NOTES

A PROPOSAL TO BAN SEXUAL ORIENTATION DISCRIMINATION IN PRIVATE EMPLOYMENT IN VERMONT

[T]he constitutional shelter afforded . . . relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships . . . therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.[1]

INTRODUCTION

Sexual orientation is excluded from the list of protected characteristics enumerated in Title VII of the Civil Rights Act of 1964 (Title VII).[2] Title VII prohibits employment discrimination by private employers on the basis of race, color, religion, sex, and national origin.[3] The absence of sexual orientation from this list unjustifiably legitimizes this nation's policy of sexual orientation discrimination. Ironically, unequal treatment of lesbians and gay men[4] persists in an era when legislation and evolving precedent have extended limited civil rights guarantees to heterosexual women and racial and ethnic minorities. Absent legislative and judicial protection, lesbians and gay men are compelled to conceal their identities or subject themselves to discrimination fuelled by homophobia.[5]

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1. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (Brennan, J., writing for the majority).

2. 42 U.S.C. §§ 2000e to e-17 (1988).

3. 42 U.S.C. § 2000e-2(a).

4. This note will use "lesbians" and "gay men" instead of the generic adjective "gay." The theme of this note is that women and men who stray beyond their respective gender roles are marginalized, psychologically harmed, alienated from society, and forced to conform. The indiscriminate use of the term "gay" categorizes all individuals who do not conform to traditional gender roles and perpetuates stereotypes that alienate lesbians and gay men from the heterosexual society. This alienation would inhibit the reader from understanding the similarities between the way lesbians, gay men, and heterosexuals are forced to conform.

5. The term "homophobia" refers to both the irrational fear and loathing of homosexu-

Despite modest gains in protection afforded victims of sexual orientation discrimination in public employment,[6] private employment discrimination continues with judicial approval.[7] As a result, lesbians and gay men employed in the private sector are forced either to conceal their sexual identities or risk termination.[8] Although a heterosexual facade protects lesbians and gay men from social and legal sanctions,[9] it exacts a severe toll on them as well as the society which compels its maintenance.[10]

Homophobia and its resultant discrimination prevent lesbians and gay men from access to and advancement in employment opportunities.[11] The attitudes and practices fostered by homophobia confine men and women to rigidly defined gender roles.[12] The fear of being stigmatized as lesbian or gay prevents all women and men from exploring and challenging their potential beyond the bounda-

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als. *See* Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 REV. L. SOC. CHANGE 923, 925 (1986). Homophobes acknowledge the existence of lesbians and gay men, a prerequisite to a discriminatory response, such as employment termination. *Id.*

6. *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). A federal government employee cannot be fired solely on the basis of that employee's sexual orientation. For effective dismissal, a rational nexus must exist between the gay conduct and the quality of the employee's work. *Id.* at 1164; Rivera, *Queer Law: Sexual Orientation Law In the Mid Eighties Part I*, 10 U. DAYTON L. REV. 459, 483-86 (1985). *Compare* Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985). A nontenured lesbian guidance counselor was fired for disclosing her sexual orientation to other teachers and personnel. The court held that the guidance counselor could not prevail in an equal protection claim in the absence of evidence that similarly situated heterosexuals would have been treated differently. *Id.* at 450-51.

The "unique" needs of the military also justify discharge on the basis of sexual orientation. *See* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). *But see* Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988), holding that "homosexuals" constitute a suspect class. Regulations barring "homosexuals" from military service violate the equal protection clause of the fourteenth amendment because such discrimination is not necessary to promote a legitimate compelling governmental interest.

7. *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326 (5th Cir. 1978).

8. *See* M. WEINBERG & C. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS 282 (1974).

9. *See id.* at 178-96; D. ALTMAN, HOMOSEXUAL: OPPRESSION AND LIBERATION 30-57 (1971).

10. *See* A. BELL, M. WEINBERG & S.K. HAMMERSMITH, SEXUAL PREFERENCE: IT'S DEVELOPMENT IN MEN AND WOMEN 221-22 (1981); Levitt & Klassen, *Public Attitudes Toward Homosexuality: Part of the 1970 National Survey by the Institute For Sex Research*, 1(1) J. HOMOSEXUALITY 29, 32 (1974); Morin & Garfinkle, *Male Homophobia*, 34 J. SOC. ISSUES 29, at 41 (1978); D. Steffensmeier & R. Steffensmeier, *Sex Differences in Reactions To Homosexuals: Research Continuities and Further Developments*, 10 J. SEX RESEARCH 52, 62-66 (1974).

11. *See* VERMONTERS FOR LESBIAN AND GAY RIGHTS, DISCRIMINATION AND VIOLENCE SURVEY OF LESBIANS AND GAY MEN IN VERMONT (1987) [hereinafter SURVEY].

12. *See* A. BELL, M. WEINBERG & S.K. HAMMERSMITH, *supra* note 10, at 221-22.

ries of traditional gender stereotypes.[13]

Presently, private employment discrimination on the basis of sexual orientation is prohibited only in Wisconsin and Massachusetts.[14] In an effort to determine whether Vermont should adopt similar legislation, this note examines the harm caused by sexual orientation discrimination in private employment. Part one presents examples of discrimination against gay men and lesbians in private employment[15] and also discusses homophobia and its resultant harm to men and women regardless of their sexual orientation.[16] Part one concludes with an examination of the psychological damage experienced by lesbians and gay men living in a society that considers their sexual orientation immoral and illegal.[17]

Section two considers the status of employment law with respect to sexual orientation discrimination. First, it reviews the history of employment termination law and traces the origins of Title VII.[18] Second, it advocates the position that sexual orientation falls within the purview of sex discrimination and should therefore be protected under Title VII.[19] Finally, it presents an alternative theory that sexual orientation shares "minority" status with those characteristics enumerated in Title VII and should therefore be included as a protected class.[20]

The final section chronicles and evaluates recent legislative proposals in Vermont to prohibit employment discrimination on the basis of sexual orientation.[21]

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13. *See id.*

14. *See* NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW 5-26 (1987). The state of Wisconsin prohibits "discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation." WIS. STAT. ANN. § 111.31(1) (West 1988). Massachusetts recently enacted a similar comprehensive anti-discrimination statute. Accordingly, "it shall be an unlawful practice . . . [f]or an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation . . . to refuse to hire or employ or to bar or to discharge from employment such individual . . . . MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1988 & Supp. 1989). *See* LESBIAN/GAY LAW NOTES, MASSACHUSETTS ENACTS GAY RIGHTS LAW 65 (1989).

15. *See infra* text accompanying notes 22-49.

16. *See infra* text accompanying notes 50-83.

17. *See infra* text accompanying notes 84-138.

18. *See infra* text accompanying notes 139-172.

19. *See infra* text accompanying notes 173-225.

20. *See infra* text accompanying notes 226-292.

21. *See infra* text accompanying notes 293-323.

I. Employment Discrimination on the Basis of Sexual Orientation and Its Resultant Harm

A. Examples of Sexual Orientation Discrimination in the United States and in Vermont

This section examines sexual orientation discrimination in the employment context. According to The National Institute of Mental Health's Task Force on Homosexuality, at least sixteen percent of lesbians and gay men experience employment difficulties because of their sexual orientation.[22] Lesbians and gay men comprise ten percent of the adult population in the United States.[23] Approximately 50,000 lesbians and gay men live and work in Vermont.[24]

Two examples provide an introduction to the extent of the problem of sexual orientation discrimination in the United States. In 1977, San Francisco adopted a gay rights ordinance that included a provision prohibiting discrimination on the basis of sexual orientation in employment.[25] In the same year, the Human Rights Commission of San Francisco documented 180 cases of such discrimination.[26] Subsequently, the Commission reported 330 cases of discrimination in 1978 and 74 cases in 1979.[27]

The case *Under 21 v. City of New York* also illustrates the problem of sexual orientation discrimination in New York City.[28] *Under 21* involved a New York City Board of Estimate resolution promulgated pursuant to an executive order.[29] The resolution pro-

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22. *To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation, and for Other Purposes: Hearing on H.R. 1454 Before the Subcomm. on Employment Opportunities of the Committee on Education and Labor of the House of Representatives*, 97th Cong., 2nd Sess. 8-9 (1982) [hereinafter *Hearing on H.R. 1454*] (statement of Jean O'Leary, President, National Association of Business Councils, referring to a study conducted by Dr. Evelyn Hooker).

23. W. Churchill, Homosexual Behavior Among Males 53 (1967). *See generally* A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male (1948).

24. Letter from Keith E. Goslant, Co-Liaison of the Vermont Coalition of Lesbians and Gay Men (no date provided) (discussing the introduction of Vermont anti-discrimination Bill, H. 211).

25. *See Hearing on H.R. 1454*, *supra* note 22, at 9.

26. *See id.*

27. *See id.*

28. Under 21, Catholic Home v. City of New York, 126 Misc. 2d 629, 481 N.Y.S.2d 632 (Sup. Ct. 1984), *aff'd sub nom.* Under 21 v. City of New York, 108 A.D.2d 250, 488 N.Y.S.2d 669 (App. Div. 1), *rev'd in part*, 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985).

29. *Id.* at 632, 481 N.Y.S.2d at 635.

hibited the award of city contracts to private contractors who discriminated on the basis of sexual orientation against persons employed to fulfill the contract.[30] The New York Court of Appeals invalidated the resolution because the Mayor as executive officer lacked the authority to enact legislation.[31]

Although the resolution was eventually annulled, this case suggests the motivation that impels employers to discriminate on the basis of sexual orientation.[32] Both plaintiffs, the Roman Catholic Archdiocese of New York and the Salvation Army, filed for a motion for injunctive relief to prevent enforcement of the resolution.[33]

The Supreme Court, Special Term, of New York County upheld the validity of the resolution and denied the plaintiffs' motions.[34] The court criticized the plaintiffs' reasoning for blindly adhering to a policy of sexual orientation discrimination:

> [T]he Roman Catholic Archdiocese of New York and the Salvation Army — in furtherance of what appears to be the moral imperatives of their dogma, which views homosexuality as evil, rather than in furtherance of their presumed devotion to charitable endeavors and good works, have asked this Court to issue preliminary injunctive relief against the enforcement of this resolution.[35]

The court rejected the plaintiffs' claim that the resolution would lead to the eventual destruction of family life.[36] The court reasoned that this fear could not justify discrimination on the basis of sexual orientation and held that such discrimination violates the constitutional guaranty of equal protection.[37]

On appeal, the Appellate Division of the New York Supreme

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30. *Id.* at 632, 481 N.Y.S.2d at 634-35. Resolution No. 382 required that all city contracts offered to prospective contractors contain the following clause: "The Contractor agrees that it will not refuse to hire or employ, or bar or discharge from employment, or discriminate against any person in compensation or in terms, conditions or principle of employment because of age, race, creed, color, national origin, sex, marital status, *sexual orientation or affectional preference*." *Id.* at 635, 481 N.Y.S.2d at 637 (emphasis in original).

31. Under 21 v. City of New York, 65 N.Y.2d 344, 353, 482 N.E.2d 1, 2, 492 N.Y.2d 522, 523 (1985).

32. Under 21, Catholic Home v. City of New York, 126 Misc. 2d 629, 632, 481 N.Y.S.2d 632, 634-35 (Sup. Ct. 1984).

33. *Id.* at 631, 481 N.Y.S.2d at 634.

34. *Id.* at 644-45, 481 N.Y.S.2d at 643.

35. *Id.* at 631, 481 N.Y.S.2d at 634.

36. Under 21, Catholic Home v. City of New York, 126 Misc. 2d 629, 632, 481 N.Y.S.2d at 634 (Sup. Ct. 1984).

37. *Id.* at 638, 481 N.Y.S.2d 632, 639.

