A RESPONSE TO KEITH CUNNINGHAM-PARMETER

Danaya C. Wright[*]

Professor Keith Cunningham-Parmeter's article[1] on the next gay rights battle tackles one of those intractable civil rights problems: Where do we go next after a victory sets the movement going in a particular direction that might be counter-productive for other battles in the overall war? In particular, he is concerned that the same-sex marriage debate centered too much on normalizing gay families and ultimately erased gay sexuality in ways that are potentially dangerous for the struggle for gay employment rights. He argues that, by disinfecting gay relationships and framing them as safe and non-threatening in the marriage cases, advocates have raised barriers for gay litigants in the employment context whose sexuality, gender, and diversity have led to a jurisprudence of danger and deviance.[2] The dissonance between the two images makes it hard to deploy the victories of the marriage cases into the arguably more important employment context and threatens to leave the promise of employment equality unrealized.

The tension between the marriage agenda and the employment rights agenda is long-standing. Former Senator Barney Frank often opined that marriage would be nice, but we should work instead to achieve employment protections through the Employment Non-Discrimination Act (ENDA).[3] Thomas Messner, with the Heritage Foundation, viewed ENDA as a path to marriage,[4] while others have viewed marriage as a path to ENDA.[5] LGBTQ activists could reasonably believe that marriage rights were closely connected to employment rights, as they were closely bound together in the context of race-based discrimination and the civil

---

* Clarence J. TeSelle Professor of 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. *Id.* at 1145.

3. John Aravosis, *Barney on ENDA Transgender Controversy. And, He's Right.*, AMERICABLOG (Sept. 28, 2007), http://americablog.com/2007/09/barney-on-enda-transgender-controversy-and-hes-right.html. ENDA would be a set of amendments to Title VII of the Civil Rights Act to prohibit discrimination on the basis of actual or perceived sexual orientation or gender identity, or other similar identity characteristics. Tamara Tabo, *The ENDA Title VII as We Know It: Why House Republicans Should Pass the Employment Non-Discrimination Act*, ABOVE THE LAW (Apr. 10, 2014), http://abovethelaw.com/2014/04/the-enda-title-vii-as-we-know-it-why-house-republicans-should-pass-the-employment-non-discrimination-act.

4. Thomas Messner, *ENDA and the Path to Same-Sex Marriage*, HERITAGE FOUND. (Sept. 18, 2009), http://www.heritage.org/research/reports/2009/09/enda-and-the-path-to-same-sex-marriage.

5. *See, e.g.*, *After Same-Sex Marriage Ruling, Broadening the Quest for Gay Rights*, L.A. TIMES (July 13, 2015), http://www.latimes.com/opinion/editorials/la-ed-enda-federal-gay-rights-law-20150713-story.html; Niels Lesniewski, *Gay Marriage Supporters Turn Focus to ENDA*, WGDB (June 26, 2015), http://blogs.rollcall.com/wgdb/gay-marriage-supporters-turn-focus-to-enda.

rights movement. The Civil Rights Act was passed in 1964[6] prohibiting discrimination in employment on the basis of race, and anti-miscegenation laws were outlawed by the Supreme Court a short three years later in *Loving v. Virginia*[7] in 1967. But there is no clear consensus that one would lead to the other, or that a strategy pursuing protections in one arena would be more or less influential on a strategy pursuing protections in the other.

In the current struggle for civil rights for sexual minorities, we simply cannot know whether it would have been better to have pursued employment protections before marriage rights because that is not the world in which we live. Thus, with the success of the marriage movement and the Supreme Court's affirmance of the right to same-sex marriage in *Obergefell v. Hodges* in June 2015,[8] employment rights are next in line. But Cunningham-Parmeter suggests that the marriage strategy may have subtly undermined the struggle for employment rights.[9] Because of that undermining, and because the courts have been less than receptive to sex discrimination claims so far, Cunningham-Parmeter suggests that we should use sex discrimination law that developed in the context of gender discrimination to achieve the employment rights needed for sexual minorities.[10]

