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# ARTICLE

## DOUBLE AND NOTHING: LESBIAN AS CATEGORY\*

Christine A. Littleton\*\*

### ABSTRACT

In this Article, Littleton argues that the social and legal construction of sexual orientation and of gender uphold the dominance of cultural masculinity. Because of this construction, members of the set “lesbians” disappear into subsets based on sexual orientation (“women” are seen only as straight women) or gender (“gays” are seen only as homosexuals.) Focusing on the doubly excluded category of lesbians reveals both the fact and the harm of heterosexual male bias in category construction. Littleton argues for centering lesbian experience such that “women” can be seen as including both straight and ho-

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\* An earlier version of this Article was written as an essay in 1990 for the *Stanford Journal on Law, Gender and Sexual Orientation*. That journal was envisioned by a wonderful group of students assisted by Francisco Valdes. Although the journal never saw print, it did allow for many important conversations and connections we otherwise might have missed. (That journal’s virtual successor is, of course, the *National Journal of Sexual Orientation Law* [“subscribe gaylaw firstname lastname” to listserve@unc.edu], now in its second volume.)

I had put the Article away, however, thinking it would not see print either. When the editors of last year’s volume of the *UCLA Women’s Law Journal* invited me to speak at their Symposium on “Institutional Barriers to Women in the Workplace” in the spring of 1996, I scavenged pieces of the almost-forgotten Article for the occasion. Interestingly, the issues raised seem less audacious now, but no less fascinating. Thankfully, the conversations this version seeks to enter into are not isolated or fragmented as they were in 1990. (In 1996, for example, the Association of American Law Schools is sponsoring its first workshop entirely devoted to “Sexual Orientation and the Law.”) Thus I am grateful to the *UCLA Women’s Law Journal* for the opportunity to revisit this ground.

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mosexual women, and "homosexual" can be seen as including gays and lesbians. Such a recentering, by challenging both heterosexism and male supremacy, would free society as a whole and lead to improved legal, social, and private relationships.

### INTRODUCTION

As a feminist, I am suspicious of purportedly gender-neutral labels.<sup>1</sup> When applied to people, who do not come in gender-neutral packages, such labels may hide vast differences in experience — as when policy makers try to make unitary rules for divorcing "parents" without recognizing that in the great run of cases mothers face quite different sets of expectations and constraints than do fathers, both as parents and as workers.<sup>2</sup> The label "homosexual" is just such a label — hiding the differences in experience and treatment between gay men and lesbians, and

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1. If the task of feminist legal theory in the 1970s was the simple but enormously burdensome effort to get courts to recognize the harm of overt sex discrimination, *see, e.g.*, Women's Rights Project, Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971), the task since then has been less simple and even more difficult — recognition of the harm to women of "gender-neutral" classification, assignment and stratification. *See, e.g.*, *Personnel Admin. v. Feeney*, 442 U.S. 256 (1979) (upholding a preference for veterans in state government employment as "neutral," despite the devastating effect on women's employment). Nonetheless, the project has been enormously generative of legal scholarship, *see, e.g.*, CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Deborah L. Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* 617 (1990), as the equivalent critiques have in other disciplines. *See, e.g.*, SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); NANCY HARTSOCK, *MONEY, SEX AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* (1983).

2. The literature is voluminous, and covers many different aspects of the problem. *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1990); Grace Blumberg, *Reworking the Past, Imagining the Future: On Jacob's Silent Revolution*, 16 *L. & SOC. INQUIRY* 115 (reviewing HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988)); Janet Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 *U. LOUISVILLE J. FAM. L.* 791 (1992); Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989).

In addition, casting social problems in gender-neutral language can obscure the very power relations which create and maintain them. Thus, for example, the "problem" of "battered women" becomes one of "domestic violence" rather than one of "violent husbands," perhaps shifting some responsibility from women's shoulders, but leaving it effectively nowhere. *See* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 *U. CHI. LEGAL F.* 23. Such failure to stigmatize violence instead of victimhood is, of course, also gendered, and that gender coding outruns its relationship to the actual sex of men and women. It thus creates difficulties even in same-sex relationships, where one might think gender-neutral labels more appropriate.

obscuring the fact that male dominance operates both within and across the homosexual/heterosexual "divide."<sup>3</sup>

As a lesbian,<sup>4</sup> I am constantly reminded of the myriad ways in which both gay liberation and feminism have often "forgotten" the existence of non-heterosexual women.<sup>5</sup> It is, of course, not surprising that even movements critical of mainstream culture and politics tend nonetheless to adopt many mainstream assumptions (such as sexism and heterosexism).<sup>6</sup> After all, "to

3. I use the term "divide" rather than "dichotomy" to connote the social — as opposed to biological or sexual — decisions that create our understanding of these categories. Despite the fact that, ever since the Kinsey report, it has been apparent that sexual orientation occurs along a spectrum and that relatively few individuals fall into the polar extremes of "totally homosexual" or "totally heterosexual," the division retains its conceptual power and continues to generate material consequences. See Janet E. Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

4. Self-identification can serve many purposes. I would prefer to disclaim any attempt to "authorize" my analysis by claiming to speak from any "authentic" lesbian experience. But identification can also guard against the gender essentialism criticized in Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) and provide a glimpse of the position from which analysis begins (although not necessarily where it ends).

At various times in my life I have identified as heterosexual, lesbian, bisexual or even pansexual — not necessarily in that order. Although I have never been "closeted," I have often been confused (and no doubt confusing) about precisely *what* I was "out" about. As a woman whose lifestyle has often been or appeared heterosexual, whose sexuality is hard to categorize, and whose politics often verge on female separatism, I have found my own process of "coming out" as a lesbian to be fraught, not only with risking family ties and "mainstream" legitimacy, but also with the complexity and elusiveness of sexual identity. See, e.g., Halley, *supra* note 3. Despite contradiction and ambiguity, I choose in this Article to identify as a lesbian, recognizing this as a (necessarily contingent) political act as much as a (necessarily incomplete) description.

5. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90).

6. Of course, as a lifelong beneficiary of the heterosexual presumption, see Leigh Megan Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RIGHTS L. REP. 39 (1990), I sometimes catch myself "forgetting" the extent to which heterosexual privilege surrounds me, as well as the extent to which I, consciously and unconsciously, rely on that privilege. This essay, in all of its versions, oral and written, has been part of my process of "coming out" — a process, not a destination.

In my enthusiasm for "coming out" as a political and personal process, I might also "forget" another side were it not for Stephanie Wildman's reminder that heterosexuals can and do become part of the process of coming out through their refusal to take their own sexual orientation for granted, and by introducing the radical concept that being "mistaken" for gay or lesbian might have some *positive* aspects. See Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326, 333 (1989-90) ("Evidently the idea that it is a compliment to be perceived as a woman who loves women in a misogynist society where an anti-woman message is very pervasive was a totally new idea to this person.");

question everything"<sup>7</sup> is an aspiration of critical theory and practice, not a prerequisite for it. Nonetheless, in this forum I want to highlight the dangers of forgetting — for feminist theory and practice, for lesbians, for heterosexual women, and for law.