Court, affirming the judgment of the Special Term,[38] ruled that the resolution did not "infringe on the right of any religious organization to maintain its religious tenets."[39]

The above examples of discrimination in the United States occurred in cities which prohibit discrimination based on sexual orientation. Few cities and states protect lesbians and gay men from sexual orientation discrimination.[40] People who exhibit attitudes of moral repugnance and fear toward lesbians and gay men feel justified in practicing sexual orientation discrimination.[41] Such attitudes are fuelled by homophobia. In cities and states which lack anti-discrimination laws prohibiting sexual orientation discrimination, homophobia and its ramifications are condoned by the silence of the legislature.[42]

A recent survey entitled *Discrimination and Violence Survey of Lesbians and Gay Men in Vermont* demonstrates the severity of the problem of sexual orientation discrimination for lesbians and gay men in Vermont. The survey consists of responses to a questionnaire issued by the state's only lesbian and gay newspaper. The results indicate that forty-four percent of lesbians and gay men in Vermont have "experienced some type of employment discrimination."[43] For purposes of the survey, evidence of discrimination included demotions, refusals to hire or to promote, and denials of raises.[44] According to the respondents, employers refused to hire eighteen percent of those surveyed solely because of their sexual orientation.[45] Thirteen percent of the respondents' employers either terminated or pressured the respondents to resign because of sexual orientation.[46] Finally, ten percent of the respondents were

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38. Under 21 v. City of New York, 108 A.D.2d 250, 259, 488 N.Y.S.2d 669, 676 (App. Div. 1 1985).

39. *Id.* at 252, 488 N.Y.S.2d at 671. Likewise, the court ruled that the resolution did not restrict "a private group [from] using its own funds for its own purposes." *Id.* at 252; 488 N.Y.S.2d at 671. The court reasoned that the plaintiffs had contracted "to perform *secular* services for the City" and therefore no exemption applied. *Id.* at 252, 488 N.Y.S.2d at 671 (emphasis added).

40. *See* NATIONAL LAWYER'S GUILD, *supra* note 14, at 5-27.

41. *See* Levitt & Klassen, *supra* note 10, at 30-35.

42. *See* A. BELL, M. WEINBERG & S.K. HAMMERSMITH, *supra* note 10, at 221-22.

43. SURVEY, *supra* note 11, at 1. This survey was compiled from data "gathered from 123 respondents from November 1, 1986 through February 1, 1987 by means of pre-coded quantitative questionnaires disseminated across Vermont via Vermont's lesbian/gay newspaper *Out in the Mountains*." *Id.*

44. *Id.*

45. *Id.*

46. SURVEY, *supra* note 11, at 1.

denied promotions, raises or benefits because of their sexual orientation.[47] The survey also revealed that eighty-two percent of the respondents concealed their sexual orientation in an effort to avoid employment discrimination.[48]

The Vermont data must be reviewed with the understanding that efforts to document sexual orientation discrimination are often frustrated by the desire of members of the target population to remain unidentified as lesbians and gay men.[49] Despite this phenomenon, the survey suggests that some Vermont employers have adopted a practice of sexual orientation discrimination. The survey results evidence the existence of homophobia in Vermont.

B. Homophobia: How it Influences the Perpetuation of Gender Stereotypes

Homophobia forces men and women to adhere to rigid gender roles.[50] Sociological and psychological studies demonstrate that the preservation of the traditional family and the perpetuation of established gender roles are served by homophobia and sexual orientation discrimination.[51] Studies also reveal a correlation between the severity of homophobia and the "different values placed on the male and female [gender] roles."[52] Specifically, heterosexual men exhibit a stronger rejection toward gay men who violate the male gender role than they do toward lesbians who violate the female gender role.[53] This censure disparity toward lesbians and gay men demonstrates the greater importance and value placed on the male role in this society.[54]

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47. *Id.* The survey also reported the following results: "1) 9% of the respondents were threatened because they reported discrimination. 2) 4% were denied apprenticeship or equal membership rights in labor organizations." *Id.*

48. *Id.* Despite these attempts to shield their sexual orientation at work, 31% of the respondents had been questioned about their sexual orientation. *Id.*

49. *Id.* The reluctance to report such discrimination can also be attributed to the lack of legal redress for victims of sexual orientation discrimination. *See* Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 194. The motivation for and effects of such concealment practices are discussed under subsection C of this section.

50. *See* A. BELL, M. WEINBERG & S.K. HAMMERSMITH, *supra* note 10, at 221-22.

51. *See* Larson, Reed & Hoffman, *Attitudes of Heterosexuals Toward Homosexuality: A Likert-Type Scale and Construct Validity*, 16 J. SEX RESEARCH 245, 246-49 (1980); Levitt & Klassen, *supra* note 10, at 31-41; Morin & Garfinkle, *supra* note 10, at 41.

52. Morin & Garfinkle, *supra* note 10, at 40.

53. *Id.* at 41. Heterosexual women "are more tolerant of homosexuality than their male counterparts." D. Steffensmeier & R. Steffensmeier, *supra* note 10, at 65.

54. Morin & Garfinkle, *supra* note 10, at 40-41.

Darrell and Renee Steffensmeier evaluated and compared the reactions of men and women to both lesbians and gay men.[55] The Steffensmeiers found that the supposed sexual aggressiveness of males, imposed by heterosexual society, contributes to the strong rejection heterosexual men exhibit toward gay men.[56]

Two findings support this conclusion. First, because men are expected to be sexually aggressive, heterosexual men perceive gay men as a physical threat to their masculinity.[57] Second, gay men, unwilling to exhibit sexual aggression against women, are considered failures as men.[58] Because men are required to initiate heterosexual sex with the passive female, gay men's reluctance to perform this task violates cultural norms.[59] This reasoning also supports the Steffensmeiers' conclusion that lesbian women receive less rejection from both heterosexual men and women than do their male counterparts.[60]

Strict adherence to gender roles mandates that women be heterosexually passive.[61] Lacking responsibility as the heterosexual initiator in sex, women can stray from their heterosexual boundaries without incurring the harsh wrath directed toward gay men.[62] Women may deviate from established gender norms only if such variation does not interfere with their primary role as recipient of men's heterosexual initiatives.[63]

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55. *See generally* D. Steffensmeier & R. Steffensmeier, *supra* note 10.

56. *Id.* at 62-64. The study found that: "a) male homosexuals are more likely to be rejected than are female homosexuals, and b) male subjects [heterosexual men] are more rejecting of homosexuals than are female subjects [heterosexual women]." *Id.* at 62.

57. *Id.* at 74. Andrea Dworkin in her book *Intercourse* elaborates on why heterosexual men fear gay men. Dworkin claims that heterosexual men cannot bear the thought of gay men treating other men in the same subordinate way that heterosexual men treat women. She offers the following:

> Do not fuck men as if they are women; it is an abomination. . . . The abomination is to do to men what is normally done to women in the fuck: the penetration; the possession; the contempt because she is less, lower in standing before the law or God; the right to use her, which is, inevitably, a right over her.

A. Dworkin, Intercourse 155 (1987).

58. *See id.*; Morin & Garfinkle, *supra* note 10, at 40.

59. A. Dworkin, *supra* note 57, at 155; Morin & Garfinkle, *supra* note 10, at 40.

60. D. Steffensmeier & R. Steffensmeier, *supra* note 10, at 62.

61. *See id.* at 63-64.

62. *See id.*; Morin & Garfinkle, *supra* note 10, at 40.

63. *See* Law, *supra* note 49, at 209. In other words, women may avail themselves of sexual encounters with women only if these encounters do not impede their accessibility to men.

Homophobia has been shown to perpetuate stereotypes which define men and women as members of sexually determined classes.[64] The refusal to discard the social meanings ascribed to gender impedes the ability of men and women to choose careers and roles which fall outside the parameters of the "traditional gender script."[65] Women who attempt to gain access into the male sphere of public employment are often frustrated by its inability to incorporate their unique attributes.[66] Employers, threatened by women who enter the male domain of public employment, fail to accept and utilize the qualities that distinguish women from men.[67]

Excluded from the male-defined public forum, women are lured into conforming to their traditional role.[68] This conformity prevents women from entering the public realm and participating as women.[69] Sylvia Law illustrates the effects on a society of relegating women to the home.

> The social and economic arrangements built upon gender shape the texture of our daily lives. Under the normal prevailing arrangements of market and family, the woman pays a price for the warmth, support and legitimacy of family: she subordinates her capacity to achieve and contribute in the public world to the nurturing needs of children, parents and men.[70]

The absence of women in the public marketplace further entrenches socially defined gender roles and encourages homophobia and sexual orientation discrimination.[71]

Sociologists report that "the best single predictor of homophobia is a belief in the traditional family ideology, i.e., dominant father, submissive mother, and obedient children."[72] Moreover, they conclude that the second best predictor is the level of a person's agreement with traditional beliefs about women.[73]

These predictors would indicate that homophobia is a problem

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64. *See id.*
65. *Id.* at 208-11.
66. N.Y. Times, Mar. 8, 1989, at A18, col. 1.
67. *See* Law, *supra* note 49, at 208-09.
68. *See id.* at 208-10.
69. *See id. See generally* C. MacKinnon, Feminism Unmodified (1987).
70. Law, *supra* note 49, at 208.
71. *See id.* at 208-09.
72. *See* Morin & Garfinkle, *supra* note 10, at 31.
73. *Id.*

in Vermont. Remarks offered in opposition to a proposed anti-discrimination bill mirrored the beliefs that sociologists use to predict homophobia. On March 10, 1987, the Vermont House Committee on the Judiciary held an open forum for opponents and proponents of the bill.[74] One witness offered the following testimony:

> We the *men* and families of the Bristol Evangelical Free Church stand opposed to homosexuality, it is sinful in God's eyes. To prohibit discrimination as this bill entails would be to condone homosexuality . . . . Homosexuality destroys our family, and we cannot continue to condone homosexuality. This Bill like the ERA must be defeated.[75]

Imbued in the orator's statement is a strong belief in the traditional family and role of women. Adherents of such beliefs argue that lesbians, gay men, and heterosexual women should all be denied the rights and privileges of heterosexual men.[76] The family this witness seeks to preserve is founded on a patriarchal cultural arrangement that requires the subordination of women.[77] To maintain this status quo, women and men must conform to rigid gender roles.[78] The traditional male role requires men to be masculine, autonomous, and sexually aggressive.[79] The traditional female role dictates that the woman be sexually passive, nurturant, receptive, charming, and glamorous.[80]

Women and men who deviate from these traditional gender roles suffer the castigation of society.[81] In an effort to avoid society's rejection, women and men conform.[82] In his testimony supporting the Vermont anti-discrimination bill, Dr. William Lippert, Executive Director of the Counseling Services of Addison County, Vermont, provided a grim picture of the effects of homophobia and the pressure to conform.

> Gay oppression is used to destroy closeness and prevent unity

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74. *Discrimination on the Basis of Affectional Sexual Orientation: Hearings on H. 247 Before the House Committee on Judiciary*, (Mar. 10, 1987, Vt., Bien. Sess.) [hereinafter *Hearings on H. 247*].

75. *Id.* (statement of Walcott Palmery) (phonetic transcription of audio recording) (emphasis supplied).

76. *Id.*

77. Law, *supra* note 49, at 197.

78. *See* D. Steffensmeier & R. Steffensmeier, *supra* note 10, at 63-64.

79. *Id.*

80. *Id.*

81. *See* A. Bell, M. Weinberg & S.K. Hammersmith, *supra* note 10, at 221-22.

