BEYOND THE BINARY: PROTECTING SEXUAL MINORITIES FROM WORKPLACE DISCRIMINATION

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Abstract

The LGBT community has benefitted from a rapid change in public perception. In the past few decades alone, the Supreme Court has greatly expanded the civil rights of queer people by decriminalizing homosexual conduct and recognizing gay marriage. Despite this progressive social setting, LGBT employees have yet to receive full protection from employment discrimination. The EEOC and two circuit courts have attempted to remedy this paradoxical legal landscape by extending protection to the LGBT community under Title VII's "because of . . . sex" provision, using three principle methods of statutory interpretation to arrive at this conclusion. These methods of interpretation—though admirable in their purpose—conflate sex, gender, and sexual orientation, relying on exclusive binaries that do not reflect the vast continuum of sexual minorities.

These developments in the law have coincided with an expanding queer community. From LGBT to LGBTQIA+, the number of sexual identities has grown rapidly. Even in those states that currently have anti-discrimination statutes protecting LGBT employees, a wide array of sexual minorities are not protected. The common understanding of what constitutes sexual orientation has been heavily influenced by efforts to create a stable and immutable queer identity. Consequently, restrictive statutory definitions of sexual orientation fail to anticipate new forms of employer prejudice that are likely to arise as the queer community progresses. This Note critically evaluates existing anti-discrimination law and argues for forward-looking legislation which anticipates these new forms of employer discrimination toward an evolving queer community.

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INTRODUCTION

From the decriminalization of homosexual conduct[1] to the recognition of gay marriage,[2] the gay community has benefited from a rapid change across the legal landscape in the past few decades.[3] Given this legitimization of homosexuality in law and public opinion,[4] it is unsurprising that there has been a substantial push to address sexual

1. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (recognizing that private and consensual homosexual sex within the home is a protected liberty interest under the Due Process Clause of the Fourteenth Amendment).

2. Obergefell v. Hodges. 135 S. Ct. 2584, 2607 (2015) ("[S]ame-sex couples may exercise the fundamental right to marry in all States.").

3. For an interesting discussion on the use of the Fourteenth Amendment to bolster LGBT exceptionalism, see Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 171 (2016). *But see* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (illustrating that LGBT people do not experience exceptional protections under the First Amendment).

4. Gallup polls reveal that public support for LGBT rights reached record numbers in 2018, with 75% of Americans believing that gay and lesbian relations should be legal and 67% supporting same-sex marriage. *Gay and Lesbian Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/7K8J-EXR3] (last visited May 1, 2019).

orientation discrimination in the workplace.[5] State legislation and local ordinances have addressed sexual orientation discrimination in the employment context,[6] but Congress's efforts to enact or amend federal legislation to include sexual orientation have failed repeatedly.[7] In light of these unsuccessful attempts at federal legislation, the Equal Employment Opportunity Commission (EEOC) and the circuit courts have undertaken an interpretive expansion of Title VII to address the "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[8]

Title VII forbids employment discrimination "because of such individual's race, color, religion, sex, or national origin."[9] Sexual orientation is not an enumerated category. However, could an employee, argue that the discrimination he suffered based on his sexual orientation was "because of . . . sex?" Since 1979, the circuit courts have refused to acknowledge discrimination based on homosexuality under Title VII,[10] and they universally maintained that position until 2017.[11] The EEOC is largely responsible for sparking a change in the statute's interpretation. In *Baldwin v. Foxx*,[12] the EEOC found that it had jurisdiction over the complainant's claim of sexual orientation discrimination because "sexual orientation is inherently a 'sex-based consideration'" under Title VII.[13] While the Eleventh Circuit recently declined to adopt the EEOC's

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5. "Despite the popular notion that marriage [equality] represents gay advocacy's crowning achievement, employment protections constitute a far more important objective for many gay individuals." Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1101 (2015) (citations omitted).

6. For a visual guide to the existing nondiscrimination laws, see *Equality Maps: Non-discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/6HNL-QT43] [hereinafter *Non-discrimination Laws*]; *Equality Maps: Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances [https://perma.cc/82M2-ZELL] [hereinafter *Local Non-discrimination Ordinances*].

7. William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 329 n.30 (2017) (detailing the several proposals of the Employment Non-Discrimination Act that failed to pass Congress). Eskridge also mentions the introduction of the Equality Act to the 115th Congress. *Id.* This bill died in committee. *See Committees: S.1006 — 115th Congress (2017–2018)*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/1006/committees [https://perma.cc/W7XD-XS7Q].

8. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 342 (7th Cir. 2017) (quoting a previous ruling made in the same case by a three-judge panel of the Seventh Circuit).

9. 42 U.S.C. § 2000e-2 (2012).

10. *See, e.g.*, Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

11. For a list of circuit court cases supporting the position that sexual orientation discrimination is not cognizable under Title VII, see *Hively*, 853 F.3d at 341–42.

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

13. *Id.* at *5.

position in *Evans v. Georgia Regional Hospital*,[14] the Second and Seventh Circuits have held that Title VII's "because of . . . sex" provision encompasses sexual orientation discrimination.[15] Though the EEOC does not receive considerable deference from the judiciary,[16] both circuit courts referenced *Baldwin v. Foxx* at the outset of the opinions, relying heavily on the theories of statutory interpretation applied therein.[17]

Meanwhile, popular conceptions of sex, gender, and sexual orientation are changing and evolving. A community that was once simply described by the four letters, "LGBT," (lesbian, gay, bisexual, and transgender) has largely adopted a more inclusive denotation: LGBTQIA+ (lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual or ally, and a plus sign, for those that do not identify with any of the prior labels).[18] Since the revolutionary Kinsey studies in the mid-twentieth century, sociologists and psychologists alike have increasingly recognized that sexual orientation exists on a continuum.[19] The definition of sexual orientation is further complicated by the recognition that biological sex, gender, and sexual orientation are separate, though oftentimes related, components of a person's identity.[20] Both gender[21] and sexual orientation[22] are nonbinary; even biological sex

14. 850 F.3d 1248, 1255 (11th Cir. 2017) (denying an allegation of discrimination based on sexual orientation as a claim under Title VII).

15. Zarda v. Altitude Express, Inc., 883 F.3d 100, 131 (2d Cir. 2018); *Hively*, 853 F.3d at 359.

16. *See* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) ("In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to 'chart its own course' rather than defer to the Equal Employment Opportunity Commission . . . .").

17. *Hively*, 853 F.3d at 344; *Zarda*, 883 F.3d at 107.

18. Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html [https://perma.cc/TZ2G-BCG9].

19. Kinsey famously asserted that homosexuality and heterosexuality are at two ends of a spectrum, with several gradations in between these two extremes. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 380 (2000). Notably, Kinsey's studies revealed that bisexuality was more common than homosexuality. *Id.* at 382.

20. *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, AM. PSYCHOL. ASS'N, https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf [https://perma.cc/KGQ9-LEWM] [hereinafter *APA Definitions*]. It is important to note that while "sex" and "gender" are often used interchangeably, sex is used in reference to biology and gender is a matter of social construct. For a discussion on the conflation of these terms and its effect on Title VII jurisprudence, see *infra* Part II.A.

21. "Genderqueer" and "nonbinary" are two terms describing people who do not identify as male or female. Christina Richards et al., *Non-binary or Genderqueer Genders*, 28 INT'L REV. OF PSYCHIATRY 95, 95 (2016).

22. Sexual orientation is even more complicated than the gradations of the Kinsey scale might suggest. For example, asexuality was found in the Kinsey studies, but defies placement on the continuum. *See* Yoshino, *supra* note 19, at 357 n.8. Pansexuality also exists outside of the homosexual/heterosexual spectrum. Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. &

is more nuanced than it might appear at first glance.[23]

The courts have principally relied on three approaches to portray sexual orientation discrimination as a form of sex discrimination.[24] Were the United States Supreme Court to adopt any one or all of these theories of interpretation, the public might believe that sexual orientation is protected under Title VII. This belief would be mistaken. The approaches embraced by the circuit courts and the EEOC rely on a binary that does not reflect the breadth of sexual orientations requiring protection from employer discrimination.[25] These theories of Title VII interpretation conflate sex, gender, and sexual orientation in a way that obscures the diversity of sexual identities in an increasingly inclusive social landscape.