Finally, as a feminist legal theorist, I am concerned with the ways in which legal and social categories act and interact to erase or marginalize the experience of women (all women — heterosexual, lesbian, bisexual, whether conforming to gender expectations or not) and to obscure both the existence and the contingency of male dominance. These effects are not distinct. Male dominance is hidden through the disappearance of women, as it is naturalized through their marginalization.<sup>8</sup>

Logically, the category "lesbian" should represent the intersection of the category "women" and the category "homosexuals." One might suppose that the ability to frame one's experience as being inside *two* categories of historical (and continuing) discrimination could be an advantage in seeking legal redress — i.e., that lesbians might be able to use both the well-developed and widespread legal norms against sex discrimination<sup>9</sup> and the fragmentary and local legal norms against sexual orientation discrimination.<sup>10</sup> Such reasoning, however, would ig-

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Cain, *supra* note 7, at 271-72 (encouraging heterosexual women to "notice" their own sexual orientation) (quoting Marilyn Frye, *A Lesbian Perspective on Women's Studies*, in *LESBIAN STUDIES: PRESENT AND FUTURE*, 194, 196 (Margaret Crushiak ed., 1982)).

7. Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 *BERKELEY WOMEN'S L.J.* 64 (1985).

8. Feminist legal theory has seemed to divide cleanly between a focus on how women are left out ("difference" theory) and how women are subordinated ("dominance" theory), see, e.g. Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 *BUFF. L. REV.* 11, 73-75 (1985) (interchange between Carol Gilligan and Catharine MacKinnon), each theory can more fruitfully be seen as a partial explanation of the complex organization of gender. Therefore, I feel free to draw on both strands of contemporary theory and to bring them to bear on the process of category construction.

9. These norms may be found, not only in state and local law, but in hundreds of federal statutes. E.g., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1994); Title IX of the Education Codes of 1982, 20 U.S.C. §§ 1681-88 (1994); the Equal Pay Act, 29 U.S.C. § 206 (1991). Sex discrimination is also prohibited — at least in its most overt forms — by prevailing interpretation of Constitutional provisions, including a specific level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264 (1996); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Craig v. Boren*, 429 U.S. 190 (1976).

10. No federal law protects gay men, lesbians, bisexuals or other sexual minorities against discrimination in education, employment, housing or any other sphere of public life. Several states offer partial protection, usually limited to employment,

nore the deep connections between homophobia and misogyny, and between heterosexism and sexism.<sup>11</sup> In fact, sex discrimination law demands that its beneficiaries “pass” not only as heterosexual, but also as socially male.<sup>12</sup>

Thus, members of the set “lesbians” disappear into sets constructed in contrast to our sexual orientation (“women” reads as straight women) or in contrast to our gender (“gay” reads as male). When we roll the dice — by making a political or legal claim — we are not offered the choice of “double or nothing.” Our roll is instead “single or nothing.” That is, we will be understood to be *only* women — and thus intended beneficiaries of sex discrimination law or policy — or we will be understood as “double *and* nothing,” and thus ignored.

This Article explores some of the convergences among and contradictions between categories of sex and sexual orientation as they are played out in political and legal discourse. Two areas are analyzed: public health policy and employment discrimination law. The first analysis focuses on exclusion of lesbians, the second on subordination of attributes coded as feminine. Given my criticism of the erasure of lesbians, it may appear odd that there is little mention of lesbians in the second analysis. Yet the category “lesbian” is the lens through which the anomaly created by the artificial separation of sex and sexual orientation begins to appear. This Article thus claims, both by statement and by method, that the costs of failure to address the interaction of sex privilege and sexual orientation privilege will be borne disproportionately by women — even when the short-term effects seem to favor women, and even when the most obvious victims of discrimination are in fact men.

The picture is concededly grim. Yet, having been painted by the palette knife of political choice and the brush of legal interpretation, it is neither natural nor necessary. Contained within it

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*see, e.g.*, CAL. LAB. CODE § 1102.1 (1996), or public accommodation, *see, e.g.*, CAL. CIV. CODE § 51 (1996) (Unruh Civil Rights Act); MINN. STAT. § 363.03 (1995). Municipal codes may also offer some protection against discrimination in housing, insurance, health and welfare services, education, employment or public accommodations. *See, e.g.*, BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-4; LOS ANGELES, CAL., CODE § 49.72 (1996) (employment); *see also* discussion *infra* note 32.

11. *See, e.g.*, Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

12. *See infra* text accompanying notes 36-62. For a discussion of the distinction between biological and social sex, see Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1308-14 (1987).

are the pigments of a very different picture. Just as identifiable groups are harmed (although differently) by the gendered processes of exclusion and subordination, those same groups attain a stake (although differentially) in its alteration. Coalition thus becomes both logical and possible.

In the face of a social system that demands that women nurture *men*,<sup>13</sup> and a legal system that protects non-conforming women only if they choose *not* to nurture,<sup>14</sup> lesbians both violate the prescription and refuse the "choice" — daring to nurture *women*.<sup>15</sup> The consequence has been erasure and marginalization

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13. For a thorough (and thoroughly horrifying) listing of the ways in which men have coerced women's affectional and sexual response, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 638-40 (1980) (including clitoridectomy and infibulation, rape and battering, sexual harassment, and economic sanctions). See also Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1987).

14. Of course women are often coerced into nurturing by law, especially by laws restricting access to contraception or abortion. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992). Yet women who refuse or fail to conform to gender-prescribed roles have gained some temporary protection in that choice from *Roe v. Wade* and its progeny. In contrast, access to prenatal care, Aid to Families with Dependent Children, and other methods of enabling (rather than coercing) nurturance are seen as a privilege, to be granted or withheld at the legislature's whim, rather than as a right, however shaky. The realization of President Clinton's campaign promise to "end welfare as we know it" has resulted in legislation that forces women with even very young children into a workplace that, at best, fails to recognize nurturance (and may be purely hypothetical).

Divorce cannot be denied even to those who cannot afford to pay for it, so fundamental is the right to refuse to be bound to another. See *Boddie v. Connecticut*, 401 U.S. 371 (1971). Yet marriage, equally a monopoly of the state, can readily be refused to gay men and lesbians, regardless of how fervently they wish to bind themselves. Only in Hawaii has a court even considered that this refusal requires justification. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The legal obligation of a husband to support his wife can be enforced only on separation or divorce. See Marjorie Maguire Shultz, *The Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207, 233-34 (1982). Women who leave battering husbands can obtain temporary restraining orders against further violence; those who remain, whether in fear, hope or love, get no aid from the law. See Littleton, *supra* note 2.

15. Although I consciously resist defining the term "lesbian" in this Article, I recognize that the statement in the text contains at least an implicit definition of lesbians as "women who nurture women." Given the complexities of sexual identity, see *supra* note 4, suffice it to say that I believe this is a crucial element, but not an exhaustive description, of what it means to be a lesbian. For other explorations of the meaning of lesbian identity see, for example, Ruthann Robson, *Lesbian Jurisprudence?*, 7 LAW & INEQ. J. 443, 444-47 (1990); Rich, *supra* note 13.

— in the media, in public policy, in social science and in law.<sup>16</sup> Stubbornly refusing to tailor the complexity of our lives to fit the narrow and unitary categories of legal and political theory, lesbians offer our very absence as a site of reconstruction,<sup>17</sup> and our double vision of gender relations as a source of re-vision.

