MARRIAGE EQUALITY, WORKPLACE INEQUALITY: THE NEXT GAY RIGHTS BATTLE

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Abstract

Same-sex marriage is not the only civil rights issue impacting the gay community. Although the Supreme Court's decision in *Obergefell v. Hodges* represented a momentous victory on same-sex marriage, workplace protections affect far more people and remain a high priority for many lesbians and gay men. Today, even though the Supreme Court has invalidated state marriage restrictions across the country, federal law still makes it perfectly permissible to fire a gay man for telling a coworker about his sexuality or to discharge a woman for displaying her wife's picture at work.

This Article critically evaluates the relationship between same-sex marriage and workplace rights. Focused narrowly on case-by-case tactics, proponents of same-sex marriage won in court by selectively choosing gay couples who appeared "safe" and "ordinary" to judges. The decision to prioritize marriage over other gay civil rights—while utilizing reductive depictions of gay relationships in the process—raises distinct challenges for lawyers attempting to extend victories on the marriage front to other important legal realms such as employment protections.

Outlining a model for thinking about gay rights beyond marriage, this Article calls for renewed attention to the argument that sexual orientation discrimination constitutes a form of sex discrimination. The cultural imperative requiring individuals to desire only partners of the opposite sex constitutes American society's most enduring gender stereotype. Employers and states that punish sexual minorities for violating this norm engage in both sexual orientation discrimination and sex discrimination. By combating discrimination in employment, housing, and other civil rights areas, this refocused approach to gay rights applies to numerous legal contexts outside of marriage, thereby addressing the legal needs of a much larger segment of the gay community.

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INTRODUCTION

Has the moment for gay civil rights finally arrived? With the now-familiar image of same-sex couples exchanging vows on city hall steps, it might appear that gay individuals finally stand on the precipice of enjoying full social equality in the United States. But the seductive urge to meld "marriage rights" with "gay rights" obscures other important goals that the gay community has not yet attained.[1] For example, despite the Supreme Court's historic ruling in *Obergefell v. Hodges* invalidating same-sex marriage bans throughout the country,[2] federal law still does

1. Amy L. Brandzel, *Queering Citizenship? Same-Sex Marriage and the State*, 11 GLQ 171, 189 (2005); *see also* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 90 (2014) [hereinafter NeJaime, *Before Marriage*] (discussing the centrality of marriage within contemporary debates over gay civil rights).

2. Obergefell v. Hodges, No. 14-556, slip op. at 28 (U.S. June 26, 2015); *see also* United States v. Windsor, 133 S. Ct. 2675, 2682–83 (2013) (striking down a provision of the Defense of

not protect gay workers from employment discrimination.[3] This curious state of affairs means that gay couples can legally marry in every jurisdiction, while employers in most states can legally fire gay employees based on their sexual orientation.[4]

Despite the popular notion that marriage represents gay advocacy's crowning achievement,[5] employment protections constitute a far more important objective for many gay individuals.[6] The workplace mistreatment that this group continues to endure underscores the importance of this issue. For example, one recent study on the topic noted that more than one third of sexual minorities said that they had experienced workplace harassment in the last five years, and twelve percent believed that their employer had fired them because of their sexual orientation.[7] Compared to heterosexuals, openly gay job applicants are forty percent less likely to receive job interviews in certain sectors.[8] Given that employment discrimination affects a much larger

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Marriage Act that defined "marriage" as a legal union between "one man and one woman as husband and wife" (internal quotation marks omitted)). For an examination of court decisions striking down state marriage bans, see *infra* Subsection III.A.1 and accompanying discussion.

3. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (explaining that employment protections under Title VII do not extend to people "based on their sexual preferences"); *see also* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 722 (2014) (noting consistency on the issue among federal courts).

4. *Compare* Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES (Jan. 16, 2015), http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html?_r=0 (noting that the number of jurisdictions that have adopted same-sex marriage is rapidly expanding), *with* Soucek, *supra* note 3, at 722 ("[F]ederal courts have almost universally refused to derive protection for sexual orientation from Title VII's 'sex' prong."). *See, e.g.*, Caroline J. Lindberg, Comment, Lisa Grant v. South-West Trains*: The Limited Utility of Sex Discrimination Arguments in Securing Lesbian and Gay Rights*, 12 TEMP. INT'L & COMP. L.J. 403, 421 (1998) ("For example, a lesbian living in Hawaii might well be entitled to legally marry her partner, but in the absence of protection for sexual orientation, she could be summarily fired when she sends her boss an invitation to her wedding and he discovers that she is a lesbian.").

5. *See, e.g.*, Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1236–37 (2010) (discussing analogies between same-sex marriage and the civil rights movement).

6. *See generally* PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 9 (2013) (internal quotation marks omitted), *available at* http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf (outlining policy priorities within the gay community).

7. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 721 (2012) (summarizing data on discrimination against gay workers).

8. András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 614 (2011) (examining sexual orientation discrimination in American labor markets).

share of the gay population, it is unsurprising that many gay individuals rank workplace protections above marriage rights.[9] After all, not everyone wants a state-sanctioned marriage, but everyone wants to hold down a job.[10]

This Article considers the relationship between same-sex marriage and workplace protections. Although proponents of gay marriage often contend that marriage rights will lead to other civil rights,[11] this Article outlines the challenges of parlaying the success of *Obergefell* to other areas. Unfortunately, proponents of same-sex marriage—despite their success—have not devised an antidiscrimination framework that easily extends beyond the marriage context to other important civil rights such as employment and housing. In short, movement lawyers won in court by presenting a "just like you" image of homosexuality to judges that focused on gay couples' long-term commitment, professional careers, and children.[12] These "safe," undifferentiated images intentionally downplayed issues of sexuality, gender, and diversity within the gay community while placing the importance of marriage above other interests.[13]

Although this strategy yielded remarkable success on the marriage front, it presents serious challenges in the employment context. To explain why, this Article contrasts the image of the non-threatening gay couple presented in marriage cases with various gay figures that appear in employment discrimination decisions. Since the Supreme Court recognized same-sex harassment as a form of sex discrimination over fifteen years ago,[14] two exceptions have emerged to the general rule that an employee's sexual orientation is irrelevant to liability under Title VII of the Civil Rights Act of 1964 (Title VII).[15] This Article identifies a

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9. *See* Brandzel, *supra* note 1, at 189 (noting commentary that "only a few stand to benefit" from same-sex marriage).

10. *See* Josh A. Goodman, *Marriage Equality as a Catalyst for Full LGBT Equality?*, HUFFINGTON POST (May 26, 2013, 5:12 AM), http://www.huffingtonpost.com/josh-a-goodman/marriage-equality-as-a-catalyst-for-full-lgbt-equality_b_2946588.html (discussing priorities within the gay-rights movement).

11. *See* Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 272 (2013) (examining the categorization of marriage as a central civil rights issue for gay individuals).

12. *See* Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 170 (2009) (analyzing the "normalizing rhetoric" utilized by same-sex marriage advocates).

13. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239–40 (2006) [hereinafter Franke, *Politics*] (critiquing the cabined presentation of gay identity within the same-sex marriage movement).

14. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

15. *See* 42 U.S.C. § 2000e-2 (2012) (enumerating the protected classes of "race, color, religion, sex, or national origin"); Johnson v. Hondo, Inc., 125 F.3d 408, 415 (7th Cir. 1997) (discussing the irrelevance of sexual orientation to Title VII).

"predatory gay" exception to Title VII that rejects the relevance of a straight harasser's sexual orientation but focuses intently on a gay harasser's sexual orientation.[16] Conversely, this Article outlines an "effeminate victim" exception that prevents gay men from winning Title VII harassment claims unless they can prove separately that they are exceptionally effeminate.[17] A less common but still present "masculine victim" exception exists for lesbians as well.[18]

Put together, these exceptions paint a picture of gay workers that starkly contrasts with the representations of gay plaintiffs in same-sex marriage decisions such as *Obergefell*. Sexualized and aggressive on one hand, while soft-spoken and weak on the other, the gay figures of Title VII tap into age-old tropes that associate homosexuality with danger, predation, and deviancy.[19] Indeed, the menacing gay figures of employment law might appear unrecognizable or, even worse, frightening to the happy, ordinary couples of same-sex marriage.

The benign imagery of the same-sex marriage campaign has enabled courts to emphasize the primacy of marriage without delving into more complicated issues of gender, sex, and sexuality.[20] But without a vision of equality that connects sexual orientation discrimination to larger systems of gender construction, the expansion of gay civil rights may end at marriage.[21] This Article seeks to avoid such a result by drawing renewed attention to the sex discrimination attack on sexual orientation discrimination.[22]

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16. *See, e.g.*, Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 186, 188 (5th Cir. 2012) (basing liability on evidence that an accused same-sex harasser had "sexual interest in males" (internal quotation marks omitted)), *cert. denied*, 133 S. Ct. 162 (2012); *see also* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 583–84 (2013) (discussing heteronormative presumptions in Title VII).

17. *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) (affirming gay victim's harassment claim); Soucek, *supra* note 3, at 732–37 (discussing the importance of perceived effeminacy in Title VII case law).

18. *See infra* Section II.B and accompanying discussion of lesbian plaintiffs in Title VII cases.

19. *See* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1335–36 (2011) (outlining common cultural assumptions associated with gay identity).

20. *See* Adler, *supra* note 12, at 170 (discussing the discursive strategies used by advocates of same-sex marriage).

21. *See id.* (examining the obfuscating effects of formal equality).

22. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 197–98 (1994) [hereinafter Koppelman, *Sex Discrimination*]; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 231. *See generally* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995) (distinguishing between the concepts of gender and sex).

According to the sex discrimination argument, when states (and private employers) discriminate against gay individuals, they do so not only because of their sexual orientation but also because of their sex.[23] For example, discriminating against a woman because she chooses a female partner is simply a form of sex discrimination because the state or her employer would not have taken the adverse action against her had she been a man with a female partner. In other words, but for the plaintiff's sex, the state would not have engaged in discriminatory acts and her employer would have refrained from harassing her.

Even though courts have not yet widely embraced this theory, judges in recent gay-rights decisions have begun to connect sexual orientation discrimination to sex discrimination.[24] Likewise, the U.S. Equal Employment Opportunity Commission (EEOC)—the agency that enforces Title VII—has recently taken the rather dramatic step of prosecuting sex discrimination claims on behalf of gay workers even though Title VII does not explicitly prohibit sexual orientation discrimination.[25] Although scholars have separately considered the sex discrimination argument in the contexts of marriage[26] and employment,[27]

23. Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 108–09 (2002); Koppelman, *Sex Discrimination*, *supra* note 22, at 199, 203 (discussing the stigmatization of sexual minorities in American society); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462, 464 (2007) (examining the contours of the sex discrimination argument).

24. *See, e.g.*, Terveer v. Billington, 34 F. Supp. 3d 100, 105–06 (D.D.C. 2014) (affirming a gay plaintiff's hostile work environment theory under Title VII); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206–07 (D. Utah 2013) (finding that a state amendment's ban on same-sex marriage discriminates on the basis of sex), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

25. *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, *available at* http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm (last visited Feb. 22, 2015) ("Lesbian, gay and bisexual individuals may also experience sex discrimination, including sexual harassment or other kinds of sex discrimination." (citation omitted)); Michel Martin, *Equal Employment Agency No Longer Turning Away Gay Discrimination Claims*, NPR (Apr. 2, 2014, 11:47 AM), http://www.npr.org/2014/04/02/298328951/equal-employment-agency-no-longer-turning-away-gay-discrimination-claims (summarizing the agency's policy change).

26. *See* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 103 (2005); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1199–2000 (2010) [hereinafter Case, *Have to Lose*]; Clark, *supra* note 23, at 108–09; William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085 (1999); Koppelman, *Sex Discrimination*, *supra* note 22, at 197–98; Widiss et al., *supra* note 23, at 461–62. For critics of this approach, see MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 471 (2001).

27. *See, e.g.*, Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v.

this Article evaluates the theory across multiple legal fields. By applying the sex discrimination argument to different forms of discrimination against sexual minorities, this Article explains how the theory's universalism constitutes its greatest strength.

The sex discrimination argument offers several practical and theoretical benefits over other approaches to gay civil rights. For example, instead of categorizing marriage as a stand-alone right that courts should elevate above all others, the sex discrimination argument recasts all state action based on sexual orientation as just another form of sex discrimination, placing sexual orientation discrimination within a settled constitutional framework that triggers heightened scrutiny in a variety of contexts.[28] Likewise, because courts interpret constitutional claims alleging intentional sex discrimination coextensively with Title VII,[29] a decision applying the sex discrimination argument to various instances of state discrimination against sexual minorities in areas such as housing, education, or adoption[30] would effectively extend Title VII protections to gay workers as well.[31]

Beyond the practical significance of such an approach, the theory draws critical attention to the fact that any regulation of sexual activity (whether by the government or private employers) works to reinforce gender stereotypes about how men and women ought to behave. For example, if the government extends certain rights to heterosexual women that it denies to lesbians, the state effectively regulates female sexual

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Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1334–35 (2014) [hereinafter Case, *Legal Protections*]; Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 207–08 (2009); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1703–04 (2002); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1158–59 (1991).

28. *See* Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 536 (2001) [hereinafter Koppelman, *A Reply to Stein*] (summarizing the reach of the sex discrimination argument); Koppelman, *Sex Discrimination*, *supra* note 22, at 284–85 ("In short, any state action that discriminates against lesbians and gay men solely because they are gay is impermissible.").

29. *See* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 638 (1992) (discussing various applications of the sex discrimination argument); Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUM. J. GENDER & L. 1, 23 (2007).

30. *See generally* Jack M Balkin, Obergefell *and Equality*, BALKINIZATION (June 28, 2015, 1:58 PM), http://balkin.blogspot.com/2015/06/obergefell-and-equality.html (considering the application of *Obergefell* to instances of state discrimination).

31. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135–36 (1976) (noting the overlap between sex discrimination under Title VII and the Equal Protection Clause); Mange, *supra* note 29, at 24 (same); *see also infra* Subsection III.A.2 and accompanying discussion of the relationship between Title VII and equal protection.

behavior by restricting benefits only to those women who conform to the gender stereotype that requires women to desire men. In the Title VII context, the effeminate victim exception reinforces the gender stereotype that equates effeminacy with homosexuality. These gender norms do not exempt straight workers either. For example, the cultural expectation of opposite-sex desire calls upon straight employees to prove their heterosexuality at work through acts such as talking about their love lives and displaying pictures of their partners on their desks.[32] Workers who do not conform to these norms are subject to sanctions by employers and coworkers who police gendered behavior at work and punish "suspected" homosexuals.[33] In sum, the sex discrimination theory brings critical attention to numerous gender-based rules and expectations that limit the autonomy of all individuals in public and private spheres.

Part I of this Article discusses the successful strategic approach that same-sex marriage advocates utilized to portray gay couples as ordinary plaintiffs who sought access to one of the "basic civil rights of man."[34] Contrasting the discursive structures of marriage equality with those of Title VII, Part II explains how federal law does not simply *fail* to protect sexual minorities from discrimination. Indeed, by punishing accused harassers who come out as gay while "rewarding" those gay plaintiffs who conform to society's preconceived notions of homosexuality, Title VII actually creates powerful incentives for gay employees to adhere to gendered expectations at work.[35] Part III explains why the sex discrimination argument constitutes a potent tool for challenging gender stereotypes on multiple legal fronts. Rather than bury gay sexual identity—as proponents of marriage equality tended to do—the sex discrimination argument represents a more promising route going forward by providing courts with a mechanism for finally considering how presumptions of heterosexuality limit the individual freedom of gay and straight individuals alike.[36]

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32. Kramer, *supra* note 27, at 228 (discussing the cultural ubiquity of heterosexuality).

33. *See infra* Section II.A and accompanying discussion of the interaction between Title VII jurisprudence and workplace norms.

34. Complaint for Declaratory, Injunctive, or Other Relief at 1, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. May 22, 2009) (No. CV09-2292VRW), 2009 WL 1490740 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)) (internal quotation marks omitted); *see also* Obergefell v. Hodges, No. 14-556, slip op. at 6 (U.S. June 26, 2015) ("Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.").

35. *Cf.* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 813 (2002) (discussing cultural pressures placed on lesbians and gay men to "act[] straight").

36. *See* Appleton, *supra* note 26, at 124 (explaining how the sex discrimination argument highlights universal harms).

Because the Supreme Court has long prohibited states and employers from policing the behavior of men and women based on gendered presumptions,[37] the sex discrimination argument constitutes the best vehicle for highlighting the gender stereotypes manifest in sexual orientation discrimination. The cultural imperative requiring individuals to choose only partners of the opposite sex remains our society's most enduring gender stereotype. Until that presumption is properly recognized as sex discrimination, dissonant pictures of wedding cakes and predators will continue to dominate gay imagery in the law.