Part I will explain the three primary approaches the circuit courts currently use to interpret sexual orientation discrimination under Title VII's "because of . . . sex" provision. Part II will explore the sexual orientations which fall outside of the heterosexual/homosexual binary and illustrate that such orientations would not be protected by the courts' jurisprudence. Finally, Part III will argue for a forward-looking legislative remedy to this gap in Title VII's protections.

I. THREE THEORIES OF INTERPRETATION

The circuit courts and the EEOC rely on three theories of Title VII interpretation to maintain that sexual orientation discrimination is a form of sex discrimination. They first use the "comparative test" of Title VII; if holding all things constant and changing only the employee's sex would have altered the employer's course of action, it is sex discrimination.[26] The second approach applies Supreme Court precedent

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MARY J. WOMEN & L. 297, 301 (1999). Some scholars have even suggested that polyamory is its own sexual orientation, or at least a manifestation of sexual orientation. Anne E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1510–11 (2011). For more details about variations in sexual orientation and their increasing acceptance see *infra* Part II.

23. Intersexuality describes the presence of biological features which are neither wholly male nor wholly female. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267 (1999). Even the most conservative estimates place the incidence of intersexuality at one-tenth of one percent of the population, making intersexuality as common as cystic fibrosis and Down's Syndrome. *Id.* at 267 n.7.

24. Zarda v. Altitude Express, Inc., 883 F.3d 100, 109 (2d Cir. 2018); *see infra* Part I.

25. Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersexions*, 7 GEO. J. GENDER & L. 31, 38 (2006) ("With regards to a person's sexual orientation, Title VII clings to a hetero/homo binary.").

26. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017) ("It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change."); *Zarda*, 883 F.3d at 116 (applying the comparative method to determine if an employer would have discriminated "but for" the employee's sex); Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015) (using the comparative test to address a hypothetical in which a lesbian employee places a picture of her wife on her desk).

on sex stereotyping[27] to assert that discrimination based on homosexuality is rooted in an impermissible gender-based stereotype; women should only date men and vice versa.[28] The final approach concerns "associational discrimination," wherein the employer discriminates on the basis of sex in regard to his employee's partner.[29]

A. *The Comparative Method*

When evaluating a discriminatory provision or action, how can a court determine if the employer's action is really "*because of* . . . sex?" The circuit courts and the EEOC have analyzed the issue by holding all factors constant and changing only the plaintiff's sex: if the employer's treatment would have been different, it constitutes sex discrimination.[30] The Second Circuit imbues a common law understanding of causation by articulating the inquiry as whether an employee would have been treated differently "but for" that employee's sex.[31] Finding that "one cannot fully define a person's sexual orientation without identifying his or her sex," the plurality in *Zarda v. Altitude Express*[32] classified sexual orientation "[as] a function of sex."[33]

In *Hively v. Ivy Tech Community College of Indiana*[34], the Seventh Circuit more directly applied the standard to the plaintiff's factual claims.[35] Kimberly Hively, a part-time professor at Ivy Tech Community College, applied to become a full-time professor with the college several times.[36] In her complaint to the EEOC, Hively asserted that she was

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27. The reliance on stereotypes is a dominant argument in the legal literature preceding the EEOC's 2015 decision in *Baldwin*. *See generally* Zachary R. Herz, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396 (2014) (arguing that the application of stereotypes in *Price Waterhouse* may be used to address sexual orientation discrimination). For a more detailed discussion of this approach see *infra* Section I.B.

28. The Seventh Circuit only briefly addresses this method of interpretation. *Hively*, 853 F.3d at 346. However, the EEOC and the Second Circuit firmly adopt this rationale. *Baldwin*, 2015 WL 4397641, at *7; *Zarda*, 883 F.3d at 120. Sex stereotyping is also the crux of Judge Rosenbaum's dissent in the Eleventh Circuit's most recent decision on the issue. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1261 (11th Cir. 2017) (Rosenbaum, J., dissenting).

29. *Zarda*, 883 F.3d at 124; *Hively*, 853 F.3d at 347; *Baldwin*, 2015 WL 4397641, at *6.

30. *Zarda*, 883 F.3d at 116.

31. *Id.* (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)). It is important to note that the Supreme Court in *Manhart* hardly *created* a test when it applied the "but for" language of the statutory enactment as issue. Regardless, the Second Circuit relied on this precedent in attempting to articulate a test that would isolate the effect of the employee's sex. The court likely chose this case to illustrate the comparative test because it was cited by the EEOC when it created the hypothetical described directly below.

32. 883 F.3d 100 (2d Cir. 2018).

33. *Id.* at 113.

34. 853 F.3d 339 (7th Cir. 2017).

35. *Id.* at 345.

36. *Id.* at 341.

denied a position each time because she is a lesbian.[37] Taking her alleged sexual orientation discrimination as true, the court considered whether the employer's actions would have been different were Hively a man.[38] Holding all other factors constant, "in particular, the sex or gender of the partner," the majority reasoned that if Hively had been a man married to a woman, the employer would not have rejected Hively's applications for a promotion.[39] As such, when the employer discriminated against Hively on the basis of her homosexuality, it necessarily discriminated against her on the basis of her sex.

Both circuits may have been inspired by the EEOC's hypothetical outlined in *Baldwin*.[40] The Commission described a situation in which a female employee is fired for having a picture of her wife on her desk, but a male employee is not fired for having a picture of his wife on his desk.[41] The employer would not have fired the female employee had she been male, illustrating that sexual orientation discrimination necessarily involves at least some consideration of the employee's sex.[42]

B. *Gender Stereotyping*

For the first few decades of Title VII jurisprudence, impermissible stereotypes in the context of sex discrimination solely included generalizations based on characteristics shared among the group facing discrimination, i.e., women.[43] In cases where stereotyping was effectively used as evidence of discrimination, the employer made certain assumptions about the employee based on her membership in a protected class.[44]

The use of stereotypes shifted dramatically in 1989 when the Supreme Court decided *Price Waterhouse v. Hopkins*.[45] Plaintiff Ann Hopkins was denied a partnership due to her unladylike aggression and failure to "walk . . . talk . . . [and] dress more femininely . . . ."[46] The Court held that the

37. *Id.*
38. *Id.* at 345.
39. *Id.*
40. Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).
41. *Id.*
42. *Id.*
43. *See* Herz, *supra* note 27, at 404–08 (explaining that, prior to *Price Waterhouse*, "sex-plus" analysis under Title VII required that the employer rely on stereotypes which applied to the entire group). The thesis promulgated by Herz in his note proved influential to the adoption of gender stereotyping theory in the Second Circuit's opinion and the Eleventh Circuit's dissent. Zarda v. Altitude Express, Inc., 883 F.3d 100, 120 (2d Cir. 2018); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1262 (11th Cir. 2017) (Rosenbaum, J., dissenting).
44. Herz, *supra* note 27, at 406.
45. 490 U.S. 228 (1989).
46. *Id.* at 235.

employer had impermissibly acted on the basis of Hopkins's sex.[47] For the first time, the Court recognized that an employer could discriminate on the basis of gender stereotypes when the employer assumed that his employee *should* act a certain way based on her membership in a protected class, rather than assuming the employee possessed some innate characteristic.[48]

District court cases following *Price Waterhouse* illustrate the difficulty many courts have had distinguishing between claims of gender-stereotyping (impermissible basis of discrimination) and claims based on sexual orientation (permissible basis of discrimination).[49] Was the employer discriminating because the employee was gay, or simply because he was too feminine?[50] The distinction between gender nonconformity and sexual orientation led many gay plaintiffs to couch their discrimination claims in terms of gender stereotyping, rather than sexual orientation.[51] The EEOC expressly incorporated the use of gender stereotypes in support of its decision in *Baldwin*, looking to two district court decisions that relied on gender stereotypes to refuse dismissal of the plaintiff's Title VII claim.[52] Though the employers in both cases claimed that the discrimination was based on the plaintiff's sexual orientation, not sex, the court in each case found that the employer may have relied on the plaintiff's failure to adhere to sex stereotypes and denied a motion to dismiss.[53]

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47. *Id.* at 250–51.