My response to Cunningham-Parmeter consists of three basic concerns that I will explain and explore in this brief article. First, Cunningham-Parmeter claims that in the struggle for marriage equality, sexual minorities had to subsume their sexual difference and normalize their relationships to gain traction in the courts and ultimately majority approval by the general public. He claims:

> In the worlds described in *Obergefell*, *Windsor*, and other recent same-sex marriage decisions, gay couples fall in love, grow old together, and support each other through illness. In large part, this choice of frames represented a pragmatic litigation tactic. Minority groups have often attempted to gain social acceptance by tapping into shared cultural values and downplaying differences. According to this strategy, if courts view plaintiffs through culturally intelligible frames, then decision makers can better comprehend gay couples' demands for recognition.[11]

And along with many other advocates and critics, Cunningham-

6. Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000 (2015).

7. 388 U.S. 1, 2 (1967).

8. 135 S. Ct. 2584, 2608 (2015).

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

10. *Id.* at 1104–05.

11. *Id.* at 1111.

Parmeter notes that this strategy came with certain potential costs, particularly the erasure of gay sexual identity[12] and the acceptance of the "gendered baggage that came with the institution"[13] of marriage. Perhaps the largest potential cost came in focusing on the couple as a long-term partnership rather than on the needs and identity of the gay individual. Same-sex couples were made out to be just like their heterosexual counterparts in terms of family formation and private relationships, thus ignoring the profound discrimination they face in many daily activities of life because of their individual characteristics.

Certainly I don't believe anyone would disagree that an important part of the strategy toward achieving same-sex marriage rights was to make gay couples appear to be fundamentally like opposite-sex couples in the legitimacy of their claims to equal treatment. But Cunningham-Parmeter's article begs the question: are we worse off in the struggle for equal treatment in employment because of the shift in focus that occurred with the same-sex marriage struggle? In breaking down this question, there are two plausible results. One is that implied by Cunningham-Parmeter, that sexual minorities have been set-back in their struggle for equal rights, had their more important struggle side-lined, or at least had focused their attention on one set of benefits that don't benefit the group as a whole, thus wasting time and resources better spent focusing on the bigger issue of equal employment rights. The other plausible perspective, however, is that because of the normalizing of gay relationships in the marriage context, sexual minorities are actually better situated to obtain equal treatment in employment because gay people are no longer perceived to be the abhorred other. The answer to which view better describes the current LGBTQ struggle is impossible to determine because we can't set the clock back and opt for employment protections before marriage protections.

But two facts lead me to think that the marriage movement has actually speeded up the likelihood of employment rights. First, ENDA has been introduced every year but one into Congress since 1994,[14] and similar legislation has been introduced almost every year since 1974.[15] In 2007 it passed the House,[16] and in 2013 it passed the Senate with a significant bi-partisan majority.[17] It currently has President Obama's

12. *Id.* at 1117.

13. *Id.* at 1112.

14. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act.

15. *Employment Non-Discrimination Act (ENDA)*, LGBTQ NATION (last visited Mar. 10, 2016), http://www.lgbtqnation.com/tag/enda.

16. Hunt, *supra* note 14.

17. Leigh Ann Caldwell, *Senate Passes LGBT Anti-Discrimination Bill*, CNN (Nov. 8, 2013), http://www.cnn.com/2013/11/07/politics/senate-lgbt-workplace-discrimination.

support.[18] But religious exemptions have caused it to lose some support by gay-rights activists, and transgender provisions have caused it to lose some support by conservative lawmakers.[19] It faced its most favorable reception shortly after the landmark gay-rights decisions in 2003 in *Lawrence v. Texas*[20] and 2013 in *United States v. Windsor*.[21]

Although *Lawrence* was not a marriage case, it certainly paved the way for the normalizing of gay relationships that underlay the marriage decisions as homosexual sodomy was decriminalized and gay sexual relations were brought under the privacy umbrella of *Griswold v. Connecticut*.[22] There is no question that *political* support for employment rights has grown significantly alongside the marriage decisions. This is likely caused by the growing public awareness of gay civil rights and the daily discrimination that sexual minorities face. The second fact is the public acceptance of same-sex marriage, which reached a majority of the public in 2015.[23]

Does this mean that ENDA is closer to being a reality because of *Obergefell*, or was it delayed because gay activists were focusing on marriage rather than employment and we actually might have had it already but for using all the resources and public good-will on marriage? We can't answer that question, but we certainly can see that there is far greater support for employment rights, both in Congress and by the public, than there was in the late 1990s. In my mind, marriage was likely a good strategy as public approval of both same-sex marriage and employment non-discrimination has reached unprecedented levels. Had the movement focused on gay sexuality and civil rights for sexual minorities by highlighting sexual identity and difference, I have deep doubts that the public approval for either employment rights or marriage would be where it is today.