I. THE MARRIAGE EQUALITY NARRATIVE

Advocates for gay civil rights did not always prioritize same-sex marriage.[38] After the Stonewall protests of 1969 and the birth of the modern gay rights movement, activists established a reform agenda that included abolishing anti-sodomy laws, passing hate-crimes legislation, and expanding employment protections for gay workers.[39] Indeed, during the early waves of modern gay-rights activism, if the topic of same-sex marriage came up at all, advocates dismissed the notion as either hopelessly unattainable or dangerously assimilationist.[40]

But when the Hawaii Supreme Court shocked the nation in 1993 and ruled in favor of Nina Baehr's petition to marry her female partner in *Baehr v. Lewin*,[41] the issue of same-sex marriage drew prominent national attention.[42] Even then, though, many gay advocacy groups came to the movement kicking and screaming. In fact, so-called "boardroom gay" organizations like Lambda Legal and the ACLU had specifically urged

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37. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982) (holding that "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females").

38. Patrick J. Egan & Kenneth Sherrill, *Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays*, 38 POL. SCI. & POL. 229, 229 (2005) (noting that gay-rights organizations did not prioritize same-sex marriage until recently).

39. *See id.* (outlining policy changes pursued by gay activists); *see also* WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE 241–45 (2006) (discussing the evolution of gay civil rights); Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L.J. 1989, 1997 (2012) (noting changes among gay-rights activists toward the issue of same-sex marriage).

40. Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U. L. REV. 467, 475–77 (2012) (discussing changes in tactics among mainstream gay-rights organizations).

41. *See* 852 P.2d 44, 67–68 (Haw. 1993).

42. Hillel Y. Levin, *Resolving Interstate Conflicts over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47, 60 (2011) (asserting that *Baehr* "open[ed] the door" for state recognition of same-sex marriage); *see also* Michael J. Klarman, *Judicial Statesmanship: Justice Breyer's Concurring Opinion in* Van Orden v. Perry, 128 HARV. L. REV. 452, 454 (2014) (describing the national reaction following *Baehr*).

Baehr *not* to file her claim.[43] Believing that the United States was not ready for gay marriage, Lambda Legal joined *Baehr* only after the state's highest court announced its plans to evaluate the merits of Baehr's claims.[44]

In many ways, these groups' reluctance to force change through litigation was based on a well-founded fear of public backlash.[45] For example, soon after *Baehr*, Congress passed the Defense of Marriage Act (DOMA), which limited the federal definition of marriage to opposite-sex couples.[46] In addition, states followed suit and passed "mini-DOMAs" of their own.[47] Reflecting the ongoing concern for avoiding public backlash, litigation on the marriage front following these developments oscillated between cases carefully selected by national organizations and other suits instigated by non-movement lawyers.[48]

The most famous example of non-movement-initiated litigation was *Perry v. Schwarzenegger*,[49] the constitutional challenge to California's Proposition 8. In May 2009, Ted Olson and David Boies—prominent national lawyers who had faced each other in *Bush v. Gore*[50]—announced that they would pursue a constitutional case for same-sex marriage in federal court.[51] To mainstream gay-rights groups that had focused on incremental change through public education and state court litigation, Boies and Olson's federal lawsuit represented a risky move.[52] In fact, just days before Boies and Olson filed their complaint in *Perry*, advocacy groups issued a joint statement entitled, "Why the ballot box and not the

43. NeJaime, *Before Marriage*, *supra* note 1, at 105–06.

44. Cummings & NeJaime, *supra* note 5, at 1250; NeJaime, *Before Marriage*, *supra* note 1, at 105–06; Egan & Sherrill, *supra* note 38, at 229.

45. Cummings & NeJaime, *supra* note 5, at 1250.

46. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)); United States v. Windsor, 133 S. Ct. 2675, 2682 (2013) (discussing DOMA's legislative history).

47. Brandzel, *supra* note 1, at 180 (reviewing the history of state marriage restrictions).

48. *See* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 31–33 (2010) (examining same-sex marriage litigation strategies); *see also* Cummings & NeJaime, *supra* note 5, at 1245 (emphasizing the distinction between movement and non-movement lawyers).

49. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *see also* Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 618 (2014) (discussing the trajectory of the *Perry* litigation).

50. 531 U.S. 98 (2000); Cummings & NeJaime; *supra* note 5, at 1299.

51. Cummings & NeJaime, *supra* note 5, at 1299–1300 (discussing gay-rights groups' reaction to the announcement).

52. Andrew Koppelman, *Salvaging* Perry, 125 HARV. L. REV. F. 69, 69–70 (2012) (explaining why the *Perry* lawsuit dismayed mainstream gay-rights groups).

courts should be the next step on marriage in California."[53] Realizing that the stakes were too high to stay out of the case altogether, however, movement lawyers provided behind-the-scenes support after Boies and Olson proceeded with *Perry* anyway.[54] To a large degree, the combined efforts of movement and non-movement lawyers in *Baehr*, *Perry*, and other cases laid the foundation for the Supreme Court's final validation of same-sex marriage in *Obergefell*.[55] Setting the stage for the Court's ultimate ruling on the issue, movement lawyers tactically crafted their arguments to appeal to a hesitant judiciary by carefully selecting model plaintiffs and sympathetic stories.[56]

A. *The Ordinary Gay Couples of* Obergefell *and* Windsor

Obergefell's historic ruling in favor of same-sex-marriage embraced a long-running discursive strategy that focused on the stories of likeable, committed same-sex couples.[57] Writing for the *Obergefell* majority, Justice Anthony Kennedy explained how James Obergefell and John Arthur had met two decades earlier, "started a life together," and "establish[ed] a lasting committed relationship."[58] After John fell ill from ALS, the couple decided to wed. Because their home state of Ohio banned same-sex marriages, the couple flew in a medical transport plane to Maryland, which, unlike Ohio, recognized their union.[59] Due to his failing health and physical inability to leave the plane, John married James on the tarmac in Baltimore.[60] When John died three months later, however, Ohio refused to list James as John's surviving spouse.[61]

Prior to his death, John anticipated this situation and said: "I love

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53. *Why the Ballot Box and Not the Courts Should Be the Next Step on Marriage in California*, ACLU (May 2009), https://www.aclu.org/sites/default/files/field_document/ballot_box_20090527.pdf.

54. Douglas NeJaime, *The View from Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 UCLA L. REV. DISCOURSE 182, 192 (2013) (discussing the litigation history of *Perry*).

55. Obergefell v. Hodges, No. 14-556, slip op. at 28 (U.S. June 26, 2015); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (legalizing same-sex marriage); Baker v. State, 744 A.2d 864, 889 (Vt. 1999) (legalizing civil unions); *see also infra* Subsection III.A.1 and accompanying discussion of recent rulings on same-sex marriage; Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17, 19–20 (2014) (summarizing developments in same-sex marriage litigation).

56. Levit, *supra* note 48, at 22–23 (discussing the theoretical tensions raised by litigation strategies).

57. *Obergefell*, slip op. at 4–6.

58. *Id.* at 4.

59. *Id.* at 4–5.

60. *Id.*

61. *Id.* at 5.

[James] and want our last days together to be a celebration of our love. How can we celebrate when Ohio law requires that my death certificate say I am not married and that I have no surviving spouse?"[62] Characterizing the outcome as a "state-imposed separation," Justice Kennedy explained how Ohio's same-sex marriage ban caused the couple to "remain strangers even in death."[63] According to Justice Kennedy, the Fourteenth Amendment prevents states from injuring couples like John and James in this way. As such, the *Obergefell* Court held that the Constitution required Ohio to extend the fundamental right of marriage to same-sex couples on equal terms with opposite-sex couples.[64]

This was not the first time that Justice Kennedy had reflected on the costs of marriage restrictions. He had utilized a similar narrative trend to highlight the harm that these limits placed on ordinary, same-sex couples in *United States v. Windsor*[65]—the Supreme Court decision that predated *Obergefell* by two years.[66] "Edie," as Edith Windsor's lawyers referred to her before the trial court, married Thea Clara Spyer.[67] Her brief stated:

> Prior to Thea's death in February 2009, Edie and Thea spent over four decades together in a loving, committed union . . . . [W]hile grieving the loss of the love of her life, Edie also had to face the injustice of the federal government's refusal to recognize her marriage.[68]

Thus, Edith Windsor's lawyers articulated their client's harm in both dignitary and monetary terms. In addition to enduring the loss of a four-decade-long, loving union, Edith had to pay $363,053 in estate taxes that would not have come due had the federal government accepted her marriage to Thea.[69]

Reviewing her claim in *Windsor*, Justice Kennedy explained how the couple had "met in New York City in 1963 and began a long-term relationship."[70] Justice Kennedy noted that New York had already recognized their union and that the two women welcomed the "rights and

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62. Brief of Plaintiffs–Appellees at 7, Obergefell v. Himes, No. 14-3057, 2014 WL 1745560 (6th Cir. Apr. 24, 2014), *cert. granted*, *sub nom*. Obergefell v. Hodges, 135 S. Ct. 1039 (Jan. 16, 2015), *rev'd* slip op. at 28.

63. *Obergefell*, slip op. at 5.

64. *Id.* at 22–23.

65. 133 S. Ct. 2675 (2013).

66. *Id.*

67. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. June 24, 2011) (No. 10 Civ. 8435(BSJ)(JCF)), 2011 WL 3165327 [hereinafter *Windsor* Plaintiff's Memorandum of Law].

68. *Id.*

69. *See Windsor*, 133 S. Ct. at 2683.

70. *Id*.

responsibilities" that came with marriage.[71] According to Justice Kennedy, under such circumstances the Fifth Amendment prohibited the federal government from "demean[ing] the couple, whose moral and sexual choices the Constitution protects."[72]

Without question, *Obergefell*'s reference to the "grave and continuing harm"[73] caused by marriage restrictions and *Windsor*'s affirmation of same-sex couples' "personhood and dignity"[74] constituted major victories for sexual minorities. At the same time, however, the context in which James Obergefell and Edith Windsor secured those rights bears noting. As framed by her lawyers, Edith Windsor's claim centered on the loss of the "love of her life" and the tangible economic harm she suffered due to the government's refusal to honor that loss.[75] Likewise, James Obergefell described the damage caused by Ohio's marriage restriction in non-economic terms. As he stated shortly before his husband's death: "[T]his is about more than money or benefits. John will die soon. I love him deeply; more than any other person on earth. I want the world to know that we share the highest commitment two people can make to each other in our society."[76]

By emphasizing the real-world consequences of discrimination (both romantic and financial), parties in these cases framed their injuries in terms of relationships that could not have been more traditional, but for their sexual orientation.[77] In the worlds described in *Obergefell*, *Windsor*, and other recent same-sex marriage decisions, gay couples fall in love, grow old together, and support each other through illness. In large part, this choice of frames represented a pragmatic litigation tactic. Minority groups have often attempted to gain social acceptance by tapping into shared cultural values and downplaying differences.[78] According to this strategy, if courts view plaintiffs through culturally intelligible frames, then decision makers can better comprehend gay couples' demands for recognition.[79] Thus, to the extent that these frames emphasized the

71. *Id.* at 2694.

72. *Id.* (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

73. Obergefell v. Hodges, No. 14-556, slip op. at 22 (U.S. June 26, 2015).

74. *Windsor*, 133 S. Ct. at 2696.

75. *Windsor* Plaintiff's Memorandum of Law, *supra* note 67, at 1.

76. Brief of Plaintiffs–Appellees at 8, Obergefell v. Himes, No. 14-3057, 2014 WL 1745560 (6th Cir. Apr. 24, 2014) (alteration in original), *cert. granted*, *sub nom*. Obergefell v. Hodges, 135 S. Ct. 1039 (Jan. 16, 2015), *rev'd* slip op. at 28.

77. Peter Applebome, *Reveling in Her Supreme Court Moment*, N.Y. TIMES, Dec. 11, 2012, at A24 (discussing the factual background of *Windsor*).

78. Nosanchuk, *supra* note 39, at 1994–95 (discussing debates within the gay community over conformity).

79. *See* Yoshino, *supra* note 35, at 930 (examining instances of assimilation in American law).

presence of long-term intimate bonding within the gay community, such narratives helped counteract a reductive view of homosexuality that focused exclusively on sexual acts.[80]

But a strategy that embraces essentialized representations of homosexuality also has its costs. For example, choosing a frame that emphasizes gay couples' ordinary existence can mask cultural rules related to gender and sexuality that ultimately drive discriminatory acts against gay individuals.[81] In addition, the characterization of marriage as the springboard to public acceptance suggests that once sexual minorities have access to this "rewarding and cherished institution"[82]—as they do now—then the gay community will have won the battle for equality. In the process, this narrative risks obscuring the animating cause of discrimination against lesbians and gay men while diverting energy away from other important goals such as combating workplace discrimination.[83]

B. *Narrative Costs: Concealing Sexuality, Deprioritizing Other Rights*

Although the current rhetorical approach to same-sex marriage has yielded tremendous success in the courtroom, any litigation strategy comes with tradeoffs. The most fundamental tradeoff involves rights and freedoms that individuals may sacrifice in exchange for marriage. Indeed, prior to *Obergefell*, legal scholars frequently questioned whether the gay community should pursue same-sex marriage at all.[84] These debates largely separated those thinkers who favored integration from those who espoused a more radical perspective on the state's ability to favor certain relational forms over others.[85]

Professors Nan Hunter and William Eskridge, for example, supported same-sex marriage but also acknowledged the gendered baggage that came with the institution.[86] Professor Hunter argued that same-sex

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80. *See id.* at 847–48.

81. Levit, *supra* note 48, at 37–38 (discussing the topic of sexuality in the same-sex marriage setting).

82. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

83. GARY MUCCIARONI, SAME SEX, DIFFERENT POLITICS, at ix (2008) (examining the categorization of marriage as a primary gay civil right and the risk that, through such categorization, the gay community may lose sight of the "many other important goals of the gay rights movement").

84. William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1355–58, 1360 (2010) (discussing debates over assimilation among feminists, queer theorists, and trans theorists).

85. *Id.*

86. William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason*: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 353, 356 (1992) [hereinafter Eskridge,

marriage can "denaturalize the historical construction of gender at the heart of marriage."[87] Similarly, Professor Eskridge believed that gay marriage had the potential to erode gender hierarchies within marriage.[88]

On the other hand, Professor Katherine Franke expressed skepticism toward a vision of liberty that exposed sexual minorities to state control.[89] She questioned a political movement that enabled state players to favor only those personal associations that conformed to a predefined notion of legitimacy.[90] Likewise, Professor Nancy Polikoff expressed deep reservations about a marriage strategy that analogized gay relationships to heterosexual marriages while failing to attack the gendered structures of the institution.[91] But even these skeptics acknowledged that, as long as marriage existed as a legal form, the state should at least extend rights to gay couples in a nondiscriminatory fashion.[92]

Although the foregoing debate often focused on *whether* the gay community should pursue same-sex marriage, it also informs the present analysis of the effect that the fight for same-sex marriage has had on other civil rights such as employment protections. Just as Professor Franke critiqued same-sex marriage for privileging certain family forms over others,[93] advocates for marriage equality privileged certain legal rights over others. For example, by repeatedly categorizing marriage as the gay community's ultimate civil right, the campaign for same-sex marriage ranked the rights of gay individuals just as some scholars feared that it ranked family forms.

Proponents of same-sex marriage often implied or directly asserted that once they prevailed on this issue then the gay community would

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Gaylegal Agenda] (book review); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY REV. 9, 18 (1991) [hereinafter Hunter, *Marriage Law*] (explaining how legalization may threaten gender systems).

87. Hunter, *Marriage Law*, *supra* note 86, at 18; Nosanchuk, *supra* note 39, at 2006 (examining Hunter's contention that same-sex couples can reform marriage).

88. Eskridge, *Gaylegal Agenda*, *supra* note 86, at 356.

89. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1426 (2004) (examining the legal regulation of sexual behavior).

90. Franke, *Politics*, *supra* note 13, at 240 (critiquing the gay community's "desire for governance").

91. Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993) (arguing that the underlying critique of gender roles stemming from the institution of marriage becomes "not only secondary but marginalized, even silenced").

92. *See* Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2687 (2008) [hereinafter Franke, *Longing*]; Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 53–54 (2011) (discussing debates among gender theorists over same-sex marriage).

