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## Protecting Bisexual Victims Instead of "Harassers": Alternatives to Monosexist Theories of Sexual Orientation Discrimination under Title VII

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**PROTECTING BISEXUAL VICTIMS INSTEAD  
OF “HARASSERS”: ALTERNATIVES TO  
MONOSEXIST THEORIES OF SEXUAL  
ORIENTATION DISCRIMINATION UNDER  
TITLE VII**

*Thomas Lloyd\**

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### INTRODUCTION

*“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?”*

- Chief Justice Roberts at *Obergefell v. Hodges* oral argument<sup>1</sup>

Title VII of the Civil Rights Act of 1964 provides that it is unlawful to discriminate in employment against an individual, “because of such individual’s race, color, religion, sex, or national origin.”<sup>2</sup> The scope of the prohibition on “sex” discrimination has consistently been expanded over time by statute and case law to recognize new bases and forms of discrimination.<sup>3</sup> Since 2012, the Equal Employment and Opportunity Commission (EEOC) has maintained that gender identity discrimination is an actionable form of sex discrimination for Title VII

1. Transcript of Oral Argument at 62, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). Chief Justice Roberts posed this question to the respondent, the Ohio Department of Health, which refused to allow Mr. Obergefell to be listed as the surviving spouse on his husband’s death certificate. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). Counsel offered two responses. Transcript of Oral Argument at 62, *Obergefell*, 135 S. Ct. 2584 (No. 14-556). First, that banning same-sex marriage imposed an *equal burden* on classes of both men and women. *Id.* Second, that *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), supported some legal distinctions based on sex if they related to biology. *Id.* This moment and the subsequent argument generated significant speculation that Chief Justice Roberts would concur in *Obergefell* on sex discrimination grounds. *See, e.g.*, Adam Liptak, *Gender Bias Issue Could Tip Chief Justice Roberts into Ruling for Gay Marriage*, N.Y. TIMES (Apr. 29, 2015), <https://www.nytimes.com/2015/04/30/us/gender-bias-could-tip-chief-justice-roberts-into-ruling-for-gay-marriage.html> [<https://perma.cc/TA77-BZWK>]. Ultimately, this issue failed to appear in either the *Obergefell* majority opinion or any of the four dissents, including the one authored by Chief Justice Roberts. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Instead, the Chief Justice read his *Obergefell* dissent from the bench, which was the first time he had done so in his ten-year tenure. *See* Amber Phillips, *John Roberts’s Full-Throated Gay Marriage Dissent*, WASH. POST (June 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/john-robertss-full-throated-gay-marriage-dissent-constitution-had-nothing-to-do-with-it/> [<https://perma.cc/PB9Q-U4MC>].

2. Unlawful Employment Practices, 42 U.S.C. § 2000e-2(a) (1964).

3. *See* Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978) (adding pregnancy discrimination to Title VII’s definition of “sex” discrimination); *see also* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986) (recognizing sexual harassment and a hostile working environment as forms of sex discrimination).

purposes.<sup>4</sup> In 2015, the EEOC concluded that sexual orientation discrimination was also a cognizable form of sex discrimination.<sup>5</sup> Two circuit courts, the Seventh and the Second Circuit, have since also adopted this interpretation.<sup>6</sup> On April 22, 2019, the Supreme Court agreed to consider these most recent expansions by granting certiorari in three cases: *Altitude Express v. Zarda* and *Bostock v. Clayton County, Georgia*, which address sexual orientation discrimination, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, which addresses gender identity discrimination.<sup>7</sup> The Court heard oral arguments in all three cases on October 8, 2019.<sup>8</sup>

*Hively v. Ivy Tech* and *Zarda v. Altitude Express* are two circuit decisions that embrace an interpretation of Title VII that includes sexual orientation protections.<sup>9</sup> Both cases involved gay employees who were fired because of their sexual orientation.<sup>10</sup> The plaintiffs relied on some combination of three different theories in order to advance the claim that sexual orientation discrimination necessarily constitutes sex discrimination. The first is a comparative “but-for” test, which asks whether the injured plaintiff would have been treated differently if their sex were changed.<sup>11</sup> The second theory is “associational” discrimination, an analogy to *Loving v. Virginia* and racial discrimination, which suggests that discrimination based on the sex of one’s partner constitutes discrimination based on one’s own sex.<sup>12</sup> The third theory is that discrimination against sexual minorities is a form of sex stereotyping, which is already actionable under *Price Waterhouse v. Hopkins*, either because sexual minorities often violate

4. *Macy v. Dep’t of Justice*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

5. *Baldwin v. Dep’t of Transp.*, EEOC DOC 0120133080, 2015 WL 4397641 (July 15, 2015).

6. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

7. *See Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019); *Bostock v. Clayton Cty.*, 139 S. Ct. 2049 (2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019); Amv Howe, *Court to Take Up LGBT Rights in the Workplace (Updated)*, SCOTUSBLOG (Apr. 22, 2019), <https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/> [<https://perma.cc/JL26-T3NU>].

8. Adam Liptak & Jeremy Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html> [<https://perma.cc/4FAR-5NYS>].

9. *See generally Zarda*, 883 F.3d 100; *Hively*, 853 F.3d 339.

10. *See Zarda*, 883 F.3d at 110; *Hively*, 853 F.3d at 345.

11. *Hively*, 853 F.3d at 345.

12. *Id.* at 334. *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967).

strict gender stereotypes or, more broadly, because being non-heterosexual is inherently a violation of sex stereotypes.<sup>13</sup>

While each of these theories was sufficient to link discrimination against their gay or lesbian plaintiffs in those specific factual contexts, they are not conceptually broad enough to consistently capture discrimination that targets bisexuals, asexuals, and other non-monosexual orientations. These orientations do not necessarily pass desire through the lens of sex and therefore make poor comparators, can lack associations, or conform with stereotypes. This under-inclusivity is not trivial, as bisexuals alone constitute a majority of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community.<sup>14</sup> These theories are also conceptually distinct from those addressing whether transgender people are also covered by Title VII, despite the fact that the vast majority (up to 85%) of transgender people do not identify as heterosexual.<sup>15</sup> If these limitations are not addressed, a favorable rule may not effectively capture all sexual orientation discrimination, and that under-inclusivity may help LGBT opponents argue that sex and sexual orientation discrimination are not necessarily linked phenomena for the purposes of Title VII.

