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Abstract

Parallel Lives: A Critical Comparison of Women's Rights and Lesbian Rights Jurisprudence

This essay explores questions posed for feminist legal theory by relationship between litigation and jurisprudence regarding women and lesbians. Its approach comes, in part, from my experience during nearly a decade of handling lesbian (and gay) rights cases, during which little overlap existed between the dockets of the lesbian and gay legal groups and the women's rights. While we would occasionally appear as amicus in support of each other's cases, the nature of our work was largely distinct, as the essay illustrates through numerous examples.

The place of lesbians in feminist legal theory has not been entirely different. Just as much feminist theory other than that written by critical race feminists has tended to deal marginally with the relationship between women's rights and race, so too much feminist theory has focused largely on theorizing the relationship between law, sex and gender without taking an in depth account of the different ways in which a woman's sexual orientation will shape her relationship with the law.

My interest is not in condemning this trend in feminist legal theory but rather in closely interrogating the presumptive connection between cases implicating women's rights and cases implicating lesbian rights. Because I conclude that surprisingly little connection exists, except at the most general levels, my hope is that this frank assessment of the real and imagined differences between these bodies of law and theory will create an opening for additional theorizing about the possibilities for connection and alliance between the two.

To supplement this comparative project, the final and most innovative section of this essay focuses on cases regarding gender-non-conformity as a platform for developing a theory based on *Price Waterhouse v. Hopkins* that would potentially support bridge-building between women and lesbians.

[One additional note: As this abstract suggests, the essay treats the identities of woman and lesbian as analytically significant. Although critical scholarship effectively destabilizes these identity categories, courts continue to treat them as meaningful and material. For that reason, the essay treats these categories as meaningful although every effort is made not to essentialized them unnecessarily.]

Parallel Lives: A Critical Comparison of Women's Rights and Lesbian Rights Jurisprudence

By Suzanne B. Goldberg¹

This essay, like many that have preceded it,² explores the relationship of the category “lesbian” to the category “woman.” In a somewhat different vein, though, it concentrates not on the categories themselves but instead on the relationship of the plaintiff lesbian to the plaintiff woman³ with occasional reference to the plaintiff man or gay man. In the spirit of Angela Harris’ admonition that we must build bridges among women rather than find them,⁴ this essay will consider the possibilities for legal bridge-

¹ Assistant Professor, Rutgers-Newark School of Law. I welcome comments on this work in progress at sgoldbrg@andromeda.rutgers.edu or 973-353-3177 and hope that readers will generously keep in mind that much work remains to be done both on the substantive argument and the citations. Many thanks to Mary Anne Case, Paula Ettlbrick, Nan Hunter, and participants at the “Sexuality and Feminist Theory: Road Blocks, Detours and New Directions” workshop of the Feminism and Legal Theory Project at Cornell Law School for their insights, and to Laura Barrios and Lauren Hudecki for research assistance.

² See, e.g., Ruthann Robson, *SAPPHO GOES TO , SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* (1998); Ruthann Robson, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) [hereinafter *SAPPHO GOES TO LAW SCHOOL*]; Note, Theresa Raffaele Jefferson, *Toward a Black Lesbian Jurisprudence*, 18 B.C. Third World L.J. 263 (1998); Elvia R. Arriola, *Law and the Gendered Politics of Identity*, 8 Hastings Women’s L.J. 1 (1997); Christine A. Littleton, *Double or Nothing: Lesbian as a Category*, 7 UCLA Women’s L.J. 1 (1996); Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 Va. J. Soc. Pol’y & Law 43 (1994); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 Berkeley Women’s L.J. 103 (1994)[hereinafter “*Gendered Inequality*”]; Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. Cal. Rev. L. & Women’s Stud. 183 (1994), Ruth Colker, *The Example of Lesbians: Posthumous Reply to Professor Mary Joe Frug*, 105 Harv. L. Rev. 1084 (1992); Cf. Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 Am. U. Gender Soc. Pol’y & L. 167 (1999).

³ To further this comparative project, this essay will sometimes refer to women and lesbians as discrete classes, based on the distinct treatment each receives in the law notwithstanding the demographic overlap between the categories. Similarly, the essay will talk about women’s rights litigation and advocacy as an enterprise distinct from lesbian rights litigation and advocacy, although the two overlap at times as a practical and theoretical matter. To be specific, as women, lesbians will presumably benefit, at least in a general sense, from any women’s right that is newly secured. The essay’s use of these distinctions is not intended to ignore this common ground but rather to enable recognition of distinctions, when appropriate, between work aimed to secure or advance the rights of women generally and work similarly intended to benefit lesbians in particular. See *infra*.

⁴ Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 615 (1990).

building among women and lesbians in the context of the United States' domestic judicial system.

Before heading into the construction zone, I want to set out two different visions that might serve as foundations for the project. One comes from Adrienne Rich's identification of a "lesbian continuum," which encompasses women who "shar[e] a rich inner life" with other women that includes "bonding against male tyranny [and] the giving of practical and political support."⁵ Although most feminists do not identify themselves as lesbians, Rich's continuum continues to animate the view that feminism and lesbianism are integrally connected, as both concern themselves fundamentally with the position of women.⁶ Even more basically, if we assume that lesbians comprise a subset of women,⁷ logic would dictate that the members of the subset would relate, in fundamental ways, to members of the larger group. From this perspective, bridges should be fairly easy to build and omissions of lesbian experience from feminist scholarship would represent a deficiency that can and should be corrected.⁸

⁵ Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *Blood, Bread, and Poetry, Selected Prose: 1979-85* (1986). The continuum is invoked with some frequency in feminist scholarship.