93. *See* Franke, *Longing*, *supra* note 92, at 2689; Franke, *Politics*, *supra* note 13, at 245.

prevail completely.[94] This conclusion flowed logically from the characterization of marriage equality as "the last great civil rights struggle."[95] Indeed, the Supreme Court echoed this sentiment when it ruled in favor of same-sex marriage in *Obergefell*. Describing the "transcendent importance of marriage," Justice Kennedy used almost poetic language to explain how marriage rises "from the most basic human needs" and "is essential to our most profound hopes and aspirations."[96] But with marriage placed on such a high civil-rights pedestal, what do lesbians and gay men fight for now that they have attained that right? Professor Patricia Williams has discussed the value of becoming "multilingual in the semantics of evaluating rights."[97] Yet the modern discourse over gay rights has become monolingual in its singular fixation on one right—marriage—at the cost of downplaying other interests such as employment protections that remain vitally important to gay individuals.[98]

The gloss of formal equality provided by the same-sex marriage narrative has given rise to the false impression that lesbians and gay men uniformly prioritize that right above all others.[99] But even a cursory look at the diverse needs and desires of the gay community demonstrates the continuing importance of employment protections to gay workers. For example, in 2003—the same year that Massachusetts became the first state in the nation to legalize same-sex marriage[100]— lesbian, gay, bisexual, and transgender (LGBT) Americans responded to a national survey asking them to rank their policy priorities. All respondents, across every age category, listed "workplace discrimination" as their top problem.[101] Young LGBT respondents ranked "civil marriage" as the third-most-important right, and older LGBT respondents did not even list

94. Adler, *supra* note 12, at 187–88 (outlining predictions made by proponents of same-sex marriage).

95. Cummings & NeJaime, *supra* note 5, at 1236 (internal quotation marks omitted); *see also* Michael Joseph Gross, *Gay Is the New Black?*, ADVOCATE (Nov. 16, 2008, 12:00 AM), http://www.advocate.com/print/news/2008/11/16/gay-new-black (referencing cover).

96. Obergefell v. Hodges, No. 14-556, slip op. at 3 (U.S. June 26, 2015).

97. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 149 (1991).

98. *See* Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 319, 322–24 (1998) (critiquing the "strategic essentialism" of marriage advocacy); *id.* at 326 ("The energy being placed into seeking marriage benefits is overshadowing, and it is sacrificing other important material goals . . . .").

99. *See* Feinberg, *supra* note 11, at 258 ("There is far from universal agreement within the LGBT rights movement, however, regarding the prioritization of marriage equality."); Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 85 (2013) (summarizing the concern that same-sex marriage will yield only "surface change").

100. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).

101. Egan & Sherrill, *supra* note 38, at 231 tbl.3.

marriage as a top-five priority.[102] A decade later, the importance of employment protections did not change. Even with massive media attention and a cascade of favorable court rulings, fifty-seven percent of LGBT respondents still listed workplace rights as a "top priority."[103]

This widespread support for employment protections among the gay community challenges the standard characterization of marriage as the ultimate right from which all other rights flow. Indeed, many gay employees have practical reasons for caring more about nondiscrimination rules on the job. As noted above, sexual orientation discrimination remains regrettably common in American workplaces.[104] This reality disproportionally affects economically vulnerable gay workers who cannot afford to reveal their sexual orientation on the job (let alone get married) until they have some measure of security that doing so will not cost them their livelihoods.[105] What lesbian employee, for example, would publicly exchange vows with her partner on Saturday if her boss could legally fire her the following Monday? In this sense, marriage rights and employment rights interrelate. As sexual minorities enjoy more protections in diverse settings, they gain cultural legitimacy and the confidence to claim those rights.[106] History shows as much: The pioneering states that first extended marriage rights to same-sex couples did so only *after* they had first enacted workplace nondiscrimination laws.[107] The connection between the two sets of protections demonstrates how, contrary to common belief, marriage is not simply an umbrella protection that stands above all others.

In addition to distorting the regulatory needs of gay individuals, the current marriage narrative has masked the sexual identity of the individuals involved. This was true even in marriage decisions that fully validated the dignitary interests of gay couples. For example, in *Goodridge v. Department of Public Health*,[108] the first state decision legalizing same-sex marriage, the Massachusetts Supreme Judicial Court described how the couples petitioning for marriage went to church and

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102. *Id.*

103. PEW RESEARCH CTR., *supra* note 6, at 9 (reporting that fifty-three percent of LGBT respondents listed same-sex marriage as a "top priority").

104. *See* Pizer et al., *supra* note 7, at 721 (discussing rates of workplace discrimination against sexual minorities); Tilcsik, *supra* note 8, at 614 (same).

105. *See* Foster, *supra* note 98, at 325–27 (considering potential costs that members of the gay community may experience from "coming out").

106. MUCCIARONI, *supra* note 83, at 2 (examining the cultural meaning of gay civil rights).

107. E.J. Graff, *Free to Work, Free to Marry*, AM. PROSPECT (May 14, 2013), http://prospect.org/article/free-work-free-marry (outlining the relationship between workplace rights and marriage rights for the gay community).

108. 798 N.E.2d 941 (Mass. 2003).

were "educators, therapists, and a computer engineer."[109] Similarly, in *Bishop v. Smith*,[110] a significant federal appellate court decision that immediately preceded *Obergefell*, the U.S. Court of Appeals for the Tenth Circuit explained how "Mary Bishop and Sharon Baldwin are in a long-term committed relationship and seek to marry. They live together in Tulsa County, Oklahoma, where they both work for the *Tulsa World* newspaper[, and] [t]hey jointly own their home and other property."[111] Through these vignettes, readers learned many details about the couples' lives—their workplaces, their interests, their church-going habits—but very little about their same-sex desires.[112]

This is not to say that such decisions entirely ignored the parties' sexuality. For example, *Windsor* acknowledged the "moral and sexual choices" of the individuals involved[113] and *Obergefell* mentioned the growing recognition that "sexual orientation is both a normal expression of human sexuality and immutable."[114] But such references were relatively rare in most same-sex marriage decisions, which, if they made allusions to same-sex desire at all, still focused more intently on the parties' ordinary, day-to-day lives.

By sidestepping the issue of sexuality, litigants hoped to redirect attention away from the bedroom to a broader discussion of the gay community's right to equal citizenship.[115] But given that sexual orientation discrimination is rooted in social disapproval of homosexuality, this tactic failed to interrogate the motivations behind anti-gay bias.[116] In fact, the strategic decision to avoid speaking of gay sex may have ultimately reinforced the historical taboo associated with

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109. *Id.* at 949–55; Adler, *supra* note 12, 168–71 (discussing images of gay plaintiffs in *Goodridge*).

110. 760 F.3d 1070, 1074 (10th Cir. 2014).

111. *Id.*

112. *See* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 247 (2013) (discussing the vision of marriage presented in *Windsor*).

113. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

114. Obergefell v. Hodges, No. 14-556, slip op. at 8 (U.S. June 26, 2015) (citing Brief for Am. Psychological Ass'n et al. at 7–17, Obergefell v. Hodges, No. 14-556, 2015 WL 1004713 (Mar. 6, 2015)).

115. *See* Soucek, *supra* note 3, at 782 (explaining the litigation tactic of downplaying differences).

116. Katherine Turk, *"Our Militancy Is in Our Openness": Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law*, 31 LAW & HIST. REV. 423, 451 (2013) (discussing the history of obtaining employment protections for sexual minorities in California).

discussing homosexual acts.[117] By relegating gay sexuality to the realm of the "unspeakable," the unnamed acts became all the more prominent.[118] Rather than taking advantage of the chance to characterize gay sexuality as a normal human condition, the silence in some marriage cases sent the countervailing message that states should extend marriage rights to gay couples *despite* their sexuality. Although courts and advocates may have believed that ignoring same-sex desire represented the path of least resistance to attaining public acceptance, this strategy of gay erasure complicates the task of extending marriage victories to other civil rights contexts.[119]

Indeed, as the following employment law decisions make clear, when advocates refrain from telling stories related to gay sexuality, others will tell those stories for them. In contrast to today's historic marriage rulings, modern workplace discrimination cases involving gay parties do not bury gay sexuality, but, instead, highlight it. Gay figures are not innocuous, but instead seen as threatening and deviant.[120] Thus, the project of extending employment rights to gay workers is as much about reinterpreting doctrine as it is about retelling stories in a way that no longer relies on reductive representations of same-sex desire. To understand the different discursive challenges present in employment law—as compared to same-sex marriage jurisprudence—the existing stories of workplace discrimination must first be told.

II. EMPLOYMENT INEQUALITY: THE SEXUALIZED NARRATIVE OF GAY HARASSMENT

The representations of gay individuals in Title VII case law differ dramatically from marriage decisions in both discourse and rights. While the marriage cases have expanded gay rights without talking about gay sexuality, the employment cases talk about gay sexuality without expanding rights. The operation of Title VII is quite clear: Federal law does not prohibit sexual orientation discrimination.[121] If a person sues his

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117. *See* Laura I. Appleman, *Oscar Wilde's Long Tail: Framing Sexual Identity in the Law*, 70 MD. L. REV. 985, 999 (2011) (analyzing the historical prohibition against naming homosexual acts).

118. *Id.* at 999–1000 (considering the consequences of certain rhetorical strategies).

119. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 209–20 (2012) (examining the presence of gay erasure in arguments involving sexual minorities).

120. *See infra* Section II.B and accompanying discussion of representations of gay figures in Title VII cases.

121. DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979); *see also* Clare Diefenbach, *Same-Sex Sexual Harassment After* Oncale*: Meeting the "Because of . . . Sex" Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42, 77 (2007) (summarizing Title VII rulings

employer alleging that a business fired him for being gay, he will almost certainly lose. Courts that reject these claims explain that Title VII protects against sex-based discrimination and not sexual orientation discrimination.[122] Although a few recent cases have declined to put a blanket ban on sexual orientation discrimination claims, judicial authority still weighs heavily against gay plaintiffs.[123]

Over the past two decades, courts have developed two exceptions to the general rule that a party's sexual orientation is irrelevant to Title VII. Both of these exceptions have occurred in the area of sexual harassment law, a form of sex discrimination.[124] Justice Antonin Scalia crafted the first exception—this Article calls it the "predatory gay exception"—over fifteen years ago in *Oncale v. Sundowner Offshore Services, Inc.*[125] In *Oncale*, Justice Scalia said that in cases of same-sex harassment, victims can win Title VII claims by offering "credible evidence that the harasser was homosexual."[126] Plaintiffs have followed Justice Scalia's cue in the years following *Oncale*, often searching desperately for "credible evidence" of their harasser's sexuality.[127]

The second exception—this Article calls it the "effeminate victim exception"—turns the relevance of homosexuality on its head. In *Price Waterhouse v. Hopkins*,[128] Justice William Brennan explained how Title VII bars employers from engaging in sex stereotyping, which entails "evaluat[ing] employees by assuming or insisting that they match[] the stereotype associated with their group."[129] As such, Title VII forbids

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involving sexual orientation discrimination and noting that "Title VII does not protect against discrimination based on sexual orientation").

122. Simonton v. Runyon, 232 F.3d 33, 34–36 (2d Cir. 2000) (discussing the "well-settled" principle that Title VII does not prohibit sexual orientation discrimination); *DeSantis*, 608 F.2d at 329–30; *see also* 42 U.S.C. § 2000e-2 (2012).

123. *See infra* Subsection III.A.2 and accompanying discussion of the emergence of the sex discrimination argument under Title VII; *see also* Anita Bernstein, *Civil Rights Violations=Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 918 (2010) (noting the general consensus among federal judges that Title VII does not prohibit sexual orientation discrimination); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2177–78 (2007) (discussing Title VII's lack of protection against sexual orientation discrimination).

124. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–69 (1986); *see also* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 692–96 (1997) [hereinafter Franke, *What's Wrong*] (arguing that scholars and courts have failed to offer a sufficient theoretical justification for connecting sex discrimination to sexual harassment).

125. 523 U.S. 75, 79 (1998).

126. *Id.* at 80.

127. *See* Clarke, *supra* note 16, at 538–40 (discussing the judicial tendency to conflate concepts of sexuality and desire).

128. 490 U.S. 228 (1989) (plurality opinion).

129. *Id.* at 251.

employers from punishing workers for failing to adhere to gender-based expectations normally associated with their sex (e.g., women will act "femininely" and men will act "manly").[130] Applying this rule to gay victims of harassment, some courts now validate claims brought by gay men if they can prove that their effeminacy (and not their sexual orientation) caused their harassment.[131] Less common but still present are cases in which women highlight their masculine mannerisms but avoid discussing their sexual orientation.[132]

In contrast to the imagery of same-sex marriage, these cases do not bury sexuality, but instead highlight the topic. The predatory gay exception punishes a certain kind of homosexuality—predatory, aggressive, and compulsive—while the effeminate victim exception offers refuge to certain gay victims who satisfy cultural stereotypes about homosexuality.[133] Both areas of the law demonstrate the need for a refocused legal framework that can evaluate the rights of sexual minorities without relying upon reductive representations of same-sex desire.

A. *Predatory Gay Exception*

Before *Oncale*, courts differed on the question of whether Title VII applied to instances of same-sex harassment. While some courts offered limited support for such claims, others held that plaintiffs could never sue members of their own sex for sexual harassment.[134] After *Oncale* authorized such claims, gender theorists disagreed about whether gay workers benefited from the decision. Those who viewed *Oncale* as a gay-rights breakthrough claimed that plaintiffs could employ the decision to

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130. *See* Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 440 & n.41 (2010) (explaining how *Price Waterhouse* prohibited businesses from utilizing gender stereotypes against employees); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 734 (2010) (discussing *Price Waterhouse*'s potential to alter gender dynamics at work).

131. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) (critiquing the contention that only effeminate heterosexual men—not homosexual men—can bring gender stereotyping claims).

132. *See, e.g.*, Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1035–36 (8th Cir. 2010) (outlining the claim of a gender-nonconforming female plaintiff).

133. *See* Robinson, *supra* note 19, at 1341–42 (discussing common cultural assumptions about gay sexuality).

134. *See, e.g.*, Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451–52 (5th Cir. 1994); Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (barring a same-sex harassment claim brought by a male plaintiff); Jeremy S. Barber, Comment, *Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 494–95 (2002) (noting that *Oncale* eliminated the ban on recognizing same-sex harassment).

finally assert claims for sexual orientation discrimination.[135] Other scholars, however, viewed Justice Scalia's reference to "credible evidence" of a harasser's homosexuality as an ominous warning to the gay community.[136] Professor Janet Halley, for example, explained how the decision could stir "homosexual panic" at workplaces wherein self-identified "straight" employees would feel inclined to accuse gay men and lesbians of harassment.[137] Likewise, Professor Vicki Schultz feared that any desire-based approach to harassment would disadvantage sexual minorities who society still viewed as embodying "offensive sexuality."[138]

In many ways, the different predictions about *Oncale*'s effect on gay workers involved two entirely different subjects. Optimists focused on *Oncale*'s transformative potential for gay *victims* of harassment.[139] Critics focused on the magnifying effect that Justice Scalia's search for "credible evidence" of homosexuality would have on accused gay *harassers*.[140] Today, with over fifteen years of judicial decisions applying *Oncale* to same-sex harassment claims, trends in the case law show that courts have focused disproportionately on the question of whether an accused harasser is "currently a practicing homosexual."[141] In other words, even though *Oncale* articulated several evidentiary routes for proving same-sex harassment,[142] the harasser's desire for the victim still constitutes the most popular way to make out a Title VII claim in post-*Oncale* decisions.[143]

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135. *See* Barber, *supra* note 134, at 506 (examining the scholarly response to *Oncale*); Sonya Smallets, *Recent Developments*, Oncale v. Sundowner Offshore Services*: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN'S L.J. 136, 136–37 (1999) (same).

136. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

137. Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 195 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); *accord* Clarke, *supra* note 16, at 589–91 (analyzing harassment cases involving gay workers).

138. Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL'Y 417, 428–29 (2001); *see also* Mary Coombs, *Title VII and Homosexual Harassment After* Oncale*: Was It a Victory?*, 6 DUKE J. GENDER L. & POL'Y 113, 126 (1999) (discussing the risks of heightened homophobia created by *Oncale*).

139. *E.g.*, Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 3 (2004) ("As a case clarifying the rules of sexual harassment law, *Oncale* has the potential to help straight and gay victims of same-sex sexual harassment in the workplace, in schools, in public housing, even in the streets.").

140. *See* Clarke, *supra* note 16, at 590 (noting the problem that plaintiffs "are now able to subject alleged harassers to inquisition about their sexual histories and desires through discovery"); Halley, *supra* note 137, at 195 (expressing concerns that persons with "homosexual panic" may sue under *Oncale*).

141. Jones v. Potter, 301 F. Supp. 2d 1, 4 n.3 (D.D.C. 2004).

142. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

143. Diefenbach, *supra* note 121, at 49 (studying post-*Oncale* federal decisions and finding a disproportionate number of cases focusing on the harasser's sexual orientation).

So how exactly does a court find "credible evidence" of homosexuality? As one might guess, the task is not easy. The search for an alleged harasser's sexual orientation can cause plaintiffs to falsely accuse coworkers of homosexuality, while defendants can falsely deny their desire for members of the same sex. One way to prove homosexuality is to directly pose the question to the accused harasser, as one plaintiff did during discovery: "Admit or Deny that you have had sex or sexual relations with another man at any time during the period of your employment . . . ."[144] Conversely, a party can present testimony from coworkers about their views on the accused harasser's sexuality, as one employer did by collecting twelve affidavits from coworkers attesting to the defendant's straight lifestyle.[145] Unsurprisingly, definitive answers are hard to come by in these circumstances.

