

RECENT ADJUDICATION

EMPLOYMENT LAW — TITLE VII — EEOC EXTENDS WORK-PLACE PROTECTIONS TO GAY AND LESBIAN EMPLOYEES. — *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

Since its enactment, Title VII of the Civil Rights Act of 1964¹ has prohibited employment discrimination on the basis of an individual's sex.² In the intervening decades, neither courts³ nor the Equal Employment Opportunity Commission⁴ (EEOC or Commission) considered sexual orientation discrimination to be a species of sex discrimination prohibited by Title VII. Recently, in *Complainant v. Foxx*,⁵ the EEOC changed its position by holding that claims of discrimination based on sexual orientation are cognizable under Title VII's proscription against sex discrimination.⁶ In doing so, the Commission soundly concluded that, based on the "words of the statute," a claim of sexual orientation discrimination by definition states a claim of sex discrimination.⁷ Yet additional support for the outcome in *Foxx* may be found by referencing Title VII's broader purpose: to eradicate social hierarchies based on particular characteristics — such as sex — and generate parity in the workforce. Because sexual orientation discrimination contributes to the preservation of sex discrimination, the EEOC's holding inherently combats workplace sexism.

Complainant David Baldwin,⁸ a gay⁹ man employed by the Federal Aviation Administration (FAA), held a temporary Front Line Manager

¹ 42 U.S.C. §§ 2000e to 2000e-17 (2012).

² *Id.* § 2000e-2(a)(1).

³ *See, e.g.,* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment." (citations omitted)); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (concluding that whether a harasser "is, or may be, motivated by hostility based on sexual orientation" was irrelevant for purposes of Title VII liability).

⁴ *See, e.g.,* *Johnson v. Frank*, No. 05910858, 1991 WL 1189760, at *3 (E.E.O.C. Dec. 19, 1991) ("Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation.").

⁵ No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

⁶ *Id.* at *5.

⁷ *Id.* at *10.

⁸ Complainant's name appears in the Commission's slip opinion. *Baldwin v. Foxx*, No. 0120133080, slip op. at 1 (E.E.O.C. July 15, 2015).

⁹ The term "gay" describes a person who engages in or wants to engage in sexual relations with a person of the same sex. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 198 n.1 (1994). Like Koppelman, this comment uses the term "gay" to refer to both men and women who experience or act on same-sex attraction.

(FLM) position in the air traffic control tower at Miami International Airport.¹⁰ On July 26, 2012, Baldwin learned that he had not been selected for conversion to a permanent FLM position at the facility.¹¹ After first contacting an Equal Employment Opportunity (EEO) Counselor on August 28, 2012, Baldwin filed a formal EEO complaint on December 21, 2012, alleging that the FAA had discriminated against him on the basis of his sexual orientation.¹² In its Final Agency Decision, the FAA dismissed the complaint on the grounds that Baldwin had not timely initiated contact with the EEO Counselor.¹³ The Decision also indicated that the FAA did not believe that Baldwin's sexual orientation discrimination claim was cognizable under Title VII.¹⁴

The EEOC reversed and remanded.¹⁵ After first determining that Baldwin's contact with the EEO Counselor was timely,¹⁶ the Commission addressed the jurisdictional issue: whether Title VII proscribed discrimination on the basis of sexual orientation.¹⁷ The Commission explained that, although sexual orientation is not explicitly listed in Title VII as a prohibited category on which to base employment decisions, the question of whether Title VII covered this discrimination "is the same as [in] any other Title VII case involving allegations of sex discrimination."¹⁸ That is, Title VII coverage turned on whether the employer "has 'relied [up]on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action."¹⁹

¹⁰ *Foxx*, 2015 WL 4397641, at *1.

¹¹ *Id.*

¹² *Id.* In particular, Baldwin alleged that his supervisor "made several negative comments about [his] sexual orientation." *Id.* at *2. For example, Baldwin alleged when he mentioned that he and his partner had visited New Orleans for Mardi Gras, his supervisor said, "We don't need to hear about that gay stuff." *Id.*

¹³ *Id.* at *2. EEOC regulations require that a complainant bring a discrimination claim to an EEO Counselor's attention "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1) (2011).