#### THE COSTS OF SILENCE: INVISIBILITY

Lesbians stand in a unique position with respect to oppositional politics and legal practice. Sharing the disadvantages of homosexual status with gay men, the disadvantages of female status with straight women, and the consciousness of multiple vectors of subordination with straight women of color,<sup>18</sup> lesbians also face the daily choice of whether to try to gain access to the advantages of straight status by “passing.” Those who, like me, inherit an unearned white privilege at birth can add heterosexual privilege by denying, explicitly or implicitly, our “difference” from our straight, white sisters. Those who are of color can

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16. Indeed, Ruthann Robson and S.E. Valentine describe conventional wisdom as follows: “The suggestions that legal mechanisms should be or even could be analyzed from a lesbian theoretical vantage point — and thus a lesbian legal theory developed — is disconcerting at first glance for several reasons.” Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 513 (1990). Nevertheless, they embark on the newly emerging project of “begin[ning] to develop a lesbian legal theory.” *Id.* at 514.

17. An outpouring of French feminist literary theory in the late 1970s made use of the “essential negativity” of the representation of the female modality as a site of resistance to male dominance. For an accessible summary of many works that represent this “new French feminism,” see Domna Stanton, *Language and Revolution: The Franco-American Dis-Connection*, in *THE FUTURE OF DIFFERENCE 3* (Hester Eisenstein & Alice Jardine eds., 1985). For example, Stanton offers a translation of Julia Kristeva’s *Polylogue*, as declaring that “[a] female praxis can only be negative, an opposition to what exists, in order to say, ‘that is not it,’ that is still not it.’ I mean by ‘female’ what is not represented, what is not said, what remains outside of nominations and ideologies.” *Id.* at 75 (quoting JULIA KRISTEVA, *POLYLOGUE* 519 (1977)). While the disruptive textual strategies employed by the new French feminists have significantly affected American feminist theory within literary academia, they have often been rejected by American legal and political feminists, who find the underlying premise (“the world is the word; it is experienced phenomenologically as a vast text which encompasses the sum total of human symbolic systems”), *id.* at 73, unpersuasive, or the incessant word-play impenetrable or unappealing, *id.* at 79. As I hope the rest of this Article demonstrates, it is not necessary to accept either the identity of the material and the textual posited by the French feminists or their style in order to make use of the methodology of tracing lesbian subversion through the absence of lesbians and the naturalization of that absence by systems of male dominance.

18. See, e.g., Harris, *supra* note 6; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989); see also *infra* notes 14-17 and accompanying text.



lessen the multiple oppression of race, sex, *and* sexual orientation by credibly denying the one piece of the triangle that can be hidden. The advantages of passing as straight are "objective" — external, economic, obvious. The costs of passing are "subjective" — internal, psychic, hidden — and deadly.

In the early days of the AIDS crisis, the media focused on "homosexual transmission," the "gay plague" and the "4-H Club."<sup>19</sup> Such stories had the unsurprising effect of partially alleviating anxiety among "low risk groups" while channeling remaining anxiety into antipathy toward those in "high risk groups." Lesbians, subjected to a full share of the hostility directed toward "homosexuals," scanned the news in vain for any mention of the number of lesbians infected or how to make lesbian sex safer. Public opinion polls showed that Americans ranked lesbians as the second highest risk group, just under gay men,<sup>20</sup> yet no one reported either the presence or the absence of HIV among lesbians.<sup>21</sup> Indeed, lesbians seemed to have disappeared with little trace into a category of "homosexual" that was defined by the tragic experience of gay men.

After years of confusion in the media and silence by high-ranking government officials,<sup>22</sup> the educational efforts of AIDS

19. The "4-H Club" referred to homosexuals, heroin users, hemophiliacs, and Haitians.

20. See, e.g., Ann Japenga, *Gay Women and the Risk of AIDS; Lesbians Oppose Misperception That They're All 'Diseased,'* L.A. TIMES, Apr. 2, 1986, at V1. This story included a report of two studies by Mykol Hamilton, then a lecturer at UCLA. One study showed that two-thirds of a sample of college students believed lesbians to be at higher risk than male or female heterosexuals. The other study found that 85% of magazine articles appearing in *Time* and *Newsweek* used the apparently gender-neutral terms "homosexuals" or "gays" in referring to high-risk groups, as did 78% of newspaper articles in the *New York Times* and *Los Angeles Times*. *Id.*

21. No news was apparently read as "safety" by more enterprising organizations. During this period, I received a solicitation to join a "safe" blood bank, where the blood would be donated solely by nuns, voluntary celibates and lesbians.

22. By 1987, when AIDS had already killed 27,000 Americans and infected as many as five to ten million people worldwide, the mainstream media began to understand, and report on, the costs of AIDS.

In the beginning — from 1981 until, at many papers, mid-1985 — the press did not chase the bouncing ball very aggressively. Indeed, the press, like most other institutions in American society, reacted very slowly to AIDS. No AIDS story appeared on the front page of the *New York Times* until May 25, 1983, for example — by which time there had already been 1,450 cases of AIDS and 558 AIDS deaths in the United States.

David Shaw, *Anti-Gay Bias?; Coverage of AIDS Story: A Slow Start; Series: The First of Two Parts*, L.A. TIMES, Dec. 20, 1987, § 1, at 1; see also Nicholas Wade, *AIDS, in Harsh Review: For All the Failures, Society Still Has Done Some Things*

activists finally had some effect. We began to hear less about “high risk groups” and more about “high risk behaviors.” Persons infected by various transmission routes were classified into categories including “homosexual,” “intravenous drug use,” and “heterosexual.” Although heterosexuals were identified as male or female, there was still no news of lesbians.<sup>23</sup> The irony was, however, that no one had been keeping track of whether or not lesbians were infected. Men with AIDS or HIV infection were routinely asked their sexual orientation; women were not.<sup>24</sup> Lesbians had again disappeared, this time into the category of “wo-

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*Right*, N.Y. TIMES, Nov. 10, 1987 (Editorial Notebook), at A34 (“The AIDS epidemic spread so far because initially no one took it seriously enough: Government, the media, researchers, blood banks and the gay community each found their own reasons to ignore or deny the threat.”) (commenting on RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987)). Wade disputes Shilts’ assessment of public health institutions’ response but agrees with one very important criticism: “A fairer verdict would be that, despite initial delay, most institutions have responded with sensitivity and skill. The major exception is the White House, which from the beginning has lacked interest and leadership in confronting the plague of our time.” Wade, *supra*, at A34.

23. Many lesbians participated in the primary care of, and activism on behalf of, people with AIDS, but press coverage of these women was scant.

24. For example, the *HIV/AIDS Surveillance Report*, published by the Division of HIV/AIDS Prevention, National Center for HIV, STD, and TB Prevention, Centers for Disease Control and Prevention, lists numbers of cases by category for male homosexual/bisexual contact and male heterosexual contact, but only lists sexual contact for women as heterosexual. See, e.g., CENTERS FOR DISEASE CONTROL & PREVENTION, HIV/AIDS SURVEILLANCE REPORT, Midyear ed. 1996, at 9-10, available in <<http://www.cdc.gov>>. Only in gay and lesbian publications were these categories questioned. See, e.g., Zoe Leonard, *Lesbians in the AIDS Crisis*, OUTWEEK (Feb. 18, 1990), at 30 (“There are 100 women with AIDS in the CDC’s records who report having had sex with other women. However, the CDC compiles its data from the reports of physicians. Most women are assumed to be straight and are not ever asked about having sex with other women.”)(footnote omitted). Further, the CDC lists women’s risks for exposure to HIV “hierarchically.” A lesbian IVDU [intravenous drug user] would only be counted as an IVDU. Men’s categories are now taking into account multiple exposure risks (i.e. “gay male IVDU”). Without multiple exposure categories for women, it is impossible to accurately track our exposure risks.