48. Herz, *supra* note 27, at 406–07.

49. Zarda v. Altitude Express, Inc., 883 F.3d 100, 121–22 (2d Cir. 2018) ("[C]ourts have resorted to lexical bean counting, comparing the relative frequency of epithets such as . . . 'fag,' 'gay,' 'queer,' 'real man,' and 'fem' to determine whether discrimination is based on sex or sexual orientation."); *see also* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (listing cases where federal district and circuit courts expressed agreement with the EEOC's decision in *Baldwin*).

50. Cases dealing with this difficulty are numerous and have been the subject of much scholarly attention. For a useful summary of such cases and the diverse holdings that result, see Lisa J. Banks & Hannah Alejandro, *Changing Definitions of Sex under Title VII*, 32 A.B.A. J. LAB. & EMP. L. 25, 36–37 n.82 (2017).

51. *See* Drew Culler, *The Price of* Price Waterhouse*: How Title VII Reduces the Lives of LGBT Americans to Sex and Gender Stereotypes*, 25 AM. U. J. GENDER SOC. POL'Y & L. 509, 511 (2017) ("[C]ourts have tried to fit a square peg in a round hole by likening sexual orientation to sex or sex stereotypes.").

52. Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *7–8 (E.E.O.C. July 15, 2015) (citing Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002); Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014)).

53. While both cases discuss, in dicta, the relationship between homosexuality and sex stereotypes, neither goes so far as to say that sexual orientation is therefore cognizable under Title VII. *See Centola*, 183 F. Supp. 2d at 410 ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his . . . sexual orientation could maintain a Title VII cause of action . . . . In this case, however, I need not go so far."); *see also*

The nexus between gender nonconformity and LGB status also led to seemingly contradictory holdings in the Eleventh Circuit. In *Glenn v. Brumby*,[54] the court held that discrimination against a transgender person, "because of her gender nonconformity," was cognizable as sex discrimination.[55] Yet this same court, clinging to precedent, declined to adopt the position that sexual orientation was within the ambit of gender nonconformity under Title VII in *Evans v. Georgia Regional Hospital* years later.[56] Recognizing this disparity in the Eleventh Circuit, Judge Robin Rosenbaum's dissent in *Evans* argued for a more nuanced understanding of the gender stereotyping theory flowing from *Price Waterhouse*.[57] Adopting ascriptive and prescriptive stereotyping as an analytical paradigm,[58] Judge Rosenbaum argued that sexual orientation is an example of the prescriptive stereotypes proscribed by *Price Waterhouse*.[59] In theory, a lesbian woman fails to conform to her employer's prescriptive stereotype that women should only date men in the same way that Hopkins failed to conform to her employer's stereotype that women should dress and behave in a certain way.[60]

While the focus on gender stereotype nonconformity was a mere blip on the plurality's radar in *Hively*,[61] the Second Circuit undertook a thorough analysis of the gender stereotyping framework in *Zarda v. Altitude Express, Inc.*[62] Noting the "pervasive confusion" among lower courts regarding the distinction between gender discrimination and sexual orientation discrimination,[63] the court looked to many of the same sources from Judge Rosenbaum's dissent and discussed the role of prescriptive stereotypes in discriminating against homosexuals.[64] Beyond citing the now familiar maxims from *Price Waterhouse* and its progeny,

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Terveer, 34 F. Supp. 3d at 116 (relying on the low threshold required to state a claim to sustain plaintiff's Title VII complaint).

54. 663 F.3d 1312 (11th Cir. 2011).

55. *Id.* at 1317.

56. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir. 2017). Judge Pryor, concurring, notably recognized the discrepancy, stating "[d]eviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation." *Id.* at 1258.

57. *Id.* at 1263.

58. *Id.* at 1262 (citing Herz, *supra* note 27, at 407).

59. *Id.* at 1264.

60. *Id*.

61. *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 346 (7th Cir. 2017) ("Hively represents the ultimate case of failure to conform to the female stereotype . . . she is not heterosexual.").

62. 883 F.3d 100, 119–23 (2d Cir. 2018).

63. *Id.* at 121–22.

64. *Id.* at 119–20 (citing Herz, *supra* note 27 and employing the prescriptive stereotyping framework).

the Second Circuit rebutted the employer's attempts to separate the concept of gender stereotyping from sexual orientation.[65] First, the court rejected the argument that negative employment actions toward homosexuals were based in "moral beliefs about sexual, marital and familial relationships,"[66] and therefore not based in views about gender. It reasoned that "it makes no difference that the employer may not believe that its actions are based in sex."[67] Second, the court rejected the argument that sexual orientation discrimination "is not barred . . . because it treats women no worse than men."[68] Reading *Price Waterhouse* in conjunction with *Oncale v. Sundowner Offshore Services, Inc.*,[69] the court explained that Title VII protects both men and women from sex stereotyping.[70]

C. *Associational Discrimination*

The EEOC and the courts seem to agree that the associational theory of discrimination is best explained in the context from which it arose: race discrimination.[71] Though clearly not a Title VII case, *Loving v. Virginia*[72] first addressed the idea of associational discrimination by holding that anti-miscegenation statutes violated the Equal Protection Clause, despite the government's assertion that the statute applied equally to both races.[73] Similarly, in Title VII proceedings, it is an established principle that an employer may not discriminate against an employee on the basis of that employee's interracial marriage.[74] When an employer takes adverse action against a white employee because of his interracial relationship, the employer is necessarily considering the employee's race and discriminating on that basis.[75]

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65. *Id.* at 122–23.

66. *Id.* at 122.

67. *Id.* This Note will address the error in this line of reasoning. *See* discussion *infra* Part II.

68. *Zarda*, 883 F.3d at 123.

69. 523 U.S. 75 (1998).

70. *Zarda*, 883 F.3d at 123; *see also Oncale*, 523 U.S. at 82 (holding that male-on-male sexual harassment is actionable under Title VII).

71. *See* Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *6–7 (E.E.O.C. July 15, 2015) (reviewing race discrimination cases); *Zarda*, 883 F.3d at 124; Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017) (relying heavily on Loving v. Virginia, 388 U.S. 1 (1967)).

72. 388 U.S. 1 (1967).

73. *Id.* at 8 (explaining that "equal application" does not overcome heightened scrutiny on the basis of race).

74. *Baldwin*, 2015 WL 4397641, at *6 ("[C]ourts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as interracial marriage or friendship.").

75. *Id.* at *6; *see also Zarda*, 883 F.3d at 124 ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers

Relying on the fact that Title VII holds its enumerated categories to the same standards, the courts and the EEOC have extended the concept of associational discrimination to sex.[76] According to this line of reasoning, when an employee faces discrimination on the basis of his partner's sex, he is necessarily being discriminated against on the basis of his own sex in violation of Title VII.[77] Therefore, when an employer takes adverse action against a gay male employee because of his sexual orientation, the employer actually discriminates on the basis of the male employee's relationship with a man, which impermissibly bases an employment action on the sex of the employee's partner.[78] In summary, an employer's hostility to homosexuality "is predicated on opposition to romantic association between particular sexes."[79]

II. RELIANCE ON FALSE DICHOTOMIES

In setting forth these three theories of statutory interpretation, the EEOC and the circuit courts rely on nonexistent dichotomies in the context of two aspects of a person's identity: gender and sexual orientation.[80] By predicating protection from sexual orientation discrimination on the plaintiff's sex or gender, these constructions of Title VII conflate three separate and distinct aspects of a person's identity: sex, gender, and sexual orientation.[81] Where these traits overlap and interact in nuanced ways that defy male–female and heterosexual–homosexual binaries, the current interpretive justifications will fail to comprehensively address evolving bases of sexual orientation

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discrimination because of the employee's *own* race.") (quoting Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008)).

76. *Zarda*, 883 F.3d at 125 ("[T]he prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex."); *see also Baldwin*, 2015 WL 4397641, at *7 ("Title VII 'on its face treats each of the enumerated categories' . . . 'exactly the same.'") (quoting Price Waterhouse v. Hopkins, 409 U.S. 228, 243 n.9 (1989)); *Hively*, 853 F.3d at 349 ("The text of the statute draws no distinction . . . among the different varieties of discrimination it addresses . . . .").

77. *See Baldwin*, 2015 WL 4397641, at *6.

78. *Id.* at *6; *Zarda*, 883 F.3d at 124.

79. *Zarda*, 883 F.3d at 124.