⁶ *But see* Harris, *supra* note [], at [] (criticizing feminist legal theory for concerning itself primarily with white women); *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241 (1991).

⁷ Arriola, *Gendered Inequality*, *supra* note [] at 133 ("The category of 'lesbian' cannot exist without 'woman[.]'" (citation omitted)). *But see, e.g.*, Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *Colum. L. Rev.* 392, 394 (2001) (questioning the "sex system," which Flynn defines as "the law's categorization and regulation of persons as male or female based primarily on their genitalia at birth").

⁸ *See, e.g.* Arriola, *Gendered Inequality*, *supra* note [] at 135 ("The feminist agenda is incomplete without a recognition of the lesbian connection."); Cain, *supra* note [] (discussing feminist philosopher Maria Lugones' view that feminist theorists "must listen to other perspectives [including lesbian perspectives] carefully as they theorize solutions"). *But see* Robson, *SAPPHO GOES TO LAW SCHOOL*, *supra* note [] (advocating lesbian-centered theory); Cain, *supra* note [] at 73 (advocating for lesbian theorizing in addition to feminist theorizing "because lesbians have a different view of the world").

The other foundation builds on the distinct legal positions of lesbians and non-lesbian women⁹ as developed through doctrine, statutory frameworks, and the dockets of organizations that hold themselves out as advocating for the rights of lesbians and/or women.¹⁰ This distinctiveness suggests that not only does Rich's continuum not exist with respect to legal conceptions of identity but also that the bridges between the categories of woman and lesbian may be difficult to build. Given courts' struggles with discrimination based on multiple aspects of individual identity,¹¹ meaningful recognition of the ways sex, gender, and sexual orientation interact in women may be difficult to realize. From this standpoint, an image of parallel tracks rather than one of overlapping or interwoven agendas may more accurately describe the relationship between women's rights and lesbian rights praxis and jurisprudence.

⁹ In light of the essay's concern with the way courts and organizations deal with women and lesbians, this essay does not address the particular, distinct concerns of bisexual women, as few reported cases involve bisexual plaintiffs and no legal organizations hold themselves out as dedicated to securing legal rights of bisexuals. However, the discussion here could benefit by further discussion of the divergent issues raised by and for bisexual women. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *Stan. L. Rev.* 353, 377 (2000)

¹⁰ These organizations include Lambda Legal Defense and Education Fund, where I worked as a staff attorney for nearly nine years on lesbian and gay rights issues, the National Center for Lesbian Rights (NCLR), the Northwest Women's Law Center, and the NOW Legal Defense and Education Fund, among others. While the organizations do not litigate the majority of cases involving lesbians or women (the private bar handles the bulk of these cases), they are all actively engaged in trying to formulate a legal agenda on behalf of their constituents.

Also, it bears noting that none of the organizations litigates exclusively on behalf of women or lesbians. The Northwest Women's Law Center, for example, fills a substantial proportion of its docket with lesbian rights cases. In addition, neither Lambda nor NCLR litigates exclusively on behalf of lesbians. Lambda, in particular, is occupied significantly with the concerns of gay men, which sometimes overlap with those of lesbians and sometimes do not. Cf. Littleton, *supra* note [] at 3 (observing that the "label 'homosexual' . . . hid[es] the differences in experience and treatment between gay men and lesbians"); Mary Coombs, *Comment: Between Women and Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)Sex Sexual Activities*, 8 *Yale J.L. & Human.* 241, 259 (1996) ("The linkage between heterosexism and patriarchy sometimes tends to disappear in discussions of gayness. One aspect of that disappearance is linguistic: Lesbians are women, but 'women' often means heterosexual women; lesbians are homosexual, but 'homosexual' often means homosexual men.").

¹¹ See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 *Mich. L. Rev.* 2479, 2481 (1994) (observing that many courts "require[e] that claimants disaggregate and choose among the elements of their identities" rather than recognizing the ways in which different aspects of an individual's identity may, in the aggregate or in combination, result in an experience of discrimination not simply redressed under one identity category); see also Crenshaw, *supra* note [].

The essay will proceed by looking first at bridges that have been built between organizations litigating on behalf of women and on behalf of lesbians. Specifically, I will consider when and why women's rights and lesbian rights organizations file amicus curiae briefs to support each other's cases. The next section will look at some of the bridges that have not been built. In particular, this section will touch on a few of the areas in which interaction has not occurred successfully between women's and lesbian and gay rights groups and will briefly speculate as to why that is so. The third section will focus on cases regarding gender-non-conformity as a platform for examining how the doctrine might be theorized in ways that could support (or undermine) bridge-building between women and lesbians. Finally, I will draw some conclusions about the relationship between women and lesbians and the future of bridge-building between these groupings.