Oncale authorized this type of inquiry into a defendant's sexuality. Not only did the Court require "credible evidence" of homosexuality, but it also cautioned against punishing mere "horseplay" at work.[146] In practice, the "horseplay" rule opposes the "credible evidence" rule. So long as plaintiffs cannot definitively prove that defendants desired members of their own sex, courts often characterize even highly sexualized conduct as "horseplay."[147] Consider the facts of *Oncale* itself. Joseph Oncale worked on an all-male oil rig in the Gulf of Mexico.[148] Three months into his job, *Oncale* quit after two co-workers grabbed him in a shower on the employer's premises, forced a bar of soap up his anus, and threatened to rape him.[149] Unable to determine whether this incident constituted sexual harassment or horseplay, the Supreme Court remanded the case and suggested three ways that Oncale could prove the existence of same-sex harassment. He could prove that: (1) the harassers were gay; (2) the harassers were "motivated by general hostility" toward the presence of members of their own sex in the workplace; or (3) members

144. Vaughn v. St. Tammany Parish Sch. Bd., No. 04-1633, 2006 WL 950109, at *1 (E.D. La. Apr. 7, 2006) (denying motion to compel).

145. English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 846 (E.D. Va. 2002); *see also* Clarke, *supra* note 16, at 590 (discussing discovery requests involving sexual orientation).

146. *Oncale*, 523 U.S. at 81–82.

147. *See* Coombs, *supra* note 138, at 127 (examining the application of the horseplay rule to heterosexual men).

148. *Oncale*, 523 U.S. at 77.

149. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118–19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998); *see also* Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After* Oncale, 11 YALE J.L. & FEMINISM 155, 157, 159–61 (1999) (examining *Oncale*'s factual and procedural background).

of the opposite sex received better treatment from the harassers.[150] But, by process of elimination, it became clear that the first evidentiary route constituted Oncale's only viable theory on remand.[151] The second evidentiary route did not apply because no evidence demonstrated that the two attackers disliked other men, and the third evidentiary route did not apply because the all-male oil rig did not employ women who could serve as comparators.[152] Therefore, the simple question on remand was whether the shower incident constituted gay harassment or straight horseplay.

Without proof of the alleged harasser's homosexuality, judicial determinations tend to fall on the horseplay side of the line.[153] For example, in *Linville v. Sears, Roebuck & Co.*,[154] the U.S. Court of Appeals for the Eighth Circuit found that one man grabbing his coworker's scrotum multiple times was "crude" but not sexual harassment.[155] In another instance, the same court found that attempting to stick a shovel up another man's anus, among other acts, was "inappropriate and vulgar" but not harassment based on sex.[156] Likewise, in *Shafer v. Kal Kan Foods, Inc.*,[157] the U.S. Court of Appeals for the Seventh Circuit determined that a harasser who talked about having anal sex with a victim, forced the victim's face down on his crotch, and forced the victim to touch the harasser's crotch was merely engaged in "horseplay."[158] In these and other cases, absent proof of the harasser's explicit sexual desire for the victim, courts have declined to infer desire-based motives from the sexualized acts themselves.[159]

Although straight men who grab their coworkers' scrotums and attempt to penetrate other men's anuses are engaged in "horseplay," the picture is very different for those who affirmatively speak about their

150. *Oncale*, 523 U.S. at 80–81 (listing three "evidentiary route[s]" that plaintiffs can pursue to prove same-sex harassment).

151. *See* Philip McGough, *Same-Sex Harassment: Do Either* Price Waterhouse *or* Oncale *Support the Ninth Circuit's Holding in* Nichols v. Azteca Restaurant Enterprises, Inc. *that Same-Sex Harassment Based on Failure to Conform to Gender Stereotypes Is Actionable?*, 22 HOFSTRA LAB. & EMP. L.J. 206, 230, 232 n.153 (2004) (noting the inapplicability of the other evidentiary routes to Oncale's case).

152. *See id.*

153. *See generally* Clarke, *supra* note 16, at 562–63 (discussing the horseplay rule).

154. 335 F.3d 822 (8th Cir. 2003).

155. *Id.* at 824.

156. McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 541–42, 544 (8th Cir. 2003).

157. 417 F.3d 663 (7th Cir. 2005).

158. *Id.* at 665–66.

159. *See* Clarke, *supra* note 16, at 566–69 (summarizing same-sex harassment cases involving sexual aggression).

same-sex desire.[160] For example, in *Cherry v. Shaw Coastal, Inc.*,[161] the U.S. Court of Appeals for the Fifth Circuit reviewed the claim of John Cherry who worked on a survey crew with other men.[162] One month into Cherry's tenure with his employer, a male coworker sent Cherry a text message saying "I want cock" and invited Cherry to wear the coworker's underwear and spend the night at his house.[163] Reviewing the record, the Fifth Circuit found more than enough evidence to conclude that the coworker's sexual propositions occurred "because of sex" in violation of Title VII.[164]

Although fewer reported cases involve female–female harassment, some courts have found that out-lesbian defendants harassed plaintiffs, but self-identified "straight" women did not necessarily desire their victims.[165] Consider the case of *Cromer-Kendall v. District of Columbia*.[166] There, Barbara Cromer-Kendall alleged that her female supervisor encouraged Cromer-Kendall to leave her boyfriend.[167] The supervisor allegedly told Cromer-Kendall that she loved her, asked the plaintiff to spend the night at her house, and fondled the plaintiff's breast.[168] Categorizing this as desire-based harassment, the court observed that "the connotations of sexual interest in [the plaintiff] certainly suggest that [the supervisor] might be sexually oriented toward members of the same sex."[169]

But compare *Cromer-Kendall* to the Fifth Circuit's decision in *Love v. Motiva Enterprises LLC*.[170] In that case, Connie Love claimed that her female coworker harassed her and propositioned her for sexual favors.[171] According to Love, the coworker "ran her finger under Love's bra strap and her underwear," "rubbed her breasts against Love," and locked herself in a changing room with Love while demanding "favors."[172] After reviewing Love's claim, the Fifth Circuit held that these incidents did not

160. *See* Coombs, *supra* note 138, at 126–27 (explaining how courts often view harassment by straight defendants as "non-actionable horseplay," whereas sexual desire for the victim is assumed with gay men who "engage in sexualized behavior towards other men").

161. 668 F.3d 182 (5th Cir. 2012).

162. *Id.* at 185.

163. *Id.*

164. *Id.* at 188–89.

165. *See* Clarke, *supra* note 16, at 584–85 (discussing the judicial treatment of openly gay workers).

166. 326 F. Supp. 2d 50 (D.D.C. 2004).

167. *Id.* at 52–53.

168. *Id.* at 53–54.

169. *Id.* at 57 (citing Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir.1999)).

170. 349 F. App'x 900 (5th Cir. 2009) (per curiam).

171. *Id.* at 902; *id.* at 905 (Dennis, J., concurring in part and dissenting in part).

172. *Id.* at 902–03 (majority opinion).

amount to implicit proposals for sex.[173] The Fifth Circuit further held that Love failed "to present credible evidence" that the coworker was homosexual, and therefore affirmed the district court's grant of summary judgment against Love.[174]

The lessons from these cases make it clear that courts generally apply a strict standard for proving homosexual desire. This approach to same-sex harassment has several practical and theoretical implications for gay workers. Most fundamentally, courts' reluctance to infer desire-based intent from the sexualized acts of same-sex coworkers exemplifies the heterosexual foundations of sexual harassment law.[175] As Justice Scalia noted in *Oncale*, the inference of discrimination is "easy" to draw in male–female harassment cases because instances of male–female harassment normally involve "explicit or implicit proposals of sexual activity."[176] But, of course, such cases are "easy" only if one presumes the heterosexuality of the harasser.[177] According to this frame, the harasser is straight until proven otherwise.[178] But the very same sexualized propositions that give rise to a Title VII claim in opposite-sex interactions tend to fail in the same-sex setting unless courts are utterly convinced of the harasser's homosexuality.

Not only does the search for desire reveal Title VII's heteronormative underpinnings, it constitutes a vastly under-inclusive approach to ferreting out instances of workplace mistreatment that occur because of sex. As many scholars have noted, sexual harassment is often less a function of sexual attraction and more a function of maintaining gender hierarchies at work.[179] Given this reality, when exactly does towel-snapping and crotch-grabbing constitute asexual bullying and when does such behavior constitute a crude method for policing gendered behavior at work? Drawing the line either way presents risks. On one hand, affixing a "sexual harassment label" to every single incident of sexualized conduct on the job risks sanitizing the workplace and suppressing

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173. *Id.* at 903.

174. *Id.* 903–04.

175. *See* Schwartz, *supra* note 27, at 1699–1700, 1708 (outlining heterosexual presumptions in Title VII).

176. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

177. *See* Franke, *What's Wrong*, *supra* note 124, at 735–36 (critiquing a desire-based view of harassment).

178. *See* Schwartz, *supra* note 27, at 1745 (arguing that *Oncale* invited courts to engage in "very ugly lines of factual inquiry").

179. *See* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1188–1220 (1998); Franke, *What's Wrong*, *supra* note 124, at 740, 742, 760–61; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998); *see also* Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 103 (2004) (arguing that courts have favored an attraction-based view of harassment).

harmless forms of sexual expression.[180] Conversely, limiting liability to self-identified gay harassers provides safe harbor to "straight" harassers who can regulate the masculine and feminine behaviors of their coworkers through acts of same-sex sexual aggression.

So why exactly did Joseph Oncale's coworkers shove a bar of soap up his anus? Under today's same-sex harassment jurisprudence, "homosexual desire" constitutes the best answer for winning in court. But judges have been too quick to ignore the possibility of a "straight" harasser's desire for members of his own sex and too slow to acknowledge that sexual assault often involves non-desire-based motivations that still occur because of sex. If one man simulates raping another man, the harasser's physical assault may have nothing to do with desire, but it can still effectively regulate gender-specific workplace norms by punishing victims for their perceived weakness or discomfort with working in a hypermasculine setting.[181] Just as simulated rape constitutes an "easy" case of opposite-sex harassment, it ought to constitute an "easy" case when perpetrators use same-sex harassment to police the gendered behaviors of their victims. Unfortunately, the predatory gay exception often obscures the issue by limiting same-sex harassment inquiries to the simple question of whether or not defendants were lust-driven, gay harassers.[182]

But these are not the only gay figures that appear in Title VII jurisprudence. In recent years, courts have validated claims brought by plaintiffs who can prove that they exhibited stereotypically homosexual mannerisms at work. In sharp contrast to the dangerous harasser of the predatory gay exception, this new gay figure appears delicate, frivolous, and yet equally reductive in its presentation of sexuality.

B. *Effeminate Victim Exception*

For years, scholars and advocates have tried to shift Title VII's focus from gay harassers to gay victims of harassment. The most direct method for achieving this end requires amending Title VII to prohibit sexual orientation discrimination.[183] But given that various legislative proposals

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180. Franke, *What's Wrong*, *supra* note 124, at 769 (discussing the risks of policing sexualized microcultures at work).

181. *See* Sheerine Alemzadeh, *Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment*, 37 N.Y.U. REV. L. & SOC. CHANGE 339, 349 (2013) (noting a judicial failure to properly apply Title VII to sexualized bullying at work).

182. *See* Coombs, *supra* note 138, at 126 (discussing the willingness of courts to infer the desire of gay defendants); *see also* Todd Brower, *Social Cognition "At Work": Schema Theory and Lesbian and Gay Identity in Title VII*, 18 L. & SEXUALITY 1, 14 (2009) (examining the trope of the "predatory, lustful, or purely sexual nature[d] homosexual liaison[]").

183. *See* Trevor G. Gates, *Why Employment Discrimination Matters: Well-Being and the Queer Employee*, 16 J. WORKPLACE RTS. 107, 108 (2011) (discussing attempts to adopt federal

to achieve this end have languished in Congress for decades, scholars have explained why a judicial solution exists as well.[184] Pointing to the Supreme Court's holding in *Price Waterhouse*, which prohibited employers from discriminating against masculine women, they argue that the law should protect effeminate men as well.[185] Professor Joel Friedman, for example, has asserted that a principled reading of *Price Waterhouse* ought to extend anti-stereotyping protections to effeminate men.[186] Likewise, Professor Mary Anne Case has famously advocated for protecting "Hopkins in drag."[187]

Despite the scholarly support for these reverse-*Price Waterhouse* arguments, courts initially did not embrace such claims. Even though masculine women could sue when their employers made workplace decisions based on sex stereotypes, some courts did not extend the same protections to effeminate men.[188] The fear among judges was that these plaintiffs were cleverly "bootstrapping" sexual orientation claims into stereotyping claims.[189] The U.S. Court of Appeals for the Second Circuit described the problem this way:

> When utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator . . . . [S]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and

protections for gay workers at the federal level); *see also infra* Subsection III.A.2 and accompanying discussion of attempts to amend Title VII.

184. *See, e.g.*, Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 33 (1995) [hereinafter Case, *Disaggregating Gender*]; Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 226–27 (2007); *see also* Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 SEX. RES. SOC. POL'Y 155, 156 (2010) (discussing legislative attempts to extend federal antidiscrimination protections to sexual minorities).

185. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion). *See generally* Stephen J. Nathans, *Twelve Years After* Price Waterhouse *and Still No Success for "Hopkins in Drag": The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713, 713–14 (2001) (discussing developments of the theory).

186. Friedman, *supra* note 184, at 227 (arguing for an expanded reading of *Price Waterhouse*).

187. Case, *Disaggregating Gender*, *supra* note 184, at 33.

188. Dillon v. Frank, 952 F.2d 403, 412 (6th Cir. 1992) (barring effeminacy discrimination claim); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978) (same); *see also* Brower, *supra* note 182, at 11–12 (discussing the difficulty that some judges have with applying rules related to same-sex harassment).

189. *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (noting that "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices").

> homosexuality . . . . [W]e have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.[190]

To this day, some courts still fear that "avowed homosexuals" dishonestly attempt to squeeze sexual orientation protections out of Title VII. This concern causes these courts to parse through the judicial record to distinguish between discrimination based on homosexuality (not covered by Title VII) and workplace mistreatment based on effeminacy (arguably covered by *Price Waterhouse*). Take the case of *Kay v. Independence Blue Cross*.[191] While working as an insurance analyst for Blue Cross, Harry Kay heard statements from coworkers that referenced both his effeminacy and homosexuality. A coworker told Kay that he was not a "real man," another called him "miss prissy," and an anonymous caller left a message describing Kay as "fem."[192] Contrasting these effeminacy remarks with explicit, anti-gay comments, the U.S. Court of Appeals for the Third Circuit noted that Kay's coworkers also called him "gay," "faggot," and "queer."[193] Weighing the relative effect of these statements, the court dismissed Kay's claim by concluding that the harassment was "motivated by sexual orientation bias rather than gender stereotyping."[194]

Of course, when a speaker uses words such as "bitch" or "fag," it is impossible to determine whether the verbal assault was directed at the listener's gender or sexuality.[195] In the speaker's mind such words can represent anti-gay intent, anti-effeminacy intent, or both.[196] Despite the difficulty with making this distinction, some courts have nevertheless charged juries with the task of separating evidence of effeminacy discrimination from anti-gay terminology used at work. For example, in *Prowel v. Wise Business Forms*,[197] Brian Prowel asserted a sex-stereotyping claim against his employer.[198] Consciously avoiding any reference to sexual orientation discrimination, Prowel focused the court's

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190. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (internal quotation marks omitted).

191. 142 F. App'x 48 (3d Cir. 2005).

192. Kay v. Independence Blue Cross, No. CIV. A. 02-3157, 2003 WL 21197289, at *1–2 (E.D. Pa. May 16, 2003) (summarizing evidence of harassment against the plaintiff).

193. *Kay*, 142 F. App'x at 50–51.

194. *Id*. at 51.

195. *See generally* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (arguing against "rigid[] compartmentaliz[ation]" in same-sex harassment cases).

196. Doe v. City of Belleville, 119 F.3d 563, 593 (7th Cir. 1998) (examining how certain statements can present multiple biases); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex*," 79 U. COLO. L. REV. 1151, 1221–22 (2008) (same).

197. 579 F.3d 285 (3d Cir. 2009).

