January 2016

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MARRIAGE EQUALITY, WORKPLACE INEQUALITY:
THE NEXT GAY RIGHTS BATTLE

Keith Cunningham-Parmetry

Abstract

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

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

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

* Professor of Law, Willamette University. J.D., Stanford University. I thank Richard Birke, Caroline Davidson, and Paul Diller for helpful conversations and input on this Article. In addition, Kimberly Davis and Tyler Millette provided outstanding research assistance throughout this project. I greatly appreciate the excellent library research support that I received from Galin Brown, Tim Kelly, and Ann Kitchel. Finally, I thank William Cochran, Vitaliy Kats, Rebekah Runyon, Marla Spector Bowman, and the other editors of the Florida Law Review who worked diligently and deftly to adapt to a fast-changing area of the law.

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INTRODUCTION

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


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

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

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


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


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

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

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

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


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

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

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

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


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


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

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

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

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


27. See, e.g., Mary Anne Case, Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v.
this Article evaluates the theory across multiple legal fields. By applying
the sex discrimination argument to different forms of discrimination
against sexual minorities, this Article explains how the theory’s
universalism constitutes its greatest strength.

The sex discrimination argument offers several practical and
theoretical benefits over other approaches to gay civil rights. For
example, instead of categorizing marriage as a stand-alone right that
courts should elevate above all others, the sex discrimination argument
recasts all state action based on sexual orientation as just another form of
sex discrimination, placing sexual orientation discrimination within a
settled constitutional framework that triggers heightened scrutiny in a
variety of contexts.28 Likewise, because courts interpret constitutional
claims alleging intentional sex discrimination coextensively with Title
VII,29 a decision applying the sex discrimination argument to various
instances of state discrimination against sexual minorities in areas such
as housing, education, or adoption30 would effectively extend Title VII
protections to gay workers as well.31

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

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

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

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

sex discrimination under Title VII and the Equal Protection Clause); Mange, supra note 29, at 24
(same); see also infra Subsection III.A.2 and accompanying discussion of the relationship
between Title VII and equal protection.
behavior by restricting benefits only to those women who conform to the
gender stereotype that requires women to desire men. In the Title VII
context, the effeminate victim exception reinforces the gender stereotype
that equates effeminacy with homosexuality. These gender norms do not
exempt straight workers either. For example, the cultural expectation of
opposite-sex desire calls upon straight employees to prove their
heterosexuality at work through acts such as talking about their love lives
and displaying pictures of their partners on their desks.32 Workers who
do not conform to these norms are subject to sanctions by employers and
coworkers who police gendered behavior at work and punish “suspected”
homosexuals.33 In sum, the sex discrimination theory brings critical
attention to numerous gender-based rules and expectations that limit the
autonomy of all individuals in public and private spheres.

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

32. Kramer, supra note 27, at 228 (discussing the cultural ubiquity of heterosexuality).
33. See infra Section II.A and accompanying discussion of the interaction between Title
VII jurisprudence and workplace norms.
34. Complaint for Declaratory, Injunctive, or Other Relief at 1, Perry v. Schwarzenegger,
(quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)) (internal quotation marks omitted); see also
Obergefell v. Hodges, No. 14-556, slip op. at 6 (U.S. June 26, 2015) (“Their stories reveal that
they seek not to denigrate marriage but rather to live their lives, or honor their spouses’ memory,
joined by its bond.”).
pressures placed on lesbians and gay men to “act[] straight”).
36. See Appleton, supra note 26, at 124 (explaining how the sex discrimination argument
highlights universal harms).
Because the Supreme Court has long prohibited states and employers from policing the behavior of men and women based on gendered presumptions, the sex discrimination argument constitutes the best vehicle for highlighting the gender stereotypes manifest in sexual orientation discrimination. The cultural imperative requiring individuals to choose only partners of the opposite sex remains our society’s most enduring gender stereotype. Until that presumption is properly recognized as sex discrimination, dissonant pictures of wedding cakes and predators will continue to dominate gay imagery in the law.

I. THE MARRIAGE EQUALITY NARRATIVE

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

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

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

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

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

43. NeJaime, Before Marriage, supra note 1, at 105–06.
44. Cummings & NeJaime, supra note 5, at 1250; NeJaime, Before Marriage, supra note 1, at 105–06; Egan & Sherrill, supra note 38, at 229.
45. Cummings & NeJaime, supra note 5, at 1250.
47. Brandzel, supra note 1, at 180 (reviewing the history of state marriage restrictions).
48. See Nancy Levit, Theorizing and Litigating the Rights of Sexual Minorities, 19 COLUM. J. GENDER & L. 21, 31–33 (2010) (examining same-sex marriage litigation strategies); see also Cummings & NeJaime, supra note 5, at 1245 (emphasizing the distinction between movement and non-movement lawyers).
50. 531 U.S. 98 (2000); Cummings & NeJaime, supra note 5, at 1299.
51. Cummings & NeJaime, supra note 5, at 1299–1300 (discussing gay-rights groups’ reaction to the announcement).
courts should be the next step on marriage in California.”