I also think the marriage success has made it very difficult for opponents to use religious arguments against gay civil rights generally. With the rise of state legislation permitting discrimination against sexual

---

18. *Id.*

19. *See* Jennifer Bendery & Amanda Terkel, *Gay Rights Groups Pull Support for ENDA Over Sweeping Religious Exemption*, HUFFINGTON POST (July 8, 2014), http://www.huffingtonpost.com/2014/07/08/enda-religious-exemption_n_5568736.html; *see also* Sunnivie Brydum, *Will Trans Folk Become an ENDA Bargaining Chip?*, ADVOCATE (Nov. 8, 2013), http://www.advocate.com/politics/transgender/2013/11/08/will-trans-folk-become-enda-bargaining-chip.

20. 539 U.S. 558 (2003).

21. 133 S. Ct. 2675 (2013).

22. 381 U.S. 479 (1965).

23. *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR. (July 29, 2015), http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/. The Pew Research Center shows that in 2001 Americans opposed same-sex marriage by 57% to 35%. In 2015 they approved same-sex marriage by 55% to 39%. *Id.*

minorities,[24] we have seen a powerful public backlash that was not present when state legislation permitted discrimination against racial minorities in the lead-up to the Civil Rights Act. When Arizona attempted to pass a Religious Freedom Restoration Act (RFRA) (Arizona SB 1062) in 2014, there was such a public outcry that Governor Jan Brewer, after initially supporting the bill, vetoed it.[25] Similar controversies have surrounded similar bills in Indiana and Georgia.[26] In 1963, when California had passed a fair housing act outlawing racial discrimination in housing, the California public was so outraged that it passed a constitutional amendment to repeal the law and permit racial discrimination in housing by a majority of two to one. That amendment was declared unconstitutional by the California Supreme Court and the U.S. Supreme Court in *Reitman v. Mulkey*,[27] but it showed just how resistant the general public can be to the civil rights ideal of non-discrimination. The powerful economic and moral arguments against the state RFRAs, as well as their success in keeping the laws from being passed in many states, shows that the anti-discrimination forces are gaining more power and are leveraging more successes than they did in the 1960s. This makes me hope that passage of more state ENDAs and a federal ENDA will not be far off.

The second concern raised by this article is whether sexual minorities would be better off had we not pursued marriage in the first place. Again, this is an unanswerable question but I think Cunningham-Parmeter needs to address it more explicitly if he is going to use marriage as the foil for his argument about employment rights. And again, there are at least two possible answers. One is that marriage gives an important benefit to some, socially-acceptable, gay people at the expense of other, less socially-acceptable people who, presumably, face greater discrimination because of their difference from the gay norm than they would have faced without the gay marriage norm. Or, marriage could be a benefit for some, but its very existence does not harm the interests of those who choose not to marry or whose sexual expressions do not conform to the norms of marriage.

Although Cunningham-Parmeter has not engaged this question directly, I suspect that there is more support for the first option rather than the second. I would not be surprised that marriage has created two groups

---

24. *See, e.g.*, Adam Serwer, *Arizona Passes Law Allowing Discrimination*, MSNBC (Feb. 21, 2014), http://www.msnbc.com/msnbc/arizona-passes-law-allowing-discrimination#50450.

25. *See* Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html?_r=0.

26. Jim Galloway, *Gearing Up for Next 'Religious Liberty' Fight, Georgia Business Leaders Look to Indiana*, AJC (Oct. 17, 2015), http://politics.blog.ajc.com/2015/10/17/gearing-up-for-next-religious-liberty-fight-georgia-business-leaders-look-to-indiana.