¹⁴ See *Foxx*, 2015 WL 4397641, at *4 ("The [FAA], in its final decision, indicated it would process [Baldwin's sexual orientation discrimination] claim only under its internal procedures concerning sexual orientation discrimination and not through the [Title VII] complaint process.").

¹⁵ *Id.* at *1.

¹⁶ *Id.* at *4. The Commission concluded that the forty-five-day window was not triggered until Baldwin learned that he was not selected for conversion to a permanent FLM position because only then could he "reasonably suspect discrimination." *Id.* at *2. In so holding, the Commission rejected the FAA's position that Baldwin "knew or should have known" that he was being discriminated against with regard to conversion to a permanent FLM position at the time he was appointed to a temporary, rather than permanent, position in October 2010. *Id.* at *3.

¹⁷ *Id.* at *4.

¹⁸ *Id.*

¹⁹ *Id.* (second alteration in original) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion), *superseded in part by statute on other grounds*, Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012), *as recognized in* *Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014)).

With this standard as its foundation, the Commission concluded that sexual orientation “inherently” involves sex-based considerations, and so sexual orientation discrimination claims are “necessarily” claims sounding in sex discrimination under Title VII.²⁰

The Commission articulated the “inescapable link” between discrimination on the bases of sex and sexual orientation in three ways.²¹ First, the Commission explained that sexual orientation discrimination is sex discrimination because it “necessarily” involves discrimination based on a person’s sex.²² The Commission provided the example of two similarly situated employees — one a gay woman, the other a straight²³ man — who both display photographs of their female spouses on their desks at work.²⁴ If the employees’ common employer suspended the gay woman for displaying her spouse’s photograph, but did not suspend the straight man for displaying his spouse’s photograph, then the gay woman could plausibly allege that the employer would not have taken adverse action against her had she been male; in determining employee treatment, the employer took sex into account.²⁵

Second, the Commission described how sexual orientation discrimination constitutes sex-based “associational discrimination”: discrimination against an employee based on a characteristic of a person with which the employee associates.²⁶ Drawing an analogy to the race discrimination context, the Commission noted that both it and courts had consistently concluded that Title VII bars discrimination based on an employee’s associations with people of other races, such as friendships or interracial marriage.²⁷ Because Title VII treats each of its enumerated categories — including sex — “exactly the same,”²⁸ the Commission determined that Title VII likewise prevents employers from treating some employees less favorably than other employees based on the fact that such individuals are, for example, in same-sex relationships.²⁹

²⁰ *Id.* at *5.

²¹ *Id.* The Commission also acknowledged that “[t]here may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.” *Id.* at *10 n.16.

²² *Id.* at *5.

²³ The Commission defines the term “straight” as “physically and/or emotionally attracted to someone of the opposite-sex.” *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at *6.

²⁷ *Id.*

²⁸ *Id.* at *7 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality opinion), *superseded in part by statute on other grounds*, Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012), as recognized in *Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014)).

²⁹ *Id.*

Third, the Commission concluded that sexual orientation “necessarily” implicates treatment based on gender stereotypes.³⁰ The Commission emphasized that Title VII already protects individuals who claim that they received adverse treatment “because they were viewed — based on their appearance, mannerisms, or conduct — as insufficiently ‘masculine’ or ‘feminine.’”³¹ To the Commission, however, gender stereotypes that can form the basis for discrimination against gay individuals include more than assumptions about “overt masculine or feminine behavior.”³² The Commission stressed its view that stereotypes about homosexuality explicitly implicate “stereotypes about the proper roles of men and women” because an employer may discriminate against a gay employee — “whether effeminate or not” — based on the belief that “‘real’ men should date women, and not other men.”³³

Finally, the Commission addressed two potential counterarguments to its ruling. While acknowledging that Congress did not foresee that Title VII would cover sexual orientation discrimination, the Commission asserted that statutory prohibitions like Title VII often reach beyond the particular harm they were passed to combat in order to cover “reasonably comparable evils” and that “ultimately the provisions of our laws rather than the principal concerns of our legislators” govern.³⁴ Likewise, while conceding that Congress has debated but not passed legislation expressly banning sexual orientation discrimination in the workplace, the Commission contended that congressional inaction should not impact its interpretation of the scope of Title VII. To the contrary, “several equally tenable inferences may be drawn from such inaction,” such as the inference that Title VII “already incorporate[s] the offered change.”³⁵ In the end, the Commission declared that it would apply the “words of the statute,” and the words mandated that claims of sexual orientation discrimination by definition state a cognizable sex discrimination claim under Title VII.³⁶