A final caveat before beginning – the discussion below treats the identities of woman and lesbian as analytically significant, although much anti-essentialist and social constructionist literature has compellingly called into question the stability and meaningfulness of these categories.¹² Notwithstanding the strength of these theoretical arguments, courts continue to treat the categories as meaningful and material (and often essential) for purposes of assessing discrimination claims and other charges that a party's identity as a woman and/or a lesbian has legal relevance to the matter being

¹² See, e.g., Judith Butler, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 16 (1990) (explaining that gender is performed and describing gender as “a complexity whose totality is permanently deferred, never fully what is given at any juncture in time. An open coalition . . . will affirm identities that are alternately instituted and relinquished according to the purposes at hand[.]”); Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *Stan. L. Rev.* 503 (1994) (critiquing essentialist explanations for sexual orientation); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 266 (1999). See generally Michel Foucault, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Colin Gordon ed., Colin Gordon et al., trans., Harvester Press 1980); Michel Foucault, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans.) (1990).

adjudicated.¹³ For that reason, this essay, too, will treat these categories as meaningful, although every effort will be made not to essentialize them unnecessarily.

Bridges Already Built: A Careful Look at Intergroup Amicus Strategies

Women's rights and lesbian and gay rights organizations have been filing amicus briefs in support of each other's cases for nearly as long as the organizations have existed. This section will review some of the areas in which these amicus briefs are filed and will consider what light these filings shed on the connections between women and lesbians in the law.

A sampling of the amicus work of NOW Legal Defense and Education Fund on lesbian rights issues and that of Lambda Legal Defense and Education Fund on women's rights issues shows a fair amount of interaction between the two organizations.¹⁴ For example, in the family law arena, NOW LDEF and Lambda have joined together on amicus briefs challenging restrictions prohibiting lesbians and gay men from adopting children¹⁵ and advocating rights for lesbian parents in custody and visitation disputes.¹⁶

¹³ See *infra*.

¹⁴ I have selected these two organizations because their dockets are among the largest and most geographically diverse of the organizations working in these areas. Of many of the briefs discussed above, other national and regional women's rights and lesbian (and gay) rights groups also signed on or directly represented the clients in the case. The selection of Lambda's docket as a basis for comparison comes with some reservation to the extent it is unrepresentative of the interests of lesbians through its many cases that raise issues particular to gay men or people with HIV.

The listing of amicus briefs shows NOW LDEF signing onto many lesbian and gay rights cases and Lambda LDEF signing onto relatively few women's rights cases. This disparity simply reflects the fact that Lambda asks women's rights advocates to sign onto its cases far more often than it is asked to sign briefs in those groups' litigation. Presumably, this is because women's rights groups are thought to bring a relatively mainstream perspective to bolster that of gay rights advocates while lesbian and gay groups' relative marginalization does not add much power to, and may detract from, the presumptive reasonableness of women's rights arguments.

¹⁵ See, e.g., *Cox v. Dry*, (Florida Supreme Ct. 1994)(Brief of Amicus Curiae Lambda LDEF, National Center for Lesbian Rights, NOW LDEF, et al.); *Lofton v. Kearney*, (11th Cir. 2002)(Brief Amici Curiae of Lambda Legal Defense and Education Fund, Inc, National Partnership for Women and Families, NOW LDEF, and the Puerto Rican Legal Defense and Education Fund, Inc. in Support of Plaintiffs and in Support of Reversal).

¹⁶ See, e.g., *Alison D. v. Virginia M.* (N.Y. Ct. App. 1991)(Brief of Amici Curiae NOW LDEF et al.); *White v. Thompson & Coke v. Looper* (Tenn. Ct. App. 1999)(Brief of Amici Curiae the National Center for

In addition, the two organizations have signed on to briefs advocating marriage rights for same-sex couples¹⁷ and challenging a refusal to allow unmarried couples to share school-sponsored housing.¹⁸ In the sexual harassment context, Lambda and NOW LDEF appeared together on briefs to the U.S. Supreme Court advocating Title VII coverage for same-sex sexual harassment¹⁹ and advocating Title IX protections for sexual harassment by one student of another.²⁰ Further, the two organizations have appeared together on a variety of briefs seeking to protect the right of abortion clinics to operate safely and peacefully.²¹ NOW LDEF has also filed amicus briefs in several of Lambda's cases, including a challenge to the Boy Scouts dismissal of a gay Scout leader,²² and an appeal of a Nebraska court's determination that Brandon Teena, a transgendered young adult,

Lesbian Rights, the American Civil Liberties Union of Tennessee, Tennessee National Organization for Women, Memphis National Organization for Women, Lambda Legal Defense and Education Fund, Inc., and NOW Legal Defense and Education Fund, in Support of Appellants).

¹⁷ *Baker v. Vermont* (Vt. Sup. Ct. 1999)(Brief Amici Curiae of Vermont NOW, NCLR, NOW LDEF).

¹⁸ *Levin v. Yeshiva* (NY Ct. App. 2001)(Brief of Amici Curiae Lambda Legal Defense and Education Fund, NOW Legal Defense and Education Fund, and People for the American Way Foundation in Support of Appellants).

¹⁹ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998)(Brief of Lambda Legal Defense and Education Fund; American Civil Liberties Union; People for the American Way; NOW Legal Defense and Education Fund; Women's Legal Defense Fund; Gay & Lesbian Advocates & Defenders; National Center for Lesbian Rights; National Women's Law Center; Connecticut Women's Education and Legal Fund, Inc.; Northwest Women's Law Center; and Bay Area Lawyers for Individual Freedom as Amici Curiae in Support of Petitioner).

