

BRIDGING THE WORK/FAMILY DIVIDE: IMPLICATIONS OF A  
BROADER SEX DISCRIMINATION ANALYSIS FOR MEN'S  
WORK/FAMILY ISSUES

*Nancy E. Dowd*

Keith Cunningham-Parmeter's analysis<sup>1</sup> of the *Obergefell* case<sup>2</sup> and its implications for the broad issues of LGBT equality offers a fascinating opportunity to explore the interplay between family law and employment law, based on the lived interaction of work and family for many employees. Cunningham-Parmeter makes a series of important arguments. First, he concludes *Obergefell* does not offer much to expand the scope of protection for gays and lesbians on issues of workplace discrimination.<sup>3</sup> His conclusion is linked to the absence in the majority opinion of analysis of the nature of LGBT discrimination, whether named as sexual orientation discrimination or as a subset of sex discrimination.<sup>4</sup> Therefore the Court sidesteps the question of the standard of analysis for such discrimination under the Equal Protection clause.<sup>5</sup> Had the Court made such a determination it would affect all areas of discrimination against LGBT persons, including employment discrimination. Moreover, had the Court concluded that this is a form of sex discrimination, such a determination would have translated into heightened review under the Court's gender cases mandating intermediate scrutiny.<sup>6</sup> In addition, such an analysis might have a ripple effect on the interpretation of sex discrimination prohibitions in a host of federal and state provisions relating to employment and other areas as well. The limitations of the opinion, then, have significant impact on the broad issues of gay rights.

Second, Cunningham-Parmeter argues that the same-sex marriage case, and the pattern of advocacy in same sex marriage litigation over several decades, treats marriage as special, even unique.<sup>7</sup> Access to that

---

\* Professor and David Levin Chair in Family Law, University of Florida Levin College of Law.

1. Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099 (2015).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. Cunningham-Parmeter, *supra* note 1, at 1102.

4. *Obergefell*, *supra* note 2, at 2589 (grounding the majority opinion in finding marriage is a fundamental right, and secondarily, that discriminating with respect to this fundamental right with respect to same sex couples violates equal protection in its interplay with fundamental rights); Cunningham-Parmeter, *supra* note 1, at 1141.

5. In prior decisions the Court has applied rational basis to cases involving discrimination on the basis of sexual orientation without deciding the level of scrutiny issue. *See Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, S.Ct. 2675 (2013).

6. *See United States v. Virginia*, 518 U.S. 515, 555 (1996).

7. Cunningham-Parmeter, *supra* note 1, at 1109–12.

unique status and its legal privileges was claimed as an individual right, or the right of the committed couple. The story told in gay rights advocacy for same-sex marriage, as he points out, was that gays and lesbians are just like straight people, with the same desire to formalize and protect their relationship through marriage, and the same desire for respect and dignity for their most important life choices.<sup>8</sup> In contrast, Cunningham-Parmeter argues, the story of LGBT advocacy in the workplace is that “we are different,” and the rights sought are ones of equal opportunity and treatment in a vast array of workplaces.<sup>9</sup> Given these different framings of the issues and claims, of the advocacy stories, the same sex marriage victory has little carryover. Indeed, a “sameness” norm might undermine the diversity needed in the workplace with a “sameness” analysis that validates as “neutral” workplace norms that are heterosexual norms. Similarly, Cunningham-Parmeter’s analysis also suggests that elevating the uniqueness and value of marriage may even exclude issues that remain in family law outside of formal marriage. For example, parentage issues persist in LGBT families linked to their ways of constructing families, and the general non-recognition of functional parenthood.<sup>10</sup> In addition, *Obergefell*’s exaltation of marriage and potential conservatism might undermine recognition and support of non-marital families, a disturbing possibility in light of the patterns of family difference and diversity, and the patterns of marriage.<sup>11</sup>

In light of these limitations of *Obergefell* for dealing with the stark realities of ongoing discrimination and subordination of LGBT individuals, Cunningham-Parmeter argues that the key to reaching these broad areas requires its own strategy, as the same-sex marriage case matters so little.<sup>12</sup> The key, he argues, is to renew, strengthen and articulate the position that LGBT discrimination is sex discrimination.<sup>13</sup>

---

8. *Id.*

9. *Id.* at 1117, 1124.

10. See, e.g., Suzanne Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same Sex Marriage Era*, 86 BOSTON U. L. REV. 227 (2006) (applicability of marital presumption to same sex married couples); Clifford J. Rosky, *No Promo Hetero: Children’s Right to be Queer*, 35 CARDOZO L. REV. 425 (2013) (arguing against any legitimate state interest in heterosexuality); Courtney M. Cahill, *Oedipus Hex: Regulating the Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183 (2015) (fertility, reproductive regulation, and the use of the traditional incest taboo); Catherine Smith, *Equal Protection for Children of Same Sex Parents*, 90 WASH. U. L. REV. 1589 (2013) (limits on claiming benefits from non-biological same sex parent).