82. *See id.*

> between people of the same gender through the installation of fears of same sex closeness. Fears of being even labeled as gay and resultant discrimination and oppression are manipulated by society to keep people within rigidly defined gender specific behaviors. Anyone who steps outside of these stereotypes becomes a target for gay oppression and discrimination.[83]

Lesbian and gay teenagers are the group most susceptible to oppression. Adolescent culture demands rigorous adherence to gender roles.[84] Young men and women who discover that they do not conform to these established roles are forced to repress this realization.[85] Many lesbian and gay youths internalize society's negative attitudes about their sexual orientation. "What they experience is internal shame, guilt and despair."[86] The fear of attacks from heterosexual adolescent peers prevents young lesbians and gay men from acknowledging and understanding the positive aspects of their sexual identity.[87] "Without the background of peer and parental support, it seems there is no way out, no escape, and no prospect of things improving."[88] As a result, many young lesbian and gay youths attempt suicide. Thirty percent of all teenage suicides are committed by lesbians and gay youths.[89]

Society's sanction of sexual orientation discrimination reflects its rejection of lesbians and gay men.[90] This rejection contributes to many of the problems encountered by lesbians and gay men.[91] Fearing reprisals from the outside world, they present a facade of heterosexuality. Although the facade provides the security and rights of citizenship often denied to overt lesbians and gay men, it imposes a heavy burden on them.[92] Sociologists at the Institute For Sex Research report that "it is worry about exposure and antici-

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83. *Hearings of H. 247*, *supra* note 74 (statement of Dr. William Lippert) (phonetic transcription of audio recording).

84. Boston Globe, Jan. 3, 1989, at 1, col. 3.

85. *Id.*

86. *Id.*

87. *Id.*

88. Boston Globe, Jan. 3, 1989, at 1, col. 3. According to clinical social worker Rik Isensee, most teenagers have "never heard anything positive about homosexuality." *Id.* at 8, col. 2. Instead, teenagers must rely on the "[s]tereotypes of lonely, closeted, doomed-to-fail gay men and lesbians [that] persist." *Id.*

89. *Id.*

90. *See* M. Weinberg & C. Williams, *supra* note 8, at 268.

91. *See id.* at 178-79.

92. *See* D. Altman, *supra* note 9, at 33-42; M. Weinberg & C. Williams, *supra* note 8, at 282.

pated consequences (rather than passing per se) which leads to many of the covert homosexual's problems."[93]

The fear of jeopardizing employment forces lesbians and gay men to conceal their sexual orientation.[94] Doctors Weinberg and Williams discovered that "the status of a homosexual's occupation is positively related to his [or her] covertness."[95] In other words, as lesbians and gay men progress in their careers they become less integrated with their sexual identity and devote more emotional energy to hiding this identity.[96] Concealment practices forced by sexual orientation discrimination deter lesbians and gay men from seeking professional advancement.[97]

In order to masquerade effectively as heterosexual, the lesbian or gay man must internalize the heterosexual attitudes towards homosexuality. As a result, lesbians and gay men suffer internal conflict because they believe themselves to be sick,[98] immoral, or dan-

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93. *See* M. WEINBERG & C. WILLIAMS, *supra* note 8, at 178-79. The knowledge that pressures from the outside environment cause the problems of lesbians and gay men dispels the long held belief that psychological disorders cause homosexuality. *See id.* at 202-03. *See also infra* note 98.

94. M. WEINBERG & C. WILLIAMS, *supra* note 8, at 282.

95. *See id.* at 224.

96. *Id.*

97. Lesbians and gay men in the legal profession are not immune from pressure to conceal their sexual orientation. An article entitled, "Homosexual Lawyers Keep Fighting Barriers" illustrates the plight of the lesbian or gay lawyer. Accordingly, "many homosexual lawyers still see a need to remain in the closet if they are to be successful in the competitive world of the advocate." N.Y. Times, Feb. 3, 1989, at B11, col. 4. The article added further that "finding a job can be difficult for the law school graduate who does not disguise his [or her] homosexuality." *Id.* A recent cum laude graduate of Harvard Law School recounted his experience, "[o]ne interviewer from a major San Francisco firm said to me, 'Don't we have a legitimate concern that you might ruin the reputation of our firm?'" *Id.* (quoting Ben Schatz).

If a lesbian or gay man is accepted at a firm, that individual's sexual orientation is usually kept confidential for the following two reasons. First, "[n]o firm wants the reputation for being a haven for gay people." *Id.* Second, the information may be used against a client. If an attorney is a lesbian or gay man, an adversary might also assume that the client is a lesbian or gay man. One attorney who is open about being a lesbian reported that "in a child custody case . . . if there is a chance that homosexuality could become an issue, 'we don't put my name on the papers.'" *Id.* (quoting Abby Rose Rubenfeld).

98. In 1973, the American Psychiatric Association concluded that homosexuality could no longer be classified as a "mental disorder." N.Y. Times, Dec. 16, 1973, § 1, at 1, col. 1; N.Y. Times, Apr. 9, 1974, § 1, at 12, col. 4. Dr. Evelyn Hooker determined that the earlier theories of homosexuality as a mental disorder were "the construct of therapists who saw only homosexuals self-selected for emotional disturbance." *Hearings on H.R. 1454*, *supra* note 23, at 61 (prepared statement of Craig W. Christensen, Dean and Professor of Law, Syracuse University); HOOKER, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 18 (1957).

gerous.[99] All lesbians and gay men, including those who manage to mask their sexual orientation successfully, without adopting the homosexual stereotypes for their own identity, experience emotional suffering.[100]

The severity of this pain is demonstrated by the experiences of some gay and lesbian Vermonters. A social psychologist who counsels lesbians and gay men describes their anguish:

> Essentially every gay or lesbian person I have seen for therapy has described some degree of suffering which was caused not by psychological difficulties, but by discrimination based on the simple fact of their sexual orientation. . . . Each of these individuals struggles with what it means to live in a situation in which being honest about who they are may well cost them their jobs, their professions, or their children.[101]

Vermont's lesbian and gay population will continue to struggle

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In a random survey conducted by Darrell and Renee Steffensmeier, "[m]ore than two-thirds of the student respondents agreed with the stereotype characterizing homosexuals as psychologically disturbed." D. Steffensmeier & R. Steffensmeier, *supra* note 10, at 57. The pioneer homosexual organizations, the Mattachine Society and Daughters of Bilitis, first adopted the policy that lesbians and gay men were not psychologically normal. This policy was based on reverence for psychological professionals who could prove to the heterosexual community that lesbians and gay men were not responsible for their sexual orientation. The groups later retracted the policy because it perpetuated the belief that lesbians and gay men were inferior or "less than WHOLE human beings." J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITY: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970, at 153 (1983) (quoting Franklin Kameny). Franklin Kameny, leader of the transition, advocated that lesbians and gay men should follow the example of blacks in pursuit of their civil rights. "I do not see the NAACP and CORE worrying about which chromosome and gene produced a black skin, or about the possibility of bleaching the Negro." *Id.* Kameny also argued:

> I do not see any great interest on the part of the B'nai B'rith Anti-Defamation League in the possibility of solving problems of anti-semitism by converting Jews to Christians. . . . We are interested in obtaining rights of our respective minorities AS Negroes, AS Jews, AS HOMOSEXUALS. Why we are Negroes, Jews, or homosexuals is totally irrelevant, and whether we can be changed to Whites, Christians, or heterosexuals is equally irrelevant.

Id.

99. *See* G. WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL 14-21 (1975). Doctors Bell and Weinberg in *Homosexualities: A Study of Diversity Among Men & Women*, reject the notion that all "homosexuals are pretty much alike . . . that this similarity necessarily involves irresponsible sexual conduct, a contribution to social decay, and . . . psychological pain and maladjustment." A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN & WOMEN 229-30 (1979).

100. *See* M. WEINBERG & C. WILLIAMS, *supra* note 8, at 282; E. ROFES, "I THOUGHT PEOPLE LIKE THAT KILLED THEMSELVES" 9 (1983).

101. *Hearings on H. 247*, *supra* note 74 (statement of Dr. Marcia Hill) (phonetic transcription of audio recording).

against the oppression of homophobia as long as discrimination on the basis of sexual orientation remains legal in Vermont.

The following subsection will reveal that the United States Supreme Court has demonstrated its agreement with traditional gender roles ascribed to men and women. The Court utilizes its judicial authority to maintain these roles by condoning and perpetuating homophobia and sexual orientation discrimination.

C. *The Legal Condemnation of Homosexuality and Its Resultant Harm to Lesbians and Gay Men*

Sodomy laws are "the chief systematic way that society as a whole tells gays they are scum."[102] These laws also justify society's discrimination against lesbians and gay men.[103] In *Bowers v. Hardwick*, five justices of the United States Supreme Court upheld the constitutional validity of sodomy statutes.[104] In its decision, the *Bowers* Court exhibited homophobia and imposed a criminal stigma on lesbians and gay men.[105]

In *Bowers v. Hardwick*, the United States Supreme Court upheld the constitutionality of Georgia's sodomy statute.[106] The statute provided in pertinent part that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."[107] Despite the statute's prohibition against heterosexual and homosexual oral and anal sex, the *Bowers* opinion ignored the statute's application to heterosexuals.[108] Instead, Justice White,

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102. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986-87).

103. *See* Brief Amicus Curiae For Lesbian Rights Project at 21-24, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); E. ROFES, *supra* note 100, at 9.

104. Bowers v. Hardwick, 478 U.S. at 186.

105. *See* Spear, *The U.S. Constitution and Gay America*, 10 HAMLINE L. REV. 159, 159 (1987). Minneapolis State Senator Allan Spear indicated that the decision "declared gay men and lesbians to be a pariah class, beyond the protection of the Constitution." *Id.* Senator Spear then analogized the treatment of homosexuals in *Bowers* with the treatment of blacks in the *Dred Scott* decision of 1857. Both decisions, he writes, placed a group of Americans beyond the reach and protection of the Constitution. *Id.*

106. 478 U.S. at 189.

107. *Id.* at 188 n.1 (citing GA. CODE ANN. § 16-6-2 (1984)).

108. *See id.* at 200 (Blackmun, J., dissenting). Justice Blackmun reminded the Court that "[t]he sex or status of the persons who engage in the act is irrelevant as a matter of state law. . . . [T]hat purpose [for Georgia's enacting the sodomy statute] seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity." *Id.*

writing for the majority, seized the opportunity to restrict the right to privacy to activities with a demonstrated "connection between, family, marriage, or procreation."[109] He determined that homosexual activity has no demonstrated connection with family, marriage, and procreation and, therefore, is not protected by the right to privacy under the due process clause of the fourteenth amendment.[110]

Justice White traced the history of this country's criminalization of sodomy to support his claim that sodomy falls outside the protected right to privacy.[111] He approved Georgia's efforts to banish sodomy as an activity outside the accepted parameters of the state's morality.[112] The opinion, in effect, legitimizes homophobic sentiments.[113]

The *Bowers* Court's "almost obsessive focus on homosexual activity" allows the history of the practice and criminalization of heterosexual sodomy to escape review.[114] Despite this oversight, the Court upheld the statute that also prohibited heterosexuals from engaging in sodomy.[115] Heterosexuals who characterize lesbians and gay men as immoral, are, therefore, hypocritical.

Society chooses not to evaluate or condemn the private activities of heterosexual couples as it does lesbian and gay couples.[116] The equal enforcement of sodomy laws against heterosexuals "[w]ould . . . allow the police to search the sacred precincts of marital bedrooms."[117] Justice Douglas in *Griswold v. Connecticut* feared such intrusive searches and found "[t]he very idea . . . repulsive to the notions of privacy surrounding the marriage relationship."[118] Through *Bowers* and *Griswold*, the Supreme Court has demonstrated its commitment to preserve the traditional heterosexual relationship.

The case of *Padula v. Webster* demonstrates that the *Bowers*

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109. *Id.* at 191.

110. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

111. *Id.* at 191-94.

112. *See id.* at 192-96.

113. *See id.* at 187-96.

114. 478 U.S. at 200 (Blackmun, J., dissenting).

115. *Id.* at 189.

116. *See* Spear, *supra* note 105, at 161; Law, *supra* note 49, at 188.

117. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (describing the improbabilities of enforcing Connecticut's law prohibiting the disbursement and use of contraceptives).

118. *Id.* at 485-86. Indeed, careful scrutiny of heterosexual relationships would expose the foundation for the current gender roles and hierarchy. Such an analysis would reveal the baselessness of traditional gender roles and subject them to change.

decision condones and contributes to homophobia and discrimination.[119] In *Padula*, the United States Court of Appeals for the District of Columbia relied, in part, on *Bowers* to find that the Federal Bureau of Investigation justifiably considered homosexual conduct when evaluating applicants for special agent positions.[120]

The *Padula* court's opinion not only facilitates, but also advocates, employment discrimination against lesbians and gay men. The court reasoned:

> If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.[121]

The constitutionality of sodomy laws effectively forces lesbians and gay men to relinquish their status as citizens in exchange for the social stigma of criminal. In addition to exposing lesbians and gay men to legally sanctioned discrimination, the criminal stigma subjects lesbians and gay men to derivative deviants who prey on people who cannot avail themselves of legal protection.[122] Derivative deviants often harass, assault, or extort money from lesbians and gay men who fear revealing their sexual orientation to the police.[123] The criminalization of homosexual activity thus contributes

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119. *See* Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

120. *Id.* at 103-04.

121. *Id.* at 103.

122. Harry, *Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546, 546 (1982). "Derivative deviance is . . . defined as that subset of all victimizations which is perpetrated upon other presumed deviants who, because of their deviant status, are presumed unable to avail themselves of civil protection." *Id.*

123. *See id.* at 548. Eric Rofes in his book *"I Thought People Like That Killed Themselves"* reports that lesbians and gay men are often driven to suicide by blackmailers who threaten to reveal their sexual orientation. "One lesbian schoolteacher was driven to attempt suicide by a blackmailer who forced her to pay several thousand dollars in exchange for not revealing her lesbianism [sic] to the school's administration. The blackmailer, a former roommate of the woman, continued to threaten her with exposure, even after the suicide attempt." E. ROFES, *supra* note 100, at 29. *See also* SURVEY, *supra* note 11. The survey also reported the following acts of violence against lesbians and gay men in Vermont.

> Because of their sexual orientation:
>
> 80% experienced some kind of harassment or violence[,] . . . 96% reported concealing their sexual orientation to avoid intimidation, harassment or violence[,] . . . 79% believed anti-lesbian/gay violence was prevalent enough to cause them to fear for their safety[,] . . . 75% expected to be assaulted at

to acts of overt violence against lesbians and gay men.

A recent Vermont incident illustrates the vulnerability of lesbians and gay men to these attacks. In that case, a man brutally attacked another man whom the assailant thought was gay.[124] The assailant boldly told police that he went into a gay bar, "found a fag and kicked the s____ out of him."[125] This statement implies that the attack was motivated by hatred towards gay men. The assailant's apparent lack of remorse suggests that he believed the attack was either permissible, or worth the risk of punishment.[126]

Police often harass and question the credibility of lesbians and gay men who muster enough courage to report incidents of derivative deviance.[127] When derivative deviants are apprehended and prosecuted they are rarely subjected to more than minimal fines or sentences.[128] The actions of Judge Jack Hampton of the Texas State District Court provide an example of the legal system's continuing policy of condoning derivative deviance.[129]

Judge Hampton presided over the murder trial of Richard Bednarski.[130] Bednarski was convicted of murdering two men whom he thought were gay. Judge Hampton also believed them to be gay.[131] The murder was the culmination of an evening of "gay bashing," an activity involving high school students who harass

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> some time in the future due to their sexual orientation [and] 89% knew people who had been victims of violence.

Id.

Professor Richard Cornwall of Middlebury College reports "that attacks on gay men are the most common hate crime (in Vermont)." *Hinesburg Man Charged in Anti-Gay Assault*, Burlington Free Press, Apr. 17, 1990, at 1, col. 5. *See also Discrimination on the Basis of Affectional Sexual Orientation: Hearings on S. 278 Before the Senate Committee on the Judiciary*, (Feb. 23, 1988, Vt., Bien. Sess.) [hereinafter *Hearings on S. 278*] (statement of Heather Wishik).

124. *Hinesburg Man Charged in Anti-Gay Assault*, *supra* note 123.

125. *Id.* (deletion in original).

126. *See id.*

127. *See* D. ALTMAN, *supra* note 9, at 33-34; *Hearings on H.R. 1454*, *supra* note 22, at 64 (prepared statement of Craig W. Christensen, Dean and Professor of Law at Syracuse University School of Law). Dean Christensen testified about his own personal trauma: "I shall never forget my own feelings of helplessness and degradation when, as a young lawyer in Chicago, I was mugged and robbed in a nearly deserted public square within shouting distance of a passing police car. When an assailant, whose advances I had just rejected, threatened to accuse me of solicitation, I did not cry out nor report the incident for fear that my career would surely be ruined by the mere assertion that I was gay." *Id.*

128. D. ALTMAN, *supra* note 9, at 33-34.

129. *See* N.Y. Times, Dec. 17, 1988, at 8, col. 5.

130. *Id.*

131. *Id.*

pedestrians "in neighborhoods thought to be favored by homosexuals."[132] On the night of the murders, Bednarski and several friends stood on a street corner shouting at cars and pedestrians.[133] The two victims responded to these shouts and gave Bednarski and a friend a ride.[134] After the car reached a secluded area, Bednarski ordered the two victims to remove their clothes. The victims refused, whereupon Bednarski proceeded to fire a gun, killing both men.[135] Although the state prosecutor requested a life sentence, Judge Hampton imposed the more lenient sentence of thirty years.[136] Supporting his decision, Judge Hampton stated: "I put prostitutes and gays at about the same level and I'd be hard put to give somebody life for killing a prostitute."[137] Judge Hampton summarily banished prostitutes, lesbians, and gay men to a "level" in society void of equal protection of the laws.[138]

II. Title VII: The Current Lack of Legal Protection for Lesbians and Gay Men

Title VII prohibits employment discrimination by private employers on the basis of race, color, religion, sex, and national origin.[139] Prior to the enactment of Title VII, "an employer could fashion his [or her] personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid."[140] Lesbians and gay men are still vulnerable to employers' stereotypes of gender roles. Under the employment at will doctrine, private employers may hire or fire any em-

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132. *Id.*

133. N.Y. Times, Dec. 17, 1988, at 8, col. 5.

134. *Id.*

135. *Id.*

136. *Id.* Although a jury convicted Bednarski of the murder, the bifurcated trial system in Texas allowed Bednarski to choose either the judge or jury to impose his sentence. Bednarski's lawyer selected the judge to make the sentencing determination "because he [the lawyer] thought the judge would be more sympathetic." *Id.* Judge Hampton's comments explaining his decision suggest that Hampton did sympathize with the young convicted murderer. *Id.* Judge Hampton claimed "I did what I thought was right" and added "I don't care much for queers cruising the streets. I've got a teen-age boy." *Id.* The judge also blamed the victims for causing their own deaths, claiming that the murders would not have occurred "if they hadn't been cruising the streets picking up teen-age boys." *Id.*

137. N.Y. Times, Dec. 17, 1989, at 8, col. 5.

138. *Id.* Paul Varnell, Research Director of the Illinois Gay and Lesbian Task Force, commenting on Judge Hampton's decision and reasoning, offered the following remarks: "It appears that we do have one law for heterosexuals and one law for homosexuals." *Id.*

139. 42 U.S.C. § 2000e-2(a) (1988).

140. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

ployee "at will."[141] The doctrine allows employers to base employment decisions on arbitrary or capricious reasons unrelated to merit or competency.[142]

This section first provides an overview of Title VII, examining its policy and application. It then advances the proposition that sexual orientation discrimination, by preserving gender conformity, inhibits employment opportunities for women and men and therefore constitutes sex discrimination under Title VII. This section then offers the alternative position that sexual orientation should be included among the characteristics enumerated in Title VII.

A. An Overview of Title VII Policy and Practice

Congress promulgated Title VII to assure all Americans of the opportunity to compete for employment free from irrelevant discrimination.[143] Employers could no longer use race, sex, religion, color, or national origin to influence their personnel policies. Despite the history of sex discrimination,[144] sex was not included in the list of prohibited characteristics until deliberations in the House of Representatives produced a floor amendment to Title VII.[145] This last minute addition passed without extensive debate or legislative hearings.[146] In the absence of clear legislative intent, the purpose and scope of the sex classification have been defined by sex discrimination claims brought under Title VII.[147] The

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141. *See* Rivera, *supra* note 6, at 464. The American tradition of employment at will provides that employers possess an absolute right to discharge any employee not protected by an express contract. *See, e.g.*, Henry v. Pittsburgh & L.E.R. Co., 139 Pa. 289, 27 A. 157 (1891); Feinman, *The Development Of The Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

142. *See* Rivera, *supra* note 6, at 464.

143. *See* Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971) [hereinafter Note, *Employment Discrimination*]. Title VII originally focused on the racial and economic causes of black oppression. Discrimination had precluded blacks' access to and advancement in employment. Congress intended Title VII to eliminate racial discrimination in employment and thereby to remove this barrier to opportunities for blacks. *Id.* at 1111, 1113.

144. *Id.* at 1166. "As in the case of the Negro, women themselves have often been brought to believe in the inferiority of their endowment. As the Negro was awarded his 'place' in society, so was there a 'woman's place.' " *Id.* at 1167 (citing G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1077 (2d. ed. 1962)).

145. *Civil Rights Act of 1964: With Explanation*, Commerce Clearing House, at 73 [hereinafter CCH].

146. *See* Note, *Employment Discrimination*, *supra* note 143, at 1167.

147. *See* Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 780 (1987).

courts have indicated in these cases that the prohibition against sex discrimination in Title VII was intended to eliminate the disparate treatment of men and women resulting from sex stereotypes.[148]

The United States Supreme Court discussed the intent of Congress in enacting Title VII in *City of Los Angeles Department of Water & Power v. Manhart*.[149] In *Manhart*, the Los Angeles Department of Water and Power instituted a pension fund which required female employees to make larger contributions to the fund than male employees.[150] The Department defended its policy with mortality tables that demonstrated "[w]omen, as a class, do live longer than men."[151] The Department reasoned that because women's longevity would entitle female retirees to more monthly payments, female employees should incur a greater burden during their tenure of employment.[152] Although the Department's generalization was factually valid,[153] the Court ruled that the Department could not compel its female employees to contribute more money than similarly situated men.[154]

The *Manhart* Court recognized that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males and females."[155] It was undisputed by the Court and both parties that women live longer as a class than men. The Court noted, however, that not all women in the Department would live longer than all men.[156] The Court emphasized that Title VII was designed to protect individuals.[157] Accordingly, "[i]t pre-

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148. *See, e.g.*, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.

Manhart, 435 U.S. at 707 n.13 (quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

149. 435 U.S. at 707.

150. *Id.* at 704-05.

151. *Id.* at 707.

152. *Id.* at 705.

153. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

154. *Id.* at 711.

155. *Id.* at 707.

156. *Id.* at 707-08.

157. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

cludes treatment of individuals as simply components of a racial, religious, sexual, or national class."[158] The Department's reliance on a gender based classification, therefore, violated Title VII and "preserve[d] traditional assumptions about groups rather than thoughtful scrutiny of individuals."[159]

The *Manhart* decision demonstrates the Supreme Court's willingness to employ Title VII as a tool for eliminating generalizations and stereotypes based on gender. "Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less."[160] Individuals, rather than the class with which they are identified, must be evaluated when making employment decisions.[161]

Application of the *Manhart* ruling to sexual orientation discrimination demonstrates that employers unlawfully rely on gender stereotypes when they base their personnel decisions on employees' sexual orientation. Such employers believe that all employees should be heterosexual and adhere to traditional gender roles. Some individuals do not conform to this gender stereotype.[162] Similar to the female employees in *Manhart*, who will predecease their male coworkers, lesbians and gay men do not share all of the characteristics of their respective gender stereotypes. Discrimination against lesbians and gay men violates the mandate of Title VII to treat employees as individuals and not as components of a class.

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158. *Id.* at 708.

159. *Id.* at 709.

160. *Id.* at 707.

161. *See* Bayer, *supra* note 147, at 790. Bayer continues by asserting that *Manhart*, and a subsequent retirement benefits case, Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983), stand for the proposition that "[n]o matter how ingrained or accepted a stereotype may be, premising employment practices upon such stereotypes is unlawful unless justified by accepted statutory defenses." Bayer, *supra* note 147, at 790.

Regarding statutory defenses, Title VII provides that employment classifications may be based on the five enumerated categories, "when religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1988). The Supreme Court has established a second Title VII defense entitled "the business necessity" defense applicable to disparate impact cases. Bayer, *supra* note 147, at 822. Cases dealing with this defense have seemingly used conflicting standards. *Compare, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977) (discriminatory requirement must be necessary for safe and effective job performance) *with* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (discriminatory employment requirement involving municipal jobs intimately concerned with public safety need only be "job related").

162. Lesbians and gay men comprise approximately 10% of the population of the United States. *See generally* A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 23.

Personnel policies that evaluate employees on the basis of sexual orientation result in "treatment of a person in a manner which but for that person's sex would be different."[163] Such policies violate Title VII.

Sexual orientation discrimination violates Title VII by perpetuating traditional gender stereotypes "that operate to 'freeze' the status quo."[164] Sexual orientation discrimination relies on myths about women's and men's ability to perform certain roles in society and therefore, should be prohibited as a form of sex discrimination under Title VII. Lesbians and gay men, by expressing their sexuality, challenge traditional gender roles.[165] Gay men do not seek to subordinate women sexually, and lesbians are not sexually subordinated by men. Divorced from the heterosexual matrix, lesbians and gay men are less encumbered by sexual stereotypes that dictate women's inferior and men's superior gender roles.[166] Lesbians and gay men challenge "[t]he prevailing social meaning attached to gender [which] systematically denies the value of traditional women's work in the home and wage market."[167] This challenge is consistent with the goals of Title VII.[168]

Extending Title VII protection to lesbians and gay men under the rubric of "sex" discrimination is supported by the legislative hearings on Title VII.[169] House discussions on Title VII disclose Congress's intent to give individuals the right to be free of irrational discrimination.[170] This interpretation of the broad scope of

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163. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (quoting Note, *Employment Discrimination*, *supra* note 143, at 1170).

164. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1970).

165. *See* Law, *supra* note 49, at 218.

166. *See generally id.* at 218-21.

167. *Id.* at 209.

168. *See Griggs*, 401 U.S. at 430.

169. *See* CCH, *supra* note 145, at 75.

170. *See id.* During the House discussions, Representative Gathings voiced his concern that, although Title VII was intended to protect every individual from employment discrimination, women were excluded from its protection. This fear stemmed from the fact that sex was as yet an unenumerated classification. Representative Gathings supported the amendment to include sex as an enumerated category:

> Title VII seeks to make it an unlawful employment practice for an employer to fail or refuse to hire or to discharge or otherwise discriminate against any individual because of race, color, religion, or national origin. The language covers all employees, or would-be employees, except white women. I do not want to discriminate against a job applicant because of her sex and I hope that Members of this body will approve the amendment of the gentleman from Virginia.

Id.

Title VII protection prompted the last minute inclusion of "sex" as an enumerated category.[171] The reach of Title VII is broad enough to protect lesbians and gay men against employment discrimination.[172]

B. Proving Sex Discrimination under Title VII

The foregoing discussion suggests that sexual orientation discrimination falls within the parameters of Title VII. Employers who discriminate against gay men and lesbians disregard the statutory prohibition on personnel policies predicated on sex or the social stereotypes ascribed to gender. Lesbians and gay men deviate from their respective gender roles. Because of this deviation they receive disparate treatment from employers. Courts and the Equal Employment Opportunity Commission (EEOC)[173] have refused to consider this type of discrimination as sex discrimination under Title VII. Lesbians and gay men, therefore, have been unable to avail themselves of the statute's protection.[174]

Title VII proscribes two types of discrimination, disparate treatment and disparate impact.[175] Accordingly, a Title VII plaintiff may pursue one claim or both.[176] Disparate treatment involves intentional discrimination against an individual or group of indi-

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171. *Id.*

172. At the time of the enactment of Title VII of the Civil Rights Act of 1964, most Americans and their elected officials were unaware of the existence of a homosexual population. Similarly, the discriminatory treatment experienced by this population was also unknown. *See generally* J. D'EMILIO, *supra* note 98, at 1-6, 149-75.

173. To initiate a Title VII action a person must file a charge or complaint with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-5(e) (1988). People who file unlawful discrimination complaints with a state or local agency can file a charge with the EEOC 300 days after the unlawful employment practice, "or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier." *Id.* Within 10 days of receiving the charge, the EEOC must serve notice upon the employer against whom the charge is made. *Id.* The EEOC investigates the validity of the claim and where it finds reason to believe discrimination has occurred, it attempts to reach a conciliation agreement with the employer. 42 U.S.C. §§ 2000e-5(f)(1)-(3). If no conciliation agreement is reached, the EEOC may bring a civil action against the employer in a federal district court. If the EEOC finds no discrimination, or if no conciliation has been reached, or if no civil action is filed within 180 days of the filing of the charge, the EEOC will provide the aggrieved person with a "right to sue" letter. Thereafter, the aggrieved person has 90 days to file a civil action in federal district court. *Id.*

174. *E.g.*, Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981). *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

175. Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1970).

176. *See* Bayer, *supra* note 147, at 795.

viduals.[177] Disparate or adverse impact occurs when an employer's facially neutral practices disproportionately harm or impact members of a group protected by Title VII.[178] Lesbians and gay men who have brought sex discrimination claims under Title VII have relied on both theories to establish causes of action.[179]

1. Disparate Treatment

Disparate treatment is discrimination with intent.[180] Employers who utilize "one hiring policy for women and another for men" violate Title VII.[181] A plaintiff in a Title VII action has the burden of proving a disparate treatment claim.[182] After the plaintiff has proven such discrimination, the employer must articulate a nondiscriminatory reason for firing or refusing to hire or promote the employee.[183] The employee then has an opportunity to prove that

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177. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *Griggs*, 401 U.S. at 429-31; Bayer, *supra* note 147, at 796. Under disparate treatment, a plaintiff may employ three forms of proof including: 1) per se discriminatory conduct, 2) individual disparate treatment, and 3) systematic disparate treatment. *Id.*

Individual disparate treatment involves " 'intentional but covert discrimination' perpetuated against an individual or small group." *Id.* at 799. The guidelines for individual disparate treatment cases were suggested in *McDonnell Douglas*, 411 U.S. at 802. According to the *McDonnell Douglas* formula, a plaintiff makes a prima facie case of discrimination by showing:

> i) that he [or she] belongs to a protected class;
> ii) that he [or she] applied and was qualified for a job for which the employer was seeking applicants;
> iii) that, despite his [or her] qualification, he [or she] was rejected; and
> iv) that, after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

In systematic disparate treatment or pattern and practice cases, the plaintiff bears the initial burden of proving by a preponderance of the evidence that sexual discrimination was the employer's "standard operating procedure — the regular, rather than the unusual, practice." Bayer, *supra* note 147, at 809.

178. *See, e.g., Griggs*, 401 U.S. at 429-31. "Disparate impact analysis is result-oriented, focusing on facially neutral employment practices that fall more harshly on members of groups protected by Title VII." Note, *Applying Disparate Impact Theory to Subjective Employee Selection Procedures*, 20 Loy. L.A.L. Rev. 375, at 377 (1987).

179. *See, e.g.*, Wright v. Methodist Youth Servs., 511 F. Supp. 307 (1981) (disparate treatment); DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979) (disparate impact).

180. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); *McDonnell Douglas*, 411 U.S. 792; Bayer, *supra* note 147, at 799.

181. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam).

182. *McDonnell Douglas*, 411 U.S. at 802.

183. *Burdine*, 450 U.S. at 253-54. The burden on the employer is relatively light. "The defendant need not persuade the court that it was actually motivated by the proffered rea-

this non-discriminatory purpose was a mere pretext.[184]

The United States Supreme Court addressed disparate treatment in *Phillips v. Martin Marietta Corp.*[185] In *Martin Marietta*, a private employer refused to hire or retain women with pre-school aged children.[186] The employer did not have a comparable policy for similarly situated male employees.[187] Martin Marietta claimed that its policy did not constitute sex discrimination because it did not affect all women. It maintained that only those women with pre-school aged children were affected by the policy.[188] The United States Supreme Court found that Martin Marietta's policy was predicated on sex.[189] The *Martin Marietta* Court determined that these female parents were a sub-group of a protected class of employees, women, under Title VII.[190] The *Martin Marietta* decision indicates that sex-plus classifications are offensive to one of the primary goals of Title VII, the eradication of gender stereotypes.[191]

The disparate treatment of lesbians and gay men resembles the sex-plus discrimination in the *Martin Marietta* employment scheme. Like women with pre-school aged children, lesbians and gay men represent a sub-group of individuals protected under the "sex" classification of Title VII. Women and men who do not conform in their behavior and relationships are subject to discrimination. Employers who insist on their employee's conformity with traditional gender roles violate the spirit of Title VII.

The EEOC has ruled that it lacks subject matter jurisdiction over Title VII complaints premised on sexual orientation discrimination.[192] In a 1977 decision, the charging party alleged that her employer fired her solely because she was a lesbian.[193] During its investigation of the charge, the EEOC determined that the charg-

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sons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254.

184. *McDonnell Douglas*, 411 U.S. at 802-04.

185. 400 U.S. 542, 544 (1971) (per curiam).

186. *Id.*

187. *Id.*

188. *Id.*

189. 400 U.S. at 544.

190. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam).

191. *See id.*

192. *See, e.g., Discharge of Lesbian Not Gender-Based Discrimination*, 1983 Empl. Prac. Dec. (CCH) ¶ 6578 (Aug. 11, 1977) [hereinafter *Discharge*]; *Sexual Preference Bias Not Covered*, 1983 Empl. Prac. Dec. (CCH) ¶ 6676 (Mar. 9, 1976).