²⁰ *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999)[cite]. See also *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996)[cite].

²¹ See, e.g., *Long Island Gynecological Services v. 1103 Stewart Avenue* (N.Y. Sup. Ct., App. Div. 2nd Dep't 1996)(Amici Curiae Brief of NOW, Lambda, et al.)(challenging effort to evict a clinic on grounds that clinic had been target of violence); *NOW v. Scheidler* (U.S. Sup. Ct. 1993)(supporting viability of challenge to clinic harassment under Racketeer Influence and Corrupt Organizations Act ("RICO"))(Brief of NOW LDEF, Lambda LDEF, et al., as Amici Curiae in Support of Petitioner); *Pro-Choice Network v. Schenck*, [cite](Brief Amici Curiae of NOW LDEF, Lambda LDEF, et al.)(supporting limited speech provision's enforcement against "sidewalk counselors" outside abortion clinic).

²² *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)(Brief Amicus Curiae of the American Civil Liberties Union; the American Federation of Teachers; the Anti-Defamation League; the California Women's Law Center; the Center for Women Policy Studies; Equal Rights Advocates; the Human Rights Campaign; the Mexican American Legal Defense and Education Fund; the NAACP Legal Defense and Education Fund, Inc.; the National Asian Pacific Legal Consortium; the National Council of Jewish Women; the National Gay and Lesbian Task Force; the NOW Legal Defense and Education Fund; the National Partnership for Women and Families; the National Women's law Center; People for the American Way Foundation; Women Employed; and the Women's Law Project in Support of Respondent).

was contributorily negligent in his own murder²³ and that, as a result, his estate was entitled to recover only a small portion of the civil jury verdict in his favor.

On the most general level, shared legal interests would draw the groups to support each other's cases. For example, the lesbian and gay rights organizations that joined briefs in *Davis* have an interest in protecting gay and lesbian students against harassment in school and in insuring that anti-gay groups can be held accountable for the harm that flows from their actions.²⁴ Similarly, the women's rights organizations that filed briefs in the lesbian and gay rights cases discussed above have an interest in insuring that parents, and mothers in particular, not be subject to undue bias based on some aspect of their identity or conduct, that marital status not become the sole basis for provision of rights and privileges, including housing, and that a different-sex requirement be kept in place for marriage, which would strengthen the idea that distinct sex/gender roles must be in place for a marriage to function successfully.²⁵

Beyond this generalized level of shared interests, an additional functional interest may draw together women's rights and lesbian rights organizations, whether through amicus briefs or other forms of strategizing. In particular, to the extent that lesbians (and gay men) are building on women's rights victories, as in *Meritor Savings Bank v.*

²³ *Brandon v. Cty. of Richardson*, (Neb. Ct. App. 2000)(Brief of Amici Curiae The American Civil Union Foundation, the Anti-Defamation League, the National Asian Pacific American Legal Consortium, the National Coalition of Anti-Violence Programs, NOW Legal Defense and Education Fund, People for the American Way, the Puerto Rican Legal Defense and Education Fund, and the Southern Poverty Law Center).

²⁴ However, the cases seeking to restrict protests outside abortion clinics also raised complex issues for Lambda and other gay rights organizations to the extent they touched on protest tactics used by some gay and lesbian groups and advocates for people with HIV/AIDS, including ACT UP!.

²⁵ *But see* Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & Pol'y 397, 399, 415 (2001)(observing that "[s]cholars whose primary field is women's rights have generally ignored the possible repercussions for sex discrimination law of using that claim in sexual orientation cases," including the arguments as they relate to marriage).

Vinson's²⁶ coverage of sexual harassment, the women's rights organizations have an interest in insuring that any changes to the established doctrine or policy are either neutral or positive for women.²⁷ This type of preventive intervention is also seen where work on behalf of lesbians could potentially have negative consequences for non-lesbian women. For example, while lesbian rights groups are advocating to secure standing for lesbian non-biological and non-adoptive mothers in custody and visitation disputes with former partners, women's rights groups also have an interest in insuring that any new "standing" rules do not expose (non-lesbian) mothers they represent to custody and visitation litigation from men they date while the child is a minor.²⁸

However, beyond the interest in preventing negative doctrinal developments,²⁹ little direct overlap is apparent in the legal interests of the two groups. In the cases outlined above, almost never would either group gain direct legal benefit from the other's victory. Instead, it seems that the strongest reason for amicus involvement is a commitment to solidarity and coalition-building – a sense that we are all in this civil rights effort together and should support each other.³⁰ On a meta level, this sense is

²⁶ 477 U.S. 57 (1986).

²⁷ Thus, the women's rights organizations had an interest in insuring that not only would the Supreme Court construe Title VII to prohibit same-sex sexual harassment but also that it would not cut back on established protections. See *Oncale*.

This interest in preventive intervention is present in the policy arena as well, where women's rights organizations have strongly supported passage of the Employment Non-Discrimination Act that would forbid sexual orientation discrimination but have also strongly opposed "opening up" Title VII to add sexual orientation to that statute's non-discrimination provisions.

²⁸ See Brief Amici Curiae of NOW LDEF in *Alison D. v. Virginia M.*, *supra* note [].