Part I of this Note discusses the history of Title VII's prohibition on sex discrimination, tracing the additions of pregnancy discrimination, sexual harassment, and sex stereotyping as cognizable forms of sex discrimination over time. Part II then evaluates the three theories advanced by *Hively* and *Zarda* — comparators, association, and stereotyping — focusing on their shortcomings in the face of particular sexual orientations. Finally, Part III advances additional rationales to conceptually link sex and sexual orientation discrimination without reinforcing “monosexism.”<sup>16</sup> This Note argues that effective capture

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13. *Hively*, 853 F.3d at 346.

14. Approximately 1.7% of all Americans identify as lesbian or gay, whereas 1.8% of the population identifies as bisexual. GARY GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LGBT? 1 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> [https://perma.cc/5CZQ-2CU3].

15. NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 59 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [https://perma.cc/M5TS-YKXJ].

16. “Monosexism” refers to:

[A]n essentialist perception of sexual orientations as solely occurring between members of same or different genders . . . . Any sexuality that blends same and different gender interactions is deemed illegitimate, occurring in a state of sexuality confusion, an experimental phase, or that bisexual persons are somehow dishonest about their orientation, attractions, and their identity.

of all sexual orientations by Title VII’s protections requires a rejection of tests that look for a *disparate impact* between men and women, which would also eliminate the so-called “bisexual harasser” defense to sexual harassment claims.<sup>17</sup>

The cases before the Supreme Court are not isolated incidents. Of the nearly 11 million LGBT people in the United States, 88% are employed.<sup>18</sup> Twenty-five percent report experiencing discrimination in the workplace in the past year.<sup>19</sup> Gay men and lesbian women on average receive less income than their heterosexual counterparts, and 22% of LGBT persons report not being paid or promoted at the same rate as their colleagues.<sup>20</sup> LGBT people live in all parts of the country, even constituting up to 5% of the United States’ rural population, where LGBT persons may need to travel further for services where they still face discrimination.<sup>21</sup> However, the impacts of these cases are more acutely felt in cities<sup>22</sup> because 80% of LGBT Americans live in suburban or urban areas.<sup>23</sup>

### I. THE EVOLUTION OF TITLE VII’S PROHIBITION ON DISCRIMINATION “BECAUSE OF” SEX

Title VII’s prohibition on sex discrimination, like its prohibitions on racial or religious discrimination, does not enumerate specific

Tangela S. Roberts et al., *Between a Gay and a Straight Place: Bisexual Individuals’ Experiences with Monosexism*, 15 J. BISEXUALITY 554, 555 (2015).

17. See, e.g., *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) (holding “[b]oth before and after *Oncale* . . . Title VII does not cover the ‘equal opportunity’ or ‘bisexual’ harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same” (emphasis in original)).

18. THE NAT’L LGBT WORKERS CTR., *LGBT PEOPLE IN THE WORKPLACE* 1–2 (2019) <http://www.lgbtmap.org/file/LGBT-Workers-3-Page-FINAL.pdf> [<https://perma.cc/XQX6-PUKN>].

19. *Id.* at 2.

20. *Id.*

21. MOVEMENT ADVANCEMENT PROJECT, *WHERE WE CALL HOME: LGBT PEOPLE IN RURAL AMERICA* 2–6 (2019), <http://www.lgbtmap.org/file/lgbt-rural-report.pdf> [<https://perma.cc/Y4YC-678W>].

22. *Id.*

23. See Leila Fadel, *New Study: LGBT People A ‘Fundamental Part of The Fabric Of Rural Communities’*, NAT’L PUB. RADIO (Apr. 4, 2019), <https://www.npr.org/2019/04/04/709601295/lgbt-people-are-a-fundamental-part-of-the-fabric-of-rural-communities> [<https://perma.cc/JZ9E-WC8Y>]; see also Caitlin Rooney & Laura E. Durso, *The Harms of Refusing Service to LGBTQ People and Other Marginalized Communities*, CTR. FOR AM. PROGRESS (Nov. 29, 2017), <https://www.americanprogress.org/issues/lgbt/reports/2017/11/29/443392/harms-refusing-service-lgbtq-people-marginalized-communities/> [<https://perma.cc/99MB-YR5B>].

discriminatory practices.<sup>24</sup> In fact, “sex” as a protected category was added to the Civil Rights Act with a last-minute amendment introduced by Howard Smith of Virginia, an opponent of the overall bill.<sup>25</sup> While commentators have derisively suggested that “sex” was added to the Civil Rights Act merely as a joke, or as a way for representative Smith to derail the efforts to combat race discrimination, that interpretation ignores the genuine coalition of conservative National Woman’s Party-aligned politicians and liberal Equal Rights Amendment advocates that secured its passage in both chambers of Congress.<sup>26</sup> Ultimately, the Supreme Court has consistently decided that the legislative history of Title VII’s prohibition on “sex” discrimination is of limited interpretive value.<sup>27</sup> Instead, the Court actively chose not to give weight to the legislative history and instead interpreted the statute on their own, exploring the parameters of what constitutes sex discrimination. Part I summarizes this exploration, focusing on where the court has openly expanded “sex” beyond the enacting Congress’s intent, citing fidelity to the law’s broad text, as seen in the sexual harassment context. At the same time, Part I will evaluate explicit congressional overrides of opinions where the Court chose to construe Title VII narrowly, such as in the pregnancy discrimination context.<sup>28</sup>

#### A. Pregnancy Discrimination: A “Strongly Sex-Related” Trait

In the early years following Title VII’s enactment, the protracted legislative history around Title VII’s prohibition on sex discrimination was invoked to constrain the reach of sex discrimination doctrines.<sup>29</sup>

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24. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

25. Robert C. Bird, *More Than a Congressional Joke*, 3 WM. & MARY J. WOMEN & L. 137, 150–51 (1997).

26. *Id.* at 149–52.

27. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) (“[T]he legislative history of Title VII’s prohibition of sex discrimination is notable primarily for its brevity.”); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (noting “the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex’”).

28. *Compare Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (expanding Title VII’s prohibition on sexual harassment to include acts of same-sex harassment) *with Gilbert*, 429 U.S. at 143 (finding that pregnancy discrimination was not covered by Title VII’s sex discrimination provision).