By the late 1980s, the CDC had taken the position that sexual contact between women was not a significant risk. For example, in 1986 the *Los Angeles Times* quoted a CDC spokesman as stating that “although a handful of lesbians have been diagnosed as having AIDS, in all of the cases to date the likely mode of transmission was either intravenous drug use or blood transfusion.” See Japenga, *supra* note 20. While this might have been reassuring on the surface, routine failure to ask HIV-positive women about their sexual orientation as well as their possible sexual contact with women left large gaps in the epidemiological research. Those gaps have yet to be filled, and are only recently being systematically questioned. See generally Special Issue, *The Behavioral and Social Contexts of HIV Infection Risk in Lesbians and Other Women Who Have Sex With Women*, 2 WOMEN’S HEALTH: RES. ON GENDER, BEHAV., & POL., Spring & Summer 1996 [hereinafter WOMEN’S HEALTH].

men," a category defined by the experience of heterosexual women, whose actual or potential sexual partnerships with infected men exposed them to the risk of infection.<sup>25</sup>

The AIDS crisis is a particularly stark example of the potential costs of invisibility. No cure exists. Education toward prevention and health maintenance has been our primary defense; yet for over a decade lesbians were denied information necessary to that education. The denial cannot be seen as a case of overt discrimination, but rather one of category construction. Fortunately, lesbian sexual contact — when questioned — appears to carry an extremely low risk of HIV transmission.<sup>26</sup> Nonetheless, it is hardly a comfort that many forms of lesbian sexual activity that could have been validated as safe were largely ignored, while other practices that exposed lesbians to risk (IV drug use, sexual contact with men, etc.) were not classified by sexual orientation. Failure to classify left the information about lesbians hidden within other groupings, and thus less available to lesbians, just as lesbians were hidden by the category constructions of "homosexuals" and "women."<sup>27</sup>

The process by which the particular experience of lesbians "disappeared" from *both* the category "homosexual" *and* the category "female" in this particular setting is similar to the process by which the experience of women of color tends to disappear from anti-discrimination doctrine organized around the categories of "race" and "sex."<sup>28</sup> African-American women are

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25. Heterosexual women are not, however, immune from similar "disappearing acts." Sharing female physiology, both heterosexual women and lesbians are excluded from the CDC definition of AIDS when our symptoms fail to match those of the males who are the norm. *See, e.g.,* Arlene Zarembka & Katherine M. Franke, *Women and AIDS: Epidemic of Societal Denial, Blame and Poverty*, 14 *THE EXCHANGE*, at 3-4 (National Lawyers Guild AIDS Network, Feb. 1991).

26. *See supra* note 24.

27. "Although we are 15 years into the U.S. HIV/AIDS epidemic and the general public has accepted that HIV/AIDS is a health concern for many women globally as well as in the United States, . . . basic questions regarding the risk of HIV infection in lesbians still remain unanswered." Vickie M. Mays, *Are Lesbians at Risk for HIV Infection?*, *WOMEN'S HEALTH*, *supra* note 24, at 2; *see also* Lalekan Araba-Owoyele et al., *Lesbians and the Risk of HIV Infection: Does Surveillance Underestimate HIV Risk?*, *WOMEN'S HEALTH*, *supra* note 24, at 112-39 (finding that almost 1/4 of HIV-positive women have incomplete sexual behavior histories, nearly all of which lack information about sex with other women).

28. For an extensive discussion of the failure of anti-discrimination doctrine, feminist legal theory, and anti-racist politics to address the "intersectionality" of Black women's experience, *see* Kimberlé Crenshaw, *Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHIC. LEGAL F.* 139.

ignored when race discrimination analysis focuses on the experience of African-American men, and likewise ignored when sex discrimination analysis focuses on the experience of white women.<sup>29</sup> Belonging to a specific group within each category, rather than resulting in twice as much protection against discrimination, may ironically result in no protection at all.<sup>30</sup> Blinded by its fascination with unitary axes of discrimination, the law fails to deal with combinations of race, gender, and sexual orientation as multiple layers of identity that engender distinct forms of discrimination, oppression and subordination.<sup>31</sup>

Lesbians similarly belong to a specific group within the categories of "sexual orientation" and of "gender" (as well as belonging to *all* groups within the category of "race").<sup>32</sup> Yet the

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29. This phenomenon is not limited to legal doctrine. A colleague of mine once related the following story: Her law school had responded to concern about underrepresentation of women and minorities on the faculty by setting up two special committees — one to identify and recruit minority candidates and the other to do the same for women. Mid-way through the academic year it became painfully obvious that no women of color were being tapped. My friend investigated and found that each committee thought the other one was "handling" women of color. Instead, no one was.

30. Crenshaw, *supra* note 28, at 141-50.

31. For a deeply textured analysis of the experience of Chicana lesbians, see GLORIA ANZALDUA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987).

32. Unlike race and sex, the two categories of sex and sexual orientation do not offer similar regimes of legal protection. Both racial and sexual classifications call for heightened scrutiny under the Equal Protection Clause, although the former calls for "strict scrutiny," while the latter merits some intermediate level. Similarly, Title VII offers explicit protection against both racial and sexual discrimination, while nevertheless allowing employers to engage in sex-based selection when sex is a "bona fide occupational qualification." 42 U.S.C. §§ 2000e-2(e). (There is no such exception for race.) While these levels of scrutiny or degrees of justification differ, the basic proscription against casual discrimination on the basis of race or sex is firmly rooted in both Constitutional and statutory law. No such firm basis is accorded to freedom from discrimination based on sexual orientation. The Supreme Court has rejected the claim that privacy protects homosexual conduct, *see Bowers v. Hardwick*, 478 U.S. 186 (1986); the Circuits have rejected or avoided claims that equal protection demands heightened scrutiny of classifications based on sexual orientation status, *see High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (rejecting heightened scrutiny claim); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (same); *Watkins v. United States*, 875 F.2d 699 (9th Cir. 1989) (en banc) (avoiding the equal protection ground and ruling on estoppel grounds); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (rejecting heightened scrutiny claim). Thus lesbians and gay men have had to rely on either state law, *e.g.*, *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979) (allegations of arbitrary employment discrimination against homosexuals states a cause of action under the California Constitution and the state Public Utilities Code), or local ordinances, *see e.g.*, *LOS ANGELES, CAL., CODE § 49.72* (1996) (prohibiting various forms of employment discrimination on the basis of sexual orientation), for protection against all but the most apparently irrational forms of sexual orientation dis-

relationship between categories of gender and sexual orientation is not limited to the fact that real people occupy positions in both categories simultaneously. The category "homosexual" is constructed, not only out of the raw material of sexual conduct,<sup>33</sup> status, and speech,<sup>34</sup> but also out of gender-coded behavior, proscriptions and taboos.<sup>35</sup> Likewise, the category "woman" is constructed, not only from the raw material of female biology, but also out of gender-coded behavior and perceived sexual availability.