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

A. The Ordinary Gay Couples of Obergefell and Windsor

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

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

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56. Levit, supra note 48, at 22–23 (discussing the theoretical tensions raised by litigation strategies).  
57. *Obergefell*, slip op. at 4–6.  
58. *Id.* at 4.  
59. *Id.* at 4–5.  
60. *Id.*  
61. *Id.* at 5.
[James] and want our last days together to be a celebration of our love. How can we celebrate when Ohio law requires that my death certificate say I am not married and that I have no surviving spouse?”  

Characterizing the outcome as a “state-imposed separation,” Justice Kennedy explained how Ohio’s same-sex marriage ban caused the couple to “remain strangers even in death.” According to Justice Kennedy, the Fourteenth Amendment prevents states from injuring couples like John and James in this way. As such, the Obergefell Court held that the Constitution required Ohio to extend the fundamental right of marriage to same-sex couples on equal terms with opposite-sex couples.

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

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

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

Reviewing her claim in Windsor, Justice Kennedy explained how the couple had “met in New York City in 1963 and began a long-term relationship.” Justice Kennedy noted that New York had already recognized their union and that the two women welcomed the “rights and
responsibilities” that came with marriage.⁷¹ According to Justice Kennedy, under such circumstances the Fifth Amendment prohibited the federal government from “demean[ing] the couple, whose moral and sexual choices the Constitution protects.”⁷²

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

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

⁷¹. Id. at 2694.
⁷². Id. (citing Lawrence v. Texas, 539 U.S. 558 (2003)).
⁷⁴. Windsor, 133 S. Ct. at 2696.
⁷⁵. Windsor Plaintiff’s Memorandum of Law, supra note 67, at 1.
⁷⁷. Peter Applebome, Reveling in Her Supreme Court Moment, N.Y. TIMES, Dec. 11, 2012, at A24 (discussing the factual background of Windsor).
⁷⁸. Nosanchuk, supra note 39, at 1994–95 (discussing debates within the gay community over conformity).
⁷⁹. See Yoshino, supra note 35, at 930 (examining instances of assimilation in American law).
presence of long-term intimate bonding within the gay community, such narratives helped counteract a reductive view of homosexuality that focused exclusively on sexual acts.80

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

B. Narrative Costs: Concealing Sexuality, Deprioritizing Other Rights

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

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

80. See id. at 847–48.
81. Levit, supra note 48, at 37–38 (discussing the topic of sexuality in the same-sex marriage setting).
83. GARY MUCCIARONI, SAME SEX, DIFFERENT POLITICS, at ix (2008) (examining the categorization of marriage as a primary gay civil right and the risk that, through such categorization, the gay community may lose sight of the “many other important goals of the gay rights movement”).
85. Id.
marriage can “denaturalize the historical construction of gender at the heart of marriage.” 87 Similarly, Professor Eskridge believed that gay marriage had the potential to erode gender hierarchies within marriage. 88

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

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

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

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87. Hunter, Marriage Law, supra note 86, at 18; Nosanchuk, supra note 39, at 2006 (examining Hunter’s contention that same-sex couples can reform marriage).
88. Eskridge, Gaylegal Agenda, supra note 86, at 356.
90. Franke, Politics, supra note 13, at 240 (critiquing the gay community’s “desire for governance”).
91. Nancy D. Polikoff, We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 VA. L. REV. 1535, 1549 (1993) (arguing that the underlying critique of gender roles stemming from the institution of marriage becomes “not only secondary but marginalized, even silenced”).
93. See Franke, Longing, supra note 92, at 2689; Franke, Politics, supra note 13, at 245.
prevail completely.\textsuperscript{94} This conclusion flowed logically from the characterization of marriage equality as “the last great civil rights struggle.”\textsuperscript{95} Indeed, the Supreme Court echoed this sentiment when it ruled in favor of same-sex marriage in Obergefell. Describing the “transcendent importance of marriage,” Justice Kennedy used almost poetic language to explain how marriage rises “from the most basic human needs” and “is essential to our most profound hopes and aspirations.”\textsuperscript{96} But with marriage placed on such a high civil-rights pedestal, what do lesbians and gay men fight for now that they have attained that right? Professor Patricia Williams has discussed the value of becoming “multilingual in the semantics of evaluating rights.”\textsuperscript{97} Yet the modern discourse over gay rights has become monolingual in its singular fixation on one right—marriage—at the cost of downplaying other interests such as employment protections that remain vitally important to gay individuals.\textsuperscript{98}