29. *See, e.g.*, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (finding that sexual harassment was not a form of sex discrimination actionable under Title VII, and citing its “little” legislative history). “[I]t would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward

While six circuit courts unanimously interpreted Title VII to include pregnancy discrimination as a form of sex discrimination, the Supreme Court rejected this theory when it first heard a pregnancy discrimination case.<sup>30</sup> In *General Electric Co. v. Gilbert*, the Supreme Court upheld a disability plan provided to employees that had a single exclusion from its coverage: pregnancy-based disabilities.<sup>31</sup> Many of the arguments made by Justice Rehnquist in his majority opinion echo the dissents in *Hively v. Ivy Tech* and *Zarda v. Altitude Express*.

For instance, according to the majority opinion written by Rehnquist, the offending disability benefits program in *Gilbert* “divide[d] potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”<sup>32</sup> Therefore, there was no risk insured by the program from which men were protected and women were not, and there was not a sufficient nexus between pregnancy and gender such that discrimination based on the pregnancy was *per se* gender discrimination.<sup>33</sup> In the context of sexual orientation, the dissenting opinions in *Hively* and *Zarda* similarly argue that discriminating based on sexual orientation does not create a “risk” that disadvantages or privileges only one sex — but merely creates subcategories of sexes.<sup>34</sup>

Justices Brennan and Marshall authored a dissent in *Gilbert* rejecting such a narrow view of “discrimination” in the Title VII context.<sup>35</sup> First, their dissent notes that the “broad social objectives promoted by Title VII” were “incompatible” with such a narrow view of what constitutes discrimination.<sup>36</sup> Second, even though pregnancy discrimination was not discrimination against *all* women, it would

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another. The only sure way an employer could avoid such charges would be to have employees who were asexual.” *Id.* at 163–64.

30. *Gilbert*, 429 U.S. at 145–46.

31. *See generally id.*

32. *Id.* at 135.

33. *Id.*

34. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 155–56 (2d Cir. 2018) (Lynch, J., dissenting) (“Title VII . . . is aimed at employment practices that differentially disadvantage men vis-à-vis women or women vis-à-vis men. Discrimination against persons whose sexual orientation is homosexual rather than heterosexual . . . is not discrimination that treats men and women differently.”); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 370 (7th Cir. 2017) (Sykes, J., dissenting) (arguing “sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all”).

35. *Gilbert*, 429 U.S. at 148 (Brennan, J., dissenting).

36. *Id.*



“offend[] common sense to suggest . . . that a classification [based on pregnancy] is not, at the minimum, strongly ‘sex related.’”<sup>37</sup> In other words, rather than focus on the creation of a disparate impact between men and women, Brennan’s view of Title VII saw discrimination wherever strongly sex-linked classifications were deployed to selectively disadvantage subcategories of a protected class.

Congress acted swiftly to overturn the majority’s interpretation in *Gilbert* with the Pregnancy Discrimination Act (PDA), passed a mere two years after the decision.<sup>38</sup> The legislative history of the PDA makes Congress’s distaste for the Supreme Court’s narrowing of Title VII’s protections clear. Harrison Williams, Chairman of the Committee on Labor and Human Resources, wrote in a foreword to the bill’s final committee reports that “the [*Gilbert*] Court contravened the intent of Congress in enacting Title VII . . . that all individuals be fully protected against unjust discrimination.”<sup>39</sup> Senators who had previously voted for the Civil Rights Act itself made clear that they did not see the PDA as *expanding* Title VII, but clarifying for the skeptical Court that a broad elimination of sex discrimination had been their intention when they initially voted for the bill.<sup>40</sup>

The story of the Supreme Court’s refusal to recognize pregnancy discrimination as within Title VII’s mandate, followed by swift congressional rebuke, should be a cautionary tale as the Court approaches the question of sexual orientation discrimination.<sup>41</sup> Today, even without the PDA’s specific enumeration of “pregnancy” into Title VII’s text, it would be difficult for one to imagine that pregnancy discrimination would not fall within sex discrimination.<sup>42</sup> However, the *Gilbert* majority’s arguments regarding why pregnancy discrimination did not constitute sex discrimination — that pregnancy lacked a sufficient sex-specific nexus since many women are not or are never pregnant<sup>43</sup> — would be even stronger today in light of increased visibility of transgender people. The question remains: Does the now real, albeit currently rare, phenomenon of legally-recognized

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37. *Id.* at 149 (internal citations omitted).

38. See Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978).

39. LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, S. REP. NO. 54-748, at III (1978).

40. *Id.* at 8.

41. See generally *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

42. Liz Elting, *Why Pregnancy Discrimination Still Matters*, FORBES (Oct. 30, 2018), <https://www.forbes.com/sites/lizelting/2018/10/30/why-pregnancy-discrimination-still-matters/#6f1f4bf763c1> [<https://perma.cc/N5WX-UET6>].

43. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134–35 (1976).

transgender men becoming pregnant further undermine the sex-specific nexus of pregnancy discrimination?<sup>44</sup> To sustain the concept that pregnancy discrimination is sex discrimination when men are also able to become pregnant, *discrimination* must mean something other than just exposing “one sex . . . to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>45</sup> Instead, discrimination should be based on a trait that is “strongly ‘sex related.’”<sup>46</sup>

### B. Sexual Harassment: Creation of the “Bisexual Harasser” Problem

Eight years after Title VII was amended to include pregnancy discrimination, the Supreme Court addressed whether claims of sexual harassment and a hostile work environment were claims of sex discrimination in *Meritor Savings Bank v. Vinson*.<sup>47</sup> Unlike the case of pregnancy discrimination, where all the circuit precedent unanimously supported the broader interpretation of Title VII, a number of courts had already expressed skepticism that sexual harassment in the workplace should be considered “discrimination.”<sup>48</sup> That said, the Supreme Court apparently had gotten the message from Congress that “the phrase ‘terms, conditions, or privileges of employment’ evinces a[n] . . . intent ‘to strike at the entire spectrum of disparate treatment of men and women.’”<sup>49</sup> While the expanded focus on the entire spectrum of treatment allowed the Court to recognize sexual harassment as a form of sex discrimination, its continued emphasis on the disparate treatment of men and women perpetuated a statutory absurdity: the so-called “bisexual harasser defense.”<sup>50</sup> Essentially,

44. See David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 338 (2019).

45. See *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

46. *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting) (emphasis added) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 652 (1974) (Powell, J., concurring)).