80. The courts and the EEOC also rely on a false dichotomy of biological sex. The medical field has increasingly recognized intersex individuals who have biological traits that are neither wholly male nor wholly female and are often arbitrarily assigned a sex at birth. *See* Greenberg, *supra* note 23, at 267. While intersexuality is surprisingly common and important to the understanding the resistance to male–female dichotomies, it is beyond the scope of this Note.

81. While biological sex, gender, and sexual orientation are clearly related, the concepts make up discrete components of a person's identity. There is a breadth of social science scholarship supporting this notion, but for perhaps the most influential discussion on the way the conflation of these components operates in the law 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).

discrimination.[82]

The male–female binary has been central to Title VII jurisprudence. First, the EEOC and the circuit courts rely on a cisgendered legal fiction that sex and gender are necessarily the same.[83] Although many courts have recognized that transgender people are already protected under Title VII jurisprudence,[84] the fact that courts have treated "sex" and "gender" as synonyms creates logical discrepancies regarding the sexual orientation of transgender employees. Second, the EEOC and the circuit courts rely on a male–female gender binary which does not comport with non-binary or genderqueer people.[85] Defining sexual orientation by reference to the plaintiff's own gender identity and expression as male or female becomes a difficult, if not impossible, task in this context.

The EEOC and the circuit courts also ignore those sexual orientations that do not rely on the sex or gender of the employee or the employee's partner, and therefore do not conform to the heterosexual–homosexual binary. Bisexuality is waived off at the outset of the opinions as falling within the definition of sexual orientation but is not further addressed in any substantive analysis.[86] Asexuality and pansexuality are not even mentioned. The attempt to shoehorn protections for sexual orientation into Title VII's "because of . . . sex" provision, while suitable to a binary world, does not capture contemporary conceptions of sexuality, especially as it interacts with gender identity and sexual conduct. The judicial activism displayed by the Second and Seventh Circuits is admirable in its purpose, but it is insufficient to protect the breadth of sexualities flowing from the modern recognition of "a richer diversity of human behavior."[87]

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82. *See infra* Section II.A.

83. *See infra* Section II.B.

84. *See, e.g.*, Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 566 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1200–02 (9th Cir. 2000) (interpreting the Gender Motivated Violence Act, in which gender motivation is construed in the same manner as Title VII).

85. Richards et al., *supra* note 21.

86. Zarda v. Altitude Express, Inc., 883 F.3d 100, 113 (2d Cir. 2018) ("'Sexual orientation' . . . is commonly categorized as 'heterosexuality, homosexuality, or bisexuality.'") (quoting *Sexual Orientation*, BLACK'S LAW DICTIONARY (10th ed. 2014)); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 342 (7th Cir. 2017) (noting that gay, lesbian, and bisexual persons fail to comport with sex stereotypes); Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *4 (E.E.O.C. July 15, 2015) (referencing sexual orientation discrimination only in the context of lesbian, gay, and bisexual individuals).

87. Banks & Alejandro, *supra* note 50, at 27.

A. *Sex, Gender, and Sexual Orientation: Converging Separate Spheres of Identity*

Sex, gender, and sexual orientation are separate, though related, aspects of a person's identity. "Sex" defines those physical characteristics that distinguish between males and females.[88] Gender refers to social or cultural traits associated with one's sex.[89] Gender can be understood in terms of both gender identity and gender expression. Gender identity refers to the "deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person's sex assigned at birth or to a person's primary or secondary sex characteristics."[90] Gender expression, on the other hand, refers to "the presentation of an individual, including physical appearance, clothing choice and accessories, and behaviors that express aspects of gender identity or role."[91] Gender expression and gender identity do not always coincide.[92] Most people are "cisgender," meaning they have a gender identity and gender expression that aligns with their biological sex.[93] In contrast, a transgender person has a gender identity, and often a gender expression, that does not align with their biological sex.[94]

The definition of sexual orientation varies depending on the source. A more limited definition of sexual orientation defines it as "one's enduring sexual attraction to male partners, female partners, or both."[95] Such a definition might limit one's understanding of sexual orientation as only including heterosexuality, homosexuality, or bisexuality. A more expansive definition of sexual orientation defines it as:

> A component of identity that includes a person's sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among

88. *APA Definitions*, *supra* note 20.

89. *Id.*

90. Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 862 (2015).

91. *Id.* at 861.

92. For example, a person may be biologically female, but have a gender identity which is male. This person may not express their gender identity due to fear and potential discrimination from others, making their "gender expression" female.

93. Am. Psychological Ass'n, *supra* note 90, at 861.

94. *Id.* at 863.

95. *APA Definitions*, *supra* note 20.

others.[96]

The fact that a more expansive definition of sexual orientation has been adopted by the LGBTQIA+ community, but not the legal community, creates the premise of this Note.[97]

The courts have failed to recognize these three spheres of identity (sex, gender, and sexual orientation) as independent characteristics. The consolidation of "gender" and "sex" as one concept throughout Title VII jurisprudence is of no surprise, given that popular culture did not differentiate biological and social aspects of a person's sex at the time of Title VII's enactment.[98] Indeed, the finding of sex stereotypes in *Price Waterhouse*, while groundbreaking at the time, was really nothing more than a recognition of "our modern concept of gender"[99] expression as it relates to biological sex.[100] Further conflating sex and gender[101] to include sexual orientation has been more of an interpretive stretch for the courts, as evidenced by a long line of cases denying protections on this basis.[102]

Ironically, those circuit court opinions denying protection from sexual orientation discrimination sometimes espouse the more progressive understanding of sexuality. In particular, Judge William Pryor's concurring opinion in *Evans* recognized that sex and sexual orientation are distinct concepts and that while "deviation from a particular stereotype may correlate disproportionately with a particular sexual orientation," it does not follow that sexual orientation is a gender stereotype.[103] Judge Pryor distinguished these concepts by explaining that gender stereotypes are based on the employee's behavior, such as dressing a certain way; sexual orientation is a status.[104] Similarly, in *Zarda*, the concurrence recognized that "heterosexuality and homosexuality are both traits that are innate and true, not stereotypes of anything else."[105] By recognizing that sex and sexual orientation are different in fact, these judges are able to distinguish the types of

96. Am. Psychological Ass'n, *supra* note 90, at 862.

97. *See, e.g.*, Gold, *supra* note 18.

98. Banks & Alejandro, *supra* note 50, at 29.

99. *Id.* at 30.

100. Kramer, *supra* note 25, at 37–38 ("Gender, in this sense, is not so much a unitary cultural construction as it is a performative notion of Title VII's sex category.").

101. The use of "sex/gender" is a necessary shorthand for conveying the assimilation of these concepts under Title VII, though this discussion relies on an understanding that these factors are distinct.

102. *See supra* notes 10–11 and accompanying text.

103. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1258 (11th Cir. 2017) (Pryor, J., concurring).

104. *Id.* at 1259–60.

105. Zarda v. Altitude Express, Inc., 883 F.3d 100, 134 (2d Cir. 2018) (Dennis, J., concurring).

discrimination associated with the characteristics.[106]

Yet the EEOC and circuit courts decline to make any such distinction, directly relying upon the overlap of sex, gender, and sexual orientation in support of their theories of interpretation: the comparative method, gender stereotyping, and associational discrimination.[107] Each of these theories of interpretation necessarily furthers the conception that sexual orientation must be defined by reference to sex and gender as it is presently understood under Title VII. While these constructions of Title VII are reasonable in light of the binaries they rely upon, they cannot be extended to protect those sexual orientations which do not have a traditional relationship with sex or gender.

B. *A Cisgendered Legal Fiction: "Sex" and "Gender" as Synonyms*

The circuit courts and the EEOC have reasoned that, for the purposes of Title VII, "sex" and "gender" are interchangeable concepts.[108] A transgender employee has a biological sex which does not match their gender identity or their gender expression.[109] Due to the way courts have conflated sex and gender, transgender employees surprisingly gained protection under Title VII before LGB employees. The EEOC used the "because of . . . sex" provision to extend protection to transgender employees in *Macy v. Holder*[110] in 2012. The EEOC principally relied on *Price Waterhouse* to hold that discrimination based on gender identity was a form of sex discrimination, clarifying that "the terms 'gender' and 'sex' are often used interchangeably to describe the discrimination prohibited by Title VII."[111] Many circuit courts even preceded the EEOC in protecting transgender status under Title VII through the conflation of "sex" and "gender."[112] These opinions relied on *Price Waterhouse*, supporting the proposition that "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[113]

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106. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 365 (7th Cir. 2017) ("Sexism . . . and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics.").