198. *Id*. at 286.

attention on his flamboyant speech and mannerisms. Prowel testified about his public persona stating:

> [H]e had a high voice and did not curse . . . filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot the way a woman would sit . . . talked about things like art, music, interior design, and decor; and pushed the buttons on the [work machine] with pizzazz.[199]

Noting the challenge of distinguishing between sexual orientation discrimination and effeminacy discrimination, the Third Circuit found sufficient facts to conclude that "Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act."[200]

As with the predatory gay exception, few women appear in cases that attempt to isolate gender nonconformity from sexual orientation. But of those claims involving lesbians or "perceived lesbians," the same precarious tension exists between evidence related to homosexuality and evidence related to gender-nonconformity.[201] Serving as the corollary to the effeminate victim exception, courts in these cases hint at a "masculine victim" exception to the rule that Title VII does not protect lesbians from workplace discrimination.[202] For example, in *Lewis v. Heartland Inns of America*,[203] the Eighth Circuit affirmed the sex-stereotyping claim of Brenna Lewis, who worked at a hotel in Iowa.[204] According to the court, Lewis wore her hair short, sported men's slacks, and had "an Ellen DeGeneres kind of look."[205] Although the court could have explained how Lewis's employer discriminated against her based on "perceived homosexuality," the Eighth Circuit did not directly mention Lewis's sexual orientation. Instead, the court focused on Lewis's physical look. Concluding that she had produced sufficient evidence to prove that her "tomboyish appearance" played a role in her employer's actions, the Eighth Circuit allowed Lewis's sex-stereotyping claim to proceed.[206]

But if a female plaintiff's sexual orientation itself becomes a known issue in a case, then courts may be less inclined to affirm any claim of

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199. *Id*. at 287 (internal quotation marks omitted).

200. *Id*. at 292.

201. *See* Soucek, *supra* note 3, at 748–49 (discussing the prevalence of male defendants in claims alleging same-sex harassment).

202. *See id*. at 717–18 (summarizing case law on same-sex harassment involving women).

203. 591 F.3d 1033 (8th Cir. 2010).

204. *Id*. at 1035–36 (ruling in favor of the plaintiff without mentioning her sexual orientation).

205. *Id*. at 1036 (internal quotation marks omitted).

206. *Id*. at 1041–43 (internal quotation marks omitted).

gender nonconformity. For example, in *Dawson v. Bumble & Bumble*,[207] the Second Circuit declined to credit the sex-stereotyping claim made by Dawn Dawson, who described herself as a "lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity."[208] Declining to assert any charge of anti-gay bias, Dawson stated that she suffered discrimination because of her "lack of feminine jewelry, lack of feminine perfume, and lack of makeup."[209] Reviewing Dawson's claim, the Second Circuit described "confusion as to the sources of the discriminatory animus allegedly visited upon Dawson," and noted that Title VII did not protect Dawson "to the extent that she is alleging discrimination based upon her lesbianism."[210] After separating any allegation of sexual orientation discrimination from the record, the Second Circuit found insufficient evidence to justify Dawson's sex-stereotyping claim.[211].

Despite the formal distinction between sex stereotyping and sexual orientation discrimination, courts often conflate the two concepts. This process is most obvious in the bootstrapping cases in which judges dismiss claims even when plaintiffs carefully state their cases in gender-stereotyping terms only. By confounding these separate approaches, courts embrace the widely held cultural assumption that lesbians and gay men exhibit opposite-sex mannerisms.[212] In claims involving gay men, for example, effeminacy becomes a marker for homosexuality through the following logical leaps: Because effeminate men find other men sexually attractive, evidence that coworkers harassed a plaintiff due to his high-pitched voice and feminine dress means that the discrimination occurred because of the plaintiff's perceived homosexuality—a status that Title VII does not protect.[213] This order of assumptions encourages employers to recast sex discrimination claims in terms of sexual orientation discrimination. For example, if employees utter ambiguous slurs such as "bitch" or "fag" at a male coworker, defendants can claim that the terms referenced the victim's perceived homosexuality instead of

207. 398 F.3d 211 (2d Cir. 2005).

208. *Id*. at 217 (internal quotation marks omitted).

209. *Id*. at 221.

210. *Id*. at 217–18.

211. *Id*. at 222–23 (distinguishing Dawson's case from successful sex-stereotyping claims).

212. Fajer, *supra* note 29, at 608–09 (discussing stereotypical assumptions about homosexuality).

213. *See* Friedman, *supra* note 184, at 218; Colleen M. Keating, *Extending Title VII Protection to Non-Gender-Conforming Men*, 2 MODERN AM. 82, 82 (2008) (examining instances of conflation in bootstrapping cases); Schwartz, *supra* note 27, at 1708 (discussing the difficulty courts have with differentiating between the concepts of sex, gender, and sexual orientation).

his gender nonconformity.[214] In this way, Title VII actually encourages employers to embrace anti-gay bias as a viable defense to harassment claims.[215]

Even when courts "get it right" by separating effeminacy from sexuality, a separate set of problems arises. Just as courts that conflate the concepts create an incentive for defendants to characterize discrimination as "anti-gay," decisions that isolate effeminacy give plaintiffs an incentive to accentuate certain characteristics that society views as gender nonconforming. Reflecting this reality, some advocates advise gay employees to play up their effeminacy (for gay men) or masculine look (for lesbians), while burying their homosexuality.[216] For example, the General Counsel of the Human Rights Campaign issued the following recommendation: "No other piece of advice can be stressed more heavily for gay plaintiffs bringing claims under Title VII than to emphasize the sex stereotyping theory as much as possible and de-emphasize any connection that the discrimination has to homosexuality."[217] Thus, men must plead that their employers discriminated against them because of their "pizzazz" rather than their homosexuality.[218] Likewise, women must plead that they suffered workplace harm because of their "Ellen DeGeneres look" rather than because of their sexual orientation.[219]

Unfortunately, the gender packages that plaintiffs must embrace to characterize their claims in these terms may not accurately reflect their actual behaviors or lived experiences.[220] What emerges in too many cases, unfortunately, is a caricatured image of the plaintiff.[221] Ironically, then, courts that try to include a larger group of gender nonconformists under Title VII may unintentionally reinforce the very gender stereotypes

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214. *See* Valdes, *supra* note 22, at 147–48 (examining the conflation of sexual orientation and effeminacy).

215. *Id*. at 146–48 (discussing the consequences of conflation).

216. Justin M. Swartz et al., *Nine Tips for Representing LGBT Employees in Discrimination Cases*, 759 PRACTICING L. INST.: LITIG. 95, 103 (2007) (advising gay plaintiffs on litigation tactics); Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) (same).

217. Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 122 (2000) (explaining the dangers of revealing a plaintiff's sexuality during Title VII litigation).

218. *See*, *e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 287 (3d Cir. 2009).

219. *See*, *e.g.*, Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1035–36 (8th Cir. 2010).

220. *See* Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 795–97 (2013) (explaining how certain plaintiffs emphasize their gender nonconformity).

221. Fajer, *supra* note 29, at 514–15 (arguing that these exaggerated acts have no causal relationship to sexual orientation).

that they are trying to combat.[222]

In addition to creating perverse incentives for both plaintiffs and defendants, the effeminate victim exception overlooks entire classes of gender nonconformists who Title VII ought to protect. For example, employers frequently discriminate against men who care for children or those who engage in "female" occupations like nursing.[223] These men do not necessarily exhibit feminine mannerisms, but they still buck gender norms in other important ways. Yet by characterizing effeminacy as the hallmark of male gender nonconformity, the effeminate victim exception highlights only one version of gender nonconformity while not necessarily crediting others. In the process, the claims of gender nonconformists other than effeminate men appear less obvious or, perhaps, less in need of judicial protection.

The effeminate victim exception neglects large segments of the gay community as well. Of course, not all gay men are effeminate and not all lesbians are masculine.[224] Likewise, many heterosexual men exhibit effeminate mannerisms and many straight women suffer workplace mistreatment due to their perceived "macho" persona.[225] But any judicial approach that treats effeminacy and homosexuality interchangeably risks under-protecting workers who fall outside either side of the equation.[226] For example, if an open lesbian appears "feminine" at work by wearing long hair and makeup, courts may automatically view her workplace mistreatment (e.g., her male coworkers call her a "bitch") as simply involving unprotected orientation-based harassment, even though the same mistreatment against a straight woman would give rise to a Title VII claim.[227] Conversely, if a straight effeminate man sues for harassment (e.g., his coworkers call him a "fag"), courts can dismiss the complaint as "perceived" homosexuality harassment even though his claim has nothing to do with his sexuality.

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222. Yuracko, *supra* note 220, at 761–62 (discussing the unintended consequences of gender-stereotyping law).

223. *See* Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 296–97 (2013) (examining gender nonconformity among male caregivers); Franke, *What's Wrong*, *supra* note 124, at 761–62 (discussing categories of non-masculine men).

224. Soucek, *supra* note 3, at 717–18 (considering the incentives created by gender-nonconformity rulings).

225. Case, *Disaggregating Gender*, *supra* note 184, at 57 (distinguishing between sexual orientation discrimination and effeminacy discrimination).

226. *See* Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII and an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 199 (2009) (calling for courts to disaggregate the concepts of sexuality and gender nonconformity).

227. Brower, *supra* note 182, at 65 (discussing the double-edged sword that gender-stereotyping claims present to gay workers).

The problem here lies not with the sex-stereotyping theory per se, but rather in a reductive approach to the theory that either conflates effeminacy and homosexuality or, conversely, "honors" effeminacy as a privileged form of gender nonconformity above all others. In both instances, the judicial discourse on sexuality skews in wildly different directions. The conflating courts focus obsessively on sexuality, while courts that protect effeminacy pretend to ignore sexuality altogether.[228] This tortured jurisprudence occurs precisely because Title VII prohibits *sex* discrimination but not *sexual orientation* discrimination. Until a legal mechanism exists for addressing the subjects together, judges will continue to refer to sexuality only in double-speak, if they talk about it at all.

C. *Predators and Happy Couples: The Common Thread of Gay Erasure*

The effeminate victim exception and the predatory gay exception offer gay workers the stark choice of either burying their sexuality or presenting it to courts in the most culturally reified forms imaginable. The roles of flamboyant man, macho woman, and predatory harasser comprise the total universe of possible characters that gay parties can play in these cases. Part sexual aggressor, part clever bootstrapper, these gay figures barely resemble the honorable characters that appear in other battles for gay civil rights.[229]

Yet those other legal realms contain their own reductive images of homosexuality. In the now-successful marriage cases, for example, gay parties appeared not as predators, but as ordinary neighbors—not frivolous and splashy, but hardworking and normal.[230] As such, in building the case for same-sex marriage, gay plaintiffs faced another difficult discursive choice: to win in court they downplayed any reference to their sexuality. Indeed, all three settings—gay marriage, gay harassment, and gay victims of harassment—involve different forms of identity-based erasure. Title VII parties deny their sexuality, while gay couples pretended that their sexuality did not exist.

There must be a better way to advance the cause of gay civil rights without simultaneously emphasizing distorted images of homosexuality along the way. In contrast to the current approach, a different legal frame could diversify the concept of sexuality rather than essentialize it. That new frame would not bury sexual orientation discrimination but instead

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228. *See* Soucek, *supra* note 3, at 781 (discussing the erasure of gay sexuality in Title VII jurisprudence).

229. *Id.* at 781–82 (examining how courts protect those gay plaintiffs who possess a certain look and manner).

230. *See supra* notes 108–12 and accompanying discussion of narrative trends in same-sex marriage litigation.

explain how anti-gay bias feeds into larger systems of gender production. In addition, it would serve as an effective legal mechanism for attaining gay civil rights in a wide variety of legal contexts. Most important, a new frame would not require gay men and lesbians to ignore their sexuality as a requirement for winning in court.

III. REFOCUSING ON SEX DISCRIMINATION: THE GENDER STEREOTYPES OF SEXUALITY

Discrimination against sexual minorities is simply sex discrimination. For example, if an employer fires a man for displaying his boyfriend's picture at his workstation, the employer punishes the man because he is male. But for the employee's sex, the discrimination would not have occurred. Admittedly, this statement might initially seem to badly misstate the motivation for the discriminatory act. After all, the adverse action against the gay employee seems to have more to do with his sexuality than with his sex. Likewise, if the state denies a marriage license to a female applicant because she wants to marry another woman, then the state appears to discriminate against the applicant because she is a lesbian, not because she is a woman per se.[231] Indeed, plenty of women receive marriage licenses as long as they choose opposite-sex spouses.

But add comparator evidence—the gold standard in antidiscrimination law[232]—to the analysis and the presence of sex discrimination suddenly becomes obvious. For example, if the lesbian who applied for a marriage license were male, then the state would have approved her application without any problem. In other words, the state allowed men to marry brides, but denied the identical right to women. The same formal distinction applies to our male employee who lost his job for displaying a picture of his boyfriend.[233] If he had been a woman, then presumably his employer would not have punished him for showing off the picture.

Despite the elegance of the sex discrimination argument, courts have largely rejected it in both marriage and employment cases.[234] But the

231. *See* Case, *Have to Lose*, *supra* note 26, at 1218–19 (addressing objections to the sex discrimination argument).

232. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 732–33 (2011) (analyzing the presence of comparator evidence in Title VII litigation).

233. *See* Koppelman, *Sex Discrimination*, *supra* note 22, at 208 (summarizing the formal component of the sex discrimination argument); *see also* Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 401–02 (2001) [hereinafter Hunter, *Sex Discrimination*] (same).

234. Keith J. Hilzendeger, *Walking Title VII's Tightrope: Advice for Gay and Lesbian Title VII Plaintiffs*, 13 LAW & SEXUALITY 705, 725 (2004) (discussing the sex discrimination argument's failure in the employment context); Widiss et al., *supra* note 23, at 472–73 (summarizing the theory's lack of success in marriage cases).

theory is making a small comeback.[235] This Part outlines these developments, while seeking to breathe new life into the sex discrimination argument. In addition, this Part highlights the theory's most noteworthy attribute: its ability to advance numerous claims for gay rights beyond marriage while challenging the basis of anti-gay bias in the process.

A. *Return of the Sex Discrimination Argument*

Gay-rights advocates have attempted to equate sexual orientation discrimination with sex discrimination for decades.[236] Beginning in the 1970s, thinkers of different ideological stripes—from those favoring same-sex marriage to those opposing passage of the Equal Rights Amendment—explained how discrimination against sexual minorities constituted a form of sex discrimination.[237] Even though legal victories were hard to come by during the early years, scholars continued to defend the theory.[238] For example, Professor Andrew Koppelman outlined the doctrinal and theoretical benefits of the sex discrimination argument.[239] Likewise, Professors Sylvia Law and Francisco Valdes asserted that marriage restrictions had less to do with regulating sexual behavior and more to do with enforcing gender norms.[240]

At its core, the sex discrimination argument involves a frontal assault on classifications involving sexual orientation.[241] Koppelman described the direct attack as follows: "[I]f the same conduct is prohibited . . . when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition . . . is

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235. *See infra* Section III.A and accompanying discussion of the theory's recent success.

236. Hunter, *Sex Discrimination*, *supra* note 233, at 397 (discussing the judicial reluctance to accept the theory).

237. Stein, *supra* note 26, at 473–74 (discussing the historical development of the sex discrimination argument); *see also* Appleton, *supra* note 26, at 103–04.

238. Appleton, *supra* note 26, at 104–05; *see also* Hunter, *Sex Discrimination*, *supra* note 233, at 397 (examining the theory's early history); *cf.* Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the* California Law Review, 100 CALIF. L. REV. 381, 411 (2012) (explaining the evolution of the sex discrimination argument).

239. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 154–58 (1996); Koppelman, *Sex Discrimination*, *supra* note 22, at 199; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 YALE L.J. 145, 146 (1988).

240. *See* Law, *supra* note 22, at 196; Valdes, *supra* note 22, at 16 (examining the "triangle" of gender, sex, and sexuality and concluding that "discrimination deemed based on sexual orientation also and necessarily is based on sex or on gender").

241. *See* Widiss et al., *supra* note 23, at 463 (calling for courts to reconnect the facial attack to the gender-stereotyping attack).

discriminating on the basis of sex."[242]

The formal attack applies to both marriage restrictions and workplace discrimination.[243] Consider the typical text of state same-sex marriage bans: "Only marriage between a man and a woman is valid or recognized."[244] By definition, these statutes require a determination of the sex of the parties involved. Without sex, the restrictions have no meaning. In fact, these bans do not technically classify individuals based on their sexual orientation. States never require marriage applicants to disclose their sexuality. Prior to *Obergefell*, gay men and lesbians could still marry other people as long as they married members of the opposite sex. The state's ability to discriminate depends entirely on determining the applicant's sex and that of his or her partner.[245]

The formal critique applies in the employment context as well. An employer who punishes Mary for dating Jane but has no problem with Manuel dating Jane has quite obviously discriminated against Mary because of her sex (in addition to her sexual orientation).[246] As a formal matter, the argument that orientation-based discrimination occurs because of sex could not be stronger.[247]

But the sex discrimination argument extends beyond mere formalism. By drawing attention to the gender stereotypes associated with sexual orientation discrimination, the theory also highlights the harm created by these distinctions. Offered in the marriage context, the anti-stereotyping aspect of the sex discrimination theory posits that when states define marriage in opposite-sex terms, they perpetuate a patriarchal family system that expects women to "act like wives" and men to "act like husbands."[248] Indeed, prior to *Obergefell*, proponents of opposite-sex marriage had espoused these very stereotypes when they defended same-sex marriage bans in court.[249] They asserted, for example, that men have

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242. Koppelman, *Sex Discrimination*, *supra* note 22, at 208; *see also* Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. 1, 9–11 (2012) (presenting the sex discrimination argument).