47. 477 U.S. 57, 66 (1986). In *Meritor*, a female employee brought an action after she was fired following years of sexual abuse and rape at the hands of her supervisor. The employer fired the female employee for an alleged abuse of sick leave. The Court decided unanimously that pervasive sexual harassment could create a “hostile or abusive work environment” and constituted cognizable injury under Title VII despite the lack of tangible economic discrimination. *Id.*

48. See *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (arguing “flirtations of the smallest order would give rise to liability”), *rev’d on other grounds*, 600 F.2d 211 (9th Cir. 1979).

49. *Meritor*, 477 U.S. at 64 (internal citations omitted).

50. See Robin Applebaum, Note, *The “Undifferentiating Libido”: A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser*, 14 HOFSTRA LAB. & EMP. L.J. 601, 613–15 (1997).

when a man sexually harasses women in the workplace, which would generally be considered sex discrimination, the man can then allege he equally harasses men, and therefore does not discriminate based on sex.<sup>51</sup> In effect, the bisexual harasser is immune from Title VII claims, rather than subject to claims by both male and female victims.<sup>52</sup>

Before *Meritor* reached the Supreme Court, Judge Bork of the D.C. Circuit authored a dissent, joined by then-Judge Scalia, to rehear the case *en banc*.<sup>53</sup> In a footnote, Judge Bork highlighted the doctrinal difficulty that would emerge if sexual harassment were actionable under Title VII but only if it occurred in a way that *discriminated between the sexes*:

[T]his court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible . . . . That bizarre result suggests that Congress was not thinking of individual harassment . . . . If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines.<sup>54</sup>

Although the *Meritor* court rejected Bork's argument that Title VII was not meant to include sexual harassment, it did not address the specter of the bisexual harasser defense.<sup>55</sup> Rather than update subsidiary doctrines to establish that liability attaches when there is pervasive sexual harassment despite "equal opportunity," the Supreme Court implicitly allowed the requirement of disparate impact to persist.<sup>56</sup> While some courts have devised individual workarounds to this theoretical problem by focusing on the so-called bisexual harasser's target *at a particular time*, others continue to recognize the defense in some shape or form.<sup>57</sup> In jurisdictions that recognize the

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51. *Id.* at 615.

52. *Id.* at 616.

53. *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting).

54. *Id.* at 1333 n.7.

55. *See generally Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

56. "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of *disparate treatment* of men and women in the workplace." *Meritor Sav. Bank*, 477 U.S. at 64 (emphasis added). "Sexual harassment which creates a hostile or offensive environment *for members of one sex* is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Id.* at 67 (emphasis added); *see also Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

57. *Compare Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 n.10 (E.D. Va. 1996) (suggesting that the bisexual sexual harasser defense may be overcome by focusing on what sex the bisexual person was targeting *at the time*), *with Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) (holding that Title VII does not

defense, one can escape Title VII liability for sexually harassing an employee by doubling that harm and also harassing someone of a different sex.<sup>58</sup>

Twelve years later, during oral arguments in *Oncale v. Sundowner Offshore Services*, the Supreme Court seemed just as confused as the D.C. Circuit as to the existence of Title VII liability for the bisexual harasser, consistent with the lower court’s findings.<sup>59</sup> There, Mr. Oncale sued his employer, Sundowner Offshore Services, alleging sexual harassment by his male supervisor and two male co-workers.<sup>60</sup> Mr. Oncale filed a Title VII claim against his employer because the harassment was pervasive and included verbal and physical threats of rape.<sup>61</sup> Although the question before the Court was whether acts of same-sex harassment were actionable under Title VII, a significant portion of the oral arguments were dedicated to the bisexual harasser problem.<sup>62</sup> The Courts extensively discussed a hypothetical posed by Justice O’Connor about a supervisor “with the unfortunate habit of patting each employee, male or female, on the fanny every day.”<sup>63</sup> The Justices struggled with whether sex was “relational,” or whether the *discrimination* requirement meant that such equal treatment would render that conduct legal.<sup>64</sup>

The unanimous opinion authored by Justice Scalia is notable for what it addresses, but also for what it omits. First, he writes that while same-sex harassment was “assuredly not the principal evil Congress was concerned with when it enacted Title VII[,] . . . statutory prohibitions often . . . cover reasonably comparable evils.”<sup>65</sup> Same-sex harassment, the Court concluded, met the statutory requirements and therefore, fell within Title VII’s scope.<sup>66</sup> Despite the extended discussion of the bisexual harasser problem at oral argument, the issue was not included in the opinion, nor was there any discussion of

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provide relief against a bisexual harasser that treats “both sexes the same (albeit badly)”), and *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 (4th Cir. 2001) (finding no Title VII violation where employee harassed both male and female colleagues).

58. *Holman*, 211 F.3d at 403.

59. See generally Transcript of Oral Argument, *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (No. 96-568).

60. Sonya Smallets, *Oncale v. Sundowner Offshore Services: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN’S L.J. 136, 137 (1999).

61. *Id.*

62. See generally Transcript of Oral Argument, *supra* note 59.

63. *Id.* at 20.

64. *Id.*

65. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

66. *Id.* at 80.

whether gross sexual conduct, in and of itself, could constitute discrimination “because of sex.”<sup>67</sup> The Court’s silence is particularly notable given Scalia’s previous support for Bork’s dissent in *Vinson*, which called for either a disavowal of sexual harassment doctrine altogether or the elimination of the requirement to find discrimination *between the sexes*.<sup>68</sup> Despite the severe harassment experienced by Mr. Oncale, there were no women on his team against whom his treatment could be compared, and it was unclear whether *Oncale*’s extension of Title VII protections was broad enough to cover Mr. Oncale’s case.<sup>69</sup> The parties in *Oncale* settled soon after the decision.<sup>70</sup>

### C. Sex Stereotyping: Remedy for “Acting” But Not “Being” Gay

One relevant theory of sex discrimination advanced by the *Hively* and *Zarda* opinions is that of sex stereotyping, first recognized in the plurality opinion of *Price Waterhouse v. Hopkins*.<sup>71</sup> In *Price Waterhouse*, the Supreme Court recognized that an employer engages in sex discrimination by relying on gender stereotypes to make an employment decision.<sup>72</sup> In summarizing why such behavior would be included under Title VII, the Court characterized Title VII as a “simple but momentous announcement” that sex is “not relevant to the selection, evaluation, or compensation of employees.”<sup>73</sup>

Despite this broad pronouncement, it remains unclear whether disparate impact between sexes caused by stereotyping is necessary to sustain a claim of sex discrimination.<sup>74</sup> The critical question for Title VII purposes is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>75</sup> This test, articulated in Justice Ginsburg’s concurrence in *Harris v. Forklift Systems* and reaffirmed by the unanimous Court in *Oncale*, focuses on sex in a way that reinforces

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67. *Id.*

68. *Vinson v. Taylor*, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J. dissenting).