107. *See supra* Part I.

108. *See, e.g.*, Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *5 (E.E.O.C. Apr. 20, 2012); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011).

109. Am. Psychological Ass'n, *supra* note 90, at 863.

110. No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

111. *Id.* at *5.

112. This included the Ninth Circuit in 2000, the Sixth Circuit in 2004, and the Eleventh Circuit in 2011. *See Brumby*, 663 F.3d at 1315–17; Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Indeed, for the purposes of [the Gender-Motivated Violence Act and Title VII], the terms 'sex' and 'gender' have become interchangeable.").

113. *Brumby*, 663 F.3d at 1316.

Yet transgender and genderqueer people still live in a heteronormative society.[114] Heteronormativity is pervasive and manifests itself in the lives of even openly homosexual people.[115] Gay couples frequently get asked questions based on the assumption that their relationships mimic the gender roles in heterosexual relationships.[116] Who's the man? Who "wears the pants?" A partner that is perceived as more feminine in a gay, male relationship may even be referred to as the "wife."[117] The prevalence of heteronormative gender roles clarifies that it is not so much a person's biological sex, but rather their gender expression, which creates expectations about their romantic relationships.[118] Defiance of these expectations is one of the most prevalent reasons for hostility towards homosexual and transgender people in society.[119] While a transgender person's identity and expression are already protected under the "because of . . . sex" provision of Title VII under the reasoning of *Macy* and its counterparts,[120] an employer may nonetheless form hostility against a transgender or genderqueer employee for defying heteronormative expectations regarding sexual orientation.

1. Transgender Employees

The current interpretations of Title VII portraying sexual orientation discrimination as a form of sex discrimination[121] do not smoothly extend

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114. Heteronormativity denotes "the attitude that heterosexuality is the only normal and natural expression of sexuality." *Heteronormative*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/heteronormativity [https://perma.cc/YUY9-CLZ2].

115. Arwa Mahdawi, *"Who's the man?" Why the Gender Divide in Same-Sex Relationships is a Farce*, GUARDIAN (Aug. 23, 2016, 12:44 PM), https://www.theguardian.com/lifeandstyle/2016/aug/23/same-sex-relationship-gender-roles-chores [https://perma.cc/J8J9-674G].

116. The presence of heteronormative assumptions is particularly noticeable when gay couples get married. Stephanie Cain, *A Gay Wedding Is a Wedding. Just a Wedding.*, N.Y. TIMES (Aug. 16, 2018), https://www.nytimes.com/2018/08/16/fashion/weddings/a-gay-wedding-is-a-wedding-just-a-wedding.html [https://perma.cc/YLE3-KU2T].

117. The reaction to the first openly gay NFL player, Michael Sam, is a prime example. On social media, many referred to Sam's boyfriend as his "wife" or "trophy wife." Steven Petrow, *Why do Gay Couples Use the Terms "Husband" and "Wife" Rather than Partner?*, WASH. POST (May 13, 2014), https://www.washingtonpost.com/lifestyle/style/why-do-gay-couples-use-the-terms-husband-and-wife-rather-than-partner/2014/05/12/8d9ae3e8-d6f4-11e3-95d3-3bcd77cd4e11_story.html?utm_term=.ff8c9936d1f5 [https://perma.cc/ABP8-NJHF].

118. *See, e.g.*, Mahdawi, *supra* note 115 ("[M]ost Americans believe the 'more masculine' partner and the 'more feminine' partner should be responsible for stereotypically male and female chores.").

119. A full discussion of the way heteronormative identities are rooted in the existing power structure is beyond the scope of this Note, but for an interesting discussion drawing on Critical Race Theory, see Lauren Wigginton, *Heteronormative Identities as Property: Adversely Possessing Maleness and Femaleness*, 23 AM. U. J. GENDER SOC. POL'Y & L. 139, 140 (2014).

120. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

121. *See supra* Part I.

to situations involving the sexual orientation of transgender employees. Because the comparative method, gender stereotyping, and associational discrimination legal standards all rely on the conflation of sex and gender in a neat dichotomy of "male" and "female," they fail to cogently connect sex and sexual orientation under Title VII.[122] Imagine an openly male to female (MTF) transgender employee.[123] As a transgender woman, her employer and her coworkers are likely to expect that she will have a male partner.[124] However, although gender identity and sexual orientation are interrelated concepts, they are not the same.[125] Imagine that this employee brings her female partner to a work function. Her supervisor is shocked and disgusted by the relationship;[126] he terminates the employee the next day. Under the interpretations of Title VII currently espoused by the circuit courts, the employer's sexual orientation discrimination is "because of . . . sex" based on the comparative method, gender stereotyping, and associational discrimination.

Under the comparative method, the court holds all things constant ("in particular, the sex or gender of the partner") and changes only the sex of the employee.[127] Although the employee is biologically male, her gender expression is female. Which of these do we hold constant? While the courts have treated sex and gender as synonymous terms,[128] a transgender employee points out that sex and gender are separate and distinct components of a person's identity.[129] Courts must continue to rely on an express legal fiction to use the comparative method in the above hypothetical. The theory of associational discrimination produces a similar result.

Gender stereotyping theory is also counterintuitive in the context of a transgender employee. Under this interpretation, sexual orientation discrimination is sex discrimination because the employer is applying the

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122. *See supra* Section II.A.

123. Am. Psychological Ass'n, *supra* note 90, at 862.

124. Indeed, this employee may have assumed she was gay in her childhood, as many transgender people are told their gender nonconformity is a product of their sexual orientation during adolescence. *Id.* at 833, 836.

125. *Id.* at 835.

126. It is not so farfetched that an employer might harbor these feelings about a transgender employee. Transgender people are often expected to "fully commit" to their gender identity, even in the context of their relationships. In other words, a transgender woman is expected to take on every societal role of a woman, including the expectation that she will have relationships with men. For example, "in the early decades of medical and social transition for TGNC people, only those whose sexual orientations would be heterosexual post-transition (e.g. trans woman with a cisgender man) were deemed eligible for medical and social transition." *Id.* at 847.

127. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017).

128. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *5 (E.E.O.C. Apr. 20, 2012) ("[T]he terms 'gender' and 'sex' are often used interchangeably to describe the discrimination prohibited by Title VII.").

129. *See supra* Section II.A.

stereotype that men should only date women and vice versa.[130] A court could assert that the employer in this hypothetical is applying the stereotype that people who present as female should date males, but is this really the same as saying that the employer relied on the sex of the employee? A transgender woman defies gender stereotypes in regard to her gender expression in a way that is recognized by Title VII jurisprudence,[131] but her sexual orientation might technically be heterosexual if it is defined strictly in terms of biological sex.[132] While the employer's reliance on gender stereotypes might still exist, the relationship to the employee's sex is further attenuated in a situation where the employee is not cisgender. As it stands, it might be difficult to conceive of an employer which would accept a transgender employee without accepting a gay employee, but the hypothetical clarifies the logical inconsistencies inherent in the current Title VII interpretations of sexual orientation.

2. Genderqueer Employees

The cisgendered legal assumption underlying Title VII jurisprudence could prove particularly problematic to non-binary or genderqueer employees. Genderqueer individuals defy the binary of male and female identities.[133] "Some people have a gender which is neither male nor female and may identify as both male and female at one time, as different genders at different times, as no gender at all, or dispute the very idea of only two genders."[134] This is not to be confused with people that are intersex, which refers to the presence of physical/biological traits that are both male and female at birth.[135] Instead, a genderqueer person might have a biological sex which is male or female, but a gender identity or gender expression which is neither or both. They may opt for the use of "they/them" pronouns to avoid being identified as a particular gender, they may request the use of a gender-neutral pronoun, or they may prefer the use of they/them/their.[136]

The rationale used to protect transgender employees under Title VII would seem to apply to non-binary employees as well. Though there are no apparent cases applying the "because of . . . sex" provision to genderqueer employees specifically, a natural extension of the rationale behind protecting transgender employees would seem to apply, as

130. *See supra* Section I.B.
131. *Macy*, 2012 WL 1435995, at *8.
132. Am. Psychological Ass'n, *supra* note 90, at 836.
133. Richards et al., *supra* note 21.
134. *Id.*
135. *See* Greenberg, *supra* note 23, at 267.
136. Richards et al., *supra* note 21, at 96.

genderqueer employees also "transgress gender stereotypes."[137] If an employer discriminates against a non-binary employee on the basis of that employee's sexual orientation, as opposed to their gender expression, however, problems arise under the current theories of interpretation.