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

\begin{itemize}
  \item \textsuperscript{94} Adler, supra note 12, at 187–88 (outlining predictions made by proponents of same-sex marriage).
  \item \textsuperscript{95} Cummings & NeJaime, supra note 5, at 1236 (internal quotation marks omitted); see also Michael Joseph Gross, Gay Is the New Black?, \textsc{Advocate} (Nov. 16, 2008, 12:00 AM), http://www.advocate.com/print/news/2008/11/16/gay-new-black (referencing cover).
  \item \textsuperscript{96} Obergefell v. Hodges, No. 14-556, slip op. at 3 (U.S. June 26, 2015).
  \item \textsuperscript{97} Patricia J. Williams, The Alchemy of Race and Rights 149 (1991).
  \item \textsuperscript{98} See Sheila Rose Foster, The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage, 7 Temp. Pol. & Civ. Rts. L. Rev. 319, 322–24 (1998) (critiquing the “strategic essentialism” of marriage advocacy); id. at 326 (“The energy being placed into seeking marriage benefits is overshadowing, and it is sacrificing other important material goals . . . .”).
  \item \textsuperscript{99} See Feinberg, supra note 11, at 258 (“There is far from universal agreement within the LGBT rights movement, however, regarding the prioritization of marriage equality.”); Dean Spade, Under the Cover of Gay Rights, 37 N.Y.U. Rev. L. & Soc. Change 79, 85 (2013) (summarizing the concern that same-sex marriage will yield only “surface change”).
  \item \textsuperscript{100} Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).
  \item \textsuperscript{101} Egan & Sherrill, supra note 38, at 231 tbl.3.
\end{itemize}
marriage as a top-five priority. A decade later, the importance of employment protections did not change. Even with massive media attention and a cascade of favorable court rulings, fifty-seven percent of LGBT respondents still listed workplace rights as a “top priority.”

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

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

102. Id.
103. PEW RESEARCH CTR., supra note 6, at 9 (reporting that fifty-three percent of LGBT respondents listed same-sex marriage as a “top priority”).
104. See Pizer et al., supra note 7, at 721 (discussing rates of workplace discrimination against sexual minorities); Tilcsik, supra note 8, at 614 (same).
105. See Foster, supra note 98, at 325–27 (considering potential costs that members of the gay community may experience from “coming out”).
106. MUCCIARONI, supra note 83, at 2 (examining the cultural meaning of gay civil rights).
were “educators, therapists, and a computer engineer.” Similarly, in *Bishop v. Smith*, a significant federal appellate court decision that immediately preceded *Obergefell*, the U.S. Court of Appeals for the Tenth Circuit explained how “Mary Bishop and Sharon Baldwin are in a long-term committed relationship and seek to marry. They live together in Tulsa County, Oklahoma, where they both work for the *Tulsa World* newspaper[, and] [t]hey jointly own their home and other property.” Through these vignettes, readers learned many details about the couples’ lives—their workplaces, their interests, their church-going habits—but very little about their same-sex desires.

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

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

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

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

111. *Id.*


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

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

II. EMPLOYMENT INEQUALITY: THE SEXUALIZED NARRATIVE OF GAY HARASSMENT

The representations of gay individuals in Title VII case law differ dramatically from marriage decisions in both discourse and rights. While the marriage cases have expanded gay rights without talking about gay sexuality, the employment cases talk about gay sexuality without expanding rights. The operation of Title VII is quite clear: Federal law does not prohibit sexual orientation discrimination. If a person sues his
employer alleging that a business fired him for being gay, he will almost certainly lose. Courts that reject these claims explain that Title VII protects against sex-based discrimination and not sexual orientation discrimination. Although a few recent cases have declined to put a blanket ban on sexual orientation discrimination claims, judicial authority still weighs heavily against gay plaintiffs.

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

The second exception—this Article calls it the “effeminate victim exception”—turns the relevance of homosexuality on its head. In Price Waterhouse v. Hopkins, Justice William Brennan explained how Title VII bars employers from engaging in sex stereotyping, which entails “evaluat[ing] employees by assuming or insisting that they match[] the stereotype associated with their group.” As such, Title VII forbids involving sexual orientation discrimination and noting that “Title VII does not protect against discrimination based on sexual orientation”).


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

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


Id. at 80.

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

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

Id. at 251.
employers from punishing workers for failing to adhere to gender-based expectations normally associated with their sex (e.g., women will act “femininely” and men will act “manly”). Applying this rule to gay victims of harassment, some courts now validate claims brought by gay men if they can prove that their effeminacy (and not their sexual orientation) caused their harassment. Less common but still present are cases in which women highlight their masculine mannerisms but avoid discussing their sexual orientation.

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

A. Predatory Gay Exception

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


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

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

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

137. Janet Halley, Sexuality Harassment, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 195 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); accord Clarke, supra note 16, at 589–91 (analyzing harassment cases involving gay workers).
139. E.g., Marc Spindelman, Sex Equality Panic, 13 COLUM. J. GENDER & L. 1, 3 (2004) (“As a case clarifying the rules of sexual harassment law, Oncale has the potential to help straight and gay victims of same-sex sexual harassment in the workplace, in schools, in public housing, even in the streets.”).
140. See Clarke, supra note 16, at 590 (noting the problem that plaintiffs “are now able to subject alleged harassers to inquisition about their sexual histories and desires through discovery”); Halley, supra note 137, at 195 (expressing concerns that persons with “homosexual panic” may sue under Oncale).
143. Diefenbach, supra note 121, at 49 (studying post-Oncale federal decisions and finding a disproportionate number of cases focusing on the harasser’s sexual orientation).
So how exactly does a court find “credible evidence” of homosexuality? As one might guess, the task is not easy. The search for an alleged harasser’s sexual orientation can cause plaintiffs to falsely accuse coworkers of homosexuality, while defendants can falsely deny their desire for members of the same sex. One way to prove homosexuality is to directly pose the question to the accused harasser, as one plaintiff did during discovery: “Admit or Deny that you have had sex or sexual relations with another man at any time during the period of your employment . . . .”\(^{144}\) Conversely, a party can present testimony from coworkers about their views on the accused harasser’s sexuality, as one employer did by collecting twelve affidavits from coworkers attesting to the defendant’s straight lifestyle.\(^{145}\) Unsurprisingly, definitive answers are hard to come by in these circumstances.