193. *Discharge*, *supra* note 192, at 4430.

ing party's allegations were true.[194] The EEOC ruled that it lacked subject matter jurisdiction over the claim, however, because "[t]he investigation did not reveal any evidence that [her employer] would not have similarly discharged [the] [c]harging [p]arty if she had been a male homosexual."[195] The decision suggests that as long as the employer discriminates against similarly situated men who fail to conform to the male stereotype, the employer's hiring practices do not violate Title VII.[196]

Similarly, the EEOC ruled it lacked jurisdiction where a gay man claimed that an employer failed to hire him because of his homosexuality.[197] The employer contended that it had rejected his application for employment because it believed that the man would not be a stable permanent employee.[198] Although the EEOC decided the gay man's allegations were valid, it declined jurisdiction because the refusal to hire decision was based on the man's "sexual proclivities or practices, not his . . . gender."[199] The EEOC determined that neither the language nor history of Title VII could support the inclusion of a person's sexual orientation within the meaning of the term sex.[200]

The refusal of the EEOC to recognize employment decisions based on gender stereotypes as violative of Title VII was demonstrated in another case.[201] During its investigation, the EEOC discovered that the employer believed the applicant to be a lesbian because of her "mannish appearance."[202] The employer also commented on the charging party's application form that her masculine appearance was a negative feature.[203] The EEOC ruled that it lacked jurisdiction because there was no evidence that the employer "had treated or would have treated a similarly situated male any differently."[204] In a footnote, the EEOC described this similarly situated man as a "male who gave the appearance of be-

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194. *Id.*
195. *Id.*
196. *Id.*
197. *Coverage of Anti-Bias Law Does Not Extend to Sexual Preference*, 1983 Empl. Prac. Dec. (CCH) ¶ 6660 (July 7, 1976).
198. *Id.*
199. *Id.*
200. *Id.* at 4639-40.
201. *Sexual Preference Bias Not Covered*, 1983 Empl. Prac. Dec. (CCH) ¶ 6675 (Mar. 9, 1976).
202. *Id.* at 4629.
203. *Id.*
204. *Id.*

ing a homosexual."[205] The United States Supreme Court in *Price Waterhouse v. Hopkins*,[206] recently suggested that the EEOC should not compare the treatment of lesbians with gay men. Instead, the inquiry should focus on whether a man or woman who demonstrated certain behaviors or characteristics was treated differently than members of the opposite sex who displayed similar attributes.

In *Price Waterhouse*, the plaintiff Ann Hopkins was denied a partnership in a nationwide professional accounting firm.[207] Hopkins had held a senior management position for five years and her evaluations for partnership revealed that she was an aggressive and competent executive.[208] Some of the partners evaluating her partnership bid, however, described her aggressiveness as "macho."[209] Some also objected to her candidacy for partner because of her use of foul language, "because it[']s a lady using foul language."[210] Finally, one partner suggested that Hopkins could improve her partnership chances if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[211]

The United States Supreme Court ruled that Hopkins's "gender played a motivating part in [Price Waterhouse's] employment decision."[212] Price Waterhouse violated Title VII by relying on gender stereotypes regarding the proper behavior of women.[213] This decision appears to overrule the EEOC policy, which allows employers to discriminate against employees whose behavior deviates from gender stereotypes. As a result, employers cannot make employment decisions based on the fact that an employee or applicant's behavior or appearance deviates from societal norms. Similarly, employers should not consider the nonconforming aspects of lesbians' and gay men's behavior and appearance when making employment decisions.

Like Hopkins, lesbians and gay men display behaviors incon-

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205. *Sexual Preference Bias Not Covered*, 1983 Empl. Prac. Dec. (CCH) at 4629 n.2.
206. *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).
207. *Id.* at 1781.
208. *Id.* at 1781-82.
209. *Id.* at 1782.
210. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1782 (1989).
211. *Id.*
212. *Id.* at 1790.
213. *Id.* at 1791.

sistent with traditional gender roles. Title VII mandates that employers disregard sex and gender stereotypes when making employment decisions.[214] Employers that require their employees be heterosexual make impermissible distinctions between women and men and discriminate against lesbians and gay men solely because of their sex.

2. *Disparate Impact*

Disparate impact is often characterized as discrimination without intent.[215] The absence of an intent requirement reflects the "broad remedial goals [of Title VII] to eradicate the effects of unlawful discrimination."[216] The policy goals of Title VII extend beyond the reach of the fourteenth amendment's equal protection clause, which requires that a plaintiff prove discriminatory intent on the part of the employer.[217]

DeSantis v. Pacific Telephone & Telegraph Co.,[218] represents an unsuccessful attempt by gay men to use the disparate impact theory as a means of extending Title VII protection.[219] In *DeSantis*, three gay male employees claimed that Pacific Telephone and Telegraph had impermissibly discriminated against them because of their sexual orientation.[220] The *DeSantis* plaintiffs used the criterion established in *Griggs v. Duke Power Co.* to argue for Title VII protection.[221] In *Griggs*, the United States Supreme Court stated: "What is required by Congress [under Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the

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214. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1790-91 (1989).

215. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1970).

216. Bayer, *supra* note 147, at 811.

217. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). The following illustrates the order of proof in disparate impact cases under Title VII. "First, the plaintiff must establish by a preponderance of the evidence that the 'facially neutral standards in question select applicants . . . in a significantly discriminatory pattern.'" Bayer, *supra* note 147, at 810 (quoting Connecticut v. Teal, 457 U.S. 440, 446 (1986)). The burden then shifts to the defendant to demonstrate that "any given requirement [has] . . . a manifest relationship to the employment in question." If the defendant meets her burden of defense, "the plaintiff may then show that other selection devices without similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.'" *Id.* at 811 (quoting Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)).

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

219. *Id.* at 330.

220. *Id.* at 328.

221. *Id.* at 330 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

basis of racial or other impermissible classification."[222] The *DeSantis* plaintiffs alleged that discrimination against "homosexuals disproportionately affects men both because of the greater incidence of homosexuality in the male population and because of the greater likelihood of an employer discovering male homosexuals as compared to female homosexuals."[223]

The *DeSantis* court determined that nothing in the legislative history of Title VII indicated that Congress intended to protect lesbians and gay men from employment discrimination.[224] In reaching this decision, the court overlooked a substantial amount of precedent which established that the eradication of sexual stereotypes is one of the central purposes of Title VII.[225]

Lesbians and gay men have yet to convince the courts that sexual orientation discrimination is a form of sex discrimination, and therefore violates Title VII. An alternative strategy for lesbians and gay men seeking redress for sexual orientation discrimination in the workplace is to pursue the passage of an amendment which would explicitly extend Title VII protection and make such discrimination actionable.

C. Amending Title VII

Judicial interpretation of Title VII precludes sexual orientation discrimination as a cause of action under the statute.[226] This has frustrated one of the primary goals of Title VII, the elimination of arbitrary discrimination in order to secure equal employment opportunities for all.[227] Excluded from the protection offered by Title VII, lesbians and gay men are evaluated for employment based on criteria that bear no reasonable relationship to job per-

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222. *Griggs*, 401 U.S. at 431.

223. *DeSantis*, 608 F.2d at 330. The greater propensity of employers to discover and reject gay men is supported by the studies on male homophobia. *See supra* text accompanying notes 52-63.

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

225. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

226. *See, e.g.*, Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("sex" in Title VII is to be given its traditional rather than expansive interpretation); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females.). *See also* NATIONAL LAWYERS GUILD, *supra* note 14, at 5-23.

227. *See* Bayer, *supra* note 147, at 856; CCH, *supra* note 145, at 75.

formance or qualifications.[228] This section suggests that evaluating employees on the basis of their sexual orientation is offensive to the policies of Title VII. To eliminate this practice, Title VII should be amended to prohibit sexual orientation discrimination.

Title VII was enacted as a response to the segregation and resultant economic and social oppression of blacks.[229] Sexual orientation discrimination subjects a group of individuals to pre-Title VII conditions. Despite the historical differences between discrimination against blacks and lesbians and gay men, both groups suffer the same effects of employment discrimination.[230] Amending Title VII to include sexual orientation as a protected classification would significantly further its stated goals.[231]

All attempts to amend Title VII to include sexual orientation as a protected characteristic have failed.[232] Most recently, two separate arguments proved fatal to the passage of such an amendment.[233] One argument was that, because sexual orientation is a mutable characteristic, lesbians and gay men should not be afforded the same protections as other minorities.[234] The other articulated a general fear about the consequences of allowing lesbians and gay men to be employed in positions of moral authority.[235] Both of these arguments are easily refuted.

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228. *See* Rivera, *supra* note 6, at 465. "Title VII was enacted not simply to follow, but to lead in the fight against arbitrary employment discrimination." Bayer, *supra* note 147, at 856.

229. *See* Note, *Employment Discrimination*, *supra* note 143, at 1111, 1113 n.2. "Title VII alone was aimed at the economic causes of black oppression. But its reach was broader than that; other groups . . . were provided a powerful weapon for equality in the job market." *Id.* at 1111.

230. *See generally* J. D'Emilio, *supra* note 98, at 40-53; Note, *Employment Discrimination*, *supra* note 143, at 1114.

231. *See Hearings on H.R. 1454*, *supra* note 22, at 2 (statement of Rep. Ted Weiss, New York).

232. The following represents a list of some of the proposed amendments: H.R. 1454, 97th Cong., 2nd Sess. (1981); H.R. 2074, 96th Cong., 1st Sess. (1979); H.R. 8269, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 7775, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975).

233. *See Hearings on H.R. 1454*, *supra* note 22, at 18-19, 40. An analysis of these two objections is particularly helpful for evaluating the viability of Vermont's anti-discrimination bill, because Vermonters expressed the same concerns during the public hearings on proposed legislation.

234. *See id.* at 40 (statement of Connie Marshner, National Profamily Coalition).

235. *Id.* at 18-19 (statement of Rep. Millicent Fenwick, New Jersey). Ms. Fenwick's primary concern was the effect of lesbians and gay men employed as teachers as role models for students. *Id.*

1. The Immutability of Sexual Orientation

Opponents of past amendments to include sexual orientation discrimination under Title VII protection have argued that sexual orientation is a mutable characteristic.[236] These opponents argue that Title VII should protect only those groups, which "have . . . suffered adverse discrimination through *no fault of their own*."[237] Blacks, hispanics, and women, therefore, cannot be faulted for the immutable characteristic which subjects them to discrimination.[238] Opponents further argue that lesbians and gay men, however, have chosen their sexual orientation, and they can and should be blamed for this choice.[239]

Two theories can be used to effectively rebut the mutability argument. The first theory asserts that sexual orientation is an immutable characteristic.[240] The second theory holds that sexual orientation is a fundamental component of an individual's identity[241] and is therefore alterable only at the expense of that identity.[242]

The first theory uses scientific evidence to demonstrate that sexual orientation is an immutable characteristic. While psychiatrists and sociologists disagree on whether sexual orientation is a product of biological or environmental factors,[243] they do share a common belief that sexual orientation is determined in early childhood.[244] Because the sexual orientation of lesbians and gay men is fixed, that orientation is immutable. Consequently, lesbians and gay men are not responsible for their sexual orientation nor the discrimination to which they are subjected.[245] The immutability of sexual orientation, therefore, is analogous to sex or race, and it

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236. *See* D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 921 (1986).

237. *Hearings on H.R. 1454*, *supra* note 22, at 40-41 (statement of Connie Marshner, National Profamily Coalition) (emphasis added).

238. *See id.*

239. *Id.* at 40.

240. *See* Spear, *supra* note 105, at 160-61.

241. *Id.* at 161.

242. Altering sexual orientation entails passing as heterosexual. *See* notes 90-101 and accompanying text for a discussion of the consequences of this behavior for lesbians or gay men. *See generally* Bayer, *supra* note 147, at 837-82.

243. *See* A. BELL, M. WEINBERG & S.K. HAMMERSMITH, *supra* note 10, at 183-92.

244. *See id*; Spear, *supra* note 105, at 160. *See also* D. WEST, HOMOSEXUALITY REEXAMINED 11-34, 59-118 (1977); D. WEST, HOMOSEXUALITY 169, 262-66 (1967).