The same issues that manifest themselves when analyzing the sexual orientation of transgender employees arise in the context of non-binary or genderqueer employees as well. The cisgendered legal fiction that holding the sex of the employee constant is the same as holding the gender of that employee constant undermines the use of both the comparative method and associational discrimination.[138] Gender stereotyping theory also runs into an obvious legal hurdle in the context of genderqueer employees. How can an employer have gendered stereotypes about the romantic associations of an employee who altogether defies standard gender classifications?

C. *Sexual Orientations Defined Independently of Sex and Gender*

Title VII jurisprudence on sexual orientation also relies on a binary of heterosexuality and homosexuality,[139] though a long history of sexuality studies rejects the existence of such a discrete division.[140] These same studies, famous for their findings on the prevalence of homosexuality, are less well known for a premise central to this Note: that bisexuality is as common, if not more common, than homosexuality.[141] While bisexuality is commonly dismissed under the umbrella of homosexuality,[142] it is a distinct sexual orientation which resists categorization as either heterosexuality or homosexuality. Of course, bisexuality is not the only sexual orientation which defies such discrete classifications. Asexuality, too, was found in Kinsey's study[143] and was recently found to constitute roughly 1% of the British population in Anthony Bogaert's seminal study.[144] While asexuality's prevalence is under-researched, its existence is accepted in the LGBTQIA+ community.[145]

Other sexual orientations function in a way that is truly independent

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137. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

138. *See supra* notes 126–128 and accompanying text.

139. Kramer, *supra* note 25, at 38.

140. *See generally* Yoshino, *supra* note 19, at 377–85 (giving an overview of studies which document sexual attraction as existing on a continuum).

141. *Id.* at 386 ("[S]tudies considered above all came to roughly the same conclusion about the relative incidence of bisexuality to homosexuality—namely, that the incidence of bisexuality was greater than or comparable to the incidence of homosexuality.").

142. Kramer, *supra* note 25, at 38. ("[B]isexuals . . . tend to fall into the homosexual cohort as a subset of homosexuality.").

143. Yoshino, *supra* note 19, at 357 n.8.

144. Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RES. 279, 279 (2004).

145. Gold, *supra* note 18.

of sex, such as pansexuality.[146] Pansexuality encompasses characteristics not restricted to desire and biological sex, such as gender,[147] and defies conventional notions of sexual behavior.[148] Unlike bisexuality and asexuality, pansexuality is defined on more than one axis of sexual orientation, as opposed to being defined only in reference to desire.[149] For example, a pansexual person may consider his polyamorous relationship to be a defining characteristic of his sexual identity. Courts will likely conclude that this is "conduct" or "behavior" that does not constitute sexual orientation, even if such conduct is integral to such a person's description of their own sexual orientation.[150] Sexual orientations that are not defined solely in reference to the sex or gender to whom a person is attracted face the biggest hurdle in future anti-discrimination statutes due to the apparent social agreement that sexual orientation does not include conduct.[151]

1. Attraction to Both or Neither: Bisexuality and Asexuality

Sexual orientations defined independently of sex become problematic under current Title VII jurisprudence protecting sexual orientation. Although bisexuality is often placed under the cohort of homosexuality,[152] it may independently form the basis of an employer's discrimination. If an employer's hostility to an employee is not based on

146. Drobac, *supra* note 22, at 299 ("Heterosexuality, homosexuality, and bisexuality track only the biological sex of the actors in a relationship, as defined by sexual desire.").

147. Without an understanding of the distinction between sex and gender, the difference between bisexuality and pansexuality may be difficult to understand. While bisexuality involves attraction to both sexes, pansexuality is truly independent of sex. For example, we would not define a person that is attracted to androgynous people as bisexual, but that person may be pansexual.

148. Stereotypes about the way men or women sexually behave, such as dominance and submission, is one of the many aspects of sexuality sometimes rigidly defined in popular culture. For an enlightening discussion on pansexuality's definition and its potential utility in the legal field, see generally *id.*

149. There are three axes on which sexual orientation may be defined: desire, conduct, and self-identification. Yoshino, *supra* note 19, at 371. While heterosexuality, homosexuality, bisexuality, and asexuality may all be defined on the "desire" axis, pansexuality resists even this classification. A full discussion of the importance of these axes in the law's definition of sexual orientation is more fully discussed in Section III.A.

150. Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713, 745 (2010) ("[S]ome engage in a more fluid sexuality including pansexuality and polyamory . . . . Courts will likely conclude that this is behavior rather than identity and is not protected . . . ."); *see also* Yoshino, *supra* note 19, at 404–10 (2000) (explaining that bisexuality is often erased because it threatens identity stabilization through the appearance of having a choice).

151. Tweedy, *supra* note 22, at 1465–66 ("[L]argely identical [statutory] definitions reflect a cultural agreement that the term sexual orientation describes sex of those to whom a person is attracted."). The source of this social agreement is more fully discussed in Section III.A.

152. Kramer, *supra* note 25, at 38.

the fact that he dates men or women, but is rooted in the fact that he dates both, is this really a form of sex discrimination? This is not a farfetched idea—bisexuals have long faced hostility from homosexuals and heterosexuals as belonging to neither the straight norm nor the gay community.[153]

To demonstrate the insufficiency of the current methods of protecting sexual orientation under Title VII, think of a bisexual male employee whose employer takes adverse action against him on the basis of his dating both males and females. Using the comparative method, the court holds all things constant ("in particular, the sex or gender of the partner") and changes only the sex of the employee.[154] It does not matter whether the employee is male or female—the employer's animus rests in his lack of monosexuality.[155] The same can be said of associational discrimination, which rests on the sex of the employee's partner. Inconsistency is at the cornerstone of the employer's hostility, regardless of whether the employee's partner is currently male or female. While supporters of current Title VII jurisprudence may be eager to classify hostility toward bisexuals as a subset of hostility toward homosexuals, even a homosexual employer might harbor hostility to a bisexual employee on the basis of his sexual orientation.[156]

A bisexual employee might be better protected under gender-stereotyping theory, but the hypothetical still highlights the theory's insufficiencies. Sex stereotyping theory asserts that the employer is applying a prescriptive stereotype to his male employee; the employer's adverse action is based on the stereotype that his male employee should be attracted to women.[157] A bisexual male employee is attracted to women, but he is also attracted to men. Even if the employee was currently in a relationship with a woman, the employer would still have animus against him on the basis of him being attracted to men as well. Regardless of whether courts might make the current stereotyping theory work to protect bisexual employees, any court declining to follow this line of reasoning could rely on this inherent logical inconsistency.

Finding discrimination against an asexual employee would also be a stretch under the current Title VII interpretations submitted by the circuit

153. *See* Yoshino, *supra* note 19, at 395–99 (explaining the ways that both heterosexuals and homosexuals remain invisible though "class erasure," "individual erasure," and "delegitimation").

154. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017).

155. Yoshino, *supra* note 19, at 398 ("Like straights, gays can often engage in this kind of erasure by characterizing individuals who self-described as bisexual as going through a 'phase' that will end in monosexuality.").

156. *See id.* at 399–429 (describing the shared interests of gays and straights in keeping bisexuality invisible in modern culture).