#### SEX ROLE AND SEXUAL ORIENTATION: DISJUNCTURE

Much has been written about the remarkable tenacity of sex-role restrictions.<sup>36</sup> Indeed, a large percentage of feminist legal scholarship has focused on the ways in which such restrictions have been only partially addressed by legal guarantees of equality, leaving in place many symbols of "women's place."<sup>37</sup> For example, exclusion of women soldiers from combat positions has not only been upheld, but used to justify sex-based draft registration laws.<sup>38</sup> Despite recognition of such exclusions, veteran's preference laws locking women out of higher level civil service have likewise been upheld.<sup>39</sup> Professor Kenneth Karst, tracing the convergence among historic segregation of African-American men in the military, ongoing exclusion of women from combat positions, and currently revitalized expulsion of gay men and

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crimination. *Cf.* *Romer v. Evans*, 116 S. Ct. 1620 (1996). The recent failure (by a 50-49 vote) to pass the Employment Non-Discrimination Act of 1996, *see* L.A. TIMES, Sept. 11, 1996 at A1, is but the most recent refusal of Congress to apply federal equal employment protections to sexual orientation.

33. *See, e.g., Padula*, 822 F.2d at 97; *High Tech Gays*, 859 F.2d at 563 (same-sex sodomy is the "behavior that defines the class").

34. *See, for example, Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), in which Rev. Pruitt was discharged from the army reserve based solely on her statements about her ministry to gay men and lesbians and her experience of "being" a lesbian in active service. The trial court opinion rejecting her first amendment claim is reported as *Pruitt v. Weinberger*, 659 F. Supp. 625 (C.D. Cal. 1987).

35. *See infra* text accompanying notes 36-41.

36. *See, e.g., Sandra L. Bem & Daryl J. Bem, Homogenizing the American Woman: The Power of an Unconscious Ideology, in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN MEN AND WOMEN 10* (A. Jagger & P. Struhl eds. 1978).

37. *See, e.g., Stephanie M. Wildman, The Legitimation of Sex Discrimination: A Critique of Supreme Court Sex Discrimination Jurisprudence*, 63 OR. L. REV. 265 (1984); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

38. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

39. *Personnel Admin. v. Feeney*, 442 U.S. 256 (1979).

lesbians from military service, finds the common root of all three practices in the maintenance of a particular "cult of masculinity" in the armed forces.<sup>40</sup> The exclusion or marginalization of women has been crucial to maintaining the myth of the male warrior.<sup>41</sup>

The same sex role restrictions that require women's exclusion in order to maintain hypermasculine arenas such as the military require less onerous, but structurally similar, forms of allegiance to cultural masculinity in "merely" male-dominated spheres such as the workplace. That allegiance is secured most directly by denying to men the freedom to act in ways traditionally associated with women. It is indirectly secured by the legal system's sympathy toward women who conform to traditionally masculine role patterns. Thus, although both women and men are constrained by the expectation that they will conform to their respective gender roles, employment discrimination law does not treat failures to conform equally.

The way employment discrimination law has understood gender "crossing" has not been as a challenge to the system of

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40. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

41. Indeed, the Virginia Military Institute made this explicit in its attempts to bar women from admission. In affirming the trial court's approval of separate schools, the Fourth Circuit found that VMI's "adversative method" was both "vital to a VMI education" and "has never been tolerated in a sexually heterogeneous environment." *United States v. Virginia*, 116 S. Ct. 2264 (1996) (quoting 44 F.3d 1229 (4th Cir. 1995)). The Supreme Court reversed. In doing so, however, the Court found disruption to VMI's "adversative" model of education to be both "hardly proved" and, more importantly, irrelevant. It was VMI's mission, rather than its method, that provided an "important governmental objective." That mission, "to produce 'citizen-soldiers,'" was "great enough to accommodate women." Thus, the Court was able to rule in favor of admitting women only by ignoring the direct challenge such admission poses to the particular (and particularly vicious) form of the "cult of masculinity" VMI had developed. The uncontested expert testimony was described by the trial court as establishing that "if VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students." 766 F. Supp. at 1413. Considering the fact that military-style adversative methods invariably rely on gender-based (misogynist) epithets and (homophobic) shaming rituals for their impact, *see, e.g.*, CYNTHIA ENLOE, *DOES KHAKI BECOME YOU?: THE MILITARIZATION OF WOMEN'S LIVES* (1983), this prediction goes far to explain the ferocity of VMI's attempt to retain its single-sex status. Picture the poor drill instructor who screams "What are you — a woman?" at a female "rat." Thus, the majority opinion supports its result by denying that the cult of masculinity will be disrupted, while I applaud the result because it will. Ironically, Justice Scalia's dissent seems much more honest in its assessment of VMI's "distinctive mission," one that he supports and I abhor, but one that we both agree will now "have to be changed." *Virginia*, 116 S. Ct. at 129 (Scalia, J., dissenting).

male dominance that insists on dichotomous roles. Instead, it has taken male dominance as the background against which refusal or failure to conform to one's socially defined gender role is measured. The inevitable result of privileging masculinity is a significant lack of symmetry — that is, inequality — in the legal treatment of women and men who challenge gender roles. Sexual orientation is implicated for male gender-crossers, but not for female gender-crossers. This lack of symmetry may appear to offer women more freedom, and it certainly offers more in-court "victories" for female gender-crossers. In the process, however, both female (biological) and feminine (social) attributes and experiences are subordinated and the category "lesbian" disappears.

To see this process, it is necessary to contrast cases in which male and female plaintiffs claim a right to engage in cross-gender behavior. Cases in which neither party discloses sexual orientation further demonstrate the way sexual orientation categories privilege masculinity.

Consider the case of Donald Strailey, who was fired by the Happy Time Nursery School after two years of service as a teacher.<sup>42</sup> Strailey alleged that he "was fired because he wore a small gold ear-loop to school prior to the commencement of the school year."<sup>43</sup> Because Strailey alleged that the reason for his firing was that he had broken gender role and had been perceived as overly "effeminate," he might have assumed that he had a strong case for protection under Title VII of the Civil Rights Act of 1964,<sup>44</sup> which prohibits discrimination on the basis of sex.<sup>45</sup>

However, the Ninth Circuit majority took only two paragraphs to reduce Strailey's claim to non-cognizability.

Appellant Strailey contends that he was terminated by the Happy Times Nursery School because that school felt that it was inappropriate for a male teacher to wear an earring to school. He claims that the school's reliance on a stereotype —

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

43. *Id.* at 328.

44. 42 U.S.C. §§ 2000e.

45. The relevant part of Title VII makes it an "unlawful employment practice for an employer —

(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."

42 U.S.C. § 2000e-2.

that a male should have a virile rather than an effeminate appearance — violates Title VII.

In *Holloway* this court noted that Congress intended Title VII's ban on sex discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference. Recently the Fifth Circuit similarly read the legislative history of Title VII and concluded that Title VII thus does not protect against discrimination because of effeminacy. . . . We agree and hold that discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII.<sup>46</sup>

No information on Donald Strailey's sexual orientation or sexual identity appears in the case report. Apparently, Strailey's sexuality is irrelevant to the disposition of his claim. Regardless of whether he "is" homosexual or not, his claim can, without further explanation, be grouped with "homosexuality or transsexualism" and found to be simply outside the purview of Title VII.<sup>47</sup>

The Ninth Circuit's casual dismissal of Strailey's claim is not unique; it is typical.<sup>48</sup> Men who break gender role by dressing (even minimally) like women — or by actually becoming women<sup>49</sup> — may be punished with impunity. For a person such as

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46. De Santis, 608 F.2d at 331-32 (citations omitted).

47. Even the dissent treats Strailey's claim as fungible with homosexuality. It differs only in suggesting that barring homosexuals from Title VII protection might have a disparate impact on men as a class if there is a significantly higher number of homosexual men than of homosexual women or if homosexual men are more readily identifiable than homosexual women. *Id.* at 333-34 (Sneed, C.J., dissenting).