69. Smallets, *supra* note 60, at 140.

70. *Id.* at 140 n.33.

71. 490 U.S. 228, 251 (1989).

72. *Id.*

73. *Id.* at 239.

74. *Compare* *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (upholding different “grooming standards” for male and female bartenders), *with* *EEOC v. R.G.*, 884 F.3d 560, 574 (6th Cir. 2018) (explicitly rejecting the need for a disparate impact between men and women to sustain a sex stereotyping Title VII claim).

75. *See Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

the gender binary.<sup>76</sup> On its face, it ignores the nearly 1.7% of the population that identifies as intersex.<sup>77</sup> Most troublingly, the test reinforces the need to compare how a standard impacts men relative to women to find discrimination, no matter how gross or targeted the offending conduct is.<sup>78</sup> In other words, if the stereotypes enforced impact more than one sex, there is no sex discrimination. This requirement is no different than in the bisexual harasser problem, where double discrimination is insulated, and would undermine contemporary arguments about pregnancy discrimination in light of the reality of male pregnancy.<sup>79</sup> Instead of focusing on the motivating factor of the discrimination, its magnitude in a vacuum, or its impacts on perpetuating a *particular* gender expression, a *Harris*-style requirement focuses the inquiry on the discrimination’s impact on the relative position of only males versus females and only with respect to one another.<sup>80</sup>

#### D. Attempts to Add Sexual Orientation and Gender Identity to Title VII

Some supporters of Title VII’s expansion toward covering sexual orientation discrimination generally admit that it is “well-nigh certain” that sexual orientation was not considered by legislators who enacted Title VII.<sup>81</sup> When the law was enacted in 1964, it was still illegal to be gay in all but one state.<sup>82</sup> The year after Congress passed the Civil Rights Act, an expanded Democratic majority enacted the Immigration and Naturalization Act, which made it illegal for “sexual deviants,” like homosexuals, to enter the country.<sup>83</sup> In short, the

76. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 25).

77. See generally ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000).

78. *Harris*, 510 U.S. at 25 (Ginsberg, J., concurring).

79. See *infra* Sections I.A–B.

80. *Harris*, 510 U.S. at 25 (Ginsberg, J., concurring).

81. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring); see also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 134 (2d Cir. 2018) (Jacobs, J., concurring).

82. Illinois was the first state to decriminalize homosexual sodomy in 1961, following the 1955 recommendations from the American Law Institute for the Model Penal Code. It would be another ten years until Connecticut became the second state to do the same in 1971. See *Getting Rid of Sodomy Laws: History and Strategy That Led to the Lawrence Decision*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision> [https://perma.cc/873A-5R7T] (last visited Apr. 21, 2019).

83. Immigration and Naturalization Act, Pub. L. No. 89-236 (1965) (codified as amended at 8 U.S.C. § 1101 (1952)); see Sharita Gruberg, *On the 50th Anniversary of*

government viewed discrimination against LGBT persons as an important regulation applying to a category of people labeled as “criminals” and “disordered” by state and federal laws.<sup>84</sup>

Although *Oncale* protected LGBT Americans from sex discrimination when targeted by a colleague of the same sex and *Price Waterhouse* supplemented protections against being punished due to sex stereotypes, the circuit courts are still resistant to allowing LGBT persons to “bootstrap” sexual orientation discrimination claims to sex discrimination claims.<sup>85</sup> As a result, Congress has attempted to amend Title VII more than 50 times to explicitly include sexual orientation and gender identity as protected categories.<sup>86</sup> The most recent attempt is the Equality Act, which would add sexual orientation and gender identity not only to Title VII but also to a variety of other civil rights laws.<sup>87</sup> Unlike previous iterations of the law, such as the 2012–2013 Employment Non-Discrimination Act (ENDA), the Equality Act does not contain a religious exemption and instead provides that the Religious Freedom Restoration Act may not serve as a defense to sexual orientation or gender identity-based Title VII claims.<sup>88</sup> While the measure has broad support in the House of Representatives, its prospects for passage in the Senate remain unclear.<sup>89</sup>

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*the INA, Changes Are Needed to Protect LGBT Immigrants*, CTR. FOR AM. PROGRESS (Mar. 23, 2015), <https://www.americanprogress.org/issues/lgbt/news/2015/03/23/109534/on-the-50th-anniversary-of-the-immigration-and-nationality-act-changes-are-needed-to-protect-lgbt-immigrants/> [https://perma.cc/ZY77-5AUK].

84. See Gruberg, *supra* note 83.

85. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006).

86. See, e.g., Equality Act, H.R. 3185, 114th Cong. (2015); Employment Non-Discrimination Act, S. 815, 113th Cong. (2013); S. 811, 112th Cong. (2011); S. 1584, 111th Cong. (2009); H.R. 3685, 110th Cong. (2007); H.R. 3285, 108th Cong. (2003); S. 1284, 107th Cong. (2002); H.R. 2355, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); S. 2056, 104th Cong. (1996).

87. The Equality Act, H.R. 5, 116th Cong. (2019); see also Michelangelo Signorile, *LGBT Rights Are Under Attack. America Needs the Equality Act — Urgently*, DAILY BEAST (Apr. 2, 2019), <https://www.thedailybeast.com/lgbt-rights-are-under-attack-america-needs-the-equality-acturgently> [https://perma.cc/TJ8W-JQNL].

88. Compare 113 CONG. REC. S7901 (daily ed. Nov. 7, 2013) (featuring the first openly lesbian Senator, Tammy Baldwin, stating that “religious organizations are not touched” by ENDA) with H.R. 5, 116th Cong. (2019) (“The Religious Freedom Restoration Act of 1993 . . . shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.”).

89. See Nick Martin, *Joe Manchin Will Vote Against the Equality Act, Because of Course He Will*, SPLINTER (Mar. 19, 2019), <https://splinternews.com/joe-manchin-will-vote-against-the-equality-act-because-1833403586> [https://perma.cc/64FT-JH9E].

Given the longstanding congressional inaction on the issue of LGBT workplace discrimination, the circuits diverge on whether and what kinds of discrimination are actionable under Title VII. While there are strong textual arguments which contend that LGBT persons are protected by the current law, many of these arguments rest on problematic theories that perpetuate gender binarism.