157. Zarda v. Altitude Express, 883 F.3d 100, 121 (2d Cir. 2018); *Hively*, 853 F.3d at 346 (7th Cir. 2017) ("Hively represents the ultimate case of failure to conform to the female stereotype . . . she is not heterosexual.").

courts and the EEOC. For example, Lisa Banks and Hannah Alejandro address the possibility of discrimination against an openly asexual employee under sex-stereotyping theory, explaining:

> [T]hat employee's Title VII claim might prevail if the employee can show that the supervisor's animus was based on the sex stereotype that a 'real woman' (or 'real man') must be sexually attracted to others. The argument is cogent, but does not fit as neatly in *Price Waterhouse*'s transgender or homosexuality analysis.[158]

To label this argument as "cogent" is generous. An employer's belief that his employee should have sexual attraction to others is not a stereotype related to the employee's biological sex.[159]

Asexuality fails not only under sex-stereotyping theory, but under the comparative method and associational discrimination as well. Under the comparative method, a court will hold all things constant and change only the sex of the employee. This does nothing to protect an asexual employee, as her sex/gender has nothing to do with the employer's discrimination against her. Male or female, it is the employee's lack of a sexual partner which forms the basis of the employer's discrimination.[160] Asexuality also necessarily fails under associational discrimination theory, which considers the sex/gender of the employee's partner.[161] The absence of a sexual partner is the basis of asexuality and it would thus fail to be protected under this construction of Title VII.

2. Self-Identification and Conduct-Based Orientations

Even where express protections for sexual orientation exist,[162] a social consensus about the definition of sexual orientation limits the scope of anti-discrimination statutes.[163] Because "sexual orientation" is commonly defined only in reference to the sex that a person is attracted to, behaviors

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158. Banks & Alejandro, *supra* note 48, at 41–42.

159. Court opinions refusing to protect sexual orientation under sex-stereotyping theory have explicitly recognized that sexual orientation is not a sex-specific stereotype. *See, e.g.*, *Zarda*, 883 F.3d at 134 (Dennis, J., concurring).

160. This is not to say that asexual people do not participate in romantic relationships. Many asexual people still participate in romantic (though not sexual) relationships, which are based on emotional needs rather than sexual desires. *About Asexuality,* ASEXUAL VISIBILITY & EDUC. NETWORK, https://www.asexuality.org/?q=overview.html [https://perma.cc/MCQ9-LDN5].

161. *See supra* Section I.C.

162. *See infra* Part III.

163. Tweedy, *supra* note 22, at 1465–66 ("[L]argely identical [statutory] definitions reflect a cultural agreement that the term sexual orientation describes sex of those to whom a person is attracted."); Yoshino, *supra* note 19, at 371–74 (explaining that sexual orientation may be defined along three axes (desire, conduct, and self-identification) but that the desire-based axis is the most common).

and sexual preferences that may be integral to a person's self-identified sexual orientation may remain unprotected. Heteronormativity influences related stereotypes about sexual practices, dominance/submission, and monogamy.[164]

For the purpose of this Note, the best example of a conduct-based orientation is polyamory.[165] Polyamorous relationships may involve three or more consenting adults that view themselves as being in a relationship with one another simultaneously.[166] The monosexual presumption of both heterosexuality and homosexuality (attraction to only one sex) is apparent through norms of monogamy.[167] Polyamorous individuals may view their relationships as a "hardwired" or essential component of their sexual identity.[168]

Under the three theories of Title VII interpretation (the comparative method, gender stereotyping, and associational discrimination),[169] a polyamorous individual would fail to be protected from employer discrimination. Each of these theories relies on the idea that the employee is being discriminated against on the basis of some enduring attraction to only one sex or is participating in a romantic relationship with only one person. Holding the employee's sex/gender constant and holding her partner's sex/gender constant both produce the same glaring conclusion: employer discrimination does not rely on sex/gender, but the presence of multiple partners.[170] Furthermore, while there is a stereotype that people will engage in monogamous relationships, this stereotype is unrelated to the sex/gender of the employee.[171]

The more obvious issue with conduct-based orientations is that they are unlikely to be protected even under anti-discrimination statutes which expressly provide for sexual orientation.[172] The common understanding of "sexual orientation" is that it only defines the desire for one or both sexes and does not encompass any aspects of sexual behavior.[173] In the same way that bisexuality has been undermined in legal history because it is perceived as "choice," rather than an essential aspect of identity,[174] conduct-based orientations are perceived as blurring the line between

164. Drobac, *supra* note 22, at 298–302 (describing ways that pansexuality differs from heterosexual standards of sexual behavior).

165. *See generally* Tweedy, *supra* note 22 (arguing for a more expansive definition of sexual orientation which would include polyamory).

166. *Id.* at 1462.

167. Yoshino, *supra* note 19, at 420–21.

168. Tweedy, *supra* note 22, at 1483.

169. *See supra* Part I.

170. *See supra* Section I.A, I.C.

171. *See supra* Part I.B.

172. *See infra* Section III.A.

173. *See supra* notes 163–164 and accompanying text.

174. Yoshino, *supra* note 19, at 405–06.

chosen behavior and immutable characteristic.[175]

III. THE NEED FOR LEGISLATION

The interpretations of Title VII asserted by the EEOC and the circuit courts fall short of conferring necessary protections against sexual orientation discrimination in a progressive social landscape. Taken to their full logical conclusion, these interpretations rely on cisgendered legal fictions and exclusive binaries that are increasingly outdated in the real world.[176] If the Supreme Court were to adopt any one or all of these theories to hold that sexual orientation discrimination is a form of sex discrimination, it would not preclude legal challenges in an increasingly diverse workplace.[177] Given the conservative composition of the Supreme Court at the writing of this Note, it is unlikely that the textualist Justices would be willing to further statutory interpretations that have such an attenuated relationship to Title VII's plain language.[178]

To fill the apparent gap in employment discrimination law, several states have enacted legislation that expressly prohibits discrimination on the basis of sexual orientation and gender identity.[179] Yet despite the widespread acceptance of LGBT Americans in public opinion,[180] there are still twenty-six states with no explicit prohibitions on sexual orientation discrimination.[181] Under this patchwork of state laws, the rights of LGBT people are still determined by their state of residence.[182] Only 48% of the LGBT population live in states that prohibit workplace discrimination on the basis of sexual orientation and gender identity.[183] In light of these discrepancies, the push for federal legislation has only

175. *See infra* Section III.A.

176. *See supra* Section II.

177. The percentage of individuals who identify as LGBT has increased by 1% over the past five years alone. Frank Newport, *In the U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx [https://perma.cc/2GV6-PMR5]. More importantly, a greater breadth of sexual identities have become an accepted part of the LGBTQIA+ community. Gold, *supra* note 18.

178. William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 333 (2017) ("[A]n ideologically driven but textualist Supreme Court no longer effectively monitored by a gridlocked Congress will be tempted to impose an anti-LGBT reading of the statutory text, structure, and history.").

179. *Non-discrimination Laws*, *supra* note 6.

180. *Gay and Lesbian Rights*, *supra* note 4.

181. *Non-discrimination Laws*, *supra* note 6.

182. Jorge L. Ortiz, *"Sobering Reality": LGBT Progress Report Shows Gains, but Most States Still Won't Grant Rights*, USA TODAY (Feb. 3, 2019), https://www.usatoday.com/story/news/2019/01/31/lgbt-report-public-support-but-state-opposition-equality-act-distant/2738550002/ [https://perma.cc/9WQ6-CEHC].

183. *Non-discrimination Laws*, *supra* note 6.

strengthened,[184] especially in the social landscape of major Supreme Court decisions such as *Obergefell v. Hodges*.[185] In 2014, President Obama issued an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity.[186] Several proposals of the Employment Non-Discrimination Act have made it to various stages of Congress,[187] and the more recent Equality Act included a Title VII amendment as a part of its more comprehensive LGBT civil rights framework.[188]

Yet even those states that currently prohibit sexual orientation discrimination in express terms define "sexual orientation" as heterosexuality, homosexuality, or bisexuality only.[189] Proposed federal legislation has also defined sexual orientation in these restrictive terms.[190] These statutory definitions limit the scope of legislation in the increasingly diverse LGBT community, clearly excluding asexuality, pansexuality, and any conduct that expresses sexual orientation other than the choice of a monogamous partner.[191] These current definitions of sexual orientation are restrictive in their scope, and a more forward-looking definition of sexual orientation in future anti-discrimination laws is necessary.

A. *Restrictive Definitions of Sexual Orientation*

Current state laws and proposed federal laws have defined sexual orientation as "homosexuality, heterosexuality, and bisexuality" only.[192] While these laws clearly account for the gap in Title VII protections by specifically including protections for homosexuals and bisexuals, they

184. Cunningham-Parmeter, *supra* note 5, at 1101–02 ("Given that employment discrimination affects a much larger share of the gay population, it is unsurprising that many gay individuals rank workplace protections above marriage rights.").