²⁹ A general sense of interdependence, or at least relatedness, exists in the privacy arena too, in that privacy doctrine could conceivably, and in some cases actually does, prevent unwanted interference by the state with decisions regarding sexuality. Compare, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) with *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁰ Generally, civil rights organizations are mindful of the strategic value in showing that a particular group is not standing alone in seeking protection for its rights. This is particularly important in cases where lesbian rights advocates seek to build on or extend the achievements of women's rights advocates. The participation of the women's rights groups helps signal to the court that the doctrinal extension sought by the lesbian plaintiffs not only would not alarm the original advocates of that doctrine but also, to the contrary, would be viewed positively.

typically expressed as a conviction that strengthening one group's civil rights will help strengthen others', if not directly then by reinforcing the value of civil rights protections more generally.

More particularly, it may be feminism – the political belief in insuring meaningful attention to and opportunity for all women³¹ -- that drives women's rights and lesbian rights organizations to work on each other's behalf, rather than any sense of direct legal need. If that is the motivating force, we then need to assess why the groups have built bridges on some issues but not others. Put another way, what are the limits of feminism's effect on motivating women's rights advocates to take specific litigation or policy steps to support lesbian and gay rights, and vice versa? Separately, we also need to consider whether, without that political commitment of feminism, women's rights groups and lesbians rights groups would have little or nothing to do with one another.

Distant Bridges: Issues for Which Connections Have Yet to be Built

This section turns briefly to consider whether there are certain areas in which lesbian-focused and women-focused organizations have not found common ground, or at least have not found ways to work directly together. In particular, this section will sketch out some legal and policy issues that have importance to lesbians but into which women's rights groups have tended to put few or no resources.³²

³¹ Of course, there are many definitions of feminism from a variety of disciplines. To the extent those definitions put women front-and-center of an analysis, they could easily be substituted for the summary definition offered here.

³² We could also consider whether there are certain issues of importance to women generally to which lesbians have made little commitment. However, for two reasons I will focus only on the commitments of women's rights organizations. First, women's rights groups frequently hold themselves out as representing all women, so the issues of special concern to lesbians would, in theory, be appropriately taken up by these groups. Second, because lesbians are viewed as relatively marginal, women's rights groups do not often solicit the participation and support of lesbian and gay rights groups, except where the connection is so direct as to be unavoidable, as in some of the sexual harassment cases. *See supra* note [] (noting that

These issues include, for example, access to reproductive technology for lesbians. Although women's rights advocates have successfully achieved insurance coverage of assistance with reproduction for women who are heterosexual and married,³³ openly lesbian women in committed relationships have little or no insurance coverage for medical assistance with reproduction and continue to be turned away by centers that provide reproductive services to married women. Yet this issue appears nowhere on the radar screens (or web sites) of women's rights and reproductive rights organizations.

Further, notwithstanding the continued interest of women's rights organizations in insuring proper interpretation and application of the Family Medical Leave Act, the Act contains a gaping loophole through which lesbians fall because it provides no security for individuals who need to take leave to care for a non-marital partner.³⁴ Yet, again, this major issue appears either nowhere or at the bottom of most organizations' priority lists related to the FMLA.

Notably, too, in many of the recent cases brought by lesbians and gay men or transgendered individuals seeking to expand *Price Waterhouse v. Hopkins*'³⁵ protection for gender-non-conformity, the women's rights organizations have taken a backseat or not participated at all, notwithstanding that these cases are on the cutting edge in challenging courts' conceptions of gender and gender identity.

All of this is not to suggest that women's rights organizations are obligated to intervene in every lesbian, gay or transgender rights case. Instead, these examples are

Lambda asks NOW LDEF to participate in its amicus briefs far more often than it is asked to sign onto briefs authored by or filed in cases of NOW LDEF).

³³ A recent policy initiative of pressing insurers cover the cost of contraception for (heterosexual) women has also been quite successful.

³⁴ The FMLA does allow individuals to take leave to care for a variety of other family members to whom they are not legally related, including in-laws.

³⁵ 490 U.S. 228 (1989).

offered here simply to highlight some of the points at which most women's interests diverge from issues that may be of importance to lesbian women.

Doctrinal Bridges?: The Case of Gender Stereotyping

While many doctrinal areas would reveal divergent treatment of women and lesbians,³⁶ I will focus here on cases evaluating the applicability of sex discrimination protections for individuals who do not conform to gender stereotypes.³⁷ Although this area is in flux, the extant cases dealing with gender stereotyping help highlight a clear point of difference in the legal position of women and lesbians – with women protected against sex discrimination under federal and state law and lesbians enjoying only a barebones patchwork quilt of some state and local but no federal protection against sexual orientation-based discrimination.

When the Supreme Court determined in 1989 that Ann Hopkins' sex discrimination claim against Price Waterhouse was actionable because the company had based its partnership decision on her non-conformity with gender-role stereotypes,³⁸ the decision seemed to bode well for lesbians (and gay men) who likewise were seen as non-conforming either because of personality traits or because of their emotional and erotic orientation toward individuals of the same sex. After all, the Court had emphasized that “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an

³⁶ In the adjudication of custody and visitation disputes, for example, Julie Shapiro has pointed out that lesbian and gay parents face heightened burdens regarding their sex lives distinct from those imposed on parents who are heterosexual. See Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 Ind. L.J. 623 (1996). See also Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 Women's Rts. L. Rep. 15 (2000).

³⁷ Cf. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. Pa. L. Rev. 1 (1995)(discussing the error in distinguishing between sex and gender).