## II. *HIVELY, ZARDA, AND MONOSEXISM IN PURSUIT OF LIBERATION*

The open question of whether a disparate impact between men and women is necessary to sustain a Title VII claim not only creates absurdities in existing sex discrimination jurisprudence, but it also threatens to erroneously establish perceptions that sexual orientation discrimination and sex discrimination as discrete phenomena. *Hively*, *Zarda*, and *Baldwin* advance three different theories to support the position that sexual orientation discrimination is necessarily sex discrimination.<sup>90</sup> These three theories include a comparative test, associational discrimination, and sex stereotyping.<sup>91</sup> While each theory captures some instances of sexual orientation discrimination within the existing sex discrimination frameworks, particularly acts against gays or lesbians, they fail to adequately address discrimination against bisexuals, asexuals, and other non-monosexual identities.<sup>92</sup> This lack of consideration for cases involving bisexuals is consistent with repeated bisexual erasure within the LGBT community, and in the law more generally.<sup>93</sup> This Part will explore the limitations of each of the three theories, with a focus on their inability to capture orientations which fall outside of binarist assumptions.

### A. The Comparative Test

*Hively v. Ivy Tech* articulates the first theory, the comparative test, which asks, *but-for* the employee’s sex, would the same discriminatory act still have occurred?<sup>94</sup> The circuits took issue with the application of the comparative test as an *interpretative* tool used to determine the

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90. See generally *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 339 (7th Cir. 2017); *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at \*5 (July 15, 2015).

91. See generally *Zarda*, 883 F.3d at 100; *Hively*, 853 F.3d at 339; *Baldwin*, 2015 WL 4397641, at \*5.

92. Elizabeth Childress Burneson, *The Invisible Minority: Discrimination Against Bisexuals in the Workplace*, 52 U. RICH. L. REV. 63, 64 (2018).

93. See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 367 (2000).

94. *Hively*, 853 F.3d at 345.



scope of Title VII, rather than a *factual* one used to determine actual motive in a particular case.<sup>95</sup> Further, the test assumes that men must be compared to women to qualify as discrimination “based on” sex. In *Hively*, the Seventh Circuit applied the test by comparing the plaintiff, a woman in a same-sex marriage who alleged she was denied a promotion because of her marriage, to a hypothetical male employee who was also married to a woman.<sup>96</sup> The Court reasoned that but-for Hively’s sex, she would have been promoted, as the man married to a woman would not be subject to the same adverse treatment.<sup>97</sup> Although this analogy was effective in the case of Hively, a lesbian woman, it is defective in other scenarios where the plaintiff is not monosexual.

The specific application of the comparative method by the Second Circuit in *Zarda* and Seventh Circuit in *Hively* also did not isolate a single motivating variable for the employees’ terminations: sex or sexual orientation. When the circuits applied the comparative test, they switched both the sex and the sexual orientation of the plaintiffs, comparing a gay woman to a straight man in *Hively*, and a gay man to a straight woman in *Zarda*.<sup>98</sup> However, to isolate a motivating variable for a discriminatory action, the courts could have compared the gay female employee to a gay male employee, and vice versa. Had a court compared a gay woman to a gay man — holding sexual orientation constant but changing sex — an anti-gay employer could make the same adverse decision, thus isolating sexual orientation, not sex, as the motivating cause for termination. This argument was explicitly advanced by respondents during oral arguments in *Bostock*.<sup>99</sup>

The utility of the comparative test becomes even more suspect when applied to various bisexual victims of sexual orientation discrimination. Suppose an employer with anti-LGBT beliefs fires a bisexual woman upon discovery of her sexual orientation, which was not obvious because she was engaged to a cisgender man. To determine if this was sex discrimination under the comparative method, we would change the sex of the plaintiff, and determine how the employer would treat the plaintiff if she was a bisexual man engaged to a man. Unlike in

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95. *See id.* at 367 (Sykes, J., dissenting); *Zarda*, 883 F.3d at 134 (Jacobs, J., concurring).

96. *Hively*, 853 F.3d at 345–46.

97. *Id.*

98. *See id.*; *Zarda*, 883 F.3d at 119.

99. Transcript of Oral Argument at 7–8, *Bostock v. Clayton County*, 139 S. Ct. 1599 (2019) (No. 17-1623) [hereinafter *Bostock* Transcript of Oral Argument].

*Hively*, where changing the sex of the lesbian plaintiff created a heterosexual comparator who would not be subject to discrimination, here, changing the plaintiff’s sex only makes the plaintiff’s queerness (and the incentive to discriminate) more obvious to the employer. A comparative test that only compares the treatment of women to the treatment of similarly situated men therefore fails to isolate sex as a cause in the case of discrimination against a bisexual person, and cannot be used to extend Title VII’s protections against sex discrimination to such cases.

The current formulation of the comparative test also fails to capture discrimination against bisexuals versus their gay and lesbian counterparts within its “sex discrimination” umbrella. In the real world, there is evidence that bisexuals are subjected to *more* discrimination in the workplace than even their gay and lesbian counterparts.<sup>100</sup> This may be because bisexual employees can be victimized by both biphobia *and* homophobia.<sup>101</sup> It may also explain why only 11% of bisexual employees are “out” to their co-workers, whereas half of gay men and lesbian are.<sup>102</sup> Suppose a gay employer were to continually harass a female bisexual employee, who is currently single, but discussing her orientation by restating antiquated tropes that all bisexuals are merely hiding their “real” homosexual orientation. The comparative test provides no path to recourse, as changing the sex of the plaintiff does not make the employer’s remarks any less likely to occur.

Perhaps the fatal conceit of the current formulation of the comparative method is that it assumes, *a priori*, that sex and sexual orientation can be distinct variables, not functions of one another. Can one have a sexual *orientation* without first identifying one’s sex? The current comparator test, although deployed in *Hively* to link sex and sexual orientation, suggests you can separate the two in other cases. If, instead, sexuality is understood to be a function of sex, it becomes possible to use not only various sexes (beyond just “men” and “women”) as comparators, but also different sexual orientations themselves. If a bisexual victim of employment discrimination can be compared to a hypothetical heterosexual *or* homosexual employee,

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100. Anne E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 735 (2015).