185. 135 S. Ct. 2584 (2015).

186. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014), *reprinted as amended in* 42 U.S.C.A. § 2000e (West 2018). While this presidential action stresses the importance of LGBT issues, it is plainly insufficient compared to broad, federal legislation. *See Civil Rights — Employment Discrimination — Executive Order Prohibits Federal Government and Contractor Employment Discrimination on the Basis of Sexual Orientation or Gender Identity. — Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014)*, 128 HARV. L. REV. 1304, 1304 (2015).

187. Eskridge, *supra* note 178, at 329 n.30.

188. Equality Act of 2017, S. 1006, 115th Cong. (2017).

189. Tweedy, *supra* note 22, at 1463 n.4 (surveying state definitions).

190. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) ("The term 'sexual orientation' means homosexuality, heterosexuality, or bisexuality."); The Equality Act of 2017, S. 1006, 115th Cong. (2017) ("The term 'sexual orientation' means homosexuality, heterosexuality, or bisexuality.").

191. Gold, *supra* note 18.

192. Tweedy, *supra* note 22, at 1463 n.4 (surveying state definitions); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act of 2017, S. 1006, 115th Cong. (2017).

expressly exclude asexuality, pansexuality, or conduct-based orientations. The limited definitions of sexual orientation in these laws "reflect a cultural agreement that the term sexual orientation describes sex of those to whom a person is attracted."[193] This cultural agreement derives from both the history of LGBT discrimination and LGBT activism, with the latter having a profound effect on the current conception of sexual orientation.

To accomplish the strides in civil rights thus far, LGBT activists have heavily relied on a minoritizing view of queer identity.[194] The choice to stabilize LGBT identity "arises out of a desire to retain the immutability defense."[195] By analogizing LGBT people to other minorities with immutable characteristics, activists were able to make incredible strides in civil rights in a short time[196] at the expense of restricting accepted notions of queer identity.[197] One's LGBT "status" was portrayed as "fixed and natural," as opposed to being "learned and relational," thus limiting the breadth of sexual orientations recognized in the queer community.[198]

This stabilized queer identity, while useful in activism, undermines diversity in the expanding LGBTQIA+ community.[199] Likening sexual orientation to an immutable characteristic inherently limits an aspect of identity which is rooted in behavior.[200] Perhaps the better view of sexual orientation has been embraced by the Supreme Court, which has "moved away from the group-based equality claims . . . to individual liberty claims,"[201] particularly in the context of sexual orientation.[202] Forward-

193. Tweedy, *supra* note 22, at 1465–66.

194. *Id.* at 1470.

195. Yoshino, *supra* note 19, at 405.

196. *See* Robinson, *supra* note 3, at 151 (calling LGBT claims "the only site of vitality in equal protection jurisprudence" and arguing that the Supreme Court has created an LBGT exceptionalism in the equal protection analysis).

197. Tweedy, *supra* note 22, at 1470 ("[O]veremphasis on the minoritizing view may whitewash the richness and complexity of LGB identity in order to project a more monolithic identity that will be presumably saleable in the courtroom . . . .").

198. McGinley, *supra* note 150, at 719.

199. Cunningham-Parmeter, *supra* note 5, at 1102 ("[M]ovement 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. The 'safe' undifferentiated images intentionally downplayed issues of sexuality, gender, and diversity within the gay community . . . .").

200. Tweedy, *supra* note 22, at 1472 ("[B]ecause of sexual orientation's conduct-based roots, the continuity of one's identity is always theoretically in question.").

201. Yoshino, *supra* note 19, at 748.

202. *See* Robinson, *supra* note 3, at 151; *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that private and consensual homosexual sex within the home is recognized as a protected liberty under the Due Process Clause of the Fourteenth Amendment); Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (declining to use a traditional Equal Protection analysis in

looking legislation must recognize sexual orientation not just as an essential identity, but as an identity rooted in behavior that expresses "core personal freedoms."[203]

B. *Forward-Looking Legislation*

There are several ways that anti-discrimination legislation might protect sexual minorities, even as new identities are recognized in the queer community. This Note suggests two possibilities. First, anti-discrimination legislation might use sexual orientation as an enumerated category, including an expansive statutory definition which recognizes the complexities of this identity. In the alternative, new legislation might abandon sexual orientation as an enumerated category altogether, instead recognizing an employee's intimate relationships should almost never form the basis of adverse action in a merit-based workplace.

1. An Expansive Definition of Sexual Orientation

In order to anticipate new forms of discrimination that may arise with an increasingly diverse LGBTQIA+ community, anti-discrimination legislation might list sexual orientation as an enumerated category under Title VII, but use a broad statutory definition. An example of an inclusive definition comes from the American Psychological Association, which defines sexual orientation as:

> A component of identity that includes a person's sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others."[204]

This definition not only recognizes the complex relationship between gender identity and sexual orientation, it acknowledges that certain behaviors and social relationships are an integral part of some orientations.

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the context of gay marriage and instead basing the decision on the Due Process notion of "liberty").

203. Tweedy, *supra* note 22, at 1477 ("[I]t is equally possible to argue that one's sexual preferences, and the ability to act on or otherwise express them without facing adverse consequences, should be considered a core personal freedom that warrants statutory . . . protection.").

204. Am. Psychological Ass'n, *supra* note 90, at 862.

2. Abandoning Sexual Orientation as an Enumerated Category

Any legislation that addresses new forms of discrimination presented by evolving sexual identities must recognize that sexual orientation is inextricably defined in reference to behavior. The intimate personal relationships that are an integral expression of sexual orientation must themselves be prohibited from forming the basis of adverse action by an employer to fully anticipate the forms of discrimination that may arise in the near future. Instead of recognizing sexual orientation as an enumerated category under Title VII, anti-discrimination legislation might instead recognize an employee's interest in personal autonomy in the context of romantic relationships.

The new Restatement of Employment Law recognizes that there might be an "interest in personal autonomy outside the employment relationship," even for those interests which do not necessarily accord with the notion of employee privacy.[205] One provision of the new Restatement even suggests that "an employer is subject to liability for intruding upon an employee's personal autonomy interests if the employer discharges the employee because of the employee's exercise of a personal autonomy interest . . ." unless the employer can show that the exercise of autonomy interfered with some legitimate business interest.[206] Unfortunately, similar provisions have not been adopted in most states.[207] A few states have passed statutes that prevent an employer from retaliating against an employee for his off-duty activities,[208] but even these statutes exclude romantic relationships from the scope of off-duty activity.[209]

Legislation which expressly prohibits an employer from taking adverse action against an employee on the basis of his romantic relationships, sexual preferences, or both, would recognize that an employee's exercise of personal autonomy should not form the basis of employer discrimination. This holistic approach to protecting the manifestations of sexual orientation, as opposed to the characteristic of sexual orientation itself, would recognize the conduct-based roots of sexual identity and create forward-looking safeguards against discrimination as the queer community grows and evolves.

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205. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.08(a) (AM. LAW INST., 2014).
206. *Id.* § 7.08(b)–(c).
207. MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 422 (3d ed. 2015).
208. *Id.*
209. *Id.* at 426–30.

CONCLUSION

Despite several federal legislative proposals and the judicial activism displayed by the circuit courts, LGBT people still remain unprotected from workplace discrimination. In the wake of civil rights decisions such as *Obergefell*, it would appear that there is a commonly held consensus that LGBT employees deserve protection from arbitrary discrimination. However, the support currently afforded to LGBT people has relied on a limited image of the queer identity. Diversity has been obscured in favor of salability. As a consequence, even the incomplete protections currently afforded to queer employees do not encompass the breadth of sexual minorities recognized in the community.

It is doubtful that federal legislation protecting LGBT people from workplace discrimination will pass under the current Administration. Even the most limited definition of sexual orientation is unlikely to make its way into a Title VII amendment or other legislation. Furthermore, given the conservative composition of the United States Supreme Court, the circuit court split on Title VII's "because of . . . sex" provision is unlikely to be resolved in favor of LGBT employees. This Note argues for forward-looking legislation that anticipates new forms of employer prejudice in an evolving LGBTQIA+ community, but not without recognizing the necessity of a substantial political shift before such legislation can be enacted. Until then, the rights of LGBT employees remain incomplete, and the workplace rights of other sexual minorities remain entirely ignored.