³⁸ 490 U.S. 228 (1989).

employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . .”³⁹

Yet, if we look to the cases, it is not at all clear what direct consequence this decision had for the lives of lesbians. Indeed, it is somewhat difficult to assess the impact of *Price Waterhouse* for any women, in that few published cases apply the Court’s analysis to a female plaintiff.⁴⁰ We might hypothesize that *Price Waterhouse* has been so helpful to gender-non-conforming lesbians that cases today settle rather than resolve through litigation. Or perhaps most gender-non-conforming lesbians who would assert *Price Waterhouse*-type claims attempt to present themselves in litigation settings as women but not as lesbians to avoid an employer’s defense that the challenged discrimination occurred not because of the plaintiff’s gender but rather because of her sexual orientation.

Another reason for the virtual absence of lesbians from *Price Waterhouse* litigation might be that lesbians do not suffer as much discrimination in the workplace based on gender non-conformity as the gay men and transgendered people who have brought most of the recent cases in this doctrinal area.⁴¹ My years on staff at Lambda Legal Defense taking calls from lesbians who suffered employment discrimination make me skeptical of this explanation. At the same time, however, it may be that, in general,

³⁹ *Id.* at 250.

⁴⁰ Among the few published decisions my research identified are *Weinstock v. Columbia University*, 224 F.3d 33 (2nd Cir. 2000)(rejecting *Price Waterhouse* claim that had been based on references to plaintiff as nurturing and nice) and *Bellaver v. Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000)(denying summary judgment to employer on *Price Waterhouse* claim because plaintiff had produced evidence that she was subjected to gender stereotyping).

⁴¹ It is also possible that lesbians are more reluctant to file lawsuits than either heterosexual women or gay men because of the compound nature of the discrimination suffered, implicating sex and sexual orientation, and the resulting sense of heightened vulnerability on the part of potential plaintiffs. In addition, lesbians, as a group, may simply have access to fewer resources to support the cost of a discrimination lawsuit. See M.V. Lee Badgett, [cite]

lesbians experience discrimination at work in a way that focuses directly on sexual orientation; that is, where employers specify that their problem with the lesbian employee is not her gender non-conformity in terms of personal style but rather her self-identification as a lesbian and her presumed choice of sexual partners. Gay men and transgendered men and women, on the other hand, may be subjected to more attacks on their personal style because they do not conform to male gender stereotypes.⁴²

In any event, although we can only speculate about exactly why relatively few *Price Waterhouse* cases are brought by women, the doctrinal developments brought about by gay and transgendered plaintiffs – and one recent lesbian plaintiff – open up two possible routes for understanding the relationship between the rights of women and lesbians in this area. One story we could tell is that the post-*Price Waterhouse* cases reinforce the lack of connection between lesbians and other women with respect to Title VII protections. As one court recently explained in rejecting a *Price Waterhouse* claim brought by a man fired for occasionally wearing feminine clothing and accessories off the job, “[I]ong after *Price Waterhouse* was decided, courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person’s ‘sex.’”⁴³ Four of the five cases on which the court relied to reach this conclusion had been decided within the past

⁴² Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995)(explaining that the devaluation of everything feminine causes sex discrimination to manifest in a range of ways, including against men and transgendered individuals who do not live up to popular stereotypes of maleness). When women adopt an aggressive style and other behaviors stereotypically attributed to men, while they may face condemnation in many quarters for stepping outside expected gender behavior, they also are adopting styles that, in many circles, are preferred to behaviors commonly identified as feminine or effeminate. In that sense, lesbians (and heterosexual women) who do not conform to feminine gender role stereotypes may wind up in Ann Hopkins’ situation far less often than their gay male and transgendered counterparts.

⁴³ *Oiler v. Winn-Dixie Louisiana*, 2002 WL 31098541, n.59 (E.D. La. 2002).

three years, underscoring Title VII's circumscribed application in contexts involving facts beyond Hopkins-type gender stereotyping.⁴⁴ From these cases, it would be sensible to conclude that lesbians and non-lesbian women are so differently positioned with respect to available legal protections as to make difficult any theorizing that could be of use to both groups. But that would be too limited a view.

The other story grows out of a new set of cases that has pressed the gender envelope to have *Price Waterhouse's* non-conformity ruling reach discrimination against gay and transgender individuals.⁴⁵ As illustrated below, these cases offer greater possibilities than the crabbed interpretations of Title VII just described for theory and practice that build connections, rather than reinforce differences, among women.

For example, in *Schwenk v. Hartford*,⁴⁶ the Ninth Circuit found cognizable a claim that a prison guard's attempt to rape a male-to-female transsexual prisoner constituted gender-motivated violence. In rejecting the guard's defense that the attempted rape was motivated by the inmate's transsexuality rather than her gender, the

⁴⁴ *Id.* (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999)(rejecting Title VII coverage for harassment because of sexual orientation); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001)(same); *Mimms v. Carrier Corp.*, 88 F.Supp.2d 706 (E.D.Tex. 2000)(same); *Broadus v. State Farm Ins. Co.*, 2000WL1585257 (W.D.Mo. 2000)(same); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 1126 (2002)(same)). *See also Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000)(same).