243. *See, e.g.*, Stein, *supra* note 26, at 485–88 (outlining the contours of the direct attack).

244. CAL. CONST. art. I § 7.5 (2008), *available at* http://www.leginfo.ca.gov/.const/.article_1, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).

245. Andrew Koppelman, *Response: Sexual Disorientation*, 100 GEO. L.J. 1083, 1087 (2012) [hereinafter Koppelman, *Sexual Disorientation*] (discussing the facial classifications of state marriage restrictions).

246. *Id.* (considering a similar example).

247. *See* Case, *Have to Lose*, *supra* note 26, at 1227 (outlining possible outcomes of the sex discrimination argument).

248. Widiss et al., *supra* note 23, at 469 (examining the gender stereotypes of marriage restrictions).

249. *See* Kim, *supra* note 92, at 72–73 (discussing arguments in favor of opposite-sex marriage).

innate "masculine" characteristics as husbands, and that women have unique "feminine" characteristics as wives as well.[250]

In the employment context, the anti-stereotyping prong of the theory takes an even wider view by challenging the universal gender stereotype that requires all individuals to desire members of the opposite sex.[251] If a business fires a woman for bringing her wife to work, for example, the adverse action occurs because of her failure to conform to the gender stereotype that women desire men. Because the Supreme Court disapproves of classifications that rely on "fixed notions concerning the roles and abilities of males and females," the anti-stereotyping prong explains how discrimination based on a person's failure to exhibit heterosexual preferences constitutes a "fixed notion" of gender that employers should not regulate.[252]

Until recently, courts have not found either version of the sex discrimination theory—the formal argument or the anti-stereotyping argument—particularly compelling. But after decades of languishing in the courtroom, several developments in marriage and employment cases have given the theory renewed momentum.

1. *Obergefell*, Marriage Inequality, and Sex Discrimination

Courts that rejected the sex discrimination argument in same-sex marriage litigation typically did so by finding that marriage restrictions imposed the same burden on men and women.[253] These courts reasoned that because a same-sex marriage ban harmed men and women equally, the restriction could not possibly involve sex discrimination.[254] The continued strength of the defense is quite remarkable given its logical and doctrinal flaws. In fact, the Supreme Court has consistently rejected the equal application argument in other contexts. For example, the Court has repeatedly held that even when states ban interracial cohabitation or interracial marriage—thus equally impairing the rights of minority and

250. *See* Michael Kavey, *Slighting the Sex-Discrimination Claim in* Hollingsworth v. Perry, 37 N.Y.U. REV. L. & SOC. CHANGE 151, 157 (2013) (explaining how the sex discrimination argument highlights gender stereotypes).

251. Kramer, *supra* note 27, at 230 (referring to the "ultimate gender stereotype" of opposite-sex desire).

252. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (evaluating the claim of gender nonconformity under Title VII).

253. *See* Kavey, *supra* note 250, at 155 (summarizing criticism of the sex discrimination argument).

254. *See, e.g.*, Latta v. Otter, 19 F. Supp. 3d 1054, 1074 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1140 (D. Or. 2014); Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1286–87 (N.D. Okla. 2014), *aff'd*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014).

non-minority citizens—such restrictions still constitute impermissible race discrimination.[255]

Although scholars have debated the value of comparing race discrimination to sex discrimination,[256] the analogy is unnecessary given that the Supreme Court has expressed the same principle in the sex discrimination context as well. In *J.E.B. v. Alabama*,[257] an equal protection case involving the state's right to exclude female jurors,[258] Justice Scalia attempted but failed to embrace the equal application defense in his dissent: "Since [men and women] are subject to the peremptory challenge . . . it is hard to see how any group is denied equal protection."[259] But the *J.E.B.* plurality explicitly rejected this equal application argument. The plurality Justices stated that "Justice Scalia's dissenting opinion is a mystery"[260] and noted that "we have emphasized that *individual jurors themselves* have a right to nondiscriminatory jury selection procedures."[261] In other words, the presence of *complete* sex discrimination does not imply the *absence* of discrimination.[262] To this point, if a state refuses to grant a marriage license to a woman because she is a woman, any separate instance of sex discrimination against men does not negate the personalized injury suffered by the female applicant.[263]

Despite the historical tendency of courts to cast aside the sex discrimination argument, several federal court decisions that preceded *Obergefell* gave the theory new energy. The sex discrimination argument's small comeback began in *Perry*.[264] Although the case was best known for uniting the legal "dream team" of Ted Olson and David Boies,[265] *Perry* also represented the first and most prominent instance of a federal court adopting the sex discrimination theory in a marriage

255. Loving v. Virginia, 388 U.S. 1, 12 n.11 (1967); McLaughlin v. Florida, 379 U.S. 184, 188–91 (1964); *see also* Kavey, *supra* note 250, at 155 (responding to the equal-application argument).

256. *See generally* Rachel F. Moran, Loving *and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239, 267–68 (discussing criticism of the analogy to antimiscegenation laws).

257. 511 U.S. 127 (1994) (plurality opinion).

258. *Id.* at 129.

259. *Id.* at 159 (Scalia, J., dissenting).

260. *Id.* at 141 n.12 (plurality opinion).

261. *Id.* at 140–41 (emphasis added).

262. *See* Case, *Have to Lose*, *supra* note 26, at 1226 (critiquing the equal application defense).

263. *See* Widiss et al., *supra* note 23, at 471–72 (discussing litigants' counterarguments to the equal application defense).

264. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

265. *See supra* Part I and accompanying discussion of the *Perry* litigation.

decision. In addition to characterizing California's same-sex marriage ban as irrational,[266] the U.S. Court of Appeals for the Ninth Circuit stated that the state's restriction constituted a cognizable form of sex discrimination: "Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."[267] This ruling came as a surprise to many court observers given that the California Supreme Court had specifically rejected the sex discrimination argument just two years prior to *Perry*.[268]

Unfortunately, Olson and Boies dropped the sex discrimination argument from their merits brief to the Supreme Court.[269] But even with this omission, both Justices Ruth Bader Ginsburg and Anthony Kennedy raised the issue at oral argument in *Perry*. When lawyers defending California's marriage restriction cited *Baker v. Nelson*[270]—a forty-year-old Minnesota decision that summarily rejected the sex discrimination argument[271]—Justice Ginsburg said, "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that *gender-based classifications* get any kind of heightened scrutiny."[272] By referring to "gender-based classifications" in the context of same-sex marriage, Justice Ginsburg subtly raised the sex discrimination argument without exploring it in detail.[273]

Justice Kennedy posed the question even more directly during the *Perry* oral argument: "Do you believe this can be treated as a gender-based classification? . . . It's a difficult question that I've been trying to

266. *Perry*, 704 F. Supp. 2d at 997, 1002.

267. *Id.* at 996.

268. *See In re Marriage Cases*, 183 P.3d 384, 439–40 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I § 7.5 (2008), *available at* http://www.leginfo.ca.gov/.const/.article_1, *invalidated by Perry*, 704 F. Supp. 2d at 997; Kavey, *supra* note 250, at 151 (discussing the adoption of the sex discrimination argument in *Perry*).

269. *Compare* Brief for Respondents, *Perry*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 648742 (filed Feb. 21, 2013) (excluding the sex discrimination argument), *with* Brief in Opposition at 29–30, *Perry*, 133 S. Ct. 2652 (No. 12-144), 2012 WL 3683450, at *13 (filed Aug. 24, 2012) (including the sex discrimination argument and stating that "Proposition 8 is . . . unconstitutional for the additional, independent reason that it impermissibly discriminates on the basis of sex"); *see also* Kavey, *supra* note 250, at 153 n.9 (explaining how respondents declined to pursue the sex discrimination argument).

270. 191 N.W.2d 185 (Minn. 1971).

271. *See id.* at 187.

272. Transcript of Oral Argument at 12, *Perry*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 6908183 (emphasis added).

273. *See* Brief of Plaintiffs–Appellees at 58–59, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 25, 2014), 2014 WL 897509, at *23 (discussing the significance of the comments made by Justices Ginsburg and Kennedy at oral argument in *Perry*), *cert. denied*, 135 S. Ct. 265 (2014).

wrestle with . . . ."[274] Although no one answered Justice Kennedy's question,[275] a few lower court opinions took up the issue during the two years between *Perry* and the Supreme Court's final ruling on same-sex marriage in *Obergefell*.[276] For example, in *Kitchen v. Herbert*,[277] three gay couples sought to overturn Utah's same-sex marriage ban.[278] Finding that Utah had indeed discriminated against the plaintiffs because of their sex, the *Kitchen* court rejected the state's equal application defense.[279] Likewise, in *Wolf v. Walker*,[280] another pre-*Obergefell* marriage decision, a federal court in Wisconsin called the sex discrimination argument "thought-provoking" and noted Justice Kennedy's interest in the theory during the *Perry* oral argument.[281] Although the *Wolf* court struck down Wisconsin's marriage restriction on other grounds, it found "some support for a view that, like sex discrimination, sexual orientation discrimination should be subjected to heightened scrutiny."[282]

In contrast to *Kitchen* and *Wolf*, other judicial opinions that came down immediately prior to *Obergefell* rejected the sex discrimination argument altogether.[283] Thus, it would be a stretch to describe any unimpeded line of support for the claim leading up to *Obergefell*. But given that proponents of same-sex marriage had pressed the sex discrimination argument for forty years, the fact that the first and only

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274. Transcript of Oral Argument, *Perry*, *supra* note 272, at 13; *see also* Sonja West, *What Is Anthony Kennedy Thinking?*, SLATE (June 12, 2013, 10:48 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/anthony_kennedy_s_gay_marriage_views_the_supreme_court_justice_may_see_banning.single.html (arguing that the sex discrimination argument constitutes a conservative compromise to the same-sex marriage debate).

275. Although Charles Cooper, counsel for the petitioners, responded to the question, Cooper ambiguously stated that while he did "not think it [was] properly viewed as a gender-based classification" and "[v]irtually every appellate court . . . with one exception . . . has agreed that it is not a gender-based classification," he did admit that "it is gender-based in the sense that marriage itself is a gendered institution." Transcript of Oral Argument, *Perry*, *supra* note 272, at 13–14. *See generally* Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 27 (2014) (discussing the *Perry* oral argument).

276. *E.g.*, Wolf v. Walker, 986 F. Supp. 2d 982, 1008–09 (W.D. Wis. 2014), *aff'd sub nom.* 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206–07 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

277. 961 F. Supp. 2d at 1181.

278. *Id.* at 1187.

279. *Id.* at 1206.

280. 986 F. Supp. 2d 982.

281. *Id.* at 1009.

282. *Id.*

283. *E.g.*, Latta v. Otter, 19 F. Supp. 3d 1054, 1074 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1139–40 (D. Or. 2014); Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1286 (N.D. Okla. 2014), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014).

federal victories on the issue occurred during this time led credence to the hope that the theory might enjoy a major revival in *Obergefell*.

Indeed, the briefing and oral argument in *Obergefell* raised the possibility that the Court might finally answer the "difficult question" that Justice Kennedy had been "wrestl[ing] with" since *Perry*.[284] In sharp contrast to Perry's lawyers sheepish attempt to raise (and ultimately drop) the sex discrimination argument, advocates in *Obergefell* fully embraced the theory.[285] They argued that marriage bans constituted a form of prohibited sex discrimination in two ways. First, they asserted that Ohio's marriage restriction constituted an "explicit gender classification[]: a person's marriage will be recognized only if her sex and her spouse's sex are different. Like any other sex classification, the marriage recognition bans must be tested through the framework of heightened scrutiny."[286] In addition to arguing that Ohio's law constituted a facial sex classification, the challengers also asserted that marriage restrictions relied upon impermissible sex stereotypes about the "proper parenting roles for men and women."[287] Because defenders of Ohio's marriage restriction drew upon old notions about the unique roles that mothers and fathers played in children's lives, challengers argued that the Court should strike down these bans for their reliance on gender stereotyping as well.[288]

More fuel was added to the fire of the sex discrimination theory when Chief Justice John Roberts raised the issue at oral argument in *Obergefell*: "I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?"[289] By posing the question in this fashion, Chief Justice Roberts suggested that the sex discrimination argument could serve as a vehicle for the Court to rule in favor of marriage equality while avoiding thornier questions about the constitutional rights of sexual minorities: "I'm not sure it's necessary to get into sexual orientation to resolve the case."[290] Reacting to this line of questioning, some observers noted that the sex discrimination argument might allow Chief Justice Roberts to avoid falling "on the wrong side of

284. Transcript of Oral Argument, *Perry*, *supra* note 272, at 13.

285. Brief of Plaintiffs–Appellees at 35–37, Obergefell v. Himes, No. 14-3057, 2014 WL 1745560 (6th Cir. Apr. 24, 2014), *cert. granted*, *sub nom*. Obergefell v. Hodges, 135 S. Ct. 1039 (Jan. 16, 2015), *rev'd* No. 14-556, slip op. at 28 (U.S. June 26, 2015).

286. *Id.* at 35–36 (citing Califano v. Webster, 430 U.S. 313 (1977) (per curiam)).

287. *Id.* at 37.

288. *Id.*

289. Transcript of Oral Argument at 61–62, Obergefell v. Hodges, No. 14-556 (Apr. 28, 2015), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf.

290. *See id.*

history" by opposing marriage equality altogether.[291]

Ultimately, the *Obergefell* Court ignored the sex discrimination argument in its final written opinion, instead ruling in favor of same-sex marriage on liberty and equality grounds.[292] Noting prior authority that had already characterized marriage as a fundamental right, the *Obergefell* majority held that the Fourteenth Amendment empowers same-sex couples to exercise that fundamental right as well.[293] The Court observed that marriage sits "at the center of so many facets of the legal and social order" and held that states could not selectively exclude lesbians and gay men from "aspir[ing] to the transcendent purposes of marriage."[294] Describing a constitutional "synergy" between the concepts of liberty and equality implicated by marriage, the *Obergefell* majority held that the challenged laws improperly burdened same-sex couples' liberty interests and simultaneously abridged "central precepts of equality."[295]

Despite the real-world significance of *Obergefell*'s invalidation of state marriage restrictions, the decision was also notable for what it did *not* say. In addition to overlooking the sex discrimination argument, the opinion also declined to identify sexual minorities as members of a quasi-suspect class who enjoyed heightened constitutional protection from state-based discriminatory acts.[296] By failing to articulate any clear level of scrutiny that applied to state discrimination against lesbians and gay men, the Court's doctrinal fuzziness may have reflected a broader

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291. Adam Liptak, *Gender Bias Issue Could Tip Chief Justice Roberts into Ruling for Gay Marriage*, N.Y. TIMES (Apr. 29, 2015), http://www.nytimes.com/2015/04/30/us/gender-bias-could-tip-chief-justice-roberts-into-ruling-for-gay-marriage.html.

292. Obergefell v. Hodges, No. 14-556, slip op. at 28 (U.S. June 26, 2015). Although the *Obergefell* majority cited certain historical instances of sex discrimination in marriage, Justice Kennedy never specifically characterized same-sex marriage bans as examples of "sex-based inequality." *Id.* at 20–21; *see also* Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality—But They Did it the Wrong Way*, SALON (June 29, 2015, 11:15 AM), http://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_%E2%80%94_but_they_did_it_the_wrong_way/ [hereinafter Koppelman, Right Call—Wrong Way] (noting the absence of any reference to the sex discrimination argument in *Obergefell*).

293. *Obergefell*, slip op. at 28.

294. *Id.* at 17.

295. *Id.* at 20–22.

296. *See generally* Conkle, *supra* note 275, at 29 (describing various routes to legalizing same-sex marriage); *cf.* Marc A. Fajer, *Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599, 605 (1997) (reviewing WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)) (same).

reticence to apply the modern tiered framework of review to gay civil rights in general.[297]

As a practical matter, then, *Obergefell* announced a constitutional right to same-sex marriage, without clearly saying much more.[298] Given *Obergefell*'s specific focus on marriage, lower courts will undoubtedly struggle to apply the holding to future cases involving state discrimination against sexual minorities in areas ranging from education to housing to employment.[299] Likewise, *Obergefell* effectively legalized same-sex unions without addressing the many instances of private discrimination that lesbians and gay men still encounter in society.[300] Thus, despite its undoubted significance, *Obergefell* failed to articulate a clear legal framework for addressing instances of public and private discrimination against sexual minorities outside of marriage. As explained below, given the continued need for such a framework in the years to come, courts may come to view the sex discrimination argument as the most effective way to develop such a model in a post-*Obergefell* world.

2. Employment Inequality as Sex Discrimination

Although the Supreme Court declined to embrace the sex discrimination argument in *Obergefell*, the theory remains the most modest (yet promising) legal approach for expanding gay rights. By characterizing sexual orientation discrimination as a form of sex discrimination—a well-recognized type of constitutional injury[301]—the theory does not require courts to announce a new protected classification.[302] Yet even with its facial appeal to doctrinal conservatism, the sex discrimination argument would still expand gay rights in a variety

297. *See* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449–50 (2004); Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 129, 146–47 (2013) (explaining how "the Justices hedged their decisions" in the area of gay rights).