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

\begin{footnotesize}
\begin{enumerate}
\item[145.] English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 846 (E.D. Va. 2002); see also Clarke, supra note 16, at 590 (discussing discovery requests involving sexual orientation).
\item[146.] \textit{Oncale}, 523 U.S. at 81–82.
\item[147.] See Coombs, supra note 138, at 127 (examining the application of the horseplay rule to heterosexual men).
\item[148.] \textit{Oncale}, 523 U.S. at 77.
\end{enumerate}
\end{footnotesize}
of the opposite sex received better treatment from the harassers.\(^{150}\) But, by process of elimination, it became clear that the first evidentiary route constituted Oncale’s only viable theory on remand.\(^{151}\) The second evidentiary route did not apply because no evidence demonstrated that the two attackers disliked other men, and the third evidentiary route did not apply because the all-male oil rig did not employ women who could serve as comparators.\(^{152}\) Therefore, the simple question on remand was whether the shower incident constituted gay harassment or straight horseplay.

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

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

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


\(^{152}\) See id.

\(^{153}\) See generally Clarke, supra note 16, at 562–63 (discussing the horseplay rule).

\(^{154}\) 335 F.3d 822 (8th Cir. 2003).

\(^{155}\) Id. at 824.

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

\(^{157}\) 417 F.3d 663 (7th Cir. 2005).

\(^{158}\) Id. at 665–66.

\(^{159}\) See Clarke, supra note 16, at 566–69 (summarizing same-sex harassment cases involving sexual aggression).
same-sex desire.\textsuperscript{160} For example, in \textit{Cherry v. Shaw Coastal, Inc.},\textsuperscript{161} the U.S. Court of Appeals for the Fifth Circuit reviewed the claim of John Cherry who worked on a survey crew with other men.\textsuperscript{162} One month into Cherry’s tenure with his employer, a male coworker sent Cherry a text message saying “I want cock” and invited Cherry to wear the coworker’s underwear and spend the night at his house.\textsuperscript{163} Reviewing the record, the Fifth Circuit found more than enough evidence to conclude that the coworker’s sexual propositions occurred “because of sex” in violation of Title VII.\textsuperscript{164}

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

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

\begin{itemize}
\item \textsuperscript{160} See Coombs, \textit{supra} note 138, at 126–27 (explaining how courts often view harassment by straight defendants as “non-actionable horseplay,” whereas sexual desire for the victim is assumed with gay men who “engage in sexualized behavior towards other men”).
\item \textsuperscript{161} 668 F.3d 182 (5th Cir. 2012).
\item \textsuperscript{162} \textit{Id.} at 185.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 188–89.
\item \textsuperscript{165} See Clarke, \textit{supra} note 16, at 584–85 (discussing the judicial treatment of openly gay workers).
\item \textsuperscript{166} 326 F. Supp. 2d 50 (D.D.C. 2004).
\item \textsuperscript{167} \textit{Id.} at 52–53.
\item \textsuperscript{168} \textit{Id.} at 53–54.
\item \textsuperscript{169} \textit{Id.} at 57 (citing Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir. 1999)).
\item \textsuperscript{170} 349 F. App’x 900 (5th Cir. 2009) (per curiam).
\item \textsuperscript{171} \textit{Id.} at 902; \textit{Id.} at 905 (Dennis, J., concurring in part and dissenting in part).
\item \textsuperscript{172} \textit{Id.} at 902–03 (majority opinion).
\end{itemize}
amount to implicit proposals for sex.\textsuperscript{173} The Fifth Circuit further held that Love failed “to present credible evidence” that the coworker was homosexual, and therefore affirmed the district court’s grant of summary judgment against Love.\textsuperscript{174}

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

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

\begin{itemize}
\item \textsuperscript{173} Id. at 903.
\item \textsuperscript{174} Id. 903–04.
\item \textsuperscript{175} See Schwartz, supra note 27, at 1699–1700, 1708 (outlining heterosexual presumptions in Title VII).
\item \textsuperscript{176} Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).
\item \textsuperscript{177} SeeFranke, \textit{What’s Wrong}, supra note 124, at 735–36 (critiquing a desire-based view of harassment).
\item \textsuperscript{178} See Schwartz, supra note 27, at 1745 (arguing that \textit{Oncale} invited courts to engage in “very ugly lines of factual inquiry”).
\end{itemize}
harmless forms of sexual expression. Conversely, limiting liability to self-identified gay harassers provides safe harbor to “straight” harassers who can regulate the masculine and feminine behaviors of their coworkers through acts of same-sex sexual aggression.