48. *See, e.g., Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (homosexual); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (transsexual).

Even when the issue of sexual orientation is not raised by either the plaintiff or the court, men's claims to cross gender boundaries are treated as outside the realm of anti-discrimination law. *See, e.g., Spaulding v. Univ. of Washington*, 740 F.2d 686 (9th Cir. 1984) (male plaintiff in predominantly female nursing school dismissed from pay equity action); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (male candidate refused employment because of long hair).

49. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), offers a particularly acute example of failure to take gender claims seriously when offered by gender-crossing men. The plaintiff was hired in 1968 as a pilot under the name Kenneth Ulane. He acquired an excellent employment record. In 1979, he was "diagnosed a transsexual," began taking female hormones and in 1980 underwent a surgical sex change. *Id.* at 1083. When she attempted to return to work as Karen Frances Ulane, Eastern fired her. The district court found that "whether plaintiff be regarded as a transsexual or as a female, she was discharged by Eastern Airlines because of her sex." 581 F. Supp. 821, 839 (1983). Nevertheless, the Seventh Circuit reversed on both grounds.

Even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on this basis. All the district judge said



Donald Strailey to enlist the law's protection against sex discrimination, he must appear both "straight" and "masculine." For men, these categories turn out to be the same thing.<sup>50</sup> Strailey's failure (or refusal) to pass as masculine was sufficient for the court to treat him as homosexual. The law thereby constructs the category "homosexual" to include Strailey based on no information *other* than gender-associated behavior, while at the same time claiming that his firing was not gender-based.

The contrast between the case of Donald Strailey and that of Ann Hopkins could not be more striking.<sup>51</sup> Only a few years after Donald Strailey lost his position for wearing an earring, Ann Hopkins began her own journey to maintain her employment status at one of the nation's largest accounting firms. Hopkins, the only woman among 88 candidates nominated for partnership at Price Waterhouse in 1982, was first placed "on hold," and then was refused renomination. She claimed, and the trial court agreed, that the refusal was based in part on her failure to conform to a feminine gender role.<sup>52</sup> Negative comments from Price Waterhouse partners focused on Hopkins' alleged lack of "interpersonal skills," finding her "too assertive, overly critical of others, impatient with her staff."<sup>53</sup> One partner suggested that

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was that his previous "findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female." This is insufficient to support a finding that Ulane was discriminated against because she is *female* since the district judge's previous findings all centered around his conclusion that Eastern did not want "[a] *transsexual* in the cockpit."

742 F.2d at 1087.

Not even sure whether they should accept Ulane's self-identification or the district judge's holding as to her gender, the court almost says that transsexuals *have* no gender!

50. Cf. Karst, *supra* note 40 (arguing that military policy excluding homosexuals arises out of desire to maintain a "cult of masculinity").

51. Other scholars have also found that the disjuncture between Donald Strailey's case and Ann Hopkins' illuminates embedded male bias. See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995). For a detailed analysis of the relationship of *Hopkins* to the cases contrasted here, see *id.*, at 37-58. Francisco Valdes takes a somewhat different (and much more extended) approach to the issue, focusing on a prevailing "conflation of sex, gender and sexual orientation" that "embodies, exudes and extends androsexist and heterosexist biases" affecting "both law and society." Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of Sex, Gender and Sexual Orientation in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

52. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985).

53. *Id.* at 1114 n.4.

she “needed to take ‘a course at charm school,’” and even a supporter advised her “to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>54</sup> The trial court readily found that such discrimination constituted a violation of Title VII.

The District of Columbia Circuit affirmed the trial court’s determination that Ann Hopkins had been discriminated against because of her sex.<sup>55</sup> Unlike the Ninth Circuit’s failure to mention any job qualifications Donald Strailey might have had, the D.C. Circuit specifically stated that Hopkins “was qualified for partnership consideration.”<sup>56</sup> Not only had “none of the other candidates considered for partnership in 1983 . . . generated more business for Price Waterhouse,” but Hopkins also “billed more hours than any of the other candidates under consideration.”<sup>57</sup>

Although the United States Supreme Court reversed on the ground that the lower courts had applied the wrong burden of proof,<sup>58</sup> the majority did not dislodge the firm conclusion of both the trial and appellate courts that a woman’s refusal to conform to feminine gender role is an illegitimate basis for adverse action by an employer.<sup>59</sup> Of the three federal courts publishing opinions in this case, none even mentioned the line of cases denying relief to “effeminate” male plaintiffs.<sup>60</sup>

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54. *Id.* at 1117 n.8.

55. 825 F.2d 458 (D.C. Cir. 1987).

56. *Id.* at 462.

57. *Id.*

58. 490 U.S. 228 (1989).

59. “There were clear signs . . . that some of the partners reacted negatively to Hopkins’ personality because she was a woman.” *Id.* at 235. “[Except] when gender is a ‘bona fide occupational qualification’ . . . a person’s gender may not be considered in making decisions that affect her.” *Id.* at 242.

Despite a finding that sex played a role in the decision, however, an employer “may avoid a finding of liability . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.” *Id.* at 258.

60. The closest any of the opinions comes to this reading is the trial court’s distinguishing of Ann Hopkins’ claim from that of Christine Craft, a case sometimes classified with the “grooming” cases that uphold restrictions on the length of men’s hair, but involving another woman. Although Craft claimed that her employer used impermissible sex-based standards in assessing her appearance and demeanor, the Eighth Circuit upheld a ruling against her, finding that the “standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images.” *Price Waterhouse*, 618 F. Supp. at 1120 (quoting *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985)). Since the “neutral professional and technical considerations” concerned themselves with Craft’s television image, I wonder how they could *fail* to be shaped by “stereotypical notions of female roles and images.”

Ann Hopkins and Donald Strailey were equally "guilty" of breaking the particular gender role society has ascribed to their respective biologies. Yet Hopkins' desire to emulate her (privileged) biologically male colleagues — perhaps even to exceed their allegiance to cultural masculinity<sup>61</sup> — is understood by judges and protected by their interpretation of the law. At the same time, Strailey's equivalent wish to emulate his female co-teachers — or at least to adopt a small and ambiguous symbol of femininity — is dismissed out of hand. Thus Ann Hopkins, while hardly a typical representative of her sex, is seen as nonetheless normal, and implicitly treated as within the default category of "heterosexual." Donald Strailey becomes not only atypical, but also aberrant and "homosexual." Neither of these categorizations require inquiry into the actual sexual conduct of *either* party.<sup>62</sup>

#### NO "WOMEN" NEED APPLY: ANOMALY

The result in *Price Waterhouse* is counter-intuitive, to say the least. Women who break gender role have historically been "lesbian-baited," regardless of their actual sexual orientation.<sup>63</sup> Lesbians are well aware that "femmes" are far more likely to pass as heterosexual than are their "butch" counterparts. Yet the *legal* intersection of gender and sexual orientation appears to privilege a masculine orientation as much as, if not more than, a straight one. In an employment structure in which traits associated with men are valued, while those associated with women are devalued, what judge would question Ann Hopkins' choice to "dress for success" by adopting behaviors coded masculine rather than draw attention to her biological femaleness?