298. *See* Koppelman, Right Call—Wrong Way, *supra* note 292.

299. *See* Balkin, *supra* note 30 (discussing "the next stages in the struggle for equality for sexual orientation minorities").

300. *See* Mark Joseph Stern, *Gay Couples May Soon Have to Choose Between Getting Married and Not Getting Fired*, SLATE (July 3, 2014, 2:05 PM), http://www.slate.com/blogs/outward/2014/07/03/gay_couples_may_soon_have_marriage_rights_but_still_face_discrimination.html (discussing civil rights issues other than marriage that impact the gay community).

301. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

302. *See* Koppelman, *A Reply to Stein*, *supra* note 28, at 534 (explaining the sex discrimination argument's "comparative advantages"); *see also* Fajer, *supra* note 29, at 647–48 (arguing that the sex discrimination argument avoids the line-drawing problems of other approaches to gay civil rights).

of contexts. Most fundamentally, it would expose state action based on sexual orientation to the same heightened scrutiny as sex-based distinctions.[303] According to this approach, states would have to articulate "exceedingly persuasive justifications" to discriminate against sexual minorities in a host of areas.[304]

The sex discrimination argument would also regulate private discrimination in a way that other approaches to gay civil rights would not. For example, even the boldest constitutional step—application of quasi-suspect classification to sexual minorities—would still only directly impact the behavior of state actors. In contrast, a favorable ruling on the sex discrimination argument would go much further. State and federal laws prohibit sex discrimination in a wide range of private contexts such as housing and employment, whereas the same regulations have no direct bearing on sexual orientation discrimination.[305]

At the federal level, a constitutional ruling that construed sexual orientation discrimination as a form of sex discrimination would effectively extend all federal bans on sex discrimination to gay individuals, including the Equal Credit Opportunity Act,[306] the Fair Housing Act,[307] Title IX,[308] the Equal Pay Act[309] and, of course, Title VII.[310] These laws differ in their procedures and methods of proof, but they share a common prohibition against sex-based discrimination.[311] For

303. *See* Case, *Have to Lose*, *supra* note 26, at 1218 (explaining how sex-based distinctions trigger heightened scrutiny); Widiss et al., *supra* note 23, at 485 (same).

304. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)); *see also* Catherine Jean Archibald, *Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case*, 34 N. ILL. U. L. REV. 1, 34–35 (2013) (examining the relationship between marriage restrictions and heightened scrutiny); Koppelman, *Sexual Disorientation*, *supra* note 245, at 1087 (same).

305. David S. Cohen, *Same-Sex Marriage Bans: A Form of Sex Discrimination*, SLATE (Jan. 17, 2014, 4:35 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/same_sex_marriage_bans_courts_should_strike_them_down_as_sex_discrimination.html (explaining how protections "already written into the law" could extend to sexual minorities).

306. 15 U.S.C. §§ 1691–1691f (2012).

307. 42 U.S.C. §§ 3601–3619 (2012).

308. 20 U.S.C. §§ 1681–1688 (2012).

309. 29 U.S.C. § 206(d) (2012).

310. 42 U.S.C. § 2000e-2 (2012) (listing unlawful employment practices); *see also* Koppelman, *Sexual Disorientation*, *supra* note 245, at 1083 (noting the connection between constitutional and statutory sex discrimination).

311. *See* Okruhlik v. Univ. of Ark., 255 F.3d 615, 626 (8th Cir. 2001) ("[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution."); *see also* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1380 n.76 (2009) (discussing the overlap between Title VII and constitutional intentional discrimination).

instance, although the Supreme Court has distinguished between Title VII and the Fourteenth Amendment in the context of disparate impact liability,[312] both laws restrict parties from engaging in intentional discrimination based on certain traits, including sex.[313] Therefore, the question of whether a public or private actor has intentionally discriminated against an individual because of sex remains the same under both laws.[314] Thus, if the Supreme Court were to determine that sexual orientation discrimination constituted a form of sex discrimination under the Fourteenth Amendment, the same holding would naturally apply to regulations that identify sex as a protected category.[315] In short, the sex discrimination argument would combine the value of decisional narrowness with the benefit of practical breadth.

Of course, there are other ways to obtain workplace and other protections for sexual minorities. For example, twenty-one states currently prohibit employment discrimination based on sexual orientation.[316] In addition, President Bill Clinton took executive action to protect federal workers from sexual orientation discrimination in 1998,[317] and President Barack Obama recently extended that protection to employees of federal contractors.[318] But given that state protections fail to cover over half of the U.S. population[319] and that executive orders can change with political administrations, the most comprehensive method for attaining workplace protections for sexual minorities requires

312. Washington v. Davis, 426 U.S. 229, 239 (1976); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495–502 (2003) (examining tensions between disparate impact law and equal protection).

313. *See* United States v. Virginia, 518 U.S. 515, 534 (1996); Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

314. *See, e.g.*, Lipsett v. Univ. of P.R., 864 F.2d 881, 896 (1st Cir. 1988) (noting the overlap between Title VII and the Equal Protection Clause on the issue of intentional, sex-based discrimination); *cf.* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 228–31 (2005) (evaluating different approaches to sex discrimination under federal law).

315. *See* Fajer, *supra* note 29, at 638 (discussing the extension of the sex discrimination argument to Title VII).

316. Michael D. Homans, The *Windsor* Blowing: Fast-Changing Protections at Work for Same-Sex Marriage, Sexual Orientation and Gender Identity 3 (Mar. 22, 2014) (meeting paper presented at the American Bar Association Section of Labor and Employment Law Employment Rights and Responsibilities Committee), *available at* http://www.flastergreenberg.com/media/article/432_ABA_Article-THE_WINDSOR_BLOWING-Michael_Homans.pdf (summarizing state-level protections).

317. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998); *see also* Homans, *supra* note 316, at 14–15 (discussing the evolution of workplace protections based on sexual orientation).

318. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

319. *See* Homans, *supra* note 316, at 3 (noting that only forty-four percent of the U.S. population lives in states that protect against sexual orientation discrimination at work).

congressional action.[320] To that end, gay-rights advocates have pursued this legislative route for forty years, first by supporting the Equality Act in 1974 and more recently by attempting to add sexual orientation protections to Title VII through the Employment Non-Discrimination Act (ENDA).[321] But in the wake of Congress's repeated failure to pass ENDA and an ever-widening religious exemption, gay-rights groups recently stopped supporting ENDA, and its passage seems unlikely for the foreseeable future.[322]

Given legislative inaction on the topic, pressing the sex discrimination argument in the courts represents the most promising route for achieving workplace protections for the gay community in the near term.[323] Before examining how the EEOC has recently advanced this very strategy, however, it is worth considering the wisdom of using the courts rather than the legislature to achieve this end. Indeed, most courts have rejected the sex discrimination argument in the Title VII context precisely because doing so seems to contradict congressional intent.[324] After all, federal legislators probably did not have sexual orientation discrimination in mind when they enacted Title VII in 1964.[325] The fact that Congress has repeatedly refused to pass ENDA seems to bolster the point that Congress never meant for Title VII to cover discrimination against sexual minorities.[326]

But these objections fundamentally misconstrue the basic premise of the sex discrimination argument. Although it might seem to represent a clever end-run around Congress,[327] the sex discrimination theory does *not* claim that Congress meant to prohibit sexual orientation discrimination

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320. *See* Soucek, *supra* note 3, at 721–22 (discussing congressional attempts to add sexual orientation discrimination protections to Title VII).

321. Vitulli, *supra* note 184, at 159–60 (summarizing attempts to amend federal antidiscrimination protections).

322. Mark Joseph Stern, *Obama Signs Historic LGBT Non-Discrimination Order*, SLATE (July 21, 2014, 10:40 AM), http://www.slate.com/blogs/outward/2014/07/21/obama_signs_history_executive_enda_forbidding_lgbt_discrimination.html (describing declining support for ENDA among gay-rights groups). *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2773–74 (2014) (discussing Title VII's exemption for certain religious entities).

323. *See* Soucek, *supra* note 3, at 727–28 (comparing different strategies for developing legal protections for gay workers).

324. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (scrutinizing the legislative history of Title VII's sex discrimination prohibition).

325. *See* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) (concluding that Congress meant to cover only "traditional notions of 'sex'" when it enacted Title VII), *abrogated by* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001); Barber, *supra* note 134, at 521.

326. *See Ulane*, 742 F.2d at 1085–86 (examining legislative attempts to amend Title VII).

327. *See* Hunter, *Sex Discrimination*, *supra* note 233, at 409 (discussing skepticism of the theory).

in American workplaces. Rather, the theory asserts that discrimination against sexual minorities constitutes *both* sex discrimination *and* sexual orientation discrimination, and that Congress obviously intended to prohibit the former type of discrimination. Sex discrimination occurs (in addition to sexual orientation discrimination) when employers engage in gender stereotyping by punishing employees who do not conform to the gender norm of opposite-sex desire. The presence of one type of bias that Title VII does not cover (sexual orientation discrimination) does not preclude the coexistence of another type of bias that Title VII prohibits (sex discrimination). Employers can punish workers both because they are gay and because they fail to adhere to prewritten gendered scripts.

As the Supreme Court acknowledged in *Oncale*, even though Congress did not originally envision male-on-male sexual harassment when it enacted Title VII, courts must give Title VII its full effect by attacking "reasonably comparable evils" as well.[328] Because Congress quite clearly intended to prohibit employers from discriminating against workers based on their sex, any doctrinal approach that limits protections to "traditional notions of sex"[329] (e.g., covering only masculine, heterosexual men and feminine, heterosexual women) works contrary to Congress's purpose by perpetuating rigid gender stereotypes that limit each sex's freedom.[330] This is why the Court in *Price Waterhouse* extended Title VII protections not only to feminine women but also to masculine women who suffer workplace discrimination due to their opposite-sex characteristics. To protect the former group but not the latter would ultimately turn Title VII into a mechanism for policing gendered behavior at work. The sex discrimination argument extends this principle. If the law of gender stereotyping comes with an asterisk—that Title VII protects gender nonconformity *except* when workers engage in the ultimate act of gender nonconformity—then the goal of combating all "reasonably comparable evils" of sex discrimination is lost.[331]

Reflecting the belief that the theory comports with legislative intent, recent employment law rulings have exhibited growing support for the sex discrimination argument. In these cases, plaintiffs have successfully brought Title VII claims by arguing that their employers discriminated against them not because they exhibited certain mannerisms at work but because they violated the most basic gender stereotype in society: that

328. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998); *see also* Keating, *supra* note 213, at 88 (outlining different views of Title VII's legislative purpose).

329. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (internal quotation marks omitted), *overruling recognized by* Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

330. Capers, *supra* note 27, at 1185 (arguing that the sex discrimination theory comports with congressional intent).

331. *See Oncale*, 523 U.S. at 79–80.

men desire women and women desire men.[332] Although this extraordinary shift has not garnered a great deal of public attention, the EEOC's current stance differs dramatically from the agency's previous guidance that harassing a gay employee is not sexual harassment because "it is based on the employee's sexual preference, not on his gender."[333] But more recent opinions make it clear that the agency now takes a far more favorable view of the sex discrimination argument.

Consider the case of *Veretto v. Donahoe*, in which the EEOC reviewed Jason Veretto's same-sex harassment allegations.[334] Veretto claimed that after a fellow postal worker read about his forthcoming wedding to his male partner in the newspaper, the worker cornered Veretto, poked him in the chest, and stated, "I will beat you, you fucking queer."[335] Characterizing Veretto's claim in terms of sex discrimination, the agency stated that Title VII prohibits harassment based on "stereotypical gender roles in marriage," including the stereotype that "marrying a woman is an essential part of being a man."[336]

The EEOC similarly embraced the sex discrimination argument in *Castello v. Donahoe*.[337] There, Cecile Castello, a lesbian postal worker, alleged that her manager said, "Cece . . . gets more pussy than the men in the building."[338] Citing *Price Waterhouse*, the agency stated, "Complainant has essentially argued that [her manager] was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant's failure to adhere to this stereotype."[339] Because Title VII prohibits discrimination based on such "stereotypical gender roles in relationships," the agency determined that Castello had asserted a valid federal claim.[340]

Mirroring the EEOC's newfound support for the sex discrimination argument, a federal district court in Washington, D.C., recently affirmed

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332. *See, e.g.*, Castello v. Donahoe, EEOC Doc. No. 0520110649, 2011 WL 6960810, at *3 (2011); Veretto v. Donahoe, EEOC Doc. No. 0120110873, 2011 WL 2663401, at *3 (2011).

333. 2 EEOC Compl. Man (BNA) § 615.2(b)(3) ex. 2 (1988); *see also* Barber, *supra* note 134, at 522 (summarizing the EEOC's previous position on claims involving sexual orientation discrimination).

334. *Veretto*, EEOC Doc. No. 0120110873, 2011 WL 2663401, at *3 (allowing plaintiff to challenge the "sexual stereotype that marrying a woman is an essential part of being a man").

335. *Id.* at *1.

336. *Id.* at *3.

337. EEOC Doc. No. 0520110649, 2011 WL 6960810, at *3 (2011) (barring employer's use of the "the sexual stereotype that having relationships with men is an essential part of being a woman").

338. *Id.* at *1.

339. *Id.* at *2–3.

340. *Id.*

a gay plaintiff's gender nonconformity claim in *Terveer v. Billington*.[341] In that case, Peter Terveer alleged that after learning about his sexual orientation, his supervisor told Terveer that "it is a sin to be homosexual . . . and that [Terveer] would be going to Hell."[342] Noting that Terveer's "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men," the district court endorsed the sex discrimination argument by holding that Title VII protected Terveer from this type of harassment.[343]

Extending Title VII's reach beyond gay men who prove their effeminacy and lesbians who prove their masculinity, plaintiffs in these cases never alleged that they exhibited effeminate or masculine mannerisms. For example, the district court in *Terveer*, did not discuss Peter Terveer's traits or public persona, but instead focused on whether Terveer conformed to his supervisor's "preconceived definition of male."[344] Likewise, Jason Veretto challenged the gender stereotype that "real" men marry only women, and Cecile Castello challenged the gender stereotype that "real" women desire only men. In sum, the employees in these cases successfully prosecuted their Title VII claims by presenting the sex discrimination argument in its purest form.[345] For the first time ever, the parties in these cases had the full and complete backing of the federal agency that Congress charged with combating sex discrimination in American workplaces. By successfully challenging the gender stereotype of opposite-sex desire, these decisions serve as crucial building blocks for expanding gay civil rights in the future.[346]

B. *Gay Erasure Redux? Responding to the Moral Critique*

Even though the sex discrimination argument has gained recent momentum, many courts remain skeptical of the theory.[347] In order for the argument to enjoy widespread success, a principled case for the argument must do more than merely articulate its doctrinal soundness. Proponents of the theory must directly respond to the charge that the sex discrimination argument is, at its core, an elaborate subterfuge. Many judges reject the sex discrimination argument because they believe that

341. 34 F. Supp. 3d 100, 116 (D.D.C. 2014).

342. *Id.* at 105–06 (quoting plaintiff's complaint).

343. *Id.* at 116.

344. *Id.*

345. *See also* Glenn v. Brumby, 663 F.3d 1312, 1317–18 (11th Cir. 2011) (applying the sex discrimination argument to transgender plaintiffs); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1, *44 (E.E.O.C. Apr. 20, 2012) (same).

346. Case, *Legal Protections*, *supra* note 27, at 1352–54 (discussing recent gains made by plaintiffs asserting the sex discrimination argument under Title VII).

347. *See supra* Section III.A and accompanying discussion of the judicial treatment of the sex discrimination argument.

the theory distracts from the central issue of sexual orientation discrimination.[348] According to this view, everyone knows that the *real* bias against gay workers relates to sexual orientation discrimination (not sex discrimination) and that the *real* trait targeted by state restrictions is homosexuality (not gender). Given that the sex discrimination argument fails to address these issues, critics view the theory as nothing more than a gimmick.[349]

Adopting this line of attack, Professor Edward Stein has argued that the sex discrimination argument ignores the "core wrong" of anti-gay bias and sidesteps moral claims made by opponents of gay rights.[350] Because it fails to take on these issues, Stein asserts that the sex discrimination argument effectively concedes such debates.[351] Others have echoed this critique. For example, Professor Martha Nussbaum has questioned the theory's ability to "get at the real source of the discrimination."[352] Similarly, Professor Jack Balkin has argued that the theory improperly characterizes "discrimination against homosexuals [as] merely a 'side effect' of discrimination against women, and therefore somehow less important."[353] In essence, these detractors assert that the sex discrimination argument overlooks the foundation of anti-gay bias and the direct harm that this bias causes to sexual minorities.