11. For the demographics of families and marriage, see NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010) and JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS RESHAPING THE AMERICAN FAMILY* (2014).

12. Cunningham-Parmeter, *supra* note 1, at 1133.

13. *Id.*

Using employment discrimination law, he analyzes sex discrimination doctrine that focuses on stereotypes in order to establish his argument that sexual orientation discrimination is sex discrimination, and to expose heteronormativity in the workplace.<sup>14</sup> Cunningham-Parmeter concludes that it is essential to elevate this argument left unanswered in *Obergefell*. Taking this step is critical both for gay rights and for all workers. Discrimination on the basis of violating the norm of heteronormativity limits straight workers just as it stigmatizes LGBT workers.<sup>15</sup> It imposes on all consequences for crossing gender boundaries.<sup>16</sup> A sex discrimination strategy attacks this gender straightjacket.<sup>17</sup>

There are a number of contributions this analysis makes. First, there is no doubt that there remains serious unrealized potential in the stereotype framework of employment discrimination law.<sup>18</sup> Indeed, in comparison to other areas of employment discrimination law that have been resistant to critique and social science research that should have strengthened individual and pattern cases,<sup>19</sup> the potentially radical contribution of stereotype cases has remained untouched, and therefore open to far greater use. Stephanie Bornstein has suggested that not only might stereotype analysis revive sex discrimination analysis, but also that stereotype analysis should transcend sex and be applied to all categories of discrimination prohibited by Title VII.<sup>20</sup> Bornstein then would take the use of stereotype analysis much further, to more generally rethink the use of employment discrimination law.<sup>21</sup>

Second, by considering the impact of family law on employment discrimination law, Cunningham-Parmeter transcends the typical separation and segregation of these legal fields.<sup>22</sup> This opens analytical frames from one field to the other. It also reflects more closely the realities of individuals, who do not compartmentalize their lives in the way that law frequently does. It is long past time that employment and

---

14. *Id.* at 1134.

15. *Id.* at 1136.

16. *Id.* at 1151.

17. Pun intended.

18. This refers to the doctrine emanating from *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989).

19. For example, implicit bias and cognitive bias research might have reframed questions and understandings of intent by a broader understanding of the dynamic of racial bias. *See, e.g.*, Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006).

20. Stephanie Bornstein, *Unifying Discrimination Law through Stereotype Theory*, 20 LEWIS & CLARK L. REV. (forthcoming 2016).

21. *Id.*

22. One of the exceptions is work/family analysis. *See, e.g.*, JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); JOAN C. WILLIAMS, RESHAPING THE WORK FAMILY DEBATE (2010).

labor law not presume families of one structure, or one distribution of unwaged family work;<sup>23</sup> or that family law not assume that work is always present and always sufficient to support a family, and therefore impose support obligations and custody frameworks without reference to the actual realities of work.<sup>24</sup>

Third, Cunningham-Parmeter's take on *Obergefell* adds significantly to the contributions of family law and constitutional scholars who are beginning to tease out the repercussions of this landmark decision.<sup>25</sup> Family law scholars have noted the opinion's conservative view of marriage, versus a recasting of marriage (although the outcome certainly does that). The employment discrimination lens adds significantly, and differently, to the analysis, and the broader view of gay rights advocacy and intersecting legal fields is a reminder to carefully assess costs and benefits of particular legal strategies.

What Cunningham-Parmeter's analysis also raises is how his expanded critique plays back into family law. That is, if we follow his shift of the lens on what LGBT discrimination is, and consider its implications for all workers, what if we turn his analysis back on family law, or the intersection of work and family law? In other words, suppose that Cunningham-Parmeter's analysis was adopted, applied, and had a significant impact on the workplace and on family life. I want to briefly explore how this might affect men, masculinities, and work/family policy.

Two of the key components of dominant or hegemonic masculinities are "don't be a girl" and "don't be gay."<sup>26</sup> Arguably men are, because of these two commands, more constrained and confined than are women in living and performing their gender. If women "act like a boy" or take on traditional male roles, they are taking on what are perceived as valuable roles and behaviors (although this can backfire into the classic critique that by doing so they have lost their attractiveness and femininity).<sup>27</sup> Women doing wage work is seen as a sign of progress, of equality.<sup>28</sup>

---

23. See, for example, the language of the federal Family and Medical Leave Act, 29 U.S.C. § 2611 (2012).

24. For example, see the Florida custody statute, FLA. STAT. § 61.13 (2015).

25. *Obergefell* has already begun to generate significant scholarship. See, e.g., Kenji Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 Harv. L. Rev. 147 (2015); Ruthann Robson, *Justice Ginsburg's Obergefell v Hodges*, 85 U. MO. K-C L. REV. (forthcoming 2016); Yuvraj Joshi, *The Respectable Dignity of Obergefell v Hodges*, 104 CAL. L. REV. (forthcoming 2016); Clare Huntington, *Obergefell's Conservatism; Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015); Kari E. Hong, *Obergefell's Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. (forthcoming 2016).