27. 387 U.S. 369 (1967).

of gay people: those who are like the mainstream heterosexual couples and those who are not. Those who are not mainstream are likely to be gay men or transgender persons, any sexual minority who is particularly visual in the expression of his or her sexual difference, those who have many sexual partners and don't choose to "settle down;" these are the unsafe gays as opposed to the safe gays. Safe gays are harmless and unthreatening, just going about their business acting like all the rest of us, while unsafe gays are in your face and challenge heterosexist norms and gender stereotypes. Safe gays settle down, have families, and pay their taxes. Unsafe gays are predators or those whose piercings, tattoos, and leather make mainstream Americans feel uncomfortable. Safe gays don't challenge homophobia in the public sphere; unsafe gays speak out and confront bigotry. Safe gays pass; unsafe gays definitely do not pass.

As studies have shown with regard to race, lighter-skinned African Americans face less hostile environments than darker-skinned African Americans.[28] The former are perceived to be less dangerous, less strident in their demands for equal treatment, and more likely to be accepted than their darker-skinned counterparts. The same likely goes for sexual minorities. And although I have no particular data to support this claim, it seems plausible that as a portion of sexual minorities become more assimilated and accepted, those who are not will be even more reviled and feared. This is due, in part, to the perception that only the radical gays are the problem, that while sexual orientation may not be a choice, assimilation is a choice. LGBTQ individuals who present as mainstream Americans can be assimilated and safely trusted, but that leaves a smaller group who do not present as mainstream who cannot be assimilated and therefore, in some measure, do not deserve equal rights. If that is so, then the marriage advocates and the normalized gay beneficiaries gain palpable benefits at a cost to others.

Of course, that begs the question whether a different strategy toward equal civil rights would have overcome social aversion to unsafe gays. Certainly, marriage helps to starkly differentiate between the safe gays and the unsafe gays in ways that may harm the interests of unsafe gays. But that is not to say that without marriage any gays, safe or unsafe, would have been better off. Although Cunningham-Parmeter does not address this question directly, he certainly relies on perceptions of unsafe gays in the employment discrimination context to support his argument that the continuation of the stereotypes inherent in discrimination cases will block meaningful employment law reforms. And he implies that

28. Ronald Turner, *The Color Complex: Intraracial Discrimination in the Workplace*, 46 LABOR L.J. 678–84 (1995). *See generally* Richard Seltzer & Robert Smith, *Color Differences in the Afro-American Community and the Differences They Make*, 21 J. OF BLACK STUD. 279 (1991); Keith B. Maddox, *Perspectives on Racial Phenotypicality Bias*, 8 PERSONALITY & SOC. PSYCHOL. REV. 383 (2004).

perhaps without marriage the courts, society, or lawmakers might have looked a bit more skeptically at the sexualized narrative and reliance on stereotypes of unsafe gays in the context of legal doctrines involving LGBTQ employment discrimination to move beyond them in a quest to achieve employment rights for all gays, regardless of perception. But do we really think judges, politicians, and the general public can critically evaluate the illegitimacy of using stereotypes about unsafe gays in making legal and policy decisions? Our track record on the subject is not promising.

The third concern I think is raised by the article, and probably the one most relevant to Cunningham-Parmeter's argument, is whether sex discrimination laws that evolved in the context of gender provide a good solution to the bad rules that have emerged in the LGBTQ employment law context which are currently based on stereotypes of unsafe gays. Cunningham-Parmeter argues that the employment law cases that have been decided to date rely on perceptions of unsafe gays, either as sexual predators or effeminate victims, who don't conform to traditional gender expectations and sexual norms.[29] He then argues that using the more well-established sex discrimination rules and norms that evolved in challenges involving gender can move the courts away from the unsafe gay stereotypes that have proved problematic to date.

Again, there are two issues here. First, isn't the move to sex discrimination really an attempt to erase sexual difference and liken sexual orientation discrimination to gender discrimination? Doesn't this reproduce precisely the erasure of sexuality that he decries in the marriage context? Second, is there any evidence that sex discrimination in the courts will be more successful than legislative efforts to pass a federal or state ENDA, or will be more successful than highlighting the problematic way in which unsafe gays are presented in the employment context? In other words, does it make more sense to work for a compromise solution using sex discrimination rules rather than tackling the problem of sexual difference and discrimination head on by embracing and highlighting sexuality?

