rhetorical strategy for the years it will take to achieve its objective will lead our movement's public representatives, and the countless lesbians and gay men who hear us, to believe exactly what we say.
Polikoff, supra note 90, at 1549-50.
figure out who is who, it will have to do some creative reading of the record to determine what kind of sexuality is being expressed and therefore whether the legal system provides protection.

Given this likelihood, and the clear heterosexism of the current legal system, feminists, queer theorists, and lesbian legal theorists should not give that system another tool to use against us. Allowing the state to regulate same-sex sexual harassment would strengthen the state's power to "define acceptable sex."\textsuperscript{100} We know that attempts to define acceptable sex have led to continued exclusion at best, and persecution of any expression of non-heterosexual sexuality at worst. As long as Title VII does not prohibit discrimination on the basis of sexual orientation, why should we trust the legal system to apply Title VII to same-sex sexual harassment in anything but a discriminatory and heterosexist way?

**CONCLUSION**

Discrimination law is experiencing growing pains as a result of the fact that more men and women—in the workplace and everywhere else—are out as lesbians and gay men. Title VII has been a partially effective remedy for victims of race and sex discrimination and, to a lesser degree, for victims of sexual harassment. What Title VII has never been able to do, however, is integrate sexual orientation—either as a part of "sex" or as a category on its own—into the scope of protection it provides. The law as it stands provides no protection for lesbians and gay men in the workplace, leaving them open targets for society's discomfort and phobia about homosexuality.

The starting point, then, must be a statute that provides protection for lesbians and gay men because they are lesbians and gay men, not because they have been harassed by lesbians and gay men. Whether that statute takes the form of an expanded Title VII or a new piece of stand-alone legislation governing sexuality in the workplace, it must prohibit discrimination and harassment on the basis of sexual orientation.\textsuperscript{101} Since there is no such statute, any "protection" for individual lesbians and gay men would be illusory and dangerous.

I am not saying that same-sex sexual harassment is not a problem for lesbians and straight women alike, or that it should be ignored. In crafting the solution, however, we have to be careful about what tools we use and how we use them. As Audre Lorde has cautioned, we must learn "how to take our

\textsuperscript{100} Cain, supra note 28, at 835 (referring to attempts to ban pornography).

\textsuperscript{101} There have been congressional attempts to expand Title VII to include a prohibition against discrimination on the basis of sexual orientation. The most recent is a bill introduced by Sen. Edward Kennedy (D. Mass.) and Rep. James Jeffords (R. Vt.) which would prohibit both public and private employers from discriminating against gay men, lesbians or bisexuals either in hiring or in other workplace practices. The bill has little chance of passing the Republican Congress, but President Clinton has endorsed it. See, e.g., Hilary Stout, Clinton Endorses Gay Rights Bill Against Job Bias, WALL ST. J., Oct. 23, 1995, at B10.
differences and make them strengths. *For the master's tools will never dismantle the master's house.* They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.\textsuperscript{102} Patricia Cain has called upon us to listen to and for those differences by constructing theories that "encourage the right kind of listening, a listening that privileges (temporarily) the previously silenced."\textsuperscript{103} Listening to other women's experiential reality, we gain a clearer sense of what "ought to be."\textsuperscript{104}

In the Title VII context, that means listening to lesbians, both those in positions of power ("alleged harassers") and those not ("plaintiffs"). And it means listening to straight women, both those who have been harassed by men and those who have been harassed by women. Sexual harassment theory is the quintessential feminist legal creation, relying on the narrative, experiential realities of women;\textsuperscript{105} it is the definitive creature of feminist process. We must not lose sight of this achievement by transforming it into another tool of lesbian domestication.\textsuperscript{106} The critique of male power and female subordination must be strong enough either to expand to include the voices of those who experience different realities or to allow an independent critique of heterosexism and homophobia to evolve. Otherwise, the critique of women's subordination will not be a useful critique at all.\textsuperscript{107}

\textsuperscript{103} Cain, *supra* note 28, at 844.
\textsuperscript{104} Id. at 845; see also Cain, *supra* note 43, at 195 (arguing that by listening to women's stories we perceive problems correctly and propose appropriate solutions).
\textsuperscript{105} Id. at 197.
\textsuperscript{106} Id. at 212-14; id. at 211 (expressing fears that "what started as a useful critique of one privileged (male) view of reality may become a substitute claim for a different privileged (female) view of reality"); see generally Minow, *supra* note 88, at 95 (arguing that in fashioning solutions to legal disputes we must question "existing social arrangements" in order to guard against risk that "new answers" reinforce status quo).
\textsuperscript{107} See generally Cain, *supra* note 43, at 191-92 ("Lesbian experience is essential to the formation of feminist theory because it stands in opposition to the institution of heterosexuality, which is a core element of male-centered reality."); Rich, *supra* note 68, at 647-48 (arguing that feminist theory will be weakened if it marginalizes lesbianism).