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

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

B. Effeminate Victim Exception

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

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


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

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

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

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


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


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

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

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

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

\begin{itemize}
  \item 190. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (internal quotation
  marks omitted).
  \item 191. 142 F. App’x 48 (3d Cir. 2005).
  \item 192. Kay v. Independence Blue Cross, No. CIV. A. 02-3157, 2003 WL 21197289, at *1–2
  \item 193. Kay, 142 F. App’x at 50–51.
  \item 194. Id. at 51.
  \item 195. See generally Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065 n.5 (7th
  Cir. 2003) (arguing against “rigid[] compartmentalization” in same-sex harassment cases).
  \item 196. Doe v. City of Belleville, 119 F.3d 563, 593 (7th Cir. 1998) (examining how certain
  statements can present multiple biases); Ann C. McGinley, \textit{Creating Masculine Identities:
  \item 197. 579 F.3d 285 (3d Cir. 2009).
  \item 198. Id. at 286.
\end{itemize}
attention on his flamboyant speech and mannerisms. Prowel testified about his public persona stating:

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

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

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

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

199. Id. at 287 (internal quotation marks omitted).
200. Id. at 292.
201. See Soucek, supra note 3, at 748–49 (discussing the prevalence of male defendants in claims alleging same-sex harassment).
202. See id. at 717–18 (summarizing case law on same-sex harassment involving women).
203. 591 F.3d 1033 (8th Cir. 2010).
204. Id. at 1035–36 (ruling in favor of the plaintiff without mentioning her sexual orientation).
205. Id. at 1036 (internal quotation marks omitted).
206. Id. at 1041–43 (internal quotation marks omitted).
gender nonconformity. For example, in Dawson v. Bumble & Bumble,207 the Second Circuit declined to credit the sex-stereotyping claim made by Dawn Dawson, who described herself as a “lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity.”208 Declining to assert any charge of anti-gay bias, Dawson stated that she suffered discrimination because of her “lack of feminine jewelry, lack of feminine perfume, and lack of makeup.”209 Reviewing Dawson’s claim, the Second Circuit described “confusion as to the sources of the discriminatory animus allegedly visited upon Dawson,” and noted that Title VII did not protect Dawson “to the extent that she is alleging discrimination based upon her lesbianism.”210 After separating any allegation of sexual orientation discrimination from the record, the Second Circuit found insufficient evidence to justify Dawson’s sex-stereotyping claim.211.

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

207. 398 F.3d 211 (2d Cir. 2005).
208. Id. at 217 (internal quotation marks omitted).
209. Id. at 221.
210. Id. at 217–18.
211. Id. at 222–23 (distinguishing Dawson’s case from successful sex-stereotyping claims).
212. Fajer, supra note 29, at 608–09 (discussing stereotypical assumptions about homosexuality).
213. See Friedman, supra note 184, at 218; Colleen M. Keating, Extending Title VII Protection to Non-Gender-Conforming Men, 2 Modern Am. 82, 82 (2008) (examining instances of conflation in bootstrapping cases); Schwartz, supra note 27, at 1708 (discussing the difficulty courts have with differentiating between the concepts of sex, gender, and sexual orientation).
his gender nonconformity. In this way, Title VII actually encourages employers to embrace anti-gay bias as a viable defense to harassment claims.

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

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

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

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


221. Fajer, supra note 29, at 514–15 (arguing that these exaggerated acts have no causal relationship to sexual orientation).
that they are trying to combat.222

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

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


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

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

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

227. Brower, supra note 182, at 65 (discussing the double-edged sword that gender-stereotyping claims present to gay workers).
The problem here lies not with the sex-stereotyping theory per se, but rather in a reductive approach to the theory that either conflates effeminacy and homosexuality or, conversely, “honors” effeminacy as a privileged form of gender nonconformity above all others. In both instances, the judicial discourse on sexuality skews in wildly different directions. The conflating courts focus obsessively on sexuality, while courts that protect effeminacy pretend to ignore sexuality altogether.228 This tortured jurisprudence occurs precisely because Title VII prohibits sex discrimination but not sexual orientation discrimination. Until a legal mechanism exists for addressing the subjects together, judges will continue to refer to sexuality only in double-speak, if they talk about it at all.

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

The effeminate victim exception and the predatory gay exception offer gay workers the stark choice of either burying their sexuality or presenting it to courts in the most culturally reified forms imaginable. The roles of flamboyant man, macho woman, and predatory harasser comprise the total universe of possible characters that gay parties can play in these cases. Part sexual aggressor, part clever bootstrapper, these gay figures barely resemble the honorable characters that appear in other battles for gay civil rights.229 Yet those other legal realms contain their own reductive images of homosexuality. In the now-successful marriage cases, for example, gay parties appeared not as predators, but as ordinary neighbors—not frivolous and splashy, but hardworking and normal.230 As such, in building the case for same-sex marriage, gay plaintiffs faced another difficult discursive choice: to win in court they downplayed any reference to their sexuality. Indeed, all three settings—gay marriage, gay harassment, and gay victims of harassment—involves different forms of identity-based erasure. Title VII parties deny their sexuality, while gay couples pretended that their sexuality did not exist.

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

228. See Soucek, supra note 3, at 781 (discussing the erasure of gay sexuality in Title VII jurisprudence).
229. Id. at 781–82 (examining how courts protect those gay plaintiffs who possess a certain look and manner).
explain how anti-gay bias feeds into larger systems of gender production. In addition, it would serve as an effective legal mechanism for attaining gay civil rights in a wide variety of legal contexts. Most important, a new frame would not require gay men and lesbians to ignore their sexuality as a requirement for winning in court.