101. *Id.*

102. *New Report: Bisexual People Face Invisibility, Isolation, and Shocking Rates of Discrimination and Violence*, MOVEMENT ADVANCEMENT PROJECT (Sept. 27, 2016), <http://www.lgbtmap.org/invisible-majority-release> [https://perma.cc/VV8Z-EFWD].

instead of just a man or woman of the “opposite” sex, we can then also identify any unique ways in which a bisexual person can be discriminated against.

### B. Associational Discrimination

A minority of the circuits follow the second theory finding that sexual orientation discrimination is necessarily associational discrimination based on the sex of one’s partner.<sup>103</sup> In *Hively*, the plaintiff alleged that she was denied a promotion because of the sex of her partner, and therefore, she was discriminated against on the basis of her own sex.<sup>104</sup> This theory originated in *Loving v. Virginia*, which in the case of anti-miscegenation laws, recognized that the “equal application” of racial classifications was a tool of white supremacy.<sup>105</sup> In short, an employer who discriminates against a person in an interracial marriage is not merely discriminating on the basis of the employee’s preference in the race of their partner, but is discriminating on the basis of the employee’s race itself. Associational discrimination is a rhetorically powerful theory to advance the “sexual orientation discrimination as sex discrimination” argument, and unlike the comparative or stereotyping theories, it has not been singled out for skepticism in supportive opinions.<sup>106</sup> Undoubtedly, some of that strength comes from the previous success of a *Loving*-style argument in the same-sex marriage context.<sup>107</sup>

The consideration of non-monosexual identities in this theory, unfortunately, undermines its ultimate goal of adequately capturing all instances of sexual orientation discrimination. Consider an employer who fires a heterosexual male employee upon discovering that his wife is bisexual. While that would be a case of clear sexual orientation discrimination, the associational theory would fail to link the discrimination to the plaintiff’s sex, because the sex of his partner conforms to heterosexual relationship norms. In contrast, consider an employer who fires an asexual employee because of their lack of

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103. See *Hively*, 853 F.3d 345–47.

104. *Id.* at 347.

105. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

106. See *Zarda*, 883 F.3d at 134 (Jacobs, J. concurring) (expressing skepticism about application of the comparative method or sex stereotyping to sexual orientation discrimination but endorsing the associational theory); *Hively*, 853 F.3d at 357 (Flaum, J., concurring).

107. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (invoking *Loving*’s holdings on the importance of marriage and the interaction of the Equal Protection and Due Process clauses to guarantee rights to LGBT persons).

association. The associational theory does not provide a clear pathway to link the decision to fire the asexual employee to the “sex” of another person, as opposed to the much broader concept of engaging in sexuality.

### C. Sex Stereotyping

The final theory advanced in *Zarda* and *Hively* is that discrimination against LGBT people is actually discrimination based on nonconformity with gender stereotypes, referred to as “sex-stereotyping.”<sup>108</sup> There is both a behavior-based and identity-based version of this argument.<sup>109</sup> A person who acts “stereotypically gay” may be said to not conform to certain gender stereotypes. For instance, the effeminate gay man who is singled out as “girly” or “not a real man” may have a claim for sex stereotyping based on the treatment of his behavior. However, this theory would not protect LGBT people who do not act in a “stereotypically gay” way. For example, the concurring opinion in *Zarda* rejected the stereotyping claim because there was no record of gendered remarks or impressions made about the plaintiff’s sexual orientation.<sup>110</sup> Despite the plaintiff’s brief disclosure of his homosexual orientation to a client, he apparently did not conform to gay stereotypes and could be described as “straight-passing.”<sup>111</sup>

This behavior-based iteration of the sex-stereotyping theory creates an absurdity in which it is illegal to fire someone for “acting” stereotypically gay, but not for merely *being* gay.<sup>112</sup> For example, a straight-passing homosexual can be denied Title VII protections merely by disclosing their sexual orientation, because the discrimination was not based on a stereotype. In contrast, if a heterosexual is misidentified as LGBT and thereby discriminated against, that misidentification, often stemming from sex-stereotypes, is

108. *Zarda*, 883 F.3d at 119; *Hively*, 853 F.3d at 342.

109. *Zarda*, 883 F.3d at 119; *Hively*, 853 F.3d at 342.

110. *Zarda* 883 F.3d at 135 (Jacobs, J., concurring).

[T]he record does not associate Mr. Zarda with any sexual stereotyping. The case arises from his verbal disclosure of his sexual orientation during his employment as a skydiving instructor, and that is virtually all we know about him. It should not be surprising that a person of any particular sexual orientation would earn a living jumping out of airplanes; but Mr. Zarda cannot fairly be described as evoking somebody’s sexual stereotype of homosexual men.

*Id.*

111. *Id.*

112. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1266 (11th Cir. 2017) (Rosenbaum, J., dissenting).

actionable under Title VII. This creates another absurdity that flows from the first: straight employees who “act gay” are more protected than gay employees who “act straight.”

To address this absurdity, the *Hively* and *Zarda* opinions suggest that identifying as LGBT is *itself* a violation of a gender stereotype, and therefore, all sexual orientation discrimination is discrimination because of a failure to conform to sex stereotypes.<sup>113</sup> To some extent, this is not a radical belief, even by courts that disfavor recognizing sexual orientation as a protected category under Title VII.<sup>114</sup> However, because a stereotype of presuming heterosexuality would theoretically impact and burden *men* and *women* equally, judges have cast doubt on whether heterosexuality can fairly be called a sex stereotype.<sup>115</sup> Indeed, if “exposing one sex to disadvantageous terms of employment that the other sex is not” remains the critical inquiry, as in *Harris*, a theory of both gay men and women violating the same stereotype of heterosexuality would be insufficient.<sup>116</sup> As roughly the same amount of men and women are non-heterosexual, a stereotype of heterosexuality would not have a disparate impact on one sex, nor be an effective proxy to discriminate based on biological sex.<sup>117</sup>

A theory that homosexuality that inherently violates the stereotype of heterosexuality also fails to functionally protect the entire spectrum of sexual orientations. For example, it is unclear whether asexual people violate a “stereotype” that all persons must be engaged in sexual relationships. It is also unclear whether a gay employer at an LGBT organization could, within his or her rights, fire an employee upon discovering that the employee is heterosexual. In the latter case, despite obvious sexual orientation discrimination, the employee could not bring a sex stereotyping claim because they acted *in accordance* with the stereotype of heterosexuality. While hypothetical discrimination against heterosexuals may not be a concern, this limitation illustrates the perils of attempting to add an entire protected class under the umbrella of violating a stereotype of a defined majority.