While its reliance on the “words of the statute” to determine that sexual orientation discrimination constitutes sex discrimination under Title VII is sound,³⁷ the Commission’s ruling concurrently promotes

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at *8 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

³⁴ *Id.* at *9 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

³⁵ *Id.* (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

³⁶ *Id.* at *10.

³⁷ A number of legal scholars have advanced arguments similar to those adopted by the Commission. See, e.g., CATHARINE A. MACKINNON, *SEX EQUALITY* 1183–86 (1st ed. 2001) (constructing the argument that sexual orientation discrimination is sex discrimination); Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 *GEO. L.J.* 1, 9 (1992) (arguing that if “sexual orientation discrimination treats

Title VII's principal goal of breaking down hierarchies that present barrier to employment and advancement based on particular enumerated characteristics, including sex. At its core, sexual orientation discrimination serves to reinforce a traditional male-dominated gender hierarchy in which women are boxed into subservient social roles. By omitting discussion of the association between sexism and the stigmatization of homosexuality, the Commission missed an opportunity to demonstrate that its expansion of Title VII's scope functions not only to protect gay employees, but in fact also to protect *all* employees — male and female, straight and gay — from the strictures of societal expectations defined by sex.

The overarching purpose of Title VII is to promote equality in the workplace. Little legislative history specifically addresses the meaning of “sex” as a proscribed characteristic in Title VII,³⁸ however, the Supreme Court has interpreted Title VII's ban on sex discrimination to prevent employers from “rel[ying] upon sex-based considerations”³⁹ — including sex stereotyping⁴⁰ — in dealing with their employees.⁴¹ In the Court's view, “Congress intended to strike at the entire spectrum of disparate treatment of men and women.”⁴²

A number of scholars have pointed out the link between heterosexism — the “institutionalized valorization of heterosexual activity”⁴³ —

men and women differently in the same way that antimiscegenation laws treat blacks and whites differently, then such policies employ gender classifications” and are prohibited by Title VII).

³⁸ According to the Court, “[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. . . . [T]he bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on ‘sex.’” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (citations omitted).

³⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion), *superseded in part by statute on other grounds*, Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012), *as recognized in* *Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014).

⁴⁰ *Id.* at 251.

⁴¹ The Supreme Court has concluded that several types of sex discrimination claims — including not only sex stereotyping but also disparate treatment and sexual harassment — are cognizable under Title VII's sex discrimination prohibition. See Nicole Anzuoni, Note, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. GENDER & L. 871, 881 (2002).

⁴² *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) (quoting *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Shortly after *Price Waterhouse*, the Court clarified that “Title VII's prohibition of discrimination ‘because of . . . sex’ protects men as well as women.” *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)). However, courts have generally found that the primary purpose of Title VII's ban on sex discrimination in the workplace was to “provide economic opportunity to women.” Anzuoni, *supra* note 41, at 881.

⁴³ I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991).

and sexism.⁴⁴ The concept of heterosexism is based on traditional notions of sex and premised on the existence of both two distinct sexes and two distinct genders.⁴⁵ In this context, “sex” refers to physiological differences between men and women,⁴⁶ while “gender” refers to the “cultural overlay” on those physiological differences⁴⁷ — the behavioral expectations and socio-sexual roles that society assigns on the basis of sex as being either “masculine” or “feminine.”⁴⁸ Heterosexism’s persistence is a function of understanding these two genders as natural opposites;⁴⁹ heterosexism depends on a cultural aversion to male-female “sameness,” an aversion that exaggerates biological distinctions and creates gender.⁵⁰

The resulting bipolar male-female gender system structures social expectations based on sex and, in the process, creates the conditions from which sexism arises. A principal characteristic of this system is the regulation of behavior through carrots and sticks: men and women are

⁴⁴ See, e.g., *id.* at 1159–70 (describing how discrimination against gay individuals on the basis of their sexual orientation “simultaneously flows from and perpetuates traditional notions of appropriate sex roles,” *id.* at 1159); Koppelman, *supra* note 9, at 202 (“The case for gay rights is a powerful one for reasons that go well beyond the interests of lesbians and gay men themselves. The effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.”); Marcossou, *supra* note 37, at 24 (“[A]ntigay harassment . . . is ‘targeted’ at women because it reinforces stereotypes about appropriate gender roles.”).