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

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

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

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

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


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

A. Return of the Sex Discrimination Argument

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

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

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

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

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


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

241. See Widiss et al., supra note 23, at 463 (calling for courts to reconnect the facial attack to the gender-stereotyping attack).
discriminating on the basis of sex.”

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

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

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

243. See, e.g., Stein, supra note 26, at 485–88 (outlining the contours of the direct attack).
246. Id. (considering a similar example).
247. See Case, Have to Lose, supra note 26, at 1227 (outlining possible outcomes of the sex discrimination argument).
248. Widiss et al., supra note 23, at 469 (examining the gender stereotypes of marriage restrictions).
249. See Kim, supra note 92, at 72–73 (discussing arguments in favor of opposite-sex marriage).
innate “masculine” characteristics as husbands, and that women have unique “feminine” characteristics as wives as well.\footnote{250}

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

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

1. \textit{Obergefell}, Marriage Inequality, and Sex Discrimination

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


253. See Kavey, \textit{supra} note 250, at 155 (summarizing criticism of the sex discrimination argument).

non-minority citizens—such restrictions still constitute impermissible race discrimination.\(^{255}\)

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

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

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


\(^{257}\) 511 U.S. 127 (1994) (plurality opinion).

\(^{258}\) Id. at 129.

\(^{259}\) Id. at 159 (Scalia, J., dissenting).

\(^{260}\) Id. at 141 n.12 (plurality opinion).

\(^{261}\) Id. at 140–41 (emphasis added).

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

\(^{263}\) See Widiss et al., supra note 23, at 471–72 (discussing litigants’ counterarguments to the equal application defense).


\(^{265}\) See supra Part I and accompanying discussion of the *Perry* litigation.
In addition to characterizing California’s same-sex marriage ban as irrational, the U.S. Court of Appeals for the Ninth Circuit stated that the state’s restriction constituted a cognizable form of sex discrimination: “Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex.” This ruling came as a surprise to many court observers given that the California Supreme Court had specifically rejected the sex discrimination argument just two years prior to Perry.

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

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

266. Perry, 704 F. Supp. 2d at 997, 1002.
267. Id. at 996.
269. Compare Brief for Respondents, Perry, 133 S. Ct. 2652 (No. 12-144), 2013 WL 648742 (filed Feb. 21, 2013) (excluding the sex discrimination argument), with Brief in Opposition at 29–30, Perry, 133 S. Ct. 2652 (No. 12-144), 2012 WL 3683450, at *13 (filed Aug. 24, 2012) (including the sex discrimination argument and stating that “Proposition 8 is . . . unconstitutional for the additional, independent reason that it impermissibly discriminates on the basis of sex”); see also Kavey, supra note 250, at 153 n.9 (explaining how respondents declined to pursue the sex discrimination argument).
270. 191 N.W.2d 185 (Minn. 1971).
271. See id. at 187.
272. Transcript of Oral Argument at 12, Perry, 133 S. Ct. 2652 (No. 12-144), 2013 WL 6908183 (emphasis added).
wrestle with . . . .”274 Although no one answered Justice Kennedy’s question,275 a few lower court opinions took up the issue during the two years between Perry and the Supreme Court’s final ruling on same-sex marriage in Obergefell.276 For example, in Kitchen v. Herbert,277 three gay couples sought to overturn Utah’s same-sex marriage ban.278 Finding that Utah had indeed discriminated against the plaintiffs because of their sex, the Kitchen court rejected the state’s equal application defense.279 Likewise, in Wolf v. Walker,280 another pre-Obergefell marriage decision, a federal court in Wisconsin called the sex discrimination argument “thought-provoking” and noted Justice Kennedy’s interest in the theory during the Perry oral argument.281 Although the Wolf court struck down Wisconsin’s marriage restriction on other grounds, it found “some support for a view that, like sex discrimination, sexual orientation discrimination should be subjected to heightened scrutiny.”282

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

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

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


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

278. Id. at 1187.

279. Id. at 1206.

280. 986 F. Supp. 2d 982.

281. Id. at 1009.

282. Id.

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

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

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

284. Transcript of Oral Argument, Perry, supra note 272, at 13.
286. Id. at 35–36 (citing Califano v. Webster, 430 U.S. 313 (1977) (per curiam)).
287. Id. at 37.
288. Id.
290. See id.
history” by opposing marriage equality altogether.291

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

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


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

293. Obergefell, slip op. at 28.

294. Id. at 17.

295. Id. at 20–22.

296. See generally Conkle, supra note 275, at 29 (describing various routes to legalizing same-sex marriage); cf. Marc A. Fajer, Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage, 15 Yale L. & Pol’y Rev. 599, 605 (1997) (reviewing William N. Eskridge Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment (1996)) (same).
reticence to apply the modern tiered framework of review to gay civil rights in general.297

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

2. Employment Inequality as Sex Discrimination

Although the Supreme Court declined to embrace the sex discrimination argument in Obergefell, the theory remains the most modest (yet promising) legal approach for expanding gay rights. By characterizing sexual orientation discrimination as a form of sex discrimination—a well-recognized type of constitutional injury301—the theory does not require courts to announce a new protected classification.302 Yet even with its facial appeal to doctrinal conservatism, the sex discrimination argument would still expand gay rights in a variety


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

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

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


302. See Koppelman, A Reply to Stein, supra note 28, at 534 (explaining the sex discrimination argument’s “comparative advantages”); see also Fajer, supra note 29, at 647–48 (arguing that the sex discrimination argument avoids the line-drawing problems of other approaches to gay civil rights).
of contexts. Most fundamentally, it would expose state action based on sexual orientation to the same heightened scrutiny as sex-based distinctions. According to this approach, states would have to articulate “exceedingly persuasive justifications” to discriminate against sexual minorities in a host of areas.