Ann Hopkins' "victory," while potentially useful to other female gender-crossers, was severely limited both within and beyond federal employment discrimination law. She did not even really "win" her own case, since the Court remanded the case to determine whether *Price Waterhouse* could justify the same deci-

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61. "One partner described [Hopkins] as 'macho . . .,' another suggested that she 'overcompensated for being a woman . . .'" *Price Waterhouse*, 490 U.S. at 235 (citations omitted).

62. Indeed, this analysis demonstrates the fallacy of the courts' reasoning in *Padula* and *High Tech Gays* that homosexual conduct, rather than homosexual status, defines the class. See *supra* note 12.

63. See, e.g., Suzanne Pharr, *HOMOPHOBIA: A WEAPON OF SEXISM* (1988); Leigh Megan Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 *WOMEN'S RTS. L. REP.* 39, 41-42 (1990).

sion (against partnership) on supposedly gender-neutral grounds (e.g., lack of interpersonal skills). More to the point, her case strengthens the very cult of masculinity she found so hard to enter. Even though Hopkins' adoption of masculine attributes did not implicate her sexual orientation, had Price Waterhouse drawn the same conclusion about her gender crossing that the Ninth Circuit drew about Strailey's, no federal protection would have been available. Thus lesbians face a dilemma. To pass as straight may require conformity to female gender roles, while access to the privileges of masculinity requires the opposite.

If Ann Hopkins' partial victory had been part of a sea change in judicial attitudes toward "gender-bending," leading courts to see *all* sexual stereotypes as discriminatory, then perhaps we might expect the categories of "gender" and "sexual orientation" to attain some clear, albeit artificial, integrity.<sup>64</sup> However, the evidence indicates that gender-crossing has tended, and will continue to tend, to be protected in one direction only. Both males and females are legally protected so long as they "pass" as masculine; neither are legally protected if they call attention to attributes or behaviors associated with femininity or femaleness.<sup>65</sup>

Even with respect to female attributes purportedly valued by mainstream culture, women are at risk when we take those attributes into the masculine workplace. In *Wimberly v. Labor & Industrial Relations Commission*,<sup>66</sup> for example, the Court made it clear that states are free to punish women who "voluntarily" separate from their jobs due to pregnancy and childbirth by de-

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64. See Case, *supra* note 51 (arguing for disaggregation as useful legal reform); cf. Valdes, *supra* note 51 (impliedly rejecting the "artificiality" of deconstructed categories).

65. See, e.g., *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987); *Zahorik v. Cornell Univ.*, 729 F.2d 85 (2d Cir. 1984).

*Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337 (9th Cir. 1981), was an early exception to the legal system's typical acceptance of devaluation of women's traits and interests. In that case, Therese Ballet Lynn challenged her tenure denial as illegally tainted by sex discrimination. The district court concluded that "the University's lack of enthusiasm towards women's studies was not evidence of discrimination because the University would have had the same objection if a man concentrated his studies on women's issues." *Id.* at 1343. The Ninth Circuit rejected this more traditional view, however, recognizing that "[a] disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women." *Id.* This aspect of the case has often been distinguished, but not followed. See, e.g., *Fadhl v. City & County of S.F.*, 741 F.2d 1163 (9th Cir. 1984).

66. 479 U.S. 511 (1987).

nying them unemployment compensation benefits. The Court thus perpetuated the rule that so long as women act like men, they may not be denied the same employment opportunities as men; but, if they insist on acting like women, they will have to seek redress through the legislative process.<sup>67</sup>

By using *Wimberly* as an example, I do not mean to claim motherhood as the universal experience of either lesbians or of heterosexual women.<sup>68</sup> Rather, this example draws on what mainstream society itself exalts as important and valuable in femaleness. The fact that courts are unwilling to insist on acceptance of even this aspect of "womanhood" is thus the strongest, although by no means the only, evidence that male dominance provides the lens through which the law continues to view claims of sex discrimination.<sup>69</sup>

#### THE POSSIBILITY OF COALITION: RE-VISION

As the preceding sections have demonstrated, social constraints on gender and sexuality are sometimes reinforced and sometimes undermined by legal decisions. These differences in convergence between social and legal norms form a pattern. In general: (1) masculine behavior in men is both enforced and rewarded, socially and legally; (2) masculine behavior in women is punished socially but rewarded legally; (3) feminine behavior in women is both enforced and punished, socially and legally; (4) feminine behavior in men is punished socially and legally. Ac-

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67. This point is strengthened by the Court's decision earlier in the same term in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). In that case, California was permitted to maintain its pregnancy disability leave statute, which required job security for women temporarily unable to work because of pregnancy and childbirth. The Court acknowledged that "[b]y 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs." *Id.* at 289. Taken together with *Wimberly*, the clear message is that federal sex discrimination law, while allowing states to prohibit punishment of female behavior, will not itself provide any protection whatsoever and will support a state's more typical decision to engage in such punishment.

68. Patricia Cain cautions against confusing the challenging standpoint of "woman as mother" or "woman as sexual subordinate" with the experiential reality of women's lives. Cain, *supra* note 5, at 199-204. To the extent that feminist critique of mainstream jurisprudence depends on women's connection to their children, it ignores women's connections to each other. To the extent that the critique depends on women's subordinate position in sex with men, it ignores women's sexual relationships with women. In both strains lesbians are either absent or marginalized.

69. See Littleton, *supra* note 12, at 1304 ("The phallogentricity of equality is most apparent in the extraordinary difficulty the legal system has had dealing with the fact that women (and *not* men) conceive and bear children.).

cordingly, cross-gender behavior by women implicates sexual orientation (i.e., is coded "lesbian") socially, but not legally; while cross-gender behavior by men implicates sexual orientation (i.e., is coded "gay") both socially and legally.

The gender axis is not consistent across sexual orientation, nor is the sexual orientation axis consistent across gender. These inconsistencies offer both points of instability (where legal interpretation might be used creatively) and points of coalition (where groups and individuals with differential stakes in the pattern as a whole might find common ground).

In order to test this thesis, I return to a reality of lesbian experience described in the Introduction. In the face of a social system that demands that women nurture *men*, and a legal system that protects non-conforming women only if they choose *not* to nurture, lesbians both violate the prescription and refuse the "choice" — daring to nurture *women*. Although nurturing women is only one aspect of lesbian experience, it is an important one, and will serve the purpose of this analysis. The lesbian focus is not meant to marginalize non-lesbian experience.<sup>70</sup> Nurturing behavior is not limited to any particular sex or sexual orientation.

The punishments and rewards described above can take a variety of forms: economic, professional, political, physical. Sociologist David Greenberg, in *The Construction of Homosexuality*, focuses on economic and professional rewards and physical punishments. He argues that homosexuality was constructed as a social category (rather than as a description of discrete acts) by the process of creating the "bureaucratic personality."<sup>71</sup> The gendered nature of the construction is acknowledged by Greenberg: "Until quite recently, bureaucratic employment was restricted almost entirely to men. It is thus hardly a coincidence that what sociologists have called the *bureaucratic* personality is essentially what students of gender have portrayed as the *male* personality."<sup>72</sup> What this personality requires is a particular set of characteristics — "methodical, rational, prudent, disciplined, unemotional, and preoccupied with conformity to expecta-

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70. It is a peculiar (and gendered) concept that caring about women means *not* caring about men. Nurturance (of anyone, including children) is a behavior that is gender-coded female, but can be (and sometimes is) engaged in by men.