⁴⁵ Many of the cases foreclosing Title VII protection for harassment based on sexual orientation also support the proposition that federal law condemns gender stereotypes. *See, e.g.*, *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3d Cir. 2001) (acknowledging that employment discrimination based on gender stereotypes is impermissible); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (same); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999) (same); *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257, at * 4-5 (W.D. Mo. Oct. 11, 2000) (same).

⁴⁶ 204 F.3d 1187 (9th Cir. 2000).

court found, instead, that “the perpetrator's actions stem[med] from the fact that he believed that the victim was a man who "failed to act like" one.”⁴⁷

Similarly, in another recent Title VII case, the Ninth Circuit upheld the claim of a waiter who suffered harassment by his co-workers because he did not conform to stereotyped expectations of a man.⁴⁸ The court opined that “the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.”⁴⁹

At its essence, the systematic abuse directed at [the waiter] reflected a belief that [the waiter] did not act as a man should act. [The waiter] was attacked for walking and carrying his tray “like a woman” – i.e., for having feminine mannerisms. [The waiter] was derided for not having sexual intercourse with a waitress who was his friend. [The waiter’s] male co-workers and one of his supervisors repeatedly reminded [the waiter] that he did not conform to their gender-based stereotypes, referring to him as “she” and “her.” And, the most vulgar name-calling directed at [the waiter] was cast in female terms.⁵⁰

Because the harassment “was closely linked to gender” the court deemed it actionable as sex discrimination under Title VII.⁵¹

In an Equal Credit Opportunity Act case brought by a male cross-dresser who was denied a loan application by a bank because he was wearing “traditionally feminine attire,” the First Circuit also based its analysis on the reasoning of *Price Waterhouse*.⁵² The court found it “reasonable to infer” that the bank employee refused to provide the application because he believed the plaintiff’s attire “did not accord with his male gender:

⁴⁷ *Id.* at 1202. *See also id.* (“[T]he evidence offered by Schwenk tends to show that Mitchell's actions were motivated, at least in part, by Schwenk's gender--in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor”).

⁴⁸ *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

⁴⁹ *Id.* at 874.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Rosa v. Park W. Bank and Trust Co.*, 214 F.3d 213, 214, 215 (1st Cir. 2000).

in other words, that the plaintiff did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application.”⁵³

These cases helped lay the groundwork for *Heller v. Columbia Edgewater Country Club*,⁵⁴ in which a federal district court, for the first time in a published decision, found that a lesbian plaintiff could state a Title VII claim if, by being a lesbian, she suffered harassment because she “did not conform to [the employer’s] stereotype of how a woman ought to behave.”⁵⁵ As the court observed in denying the employer’s summary judgment motion, the employee did not conform to the employer’s stereotype because she “is attracted to and dates other women, whereas [the employer] believes that a woman should be attracted to and date only men.”⁵⁶ In other words, lesbians are, by definition, resisters to or non-conformists with gender role expectations – as existing in opposition to the role traditionally and stereotypically expected of women.⁵⁷

Heller thus tells the second story about the legal relationship of women and lesbians. While the first story ended with Title VII being definitively construed to be of no use whatsoever to a woman who is harmed because she is a lesbian, *Heller* challenges that easy distinction between sex and sexual orientation and instead finds a fundamental connection between women who do not conform to stereotypes regarding comportment and women who do not conform to stereotypes regarding sexuality. On this reading, *Heller* is definitionally allied not only with gay men and transgendered individuals but also with Ann Hopkins.

⁵³ *Id.*. The employee had instructed the applicant to “go home and change” into gender-conforming attire.

Id.

⁵⁴ 195 F.Supp.2d 1212 (D.Or. 2002).

⁵⁵ *Id.* at 1224.

⁵⁶ *Id.*

⁵⁷ This definitional paradigm that constitutes lesbians as oppositional to established gender roles raises an interesting question whether lesbians would continue to exist as lesbians if social gender role expectations were to change.

The recognition that punishment for non-conformity with gender stereotypes takes many different forms, in turn, suggests that Adrienne Rich's continuum does actually animate the law, though differently than Rich anticipated. Rather than defining all women as lesbians, all gender role resisters become defined as eligible for protection from discrimination based on sex.

If there is an incipient trend in the law to recognize that gender-role non-conformists beyond Ann Hopkins are protected by sex discrimination prohibitions, what should feminist theory do, if anything, in response? One reaction might be nothing – now that Ann Hopkins may be protected whether she is heterosexual, bisexual or lesbian, feminists might decide that our work on non-conformity theory is complete, at least to the extent it operates to insure redress for discrimination against women in employment.

But, on the other hand, if we stop there, we might miss out on much of what non-conformity theory has to offer. Why simply settle for non-conformity theory's extension of sex discrimination protections only for those who do not conform to social gender role expectations in terms of personality traits, as in *Hopkins*, or even sexual orientation, as in *Heller*? Perhaps this theory can be pushed much harder to challenge the truly wide array of discrimination that occurs when women (and men) do not conform to idealized, normative notions of their respective sexes that are dictated by gender stereotypes. After all, *Heller* had an actionable claim because she did not fit her employer's ideal that a woman should be heterosexual. Ann Hopkins did not fit her employer's ideal that a woman should refrain from being aggressive.⁵⁸ Why not bring claims on behalf of women who do not fit employers' ideals of womanhood because they are overweight, or underweight for that matter? Why not bring claims on behalf of women who do not