⁴⁵ Capers, *supra* note 43, at 1160. Despite their distinct meanings, “sex” and “gender” are often used as synonyms. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 274 (1999).

⁴⁶ 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, 10 (1995). For example, women can bear children, while men cannot. While sex reflects biology, however, law and medicine have yet to reach a consensus about which particular biological characteristics make someone male or female. See Greenberg, *supra* note 45, at 271.

⁴⁷ Case, *supra* note 46, at 10. Gender in essence amounts to a social process. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 49 (1987). Such a social process, in Professor Catharine MacKinnon’s view, represents “an inequality of power, a social status based on who is permitted to do what to whom.” *Id.* at 8.

⁴⁸ See Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 164 (1996); cf. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 38–39 (1995) (“[M]ost of us believe that on some deep, metaphysical level, biological facts exist independently of the labels we give them. . . . But in fact, the process of sexing bodies works just the other way around. Our pre-given dimorphic concepts of gender lead to the discovery of facts that differentiate the sexes. . . .”). Greenberg defines “gender” as “the cultural or attitudinal qualities that are characteristic of a particular sex.” Greenberg, *supra* note 45, at 274. For example, women may choose to wear high-heeled shoes, but men generally may not.

⁴⁹ See Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 12 (2011) (“Gender is the unequal social system attributed to sex, the central myth of which is that gender hierarchy is natural.”).

⁵⁰ Capers, *supra* note 43, at 1160 (citing Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 178–80 (Rayna R. Reiter ed., 1975)).

socially rewarded for acting like “real” men and women, while gay men and women — whose relationships challenge the very notion of a bipolar gender system — are vulnerable to social punishment.⁵¹ However, a bipolar gender system not only oppresses individuals like David Baldwin, who do not conform to its gendered expectations, but it also buttresses sexism by subordinating women as a class via the creation of a gender hierarchy.⁵² By socially constructing opposites such as male-female, some scholars have argued, society indirectly lauds one over the other: “female” comes to mean “not only different from male, but also less than male.”⁵³ This relationship between heterosexism and sexism constitutes a social configuration that systemically privileges masculine, heterosexual men to the enduring disadvantage of the nonmasculine, nonheterosexual, and nonmale.⁵⁴ Heterosexism thus implicitly — albeit perhaps unknowingly — authorizes sex discrimination.⁵⁵

Recognition of heterosexism’s patriarchal structure is also crucial to understanding the threat that gay individuals pose to the traditional male-dominated gender hierarchy.⁵⁶ Heterosexism uses the perception of two naturally opposite genders to perpetuate traditional unequal familial relationships, which in their totality prolong the subordination of women as a class.⁵⁷ In a male-dominated society, gay men threaten to fracture the male role in such a way as to lead to less male dominance of society.⁵⁸ Gay men are guilty of insubordination — of denigrating the “superior caste” to which they belong by becoming sexually “woman-like” and thereby threatening the preservation of male power.⁵⁹ Likewise, gay women repudiate the notion that female sexuality

⁵¹ *Id.* at 1160, 1162. Where “[w]omen who are heterosexual, feminine, demure, and deferential to men” receive social commendation, as do men who are “heterosexual, masculine, competitive, and protective of women,” gender serves as a means of oppression — it delineates acceptable social behavior and hinders meaningful choice about identity expression for both men and women. *Id.* at 1162; *cf.* MacKinnon, *supra* note 49, at 12–13 (“It is gender, the social reality of sex, that makes men and women . . . into unequals in a hierarchy relative to one another.”).