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

At the federal level, a constitutional ruling that construed sexual orientation discrimination as a form of sex discrimination would effectively extend all federal bans on sex discrimination to gay individuals, including the Equal Credit Opportunity Act, the Fair Housing Act, Title IX, the Equal Pay Act and, of course, Title VII. These laws differ in their procedures and methods of proof, but they share a common prohibition against sex-based discrimination. For
instance, although the Supreme Court has distinguished between Title VII and the Fourteenth Amendment in the context of disparate impact liability, both laws restrict parties from engaging in intentional discrimination based on certain traits, including sex. Therefore, the question of whether a public or private actor has intentionally discriminated against an individual because of sex remains the same under both laws. Thus, if the Supreme Court were to determine that sexual orientation discrimination constituted a form of sex discrimination under the Fourteenth Amendment, the same holding would naturally apply to regulations that identify sex as a protected category. In short, the sex discrimination argument would combine the value of decisional narrowness with the benefit of practical breadth.

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


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


319. See Homans, supra note 316, at 3 (noting that only forty-four percent of the U.S. population lives in states that protect against sexual orientation discrimination at work).
To that end, gay-rights advocates have pursued this legislative route for forty years, first by supporting the Equality Act in 1974 and more recently by attempting to add sexual orientation protections to Title VII through the Employment Non-Discrimination Act (ENDA). But in the wake of Congress’s repeated failure to pass ENDA and an ever-widening religious exemption, gay-rights groups recently stopped supporting ENDA, and its passage seems unlikely for the foreseeable future.

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

But these objections fundamentally misconstrue the basic premise of the sex discrimination argument. Although it might seem to represent a clever end-run around Congress, the sex discrimination theory does not claim that Congress meant to prohibit sexual orientation discrimination.
in American workplaces. Rather, the theory asserts that discrimination against sexual minorities constitutes both sex discrimination and sexual orientation discrimination, and that Congress obviously intended to prohibit the former type of discrimination. Sex discrimination occurs (in addition to sexual orientation discrimination) when employers engage in gender stereotyping by punishing employees who do not conform to the gender norm of opposite-sex desire. The presence of one type of bias that Title VII does not cover (sexual orientation discrimination) does not preclude the coexistence of another type of bias that Title VII prohibits (sex discrimination). Employers can punish workers both because they are gay and because they fail to adhere to prewritten gendered scripts.

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

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

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329. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (internal quotation marks omitted), overruled recognized by Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000).
330. Capers, supra note 27, at 1185 (arguing that the sex discrimination theory comports with congressional intent).
men desire women and women desire men. \(^{332}\) Although this extraordinary shift has not garnered a great deal of public attention, the EEOC’s current stance differs dramatically from the agency’s previous guidance that harassing a gay employee is not sexual harassment because “it is based on the employee’s sexual preference, not on his gender.”\(^{333}\) But more recent opinions make it clear that the agency now takes a far more favorable view of the sex discrimination argument.

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

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

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

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

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

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

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342. *Id.* at 105–06 (quoting plaintiff’s complaint).
343. *Id.* at 116.
344. *Id.*
346. *Case, Legal Protections, supra* note 27, at 1352–54 (discussing recent gains made by plaintiffs asserting the sex discrimination argument under Title VII).
347. *See supra* Section III.A and accompanying discussion of the judicial treatment of the sex discrimination argument.
the theory distracts from the central issue of sexual orientation discrimination.348 According to this view, everyone knows that the real bias against gay workers relates to sexual orientation discrimination (not sex discrimination) and that the real trait targeted by state restrictions is homosexuality (not gender). Given that the sex discrimination argument fails to address these issues, critics view the theory as nothing more than a gimmick.349

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

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

348. See Soucek, supra note 3, at 785 (asserting that the theory “balkanize[s] factions of workers”).
349. See Hunter, Sex Discrimination, supra note 233, at 409–10 (explaining how some gender theorists remain skeptical of the sex discrimination argument).
351. Id. at 504.
352. Nussbaum, supra note 26, at 115; see also Shin, supra note 242, at 11–12 (summarizing critiques of the theory).
354. See supra Parts I and II and accompanying discussion of the judicial presentations of gay sexuality in marriage and employment decisions.
355. See Adler, supra note 12, at 148 (outlining costs of the same-sex marriage campaign).
effeminate mannerisms and disavow their status as sexual minorities. Is the sex discrimination argument yet another instance where lesbians and gay men must disclaim their sexuality to win in court? To date, proponents of the sex discrimination argument have failed to articulate a satisfactory answer to this question. Instead, they have often made the critics’ point by analogizing anti-gay bias to sexism against women.356 In the marriage context, for example, those advancing the theory have argued that same-sex marriage bans cause harm because they perpetuate a patriarchal family system in which women must subордин ate their lives to men.357 According to this claim, state marriage restrictions cause losses both to gay couples and to women by supporting a sexist view of marriage wherein men enjoy disproportionate power. But at a time when most states have enacted gender-neutral family laws and when couples increasingly contest the meaning of terms like “husband” and “wife,” courts have found the “marriage is patriarchy” argument unconvincing.358 As to the charge of gay erasure, arguing that courts should stop states from engaging in discriminatory acts against sexual minorities because those acts harm women merely bolsters the contention that the sex discrimination argument conceals the underlying basis of sexual orientation discrimination.