71. See DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 434-54 (1988).

72. *Id.* at 446 n.51.

tions.”<sup>73</sup> Greenberg claims that “the formation of the bureaucratic personality in men entails the suppression of affective emotional responses toward males,” thus leading to the result that “men will tend to experience anxiety in the presence of expressions of emotional intimacy or sexual contact between men.”<sup>74</sup> He therefore explains the virulence of modern violence against gay men in terms of non-gay-identified men’s anxiety about the extent to which their own “affective emotional responses” have been effectively suppressed.

Greenberg’s use of the purportedly gender-neutral term “homosexuality,” combined with his gender-conscious attention to the experience of gay *men*, ignores the extent to which the “affective emotional responses” of *women* have been simultaneously constrained and coerced.<sup>75</sup> Because masculinity itself requires that men refuse or deny any experience of “affective emotional responses” from and with men, it makes sense that men might feel that allowing women the choice of not responding to men is very risky. An “economy” of nurturance in which only half the population is permitted to supply demand and in which “price” is kept artificially low cannot afford the loss of any “suppliers.” The violence a heterosexual male directs against a *lesbian* may well reflect, not anxiety about his own response, but anxiety about hers — writ large, men’s fear that, if they had to compete fairly against women for women’s emotional and sexual response, they would receive less.

Thus, gay men and lesbians share an interest in increasing social acceptance of men engaged in open emotional response and caretaking behavior — in increasing supply. If men of any sexual orientation are free to nuzzle and nurture each other, then violence against gay men (and against straight men perceived as gay) is likely to decrease. Affectionate behavior between men would not automatically call into question the masculinity of either the actors or male passersby. *Lesbian*-bashing might also decrease in such a setting. To the extent that straight men are threatened by either the direct message that they are sexually irrelevant to *these* women, or the indirect message that *other* women (including their wives, girlfriends or the latest centerfold model) might likewise have a choice to withdraw their sexual and emotional nurturance from men, men might well fear a shortage

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73. *Id.* at 446 n.50.

74. *Id.* at 447.

75. *See supra* notes 13 and 14.

of nurturance itself. Widespread acceptance of men nurturing men would increase the pool of potential nurturers,<sup>76</sup> and thus reduce the fear of scarcity.<sup>77</sup> Accordingly, heterosexual men are also potential beneficiaries. While the harm to straight men arising from current policies of artificial scarcity is different (psychic rather than physical), they too have a stake in increasing their own range of affective behavior.

Heterosexual women and lesbians also share an interest not only in reducing the cost of nurturing behavior, especially the nurturing we do, but also in reducing the cost of such behavior by men. Women in intimate relationships with men would clearly benefit from increasing such men's nurturance of them. At the same time, women in intimate relationships with women would gain from both increased acceptance of their choice to nurture women *and* decreased pressure to alter that choice in favor of men.

So long as nurturing behavior is expensive for both women and men,<sup>78</sup> such behavior is likely to be in short supply. Coercing nurturing behavior from women can, of course, increase the supply somewhat. However, decreasing the cost of nurturing ap-

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76. Indeed, the example of gay men caring for their friends, life partners, and even strangers with AIDS has greatly increased my consciousness of the incredible potential men have to nurture. It has also greatly increased my respect for those who choose to exercise that potential.

77. MacKinnon might argue that straight men engage in violence against lesbians, not because they fear a lack of nurturing, but because they believe female sexual subordination to be necessary to their own sense of masculinity. See MacKinnon, *supra* note 13, at 646 ("Rape is not less sexual for being violent; to the extent that coercion has become integral to male sexuality, rape may be sexual to the degree that, and because, it is violent."). MacKinnon's dominance theory focuses on sexual availability rather than on nurturance, not because she would disagree that men coerce nurturance from women, but rather that nurturance is a form of sexual availability. Even if the first sentence of this footnote is taken as a better description, however, the prescription still holds — loosening the ties between biological sex and sexual roles would begin to undercut this persistent and dangerous organization of gender.

78. The "expense" of nurturing behavior is most clearly seen in the employment setting. See *supra* notes 66-69 and accompanying text. The long-awaited Family and Medical Leave Act, 29 U.S.C. §§ 2601-654 (1994) (amended 1995), while reducing some of the insecurity, left the lost income associated with reproduction, child care and elder care on working men and women — especially on women.

The sudden poverty of many women and their children following divorce is another indication of the costs of nurturing in this society. See, e.g., Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981). See generally Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15 (1991).



pears likely to result in much larger gains since it doubles the number of potential suppliers rather than forcing additional nurturance from a limited pool.

#### CONCLUSION

The law's construction of sexual orientation and of gender upholds the dominance of cultural masculinity. While the law may therefore occasionally protect women — lesbian or not — who are willing and able to assimilate to the dominant preference, sacrificing our freedom to experiment with both gender roles and sexual identity is the cost of such partial protection. Paying for minimal legal protection from discrimination by giving up our right to self-expression represents a very bad bargain. Forming coalitions around the differential but widespread benefits of decreasing the cost of nurturance offers the possibility of radical re-vision.<sup>79</sup>

In the process of critiquing conventional jurisprudence, in which the experience of lesbians is missing, and our own partially constructed feminist jurisprudence, in which it is marginal, we must begin constructing a jurisprudence in which lesbian experience is central.<sup>80</sup> Such a recentring would necessarily challenge both heterosexism and male supremacy, thereby freeing women and men, gay, lesbian, bisexual and straight to imagine a world in which we are equally accepted regardless of our differences;<sup>81</sup> a world in which the law facilitates, rather than impedes, our public

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79. Mary Anne C. Case provides a different, but consistent, argument for urging coalitions,

[Q]uite apart from the concerns we have for men, particularly effeminate men, in and of themselves, it is important for women and feminists to concern themselves with the treatment of the effeminate man. This is because, analogous to the argument made by those who seek to integrate pink-collar ghettos, it may be that certain behaviors are just like certain jobs — they will not be valued unless and until men can feel free to engage in them. So long as stereotypically feminine behavior, from wearing dresses and jewelry to speaking softly or in a high-pitched voice, to nurturing or raising children, is forced into a female ghetto, it may continue to be devalued.

Case, *supra* note 51, at 3.

80. Interestingly, Ruthann Robson does suggest that lesbian jurisprudence might entail (or encourage) the decentering of *law*. Robson, *supra* note 15, at 461-64.

81. *Compare* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), discussed *supra* note 67, (upholding state effort to equalize position of male and female workers who become parents) *with* Wimberly v. Labor & Indus. Relations Comm'n, discussed *supra* pp. 119-20, (upholding state decision to deny analogous equalization).

and private relationships with each other;<sup>82</sup> a world in which our fundamental humanity is assumed rather than selectively denied.<sup>83</sup> None of these conditions is impossible; indeed, they all represent choices that have been made through difficult but clearly viable legal and political struggles. All of these conditions could be part of our world. In that world, the experience of lesbians might still lead us to develop a multiple perspective, but the law would no longer make our experience "double *and* nothing."

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82. *Compare* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (requiring state to demonstrate that refusing same-sex couples access to legal marriage "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights") *with* Defense of Marriage Act, Pub. L. No. 104-199, § 110 Stat. 2419 (1996) (defining marriage as "only a legal union between one man and one woman as husband and wife").

83. *Compare* Amendment 2 to the Colorado Constitution *with* Romer v. Evans, 116 S. Ct. 1620 (1996). The Colorado Constitution provides:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST., art. II, § 30b.

The Court in *Romer* stated that, "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." *Romer*, 116 S. Ct. at 1629.