⁵² See Capers, *supra* note 43, at 1162; *see also* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1090 (2004) (“[H]eterosexual dominance is male dominance, a truth deeply buried in the facial sex discrimination the Texas [anti-sodomy] statute used to accomplish its discrimination on the basis of sexual orientation.”).

⁵³ Capers, *supra* note 43, at 1163; *see also* Heather Lauren Hughes, Note, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R.-C.L. L. REV. 237, 248 (1998) (“The interdependence of terms in binary opposition is hierarchical, with one term consistently dominant and prior to the other.”); *cf.* MacKinnon, *supra* note 49, at 13 (“Gender hierarchy is the transnational social system of masculinity over femininity that becomes men over women . . .”).

⁵⁴ Valdes, *supra* note 48, at 169–70.

⁵⁵ See Capers, *supra* note 43, at 1164.

⁵⁶ Studies have documented the link between hostility toward gay individuals and “other traditional, restrictive attitudes about sex roles.” Koppelman, *supra* note 9, at 237.

⁵⁷ See Capers, *supra* note 43, at 1163.

⁵⁸ *Id.* at 1165.

⁵⁹ See Koppelman, *supra* note 9, at 235–36 (“[H]omosexuality is threatening because it calls into question the distinctive and superior status of being male. . . . As with miscegenation, a mem-

exists only for male gratification.⁶⁰ In short, gay individuals demonstrate that the bipolar gender system that continues to subordinate women is not inevitable.⁶¹ Fundamentally, when gay individuals question their denial of Title VII's employment protections, they question a society in which — more than a half century after Title VII's enactment — women have not achieved, and remain decades away from achieving, pay equity with men.⁶²

The use of Title VII to challenge heterosexism in the workplace simultaneously challenges sexism in the workplace. In confronting heterosexism head on, the Commission thus dealt workplace sexism a significant blow. By extending the reach of Title VII to encompass sexual orientation discrimination, the Commission challenged a social system that “favors masculine, independent, protective, and heterosexual males and feminine, dependent, passive, and heterosexual females.”⁶³ Such a challenge may go far toward creating a workplace where job performance is the standard by which *all* employees are measured, rather than a workplace where sex-based expectations — such as the proper sex of one's romantic partner — determine access to opportunity.⁶⁴

The Commission's determination that sexual orientation discrimination constitutes sex discrimination under Title VII relied on the “words of the statute,”⁶⁵ even as it acknowledged that Congress “may not have envisioned” the application of Title VII to discrimination on the basis of sexual orientation.⁶⁶ However, because protecting against sexual orientation discrimination inherently combats entrenched gender inequality — and in the process contributes to creating the kind of workplace that Congress envisioned when enacting Title VII⁶⁷ — the Commission's holding is in line not only with Title VII's text, but also with its purpose.

ber of the superior caste who allows his body to be penetrated is thereby polluted and degraded, and he assumes the status of the subordinate caste: he becomes woman-like.”)

⁶⁰ *Id.*

⁶¹ Capers, *supra* note 43, at 1167.

⁶² See Danielle Paquette, *At This Rate, American Women Won't See Equal Pay Until 2058*, WASH. POST (Mar. 16, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/03/16/at-this-rate-american-women-wont-see-equal-pay-until-2058> [<http://perma.cc/W9NB-MGPM>] (noting that “[i]n 2013, [w]omen made 78.3 cents for every dollar earned by men,” according to a report by Institute for Women's Policy Research). The precise size of this wage gap remains disputed. See Glenn Kessler, *The “Equal Pay Day” Factoid that Women Make 78 Cents for Every Dollar Earned by Men*, WASH. POST: FACT CHECKER (Apr. 2, 2015), <https://www.washingtonpost.com/blogs/fact-checker/wp/2015/04/02/the-equal-pay-day-factoid-that-women-make-78-cents-for-every-dollar-earned-by-men> [<http://perma.cc/BC3W-D5GW>] (comparing different methodologies for measuring the gap).

⁶³ Capers, *supra* note 43, at 1170.

⁶⁴ See *id.*

⁶⁵ *Fox*, 2015 WL 4397641, at *10.

⁶⁶ *Id.* at *9.

⁶⁷ Capers, *supra* note 43, at 1170.