If indeed the sex discrimination argument actually misrepresented the reasons why American society discriminates against lesbians and gay men, then it would seem to feed into the already distorted picture of homosexuality presented in other areas of the law. As mentioned above, the successful campaign for same-sex marriage tended to conceal gay sexuality and distort the nature of sexual orientation discrimination in a number of ways.[354] In these cases, courts too often presented a reified image of ordinary, gay couples who seemed to lack sexual impulses.[355] Likewise, in Title VII litigation, accused gay harassers must deny their sexuality to avoid liability, while gay plaintiffs must exaggerate their

348. *See* Soucek, *supra* note 3, at 785 (asserting that the theory "balkanize[s] factions of workers").

349. *See* Hunter, *Sex Discrimination*, *supra* note 233, at 409–10 (explaining how some gender theorists remain skeptical of the sex discrimination argument).

350. Stein, *supra* note 26, at 503–04.

351. *Id.* at 504.

352. NUSSBAUM, *supra* note 26, at 115; *see also* Shin, *supra* note 242, at 11–12 (summarizing critiques of the theory).

353. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997); *see also* Koppelman, *A Reply to Stein*, *supra* note 28, at 532–33 (summarizing arguments against the sex discrimination argument).

354. *See supra* Parts I and II and accompanying discussion of the judicial presentations of gay sexuality in marriage and employment decisions.

355. *See* Adler, *supra* note 12, at 148 (outlining costs of the same-sex marriage campaign).

effeminate mannerisms and disavow their status as sexual minorities.

Is the sex discrimination argument yet another instance where lesbians and gay men must disclaim their sexuality to win in court? To date, proponents of the sex discrimination argument have failed to articulate a satisfactory answer to this question. Instead, they have often made the critics' point by analogizing anti-gay bias to sexism against women.[356] In the marriage context, for example, those advancing the theory have argued that same-sex marriage bans cause harm because they perpetuate a patriarchal family system in which women must subordinate their lives to men.[357] According to this claim, state marriage restrictions cause losses both to gay couples and to women by supporting a sexist view of marriage wherein men enjoy disproportionate power. But at a time when most states have enacted gender-neutral family laws and when couples increasingly contest the meaning of terms like "husband" and "wife," courts have found the "marriage is patriarchy" argument unconvincing.[358] As to the charge of gay erasure, arguing that courts should stop states from engaging in discriminatory acts against sexual minorities because those acts harm women merely bolsters the contention that the sex discrimination argument conceals the underlying basis of sexual orientation discrimination.

But there is a way to recast the sex discrimination argument without making the harms of anti-gay bias derivative of women's struggles. Rather than link the losses caused by sexual orientation discrimination to discrimination against women (thereby reinforcing the allegation of gay erasure) or connect these harms only to discrimination against sexual minorities (thereby reinforcing the allegation of bootstrapping), the sex discrimination argument must address the universal losses that all individuals suffer from the cultural mandate of presumed heterosexuality.[359] When states and employers stamp a heterosexual identity on all legal subjects (through marriage restrictions or a tortured application of Title VII), they perpetuate the belief that all individuals *should* live heterosexual lives and exhibit heterosexual behavior.[360]

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356. *See* Widiss et al., *supra* note 23, at 479–80 (commenting on the "rather abstract" claims of harm that proponents of the sex discrimination argument have made).

357. *Id.* at 469 (discussing justifications for the sex discrimination argument in the marriage context).

358. *See* Nosanchuk, *supra* note 39, at 2006–07 (examining the evolution of ideals related to marriage).

359. *Cf.* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in* Lawrence v. Texas, 65 OHIO ST. L.J. 1081, 1087–88 (2004) (discussing how anti-sodomy legislation reflects heterosexual norms).

360. *See* David S. Cohen, *No Boy Left Behind?: Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 153–54 (2009) (outlining certain facets of heteronormativity).

Sexual orientation discrimination is sex discrimination because every gay and straight member of society feels the weight of the social, political, and legal sanctions that come with defying the gender norm of opposite-sex desire.

This is not a matter of abstract thinking or theoretical harm. Rather, presumed heterosexuality affects the day-to-day actions of all individuals, regardless of their sexual orientation. Consider the issue of "coming out" at work. Gay employees must constantly engage in a cost–benefit analysis of the risks associated with telling coworkers about their sexuality.[361] Reflecting the difficulty of this decision, ninety percent of LGBT individuals state that they have revealed their sexual orientation to other people, but only twenty-five percent have come out to all of their coworkers.[362] This dilemma presents gay workers with the impossible choice of either anxiously guarding their private lives at work or pretending to be straight.[363] The pressure to keep up appearances in either situation is constant. For example, the topics of dating and social relationships come up at least once per week for the vast majority of workers.[364] Yet less than half of straight workers say that they feel comfortable listening to LGBT coworkers talk about their dating lives.[365] It is unsurprising, then, that over one-third of LGBT people affirmatively lie about their personal lives at their jobs.[366] This manufacturing of stories about love lives and imagined opposite-sex partners as a strategy of concealment takes an obvious social and mental toll on gay individuals who engage in these practices.[367]

Beyond governing the behavior of sexual minorities, presumed heterosexuality affects the actions of straight individuals throughout their lives as well. Even children are not immune from its mandates. Well before they become sexually active, children are consciously and unconsciously aware of the powerful interplay between gender and

361. *See* Robinson, *supra* note 19, at 1371 (highlighting the individualized nature of the choice to come out); *cf.* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 80–81 (2006) (discussing the phenomena of gay individuals who strive to "act straight").

362. GARY J. GATES, WILLIAMS INST., SEXUAL MINORITIES IN THE 2008 GENERAL SOCIAL SURVEY: COMING OUT AND DEMOGRAPHIC CHARACTERISTICS i (2010); *see also* Turk, *supra* note 116, at 469 (discussing persistent biases against gay workers).

363. *See* Yoshino, *supra* note 35, at 813 (examining the process of presenting "a separate face to the outside world").

364. DEENA FIDAS & LIZ COOPER, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF THE CLOSET AND THE REWARDS OF INCLUSION: WHY THE WORKPLACE ENVIRONMENT FOR LGBT PEOPLE MATTERS TO EMPLOYERS 3 (2014) (summarizing survey data showing that over eighty percent of the workforce talks about dating and social relationships at least once per week).

365. *Id.*

366. *Id.* (discussing the importance of non-work-related conversations).

367. Fajer, *supra* note 29, at 597–99 (examining the costs of concealment to gay individuals and the gay community).

sexuality.[368] Even when grade-school boys are too young to know about specific sexual acts, they know to use terms like "queer" and "fag" to refer to gender nonconforming boys.[369] Later in life, adolescent boys prove their heterosexuality to other boys by describing how much they want to "get sex" from girls.[370] Conversely, the label "tomboy" applies to preteen girls who fail to dress and groom themselves in a way that is assumed to attract boys.[371] This social messaging makes it clear to girls that they must maintain their physical attractiveness for the opposite sex throughout their school years and beyond.[372]

The structural relationship between binary gender roles and compulsory heterosexuality continues into adulthood.[373] This adherence to heterosexual norms takes place through both verbal and social acts.[374] For example, women can signal their heterosexuality at work by talking about male coworkers whom they find attractive, distancing themselves from non-heterosexual people, or accusing coworkers of being gay.[375] Men also feel a strong urge to exhibit their heterosexuality both inside and outside the office.[376] Because they know that other men target gay employees for harassment, men attempt to prove their heterosexuality to male coworkers by engaging in hypermasculine acts such as bringing

368. Emma Renold, *They Won't Let Us Play . . . Unless You're Going out with One of Them: Girls, Boys and Butler's "Heterosexual Matrix" in the Primary Years*, 27 BRIT. J. SOC. EDUC. 489, 493–502 (2006) (discussing the consequences experienced by children who "actively worked against the heterosexual grain").

369. *See* Varona & Monks, *supra* note 217, at 67–68 (examining the relationship between gender and sexuality).

370. *See* Deborah L. Tolman, *In a Different Position: Conceptualizing Female Adolescent Sexuality Development Within Compulsory Heterosexuality*, 2006 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 71, 79; *see also* Koppelman, *Sex Discrimination*, *supra* note 22, at 235 (explaining that adolescents learn "no later than high school that [the imputation of homosexuality is] one of the nastier sanctions that one [may] suffer").

371. Renold, *supra* note 368, at 502–04.

372. *See* Varona & Monks, *supra* note 217, at 81 (scrutinizing the gender codes of girlhood and boyhood).

373. *See* Steven Seidman, *Critique of Compulsory Heterosexuality*, 6 SEXUALITY RES. & SOC. POL'Y 18, 23 (2009) (discussing the gendered nature of presumptions related to sexuality).

374. *See* Laura Hamilton, *Trading on Heterosexuality: College Women's Gender Strategies and Homophobia*, 21 GENDER & SOC'Y 145, 147 (2007); Adrienne Cecile Rich, *Compulsory Heterosexuality and Lesbian Existence*, 15 J. WOMEN'S HIST. 11, 21 (2003) (outlining instances of heterosexual norms at work).

375. *See* JAMES JOSEPH DEAN, STRAIGHTS: HETEROSEXUALITY IN POST-CLOSETED CULTURE, 149, 163 (2014) (discussing strategies people may employ to exhibit their heterosexuality); *cf.* MacKinnon, *supra* note 359, at 1087–88 (outlining the effects of dominant masculinity and heterosexuality on women).

376. *See* Robinson, *supra* note 19, at 1333–34 (discussing heterosexual men's insecurities related to sexuality).

girlfriends to work parties, talking frequently about their sexual conquests, and laughing at the correct jokes.[377]

These public displays leave no room for ambiguity. Even though many self-identified straight individuals engage in same-sex sexual behavior, presumed heterosexuality requires anyone who strays from the norm to conceal these instances of deviation.[378] Just as heteronormativity relies upon a binary construction of gender, it also makes the possibility of fluid sexuality seem unimaginable.[379] Although these rules are not necessarily "normal" or "natural," presumed heterosexuality makes them seem as such.

Laws such as Title VII and state marriage restrictions work to bolster those gender norms by creating powerful incentives for individuals to "act straight." For example, same-sex sexual harassment law punishes self-identified gay harassers but dismisses as "horseplay" the sexual acts of self-identified "straight" harassers.[380] Likewise, a same-sex marriage ban allows opposite-sex couples to claim hundreds of legal protections but denies the same privileges to gay couples.[381] These rules work in tandem with cultural representations and social interactions to compel compliance with heteronormative mandates.[382]

The sex discrimination argument has failed to attain widespread judicial acceptance because advocates have not adequately articulated the concrete harms that all men and women—both gay and straight—experience from laws like Title VII and marriage restrictions that enforce heteronormativity. The isolated prosecution of the theory partly explains this difficulty.[383] For example, proponents of the theory have explained why marriage restrictions constitute sex discrimination and, separately, why sexual orientation harassment at work constitutes sex discrimination.[384] But this issue-by-issue focus cannot fully capture the

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377. Yoshino, *supra* note 35, at 813 (listing the steps that some gay men take to act "straight"). *See generally* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000) (examining hypermasculinity).

378. *See* Coombs, *supra* note 138, at 126–27 & n.99 (discussing the realities of same-sex sexual desire among some straight individuals).

379. Vitulli, *supra* note 184, at 159 (examining social systems that reinforce heterosexuality).

380. *See supra* Section II.A and accompanying discussion of the predatory gay exception to Title VII.

381. *See* United States v. Windsor, 133 S. Ct. 2675, 2683 (2013) (referencing over 1000 federal laws that address marital or spousal status); Spade, *supra* note 99, at 81 (discussing benefits enjoyed by members of the "marriage-based family structure").

382. Seidman, *supra* note 373, at 19 (examining the social imperatives of heteronormativity).

383. *See generally* Hunter, *Sex Discrimination*, *supra* note 233, at 399–400 (summarizing the scholarly debate over the sex discrimination argument).

384. *See supra* Section III.A and accompanying discussion of the theory in the context of marriage and employment.

ubiquity of heterosexual norms and their influence on gay and straight individuals in a variety of contexts. For example, the gay plaintiff who employs the sex discrimination argument in a Title VII case seems to represent only his own interests, or at most the interests of other gay workers. Likewise, same-sex couples who employ the theory in the marriage setting seem to represent their own interests, or perhaps only those of the gay community. Therefore, when parties raise the theory in court, judges tend to view these discrete discriminatory acts as isolated instances of sexual orientation discrimination and not gender discrimination.

Reflecting this narrow view of the theory, courts repeatedly express the belief that sexual orientation discrimination cannot simultaneously constitute gender discrimination. For example, one recent decision that rejected the sex discrimination argument concluded that the state marriage restriction at issue was not "motivated by a gender discriminatory purpose."[385] Likewise, another court recently found that "the intent of the laws banning same-sex marriage is not to suppress females or males as a class."[386] In other words, because marriage restrictions seemed to affect only the gay couples petitioning for marriage, courts had a hard time seeing how these laws negatively affected the behavior of "females or males as a class" (i.e., both gay and straight individuals).

Unfortunately, such artificial distinctions between gender, sex, and sexual orientation remain common in law.[387] Judicial pronouncements frequently articulate categories involving "men," "women," "gays," and "straights," while pretending that these categories constitute natural and innate divisions.[388] But a renewed focus on heteronormativity can underscore the illogic of such parceling by showing how presumed heterosexuality commands specific actions and punishes attempts at defection among members of different groups.[389] By emphasizing how state acts of discrimination and employment rules work together to regulate the behaviors of all individuals, the sex discrimination argument

385. Latta v. Otter, 19 F. Supp. 3d 1054, 1074 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014).

386. Wolf v. Walker, 986 F. Supp. 2d 982, 1008 (W.D. Wis. 2014), *aff'd sub nom.* 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

387. Valdes, *supra* note 22, at 24 (explaining the interrelationship between these concepts).

388. Robinson, *supra* note 19, at 1331 (illustrating connections between notions of gender and sexual orientation); *see also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 97–98 (1995) (discussing the gendered meaning of the term "sex" within antidiscrimination law).

389. *See generally* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 948–56 (1989) (examining the contradictory definitions of homosexuality in the law).

highlights the many actions and attitudes that individuals must exhibit to comply with this gendered ordering.

Beyond highlighting shared harms, a focus on heteronormativity's forceful sway creates the possibility for creating alliances between artificially dichotomized groups. Consider the example of an employer who fires a man for bringing his boyfriend to a company party.[390] By explaining how his employer would have left him alone had he been a woman, the plaintiff draws attention to the gender norm requiring gay workers to keep their love lives private, as well as the gender norm requiring straight workers to advertise their heterosexuality. In this way, the sex discrimination argument demonstrates the personal interests that all workers have at stake when employers penalize exhibitions of same-sex desire.[391] The punishment of the gay employee not only regulates the behavior of other sexual minorities at work, it also identifies the performances and behaviors that employers expect of straight workers as well.

The normative impulse for states to discriminate against gay individuals works in tandem with the normative impulse of employers to punish instances of homosexual expression at work. Through a constellation of signposts—state acts of discrimination, workplace rules, and many others—the gender norm of opposite-sex desire requires gay and straight individuals to adhere to its mandates. Regardless of whether states or employers impose these rules, each instance of enforcement serves as a reminder about proper and improper expressions of sexuality and gender. Viewed in this more comprehensive light, a refocused sex discrimination argument draws attention to the ways in which presumed heterosexuality shapes individual behavior and curbs personal expression. Situated this way, the sex discrimination argument does not bury the causes of anti-gay bias, but instead brings them to the fore.

CONCLUSION

At times it seems like the different gay figures of marriage equality and employment law barely resemble one another. From the non-threatening married couples of *Obergefell* to the predatory harassers of Title VII, the roles that sexual minorities occupy in the law vary widely. Despite this discordant imagery, however, these cases remain united in their undifferentiated representations of the individuals involved.

Although advocates commonly describe same-sex marriage as the gay community's most important civil rights issue, workplace protections

390. *See* Fajer, *supra* note 29, at 649–50 (utilizing a similar example to highlight societal preconceptions about homosexuality).

391. *See* Appleton, *supra* note 26, at 124–25 (examining how "gender talk" can create alliances between groups); Hunter, *Sex Discrimination*, *supra* note 233, at 415–16 (explaining how both gay and straight individuals benefit from the successful prosecution of the sex discrimination argument).

affect far more people and remain a high priority for many lesbians and gay men. Today, even with the legalization of same-sex marriage, federal law still makes it perfectly legal to fire a gay man for telling a coworker about his sexuality or to discharge a woman for displaying her wife's picture at work.

In the wake of *Obergefell*, advocates can continue pursuing gay civil rights without talking about sexuality, or they can finally confront the gender stereotype of opposite-sex desire that lies at the root of anti-gay bias. This more ambitious course would not only expand legal protections for sexual minorities beyond marriage, it would finally allow gay plaintiffs to prosecute their claims without having to embrace reductive images of sexuality along the way.