⁵⁸ *Price Waterhouse*, 490 U.S. at 250.

conform to the idealized expectations of women because they are not attractive, or not white, or disabled, or anything else one might choose from the litany of daily ways in which women suffer discrimination in the workplace?⁵⁹

If we take the non-conformist analysis developed in *Hopkins*, *Schwenk*, *Heller* and the other cases rejecting the essentializing ideas of women's and men's proper roles, shouldn't we also find that these just-mentioned forms of differential treatment constitute sex discrimination? After all, once we acknowledge that gender role stereotypes play an affirmative, constitutive role in defining who and how we expect women to be rather than simply a descriptive role, why shouldn't we recognize that the dominant image of the ideal woman within the United States is attractive, of a particular weight, able-bodied, heterosexual, and, often, white, in addition to being mild-mannered, gentle and nurturing? In other words, why do we accept that non-conformity with gender stereotypes is limited to non-conformity in the behavioral ways that Ann Hopkins did not conform?

One possible argument against this expansive approach is that the *Hopkins*-type analysis worked only because the same aggression that was tolerated in men was not tolerated in women – in other words, that women and men with the same characteristic experienced different treatment. See *Price Waterhouse*, 490 U.S. at 251 (“... Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”)(internal quotations omitted). Even from that perspective, to the extent women and men are subjected to different standards related to

⁵⁹ Why not also bring claims on behalf of men who are penalized by employers for dedicating time to their children, contrary to the expected, if not idealized, view of masculinity?

personal appearance (whether height, weight, attractiveness or anything else), it should not be controversial to apply a *Price Waterhouse*-type sex discrimination theory.⁶⁰

However, the language of *Price Waterhouse* does not mandate this constrained reading. If “gender must be irrelevant to employment decisions,” as the Court also says, 490 U.S. at 240, then all standards related to appearance, race, accent, and other aspects of individual identity that are informed by gender-related expectations should be vulnerable under Title VII, even if expectations of men and women are not diametrically opposed. In explaining Congress’s intent to end different treatment of men and women, the Court emphasized, as noted above, that employers may not require employees to match stereotypes “associated with their group.” *Id.* at 251. Nothing in this explanation indicates that non-conformity with gender role expectations be protected only to the extent the conduct or presentation amounting to non-conformity would be accepted and even embraced for those identified as members of the other sex. To the extent particular stereotypes are associated with both men and women, the Court seems to suggest that those may be vulnerable under Title VII.

Another potential difficulty with this comprehensive view of sex discrimination argument is its apparent lack of limits. Virtually every injury directed at a woman could be seen as a form of sex discrimination because she does not conform to the idealized woman – that is, to stereotypes of who a woman is expected to be. The argument would quickly run the risk that has been highlighted in the cases that essentialize sex and reject Title VII claims for anything but traditional types of sex discrimination – that is, you (the

⁶⁰ Since, in many settings, society tends to expect far more of women than men with respect to virtually all aspects of self-presentation, it is not unreasonable to suspect that sex stereotypes are at play when women face discrimination on grounds that are not overtly sex-related.

plaintiff) are trying to bootstrap protection for – fill in the blank (sexual orientation, appearance, accent, etc.) into the protection against sex discrimination, which is really intended to protect “just sex.”

But if the bootstrapping argument has any real force, then reading *Hopkins* to cover Heller and, possibly, the plaintiffs in *Rosa*, *Nichols*, and *Schwenk*, is wrong. So, if we believe the non-essentialist approach to lesbians is correct and that lesbians suffer discrimination because of non-conformity with sex role expectations, then we would do well not to reject this theory out of hand and instead to test its limits and see where it takes us. It may be that we would then ask whether, if we use sex as a lens through which to analyze all or at least many harms, we are essentializing in the gross sorts of ways that have been thoughtfully critiqued in the literature.⁶¹ Would this theory deprive women of agency in the way that some presentations of dominance theory have been criticized? Could we use any other protected category to undertake exactly the same analysis as we have just done for sex?

Perhaps any protected category can be pressed in these directions. However, sex-based protections seem particularly ripe for this pressure both because we have *Price Waterhouse* and because certain sex role expectations, such as those related to sexuality, attractiveness, and demeanor, are so deeply entrenched.

Some Closing Thoughts on Bridge-Building

⁶¹ See Women: An Anti-Essentialist Reader ().

Even with the promise of *Heller*, we all know too well that a single case neither promises a trend of ending gender stereotyping⁶² nor builds a solid bridge. What we can take from *Heller*, though, and the slew of gender stereotyping cases being brought by gay men and transgendered women and men, is a reminder that the battle of opening up and eradicating gender stereotyping is being waged on numerous fronts and a challenge to work through the theoretical dimensions of this litigation. Groups dedicated to lesbian and gay rights and to transgender rights will necessarily continue to theorize around the roadblocks to accessing anti-discrimination protections set up by courts. So too should feminist legal scholars and women's rights litigation organizations take this tremendous opportunity to observe, and ideally, make inroads into forms of gender-based discrimination that are at once complex and terribly simple.

⁶² See, e.g., *Nguyen v. INS*, 533 U.S. 53, 87 (2001) (O'Connor, J., dissenting) (criticizing the Court for upholding a law distinguishing between mothers and fathers for purposes of petitioning for a child's naturalization; "There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.").