26. NANCY E. DOWD, *THE MAN QUESTION: MALE PRIVILEGE AND SUBORDINATION* (2010).

27. *Price Waterhouse v. Hopkins*, *supra* note 18, is an example of this.

28. *Gender Inequality and Women in the US Labor Force*, INT'L LABOR ORG., [http://www.ilo.org/washington/areas/gender-equality-in-the-workplace/WCMS\\_159496/lang--](http://www.ilo.org/washington/areas/gender-equality-in-the-workplace/WCMS_159496/lang--)

Notwithstanding persisting inequality, pushback, violence, and wage inequality, among other signs of persisting inequality, the pattern for women has been to take on valuable men's roles.<sup>29</sup>

Men, on the other hand, continue to lag in pushing the pattern in the opposite direction.<sup>30</sup> They still do not do an equal share of household or care work, work still considered to be "women's work."<sup>31</sup> This is the case even when women are coequal earners or even the dominant breadwinner.<sup>32</sup>

What Cunningham-Parmeter is suggesting could have a significant impact on this imbalance, if it meant that workplace norms began to shift in their expectations of the place of care and household work in men's lives.<sup>33</sup> For one, it might diminish or eliminate the assumption that someone else is doing the household work, the invisible support mechanism that frees men to put wage work first.<sup>34</sup> Second, it might

en/index.htm; US Bureau of Labor Statistics, *Highlights of Women's Earnings in 2012*, Oct. 2013, Report 1045; Gordon Gauchat, Maura Kelly & Michael Wallace, *Occupational Gender Segregation, Globalization, and Gender Earnings Inequality in U.S. Metropolitan Areas*, 26:5 GENDER & SOC'Y 718-47; BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS* (1990).

29. On the persistence of inequality, see *Women's Median Earnings as a Percent of Men's Median Earnings, 1960-2014 (Full time, Year Round Workers) with Projection for Pay Equity in 2059* (Sept. 2015), INST. FOR WOMEN'S POLICY RESEARCH (IWPR), <http://www.iwpr.org/publications/pubs/equal-pay-projection-2059>; *The Status of Women in the States: 2015 - Employment and Earnings*, IWPR (May 2015), <http://www.iwpr.org/publications/pubs/the-status-of-women-in-the-states-2015-2014-employment-and-earnings>; *Violence Against Women at Work*, WOMEN'S HEALTH.GOV, <http://www.womenshealth.gov/violence-against-women/types-of-violence/violence-against-women-at-work.html>; Elizabeth Weise, *US Falls to 28th on Global Gender Equality List*, USA TODAY (Nov. 20, 2015), <http://www.usatoday.com/story/money/2015/11/19/US-falls-28th-global-gender-equality-list/76018174>.

30. On men's care work and comparison to women's, see Kim Parker, *5 Facts About Today's Fathers*, PEW RESEARCH CENTER (June 18, 2015), <http://www.pewresearch.org/fact-tank/2015/06/18/5-facts-about-todays-fathers>. See also *One Third of Fathers with Working Wives Regularly Care for Their Children*, UNITED STATES CENSUS BUREAU (Dec. 5, 2011), <https://www.census.gov/newsroom/releases/archives/children/cb11-198.html>.

31. PEW RESEARCH CENTER, *supra* note 31.

32. *Id.* See also Kelley Holland, *Working Moms Still Take on Bulk of Household Chores*, CNBC (Apr. 28, 2015), <http://www.cnn.com/2015/04/28/me-is-like-leave-it-to-beaver.html>. Even if the mother is not only a full time worker, but also the primary wage earner, she does more household work and child care. *Id.*

33. PEW RESEARCH CENTER, *supra* note 31. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. OF GENDER AND LAW 253 (2013); Richard Robbins, *On Men, Child Care and Work*, HUFFINGTON POST (June 14, 2014), [http://www.huffingtonpost.com/richard-robbins/on-men-child-care-and-working-dads\\_b\\_5495507.html](http://www.huffingtonpost.com/richard-robbins/on-men-child-care-and-working-dads_b_5495507.html).