And not surprisingly, these questions also cannot be answered. But I do believe that Cunningham-Parmeter owes the reader a more nuanced argument. There is something problematic in arguing that the marriage cases set back the employment effort by erasing gay sexuality and then arguing that using sex discrimination is the best way to circumvent the bad employment cases because you can focus the courts away from the deviant sexuality on which the current employment cases rely. To the extent the sex discrimination norms erase sexual difference, they would

29. Cunningham-Parmeter, *supra* note 1, at 1118.

seem to be erasing gay sexuality just as the marriage cases have done.

Marriage has certainly benefitted safe gays, and it has possibly hurt unsafe gays in ways that might exacerbate employment discrimination jurisprudence. One can easily imagine employers firing the flamboyant gay employee and keeping the assimilated gay employee, and then defending the firing on the fact that not all gays were targeted. But is the sex discrimination strategy Cunningham-Parmeter advocates simply a stop-gap measure to prevent backsliding, which seems to be the case in the employment context, and thereby achieve some small forward movement in light of Congressional and judicial refusal to make meaningful, targeted reforms? He claims that "[g]iven legislative inaction on the topic, pressing the sex discrimination argument in the courts represents the most promising route for achieving workplace protections for the gay community in the near term."[30] This sounds like he is going for the practical over the ideal. However, in response to critics of this approach, like Martha Nussbaum and Edward Stein, who argue that the sex discrimination approach ignores the "core wrong" of anti-gay bias, Cunningham-Parmeter suggests that the sex discrimination argument is a valid tool for addressing discrimination because it is based on an employee's violation of *heterosexual* norms, not just gender norms.[31] In other words, sex discrimination isn't refashioning a legal tool designed for women to get at harms to sexual minorities; rather, sex discrimination should be viewed as including heterosexuality and homosexuality within its ambit.

While I like the argument that sex discrimination includes within it the stricture against [homo]sex discrimination just as it normalizes [hetero]sexual expression, I'm skeptical that the courts are equipped to make the leap. And to unpack this idea for a moment, let's explore what Cunningham-Parmeter means by including homo/hetero-sexuality within sex discrimination. Cunningham-Parmeter views sex discrimination as including the traditional category of discrimination based on sex (male/female) as well as a broader notion of sexuality (homo/hetero) based on the sex of the person to whom the employee is attracted.[32] If an employee is harassed because he is attracted to persons of the same sex, he is not being discriminated against because he is a man but because he is homosexual. Cunningham-Parmeter argues that this should fit within traditional sex discrimination because the sex of the person to whom the employee is attracted is counter to heterosexual norms and should count as sex discrimination. And this makes sense because male and female are defined in sexual terms and often invoke sexual opposition.

But even if we expand the notion of sex discrimination to include

30. *Id.* at 1145.
31. *Id.* at 1149, 1150–51.
32. *Id.* at 1102.

discrimination on the basis of homosexuality, or sexual non-conformity, do we achieve the full range of protections that could be obtained by a different cause of action based on protection for sexual minorities? Perhaps sex discrimination can protect gay and lesbian employees, but will it protect transgender, bi-sexual, or gender non-conforming employees who express their gender and their sexuality in non-traditional ways? Will it be necessary to prove the sex of the person the employee is attracted to in order to prove sex discrimination, and is it possible there won't be a cause of action if the employee is attracted to a person of the opposite sex but the employee presents as sexually non-conforming? I guess the question here is one of fit. Are we better off pursuing a separate set of protections for sexual orientation or trying to expand the pre-existing category that was created to deal with gender?

Perhaps it would be better to focus on a new recognition of discrimination based on sexual orientation for sexual minorities, distinct from gender bias, and tackle the unsafe gays stereotypes that have so far underlain our employment cases, now that social and legal acceptance of sexual minorities has reached an unprecedented level thanks to the marriage debate. But once again, neither of us has a crystal ball and can know which is the best strategy; we can only pursue the options that are likely to succeed, even if, in the long run, we may set the movement in another possibly wrong direction.