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

356. See Widiss et al., supra note 23, at 479–80 (commenting on the “rather abstract” claims of harm that proponents of the sex discrimination argument have made).
357. Id. at 469 (discussing justifications for the sex discrimination argument in the marriage context).
358. See Nosanchuk, supra note 39, at 2006–07 (examining the evolution of ideals related to marriage).
Sexual orientation discrimination is sex discrimination because every gay and straight member of society feels the weight of the social, political, and legal sanctions that come with defying the gender norm of opposite-sex desire.

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

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

361. See Robinson, supra note 19, at 1371 (highlighting the individualized nature of the choice to come out); cf. Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights 80–81 (2006) (discussing the phenomena of gay individuals who strive to “act straight”).
363. See Yoshino, supra note 35, at 813 (examining the process of presenting “a separate face to the outside world”).
364. Deena Fidas & Liz Cooper, Human Rights Campaign Found., The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers 3 (2014) (summarizing survey data showing that over eighty percent of the workforce talks about dating and social relationships at least once per week).
365. Id.
366. Id. (discussing the importance of non-work-related conversations).
367. Fajer, supra note 29, at 597–99 (examining the costs of concealment to gay individuals and the gay community).
sexuality. Even when grade-school boys are too young to know about specific sexual acts, they know to use terms like “queer” and “fag” to refer to gender nonconforming boys. Later in life, adolescent boys prove their heterosexuality to other boys by describing how much they want to “get sex” from girls. Conversely, the label “tomboy” applies to preteen girls who fail to dress and groom themselves in a way that is assumed to attract boys. This social messaging makes it clear to girls that they must maintain their physical attractiveness for the opposite sex throughout their school years and beyond.

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


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


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

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


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

376. See Robinson, supra note 19, at 1333–34 (discussing heterosexual men’s insecurities related to sexuality).
girlfriends to work parties, talking frequently about their sexual conquests, and laughing at the correct jokes.377 These public displays leave no room for ambiguity. Even though many self-identified straight individuals engage in same-sex sexual behavior, presumed heterosexuality requires anyone who strays from the norm to conceal these instances of deviation.378 Just as heteronormativity relies upon a binary construction of gender, it also makes the possibility of fluid sexuality seem unimaginable.379 Although these rules are not necessarily “normal” or “natural,” presumed heterosexuality makes them seem as such.

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

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

378. See Coombs, supra note 138, at 126–27 & n.99 (discussing the realities of same-sex sexual desire among some straight individuals).
379. Vitulli, supra note 184, at 159 (examining social systems that reinforce heterosexuality).
380. See supra Section II.A and accompanying discussion of the predatory gay exception to Title VII.
381. See United States v. Windsor, 133 S. Ct. 2675, 2683 (2013) (referencing over 1000 federal laws that address marital or spousal status); Spade, supra note 99, at 81 (discussing benefits enjoyed by members of the “marriage-based family structure”).
382. Seidman, supra note 373, at 19 (examining the social imperatives of heteronormativity).
383. See generally Hunter, Sex Discrimination, supra note 233, at 399–400 (summarizing the scholarly debate over the sex discrimination argument).
384. See supra Section III.A and accompanying discussion of the theory in the context of marriage and employment.
ubiquity of heterosexual norms and their influence on gay and straight individuals in a variety of contexts. For example, the gay plaintiff who employs the sex discrimination argument in a Title VII case seems to represent only his own interests, or at most the interests of other gay workers. Likewise, same-sex couples who employ the theory in the marriage setting seem to represent their own interests, or perhaps only those of the gay community. Therefore, when parties raise the theory in court, judges tend to view these discrete discriminatory acts as isolated instances of sexual orientation discrimination and not gender discrimination.

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

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

387. Valdes, supra note 22, at 24 (explaining the interrelationship between these concepts).
highlights the many actions and attitudes that individuals must exhibit to comply with this gendered ordering.

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

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

CONCLUSION

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

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

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

391. See Appleton, supra note 26, at 124–25 (examining how “gender talk” can create alliances between groups); Hunter, Sex Discrimination, supra note 233, at 415–16 (explaining how both gay and straight individuals benefit from the successful prosecution of the sex discrimination argument).
affect far more people and remain a high priority for many lesbians and gay men. Today, even with the legalization of same-sex marriage, federal law still makes it perfectly legal to fire a gay man for telling a coworker about his sexuality or to discharge a woman for displaying her wife’s picture at work.

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