245. *See* Spear, *supra* note 105, at 161.

should be included as a protected characteristic under Title VII.[246]

This argument forces lesbians and gay men to admit that their sexual orientation is beyond their control and therefore undesirable. John D'Emilio, a historian of lesbian and gay issues, asserts that this argument compels lesbians and gay men to fight for civil rights from a position of "individual and collective helplessness."[247]

> A fatal weakness attends any gay political movement which defines itself as a fixed minority in quest of equal protection based on its minority status. To do so implies acceptance of a sexual paradigm that itself shapes and strengthens the oppression we are battling. To argue that our identity, our sexuality, is in effect an accident of birth or of early conditioning is to embrace a sexual ideology that negates the choices we have made.[248]

As D'Emilio suggests, lesbians and gay men who try to create a niche for themselves within the heterosexual model, by assuming a minority status, will never achieve the goals they seek.[249]

The second theory offered to refute the mutability argument allows lesbians and gay men to embrace their sexual orientation as part of their individual identity. This theory asserts that regardless of whether it involves an element of personal choice, sexual orientation is deserving of Title VII protection. "If we recognize that individual dignity, personal freedom, and sense of self are often intimately tied to mutable characteristics, then we must criticize the cavalier fashion with which courts dismiss individuals' claims that employers' racially, sexually, or ethnically premised rules unjustly restrict personal integrity and expression."[250]

Several Title VII cases help buttress the idea that discrimination based on mutable characteristics is offensive to Title VII.[251] One involves a race discrimination claim[252] and the other two involve sex discrimination claims.[253]

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246. *See Hearings on H.R. 1454, supra* note 22, at 62 (prepared statement of Craig W. Christensen, Dean and Professor of Law, Syracuse University).

247. D'Emilio, *supra* note 236, at 921.

248. *Id.*

249. *Id.* at 921-22. Reliance on the immutability position propagates the assumption that heterosexuality is correct and that homosexuality is a mistake.

250. Bayer, *supra* note 147, at 839.

251. *Id.* at 862-73.

252. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

253. *See* Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

The United States Supreme Court first reviewed Title VII in *Griggs v. Duke Power Co.*[254] In *Griggs*, the Court found that Title VII protects individuals against discrimination predicated on certain class and culturally premised characteristics.[255] The Court ruled that non-job related standardized intelligence examinations that resulted in the disqualification of minority job applicants violated Title VII.[256] Although the ability to pass standardized tests is mutable,[257] the *Griggs* Court did not require the minority applicants to undergo an intensive regimen of academic studies to improve their scores.[258] Indeed, such a prerequisite would mandate that minorities alter the characteristic that precipitated their discriminatory treatment before they can avail themselves of Title VII protection.[259]

In *Gerdom v. Continental Airlines, Inc.*, a female flight attendant challenged disparate weight requirements for males and females.[260] The Court of Appeals for the Ninth Circuit ruled that an airline could not impose such requirements.[261] The court reasoned that although weight is a mutable characteristic, its alterability is dependent on the sacrifice and behavior modification of the individual.[262]

The *Gerdom* case is analogous to the situation of employment discrimination based on sexual orientation. Lesbians and gay men may be capable of changing their sexual orientation or portraying a heterosexual facade. Like weight loss for women flight attendants, however, this alteration requires a great sacrifice on the part of the individual lesbian or gay man. The internal struggle and conflict

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254. 401 U.S. 424 (1971). *See* Bayer, *supra* note 147, at 863.

255. *See Griggs*, 401 U.S. at 432.

256. *Id.* at 429-31.

257. Note the success of examination preparation businesses like Stanley Kaplan, Bar-Bri, and SMH.

258. *See* Bayer, *supra* note 147, at 863.

259. *Griggs*, 401 U.S. at 429-30.

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Id.

260. 692 F.2d 602 (9th Cir. 1982) (en banc).

261. *Id.* at 610.

262. *Id.* at 604.

inherent in the lesbian's or gay man's effort to pass as heterosexual is severe and damaging.[263] The forced facade imbues lesbians and gay men with a feeling of inferiority.[264] The *Gerdom* reasoning suggests that employment practices that require groups of employees to undergo severe alterations to non-job related characteristics violate the spirit of Title VII.[265]

Meritor Savings Bank v. Vinson also supports the theory that apparent mutability does not preclude the addition of sexual orientation as a protective characteristic under Title VII.[266] In *Meritor*, a bank employee sued her employer claiming that she had been sexually harassed.[267] The United States Supreme Court held that "[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature" constitute sexual harassment under Title VII.[268] The Court determined that the employee's "voluntary" involvement in a sexual relationship with the defendant did not disqualify her Title VII claim.[269]

The Court's reasoning suggests that the correct inquiry in a Title VII action is whether the plaintiff indicates by his or her action that the discriminatory treatment is unwelcome,[270] and not whether the discrimination "is predicated on mutable characteristics."[271] Accordingly, women are not required to show that they took steps to make themselves unattractive to prevail in a Title VII sexual harassment claim.[272] Likewise, lesbians and gay men should not be forced to pass as heterosexuals in order to forestall

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263. *See supra* text accompanying notes 90-101.

264. *See id.*

265. *See* Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 605-06 (9th Cir. 1982) (en banc).

266. 477 U.S. 57 (1986).

267. *Id.* at 60. Sexual harassment is a form of sex discrimination under Title VII. *See* Bayer, *supra* note 147, at 864.

268. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

269. *Id.* at 68.

270. *See* 477 U.S. 57. The *Meritor* Court fashioned the following inquiry:

> The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." . . . [T]he District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Id.

271. Bayer, *supra* note 147, at 865.

272. *Id.*

discriminatory treatment.[273] Judicial and legislative acceptance of discrimination against individuals who are open about their sexual orientation sanctions the practice of blaming the victim.[274] This attitude is inconsistent with Title VII and its goal of removing the barriers of arbitrary and irrelevant classifications that deny individuals equal employment opportunities.[275]

In summary, the mutability ascribed to sexual orientation is analogous to the mutability of gender or race. The prevailing Title VII jurisprudence, however, requires that lesbians and gay men change the characteristic which subjects them to discrimination. This practice blames the victim and pardons the employer who imposes irrelevant and arbitrary barriers to employment opportunities. Amending Title VII to include sexual orientation will shift the inquiry away from the plaintiff's characteristics and focus the review on the actions of discriminating employers.

2. *Amending Title VII Would Facilitate the Employment of Lesbians and Gay Men in Positions of Moral Responsibility*

The second argument against amending Title VII to include sexual orientation combines two misconceptions about lesbians and gay men. The first misconception holds that lesbians and gay men are psychologically sick and disturbed.[276] The second characterizes lesbians and gay men as physically dangerous.[277] These two stereotypes have produced a perception by some heterosexuals that lesbians and gay men are immoral and promiscuous people.[278] One persistent manifestation of this fear is the belief that if lesbians and gay men are entrusted with child care they will either molest[279] or indoctrinate[280] children. Neither these stereotypes nor the nightmares of child molestation and homosexual indoctrination can be factually supported.

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273. *See id.*

274. *See id.*

275. *See* CCH, *supra* note 145, at 71-77; Rivera, *supra* note 6, at 465; Note, *Employment Discrimination*, *supra* note 143, at 1111, 1116.

276. D. Steffensmeier & R. Steffensmeier, *supra* note 10, at 57-59.

277. *Id.* at 59-60.

278. *Id.* at 57-60; Morin & Garfinkle, *supra* note 10, at 34.

279. *See Hearings on H.R. 1454*, *supra* note 22, at 61 (prepared statement of Dean Christensen).

280. *Id.* at 18-19 (statements of Rep. Millicent Fenwick, New Jersey, Rep. Ted Weiss, New York, and Jean O'Leary, President of the National Association of Business Councils).

While the psychiatric community no longer classifies homosexuality as a mental disorder,[281] lesbians and gay men are still perceived to be dangerous and threatening to the current gender hierarchy.[282] While the perceived threat is merely a manifestation of homophobia, it tends to perpetuate the myth that lesbians and gay men lead promiscuous lifestyles.[283] This myth lies at the root of fears that lesbians and gay men will molest children.[284]

Empirical evidence reveals that the belief that gay men are child molesters is a myth. Statistics show that more than "90% of all sexual offenses involving children are committed by adult heterosexual males."[285] Similarly, studies of the sexual behavior of gay and heterosexual men reveal that heterosexuals have a higher frequency of sexual outlet than do gay men.[286] The belief that gay men will molest children is further refuted by the following testimony:

> [H]omosexual men prefer men of their approximate age, . . . both seduction of the young and child molestation are demonstrably more centered on heterosexual [rather] than homosexual relations, and . . . the great majority of homosexuals "do not share, do not approve, and fear to be associated with pedophiliac interests."[287]

The fear that lesbians and gay men will influence impressionable young children to adopt a lesbian or gay sexual orientation is also a misconception. Studies show that children reared by lesbians and gay men are no more likely to adopt a homosexual sexual orientation than are children reared by heterosexual parents.[288] If parents, the primary care providers, do not influence the sexual orientation of children, teachers and other childcare workers will

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281. *See* N.Y. Times, Dec. 16, 1973, § 1, at 1, col. 1; N.Y. Times, Apr. 9, 1974, § 1, at 12, col. 4. *See generally* J. D'EMILIO, *supra* note 98, at 140.

282. *See* D. Steffensmeier & R. Steffensmeier, *supra* note 10, at 59-64.

283. *See Hearings on H.R. 1454*, *supra* note 22, at 61 (prepared statement of Dean Christensen).

284. *See id.*

285. Letter from Keith E. Goslant, *supra* note 24. *See also Hearings on H.R. 1454*, *supra* note 22, at 61 (prepared statement of Dean Christensen).

286. A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 23. Kinsey's studies demonstrated that homosexual men average 1.3 orgasms per week compared to an average of 3.0 for the heterosexual man. Morin & Garfinkle, *supra* note 10, at 34.

287. *Hearings on H.R. 1454*, *supra* note 22, at 61 (prepared statement of Dean Christiansen (quoting D. WEST, *supra* note 244, at 119)).

288. *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1639 (1989).

not influence sexual orientation.

The comments of Minnesota State Senator Allan Spear help to alleviate concerns that lesbians and gay men seek to influence or persuade heterosexuals to adopt a homosexual sexual orientation. Senator Spear suggests that lesbians and gay men do not seek a forum in which to convey their sexual exploits in order to indoctrinate heterosexuals.[289] Instead, they merely wish to be honest about their identities. He states:

> As a gay man, I am often asked by heterosexuals: "Why do you have to advertise it; I don't tell you what I do in bed." I don't tell anyone what I do in bed either. But I do insist on the right to live openly with another man, just as heterosexuals live openly with their spouses.[290]

Similarly, a lesbian attorney states that she chose to be open about her sexual orientation at work, not to influence or impress colleagues, but simply to be able "to have my lover's picture on my desk; I wanted to be able to talk about my life."[291]

Amending Title VII could eliminate the need for lesbians and gay men to sacrifice a fundamental component of their identities in order to obtain and maintain employment.[292] An understanding that lesbians and gay men do not molest or indoctrinate children should facilitate discussion about adopting an amendment which offers Title VII protection for sexual orientation.

III. A Proposal to Ban Discrimination on the Basis of Sexual Orientation in Vermont

The reluctance of courts to grant legal protection to lesbians and gay men under Title VII has created a need for anti-discrimination legislation at the state and local levels.[293] The Vermont Legislature has made three attempts to enact legislation which would have prohibited private employers from discriminating on the basis of sexual orientation.[294] Although each of these efforts failed,[295]

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289. *See* Spear, *supra* note 105, at 161.

290. *Id.*

291. N.Y. Times, *supra* note 97 (quoting Abby Rose Rubenfeld).

292. See Rivera, *supra* note 6, at 480-81.

293. *Id.*

294. House Jour. 95 (Feb. 10, 1987, Vt., Bien. Sess.). The sponsoring representatives of House Bill 247 included: Glitman of Burlington, Bassett of Burlington, Burke of Putney, Christiansen of East Montpelier, Harris of Windsor, Hockert of Burlington, Lingelbach of

this section examines the proposed legislation and recommends that the Vermont Legislature reintroduce similar legislation. The enactment of an anti-discrimination statute prohibiting sexual orientation discrimination could help eliminate homophobia and its damaging effects to heterosexuals, lesbians, and gay men.