34. This is Joan C. Williams's concept of the ideal worker; if Cunningham-Parmeter's argument were successful, the ideal worker would change by being de-gendered in terms of both identity and substance. JOAN C. WILLIAMS, *UNBENDING GENDER*, *supra* note 22, at 24, 72-73,

create a new normal for men with minor children who are in need of parental care. Imagine the possibility of expectations that parents would equally share caregiving and what this would mean to the structure of work responsibilities and expectations. Suppose that workplace structures and policies, instead of favoring work prioritizing, instead favored a balance of work and family, not only because the data supports this as an ideal worker,<sup>35</sup> but because such roles were socially and publically accepted, and expected.<sup>36</sup> Suppose further that it was understood that caregiving does not reflect a single pattern, and even unmarried and never married men and women might have such responsibilities, and that these responsibilities are not limited to heterosexuals. Imagine also the consequence if such a revised sensibility of work and family responsibilities was not limited to executive level employees, but was a pervasive norm of corporate culture from the jobs at the bottom of the employment ladder to the top.<sup>37</sup>

There may be a parallel to these possible outcomes (taking the suggestion of Bornstein of a broader potential expansion of stereotype analysis) with imagining the outcomes of a truly diverse, multicultural workplace that embraced racial and ethnic diversity.<sup>38</sup> Intersectionality

---

124. See also JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2012).

35. On the benefits to employers and the workplace of workers who are able to balance work and family, see, for example, Maureen Sarna, Ariane Hegewisch, & Heidi Hartmann, *Balancing Work and Family: How Analyzing the Costs and Benefits of Work-Family Legislation Supports Policy Change*, INSTITUTE FOR POLICY RESEARCH (June 2013), <http://www.iwpr.org/publications/pubs/the-balancing-of-work-and-family-how-analyzing-the-costs-and-benefits-of-work-family-legislation-supports-policy-change>.

36. On the hesitations of men to take leave that is provided by policy as documented by several surveys as well as qualitative feedback, see Jena McGregor, *Paternity Leave Isn't Just About Dads*, WASHINGTON POST (June 14, 2013), <https://www.washingtonpost.com/news/on-leadership/wp/2013/06/14/paternity-leave-isnt-just-about-dads>. In the European Union in recent years, the embedded acceptance of fathers taking leave, even the expectation that they will do so, is evident in its application to high profile leaders. Prime Minister of the United Kingdom David Cameron took two weeks leave at the birth of his child. Jon Kelly, *The Politics of Paternity Leave*, BBC, (Aug. 26, 2010) <http://www.bbc.com/news/magazine/11086630>. Former President of France Nicolas Sarkozy was criticized for failing to take leave when his daughter was born, either to attend the birth, or take time with his newborn daughter. *Sarkozy Failed His Daughter – and My France*, EVENING HERALD (Oct. 22, 2011), <http://www.herald.ie/opinion/sarkozy-failed-his-daughter-and-my-france-27992234.html>.

37. Some of the recently reported work-family policies are limited. See, e.g., Emily Peck, *Under Fire, Netflix Defends Lopsided Parental Leave Policy*, HUFFINGTON POST (Sept. 9, 2015), [http://www.huffingtonpost.com/entry/netflix-parental-leave-policy\\_us\\_55e7239ce4b0aec9f3556d1d](http://www.huffingtonpost.com/entry/netflix-parental-leave-policy_us_55e7239ce4b0aec9f3556d1d).

38. For benefits of diversity in the workforce, see, for example Marie-Elene Roberge and Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?* 20 HUM. RESOURCE MGMT. REV. 295 (2010); Patrick Shin, Devon

analysis<sup>39</sup> suggests that gender and race identities interact in fundamental ways, and therefore it should be a consequence of the sex discrimination analysis that Cunningham-Parmeter advocates that within my focus on males and masculinities, not only would expanded sex discrimination analysis as Cunningham-Parmeter suggests potentially benefit all men, but it would disrupt hierarchies among men, by factoring in, in addition to sexual orientation, race and ethnicity.<sup>40</sup> In other words, the multiple masculinities approach, which considers the interplay of masculinities with other identity factors, as well as the interplay of breaking down sexual limits with the breaking down of race and ethnicity limits, and does so for all men of all classes, comes into play.<sup>41</sup>

The bottom line of this imagining of what might be possible is to underscore the importance of the strategy that Cunningham-Parmeter suggests, as a means to address cultural norms, which is just as critical as addressing structural discrimination. His strategy restores a potential bridge between work law and family law, and reminds us of the lived synergy between family and work that must be resolved as part of our vision of equality.

---

Carbado, & Mitu Gulati, *The Diversity Feedback Loop*, 2014 U. CHI. LEGAL F. 345 (2014); Devon Carbado and Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149 (2003) (reviewing Andrea Guerrero, *Silence at Boalt Hall: The Dismantling of Affirmative Action* (2002)).

39. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chicago Legal Forum 139.

40. DOWD, THE MAN QUESTION, *supra* note 27, at 25–56 (discussing masculinities hierarchies).

41. MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds.) (2012); NANCY DOWD, NANCY LEVIT, & ANN C. MCGINLEY, *Feminist Legal Theory Meets Masculinities Theory*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 25 (2012).