A. The Framework of the Proposed Legislation

Instead of creating new legislation, the past bills proposed the addition of the phrase "sexual orientation" to fifteen of the state's preexisting nondiscrimination statutes.[296] Laws prohibiting discrimination in private employment are included among these statutes.[297] In pertinent part, Vermont's relevant private employment statute currently provides:

> It shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, ancestry, place of birth, age, or physical or mental condition:
>
> (1) For any employer, employment agency or labor organization to discriminate against any individual because of his [or her] race, color, religion, ancestry, national origin, sex, place of birth, or age or against a qualified handicapped individual.[298]

Under the statute, the Attorney General or a state's attorney is authorized to enjoin incidents of prohibited discrimination.[299] The Attorney General or a state's attorney may also seek civil penalties against violators of the statute.[300] In addition to the government enforcement provision, the statute provides citizens with a private

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Thetford, Luginbuhl of South Burlington, Martin of Middlebury, McCormack of Rutland City, Truman of Burlington, and Youngbaer of Plainfield. *Id. See* LESBIAN/GAY LAW NOTES, VERMONT 8 (1988). Letter from Keith E. Goslant, *supra* note 24.

295. In response to a strong lobby against the anti-discrimination legislation, H. 247 was buried in the House Committee on General and Military Affairs. House Jour. 386 (Apr. 8, 1987, Vt., Bien. Sess.). Burlington Free Press, Feb. 26, 1988, at 1B, col. 4. The second bill, S.278, was also buried in the House Committee on General and Military Affairs. Telephone interview with Holly Purdue, Co-Liason of the Vermont Coalition of Lesbians and Gay Men (Feb. 11, 1989).

296. *Hearings on H. 247*, *supra* note 74 (statement of Heather Wishik). *See also* letter from Keith E. Goslant, *supra* note 24.

297. VT. STAT. ANN. tit. 21, § 495 (1987).

298. *Id.* at § 495(a).

299. *Id.* at § 495b(a).

300. *Id.*

cause of action.[301] Accordingly, any aggrieved person "may bring an action in superior court seeking damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney's fees and other appropriate relief."[302]

The proposed anti-discrimination legislation would have added sexual orientation to the list of protected characteristics in Vermont's unlawful employment practice statute.[303] As defined in the legislation, "sexual orientation . . . means female or male homosexuality, heterosexuality, or bisexuality, by and between consenting adults."[304] This definition incorporated the drafters' understanding that sexual orientation discrimination impedes behaviors by heterosexuals, lesbians, and gay men that do not comport with gender stereotypes.[305] The legislation, therefore, would have also protected heterosexuals from sexual orientation discrimination. Under the proposed addition to Vermont's unlawful employment practice statute, lesbians, gay men, and heterosexuals could avail themselves of both the private right of action and the government enforcement provisions of the statute.

The following section considers the contentions used to defeat the proposed legislation. The absence of factual support for these concerns strengthens the argument that legislation is needed to rid Vermont of homophobia and sexual orientation discrimination.

B. Repudiating Claims in Opposition to Proposed Legislation

The purpose of legislation prohibiting discrimination on the basis of sexual orientation is to guarantee the civil rights of all Vermonters.[306] Currently, employers may consider sexual orientation when evaluating the suitability of individuals for employment. According to Vermont State Senator Chester Ketcham there is "no question" that lesbians and gay men "in Vermont are the victims of discrimination."[307] This discrimination propagates homophobia and its resultant damage to lesbians, gay men, and heterosexuals.

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301. VT. STAT. ANN. tit. 21, § 495b(b).
302. *Id.*
303. Sen. Jour. 270 (Mar. 3, 1988, Vt., Bien. Sess.).
304. *Id.*
305. *See generally Hearings on S. 278*, *supra* note 123 (statement of Heather Wishik).
306. *See id.*
307. Burlington Free Press, *supra* note 295, at 4B, col. 2.

An anti-discrimination bill offers an end to this cycle by providing a legal remedy to victims of sexual orientation discrimination.[308]

Opponents of the proposed anti-discrimination bills relied on two arguments to defeat the legislation. These contentions resembled those offered to defeat the amendment to Title VII and evidenced a general misunderstanding about the proposed legislation and lesbians and gay men. The first argument contended that the legislation would force employers to hire lesbians and gay men.[309] Opponents feared that the legislation would remove the rights of religious organizations to discriminate against persons whose sexual orientation offends their religious beliefs.[310] The second argument maintained that the legislation would perpetuate and foster homosexuality.[311]

Opponents' first argument reflects a misunderstanding of the legislation and its purpose. During the public hearings on the first anti-discrimination bill,[312] opponents expressed concern that the legislation would require employers to implement affirmative action plans to hire lesbians and gay men. This attitude is reflected by the following comment:

> The bill to prevent discrimination is an extension of the Civil Rights Act of 1964 which fundamentally removed the right of the individual to make his own decisions as to who he would prefer to have as his employees or associates. Now the government can determine who you can have on the grounds of affirmative action.[313]

However, the proposed legislation would not have authorized af-

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308. *Hearings on H. 247, supra* note 74 (statement of Jim Morgan, National Association of Social Workers). "We feel quite strongly that if only one person in Vermont has suffered a breach of their civil rights because of their sexual orientation then that number is too high." *Id.*

309. *Hearings on H. 247, supra* note 74 (statements of Charles Russell, Michael Hogan, and Newman Mulligan).

310. *Id.* (statement of Denise Mangon).

311. *Id.* (statement of Michael Hogan).

312. *Id.*

313. *Hearings on H. 247, supra* note 74 (statement of Justin Blakely). The following remarks also lend support to the notion that opponents of H. 247 considered it a mandate to impose affirmative action plans: "If I am forced to hire a homosexual to work with our children then I will betray a trust to the parents of the children that we are trying to work with." *Id.* (statement of Robert Comberin). "Legislators are trying to grant special privileges to a group of individuals who chose an abhorrent lifestyle." *Id.* (statement of Charles Russell). "Why should I have to give preferential treatment to these people, in hiring, housing and education when it is against everything I believe." *Id.* (statement of Michael Hogan).

firmative action plans. It merely prohibited an employer from considering sexual orientation when evaluating the qualifications of a prospective employee.

Legislation prohibiting sexual orientation discrimination is designed to help eliminate irrelevant barriers to access and advancement in employment. Employment discrimination on the basis of sexual orientation deters a segment of Vermont's population from participating in the labor market.[314] As a result, these men and women are economically and professionally segregated from the community.[315] As one woman revealed, this discrimination impedes lesbians and gay men from taking an active and productive role in society: "Because of this fear of discrimination, I do not believe that I have fulfilled my potential as a member of society."[316] Legislation against this discrimination would promote the integration of lesbians and gay men into the general labor market which, in turn, would further the goal of eliminating homophobia and its damaging effects.

Opponents also ignored the clear language of the proposed legislation that guaranteed religious organizations the right to refuse employment to persons whose sexual orientation contravenes the employer's religious beliefs. The proposed addition contained a provision that emphasized the bona fide occupational qualification exception as it applies to religious organizations.[317] This provision reflected the drafters' attempt to reassure religious organizations that they would not be forced to hire individuals whose sexual orientation contravenes their religious beliefs. Despite this provision one opponent expressed the following concern:

> I have my children enrolled in a private school to maintain our religious convictions and to keep my children and home free from the moral decay and filth that is polluting our beloved nation. I believe this bill will take away these, my rights which have always been acknowledged and guarded by the

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314. *See* M. WEINBERG & C. WILLIAMS, *supra* note 8, at 270. According to Doctors Weinberg and Williams, "legal repression and low social acceptance" result in the segregation of lesbians and gay men from the wider society. *Id.*

315. *See id.*

316. *Hearings on H. 247*, *supra* note 74 (statement of Mary Lyons).

317. Sen. Jour. (Mar. 3, 1988, Vt., Bien. Sess.). This provision provided the following: "The provisions of this section shall not be construed to prohibit a nonprofit religious organization from refusing to employ an individual if the individual's sexual orientation would be contrary to the religious beliefs of the members of that organization." *Id.*

constitution, by giving this right to a debased faction.[318]

The proposed legislation would not have infringed on this opponent's right to keep her children in a religious school. Similarly, the legislation would not have prohibited the religious school from discriminating against lesbians and gay men, if their sexual orientation offended that religion's basic convictions.[319]

By providing religious organizations with an opportunity to exclude individuals whom they consider immoral, the proponents of the legislation sought to prevent such groups from using "morality" to defeat the bill. Proponents attempted to shift the focus of discussion away from the characteristics of the victims of sexual orientation discrimination and place it instead on the episodes and perpetrators of this discrimination. "The point is not whether one's sexual orientation is acceptable, but whether discrimination is tolerable."[320]

The opponents' second argument suggests that the legislation will assist in the spread of homosexuality. The following statement illustrates this position: "Civil rights has always been the crutch of gay rights. We have become numb in this nation to anything that comes along. We shut our eyes and time passes, and we have San Francisco."[321] This argument is reminiscent of the indoctrination myth offered to protest the amendment to Title VII. The legislation, like the defeated proposed amendment to Title VII, would not encourage individuals to adopt a lesbian or gay sexual orientation. However, it might facilitate the acceptance of lesbians and gay men as co-workers and people.

According to the sociologists Morin and Garfinkle, close personal relationships among heterosexuals, lesbians, and gay men appear "to be a crucial experience in altering homophobic attitudes and behavior."[322] This contact affords heterosexuals an opportunity to discard their fear and loathing of lesbians and gay men.

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318. *Id.* (statement of Denise Mangon).

319. House Jour. (Mar. 3, 1987, Vt., Bien. Sess.).

320. Letter from Keith E. Goslant, *supra* note 24.

321. *Hearings on H. 247*, *supra* note 74 (statement of Michael Hogan). The following statement also supports this claim: "If the bill will pass what will the side effects be? It is another trick for them to try to penetrate into our school, our jobs, and our government." *Id.* (statement of Susan Donegan).

322. Morin & Garfinkle, *supra* note 10, at 43. Morin and Garfinkle further add that "people consistently report feeling better about themselves as their homophobic attitudes decrease." *Id.*

Without this preconceived bias, heterosexuals may recognize the character and qualifications of the individual lesbian or gay man.[323] Legislation prohibiting sexual orientation discrimination in private employment would provide heterosexuals with an opportunity to form positive relationships with lesbians and gay men in the workplace. As a result, sexual orientation discrimination in private employment and its resultant harm will be diminished in Vermont.

Conclusion

Sexual orientation discrimination harms everyone. Continued oppression of lesbians and gay men guarantees employers a licence to discriminate against employees based on irrelevant considerations. This practice of discrimination violates the principles of Title VII and should therefore be prohibited. However, the failure of judges and legislators to extend the broad scope of Title VII protections to lesbians and gay men creates a demand for such legislation on the state and local levels. Vermont should fulfill this need by enacting anti-discrimination legislation. Such legislation would provide Vermont with an opportunity to eliminate the homophobia of some of its citizens. The legislation would establish a clear legislative mandate that Vermont will not tolerate sexual orientation discrimination. As a result, this mandate could convince lesbians and gay men to abandon their facade of heterosexuality, because the state will protect their rights to secure employment. Lesbians, gay men, and heterosexuals could feel more comfortable about exploring their potential beyond the limits of rigid gender roles. This process might eventually change these roles into malleable constructs that reflect the demands and attributes of both women and men.

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323. *See id.*