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113. See *Zarda*, 883 F.3d at 119; *Hively*, 853 F.3d at 342.

114. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (stating that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices” but nonetheless declining to extend a sex-stereotyping theory to a claim of sexual orientation discrimination).

115. *Hively*, 853 F.3d at 342 (Sykes, J., dissenting).

116. See *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

117. See, *LGBT Demographic Data Interactive*, UCLA SCH. L., WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/> [https://perma.cc/SQ9P-ZMXG] (last visited Feb. 15, 2019) (showing men and women constitute roughly equal proportions of the U.S. LGBT population).

#### D. The Three Theories at Oral Argument

In *Bostock* and *R.R. Funeral Homes*, the government and employees’ attorneys relied on the limitations of the three theories at oral argument. The argument that sexual orientation discrimination and sex stereotyping are necessarily linked was boldly advanced when counsel for Mr. Bostock quoted the *en banc* Second Circuit in *Zarda*:

The attempt to carve out discrimination against men for being gay from Title VII cannot be administered with either consistency or integrity. In the words of the *en banc* Second Circuit, it forces judges to . . . resort to lexical bean counting where they count up the frequency of epithets, such as “fag,” “gay,” “queer,” “real man,” and “fem,” to determine whether or not discrimination is based on sex or sexual orientation. That attempt is futile[.]<sup>118</sup>

Chief Justice Roberts was the first to suggest that an employer could hypothetically discriminate against a gay person, as Justice Alito later says, “behind the veil of ignorance,” without ever discovering their sex.<sup>119</sup> Associational discrimination is deployed as a rebuttal and later as a hypothetical by Justice Breyer, albeit with a comparison to discrimination against interfaith couples.<sup>120</sup> The comparative test was primarily assailed by counsel for the employer, who argued that the “critical inquiry” for Title VII purposes was the *Harris* test of “whether members of one sex were being treated worse than members of the other sex.”<sup>121</sup> Here, members of both sexes would be discriminated against by an anti-LGBT rule. As Justice Ginsburg suggested, however, this could allow employers that only hire members of one sex to discriminate freely on issues like marital status — as there would be no comparison.<sup>122</sup> Oncale would always lose his sex harassment claim, merely because his workplace had no women.<sup>123</sup> This also risks reinforcing the bisexual harasser defense, as a bisexual harasser would

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118. *Bostock* Transcript of Oral Argument, *supra* note 99, at 5. This is likely the first time in the Court’s history that the slur “fag” has ever been used at oral argument. The word was not invoked during oral argument in *Snyder v. Phelps*, 562 U.S. 443 (2011), a case brought against the Westboro Baptist Church for picketing a funeral with their signature “GOD HATES FAGS” signs and chants.

119. *Id.* at 8, 51–52.

120. *Id.* at 38.

121. *Id.* at 32.

122. *Id.* at 57 (referencing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1196 (7th Cir. 1971)). In *Sprogis*, a female stewardess was fired because she was married. *Sprogis*, 444 F.2d at 1196.

123. *See supra* Section I.C.

not impose a burden on male employees that he does not also impose on female ones.<sup>124</sup>

### III. ALTERNATIVES TO DISPARATE IMPACT-DEPENDENT THEORIES

Given the Court's apparent flirtation with reinvigorating the *Harris* inquiry, it is urgent that we recognize its inconsistent application thus far and develop alternatives that provide more consistent and just inquires. This final Part will advance alternative theories that seek to better include non-monosexual identities in their analysis and to conceptually link gender identity and sexual orientation discrimination.

It is no secret that with the retirement of Justice Kennedy and the appointment of Brett Kavanaugh, LGBT activists are more pessimistic about their chance of success before the Court.<sup>125</sup> At least some commentators believe that the conservative justices' emphasis of the original statutory meaning in recent opinions is foreshadowing a rejection of expanded Title VII protections for LGBT persons.<sup>126</sup> Despite the recent victories in *Hively* and *Zarda*, the weight of circuit precedent still cuts against an LGBT-inclusive view of Title VII.<sup>127</sup>

124. See *supra* Part I.

125. See German Lopez, *Anthony Kennedy's Retirement Is Devastating for LGBTQ Rights*, VOX MEDIA (June 27, 2018), <https://www.vox.com/identities/2018/6/27/17510902/anthony-kennedy-retirement-lgbtq-gay-marriage-supreme-court> [<https://perma.cc/E5DM-VNB2>]; Jim Obergefell, *I Brought the Case that Made Same-Sex Marriage Legal. Anthony Kennedy's Retirement Threatens All We Have Won*, TIME (June 28, 2018), <http://time.com/5324824/supreme-court-anthony-kennedy-obergefell/> [<https://perma.cc/K9JF-WYMT>]; cf. Masha Gessen, *The Dread of Waiting for the Supreme Court to Rule on L.G.B.T. Rights*, NEW YORKER (Apr. 23, 2019), <https://www.newyorker.com/news/our-columnists/the-dread-of-waiting-for-the-supreme-court-to-rule-on-lgbt-rights> [<https://perma.cc/6834-7SUH>]; Eugene Scott, *In Kavanaugh's Non-Answer on Same-Sex Marriage, Many Heard a Troubling Response*, WASH. POST (Sept. 7, 2018), <https://www.washingtonpost.com/politics/2018/09/07/kavanaughs-non-answer-same-sex-marriage-many-heard-troubling-answer/> [<https://perma.cc/K2R3-27BQ>].

126. Mark Joseph Stern, *The Supreme Court Just Handed a Big, Unanimous Victory to Workers. Wait, What?*, SLATE (Jan. 15, 2019), <https://slate.com/news-and-politics/2019/01/gorsuch-arbitration-labor-new-prime-oliveira.html> [<https://perma.cc/X625-8R4Q>]; see also *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019) (urging judges not to freely invest old statutes with new meanings lest they risk "amending legislation outside the 'single . . . and exhaustively considered . . . procedure' the Constitution commands" (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983))).

127. See, e.g., *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); see also *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut*

That said, there is still room for optimism as these cases go before the Supreme Court. That the *Hively* majority included five Republican appointees, including Judge Easterbrook, indicates the strength of its textual argument.<sup>128</sup> However, success before the Supreme Court may require that the Court finally addresses whether discrimination “because of sex” requires a finding of discrimination between men and women, or if it can more broadly encompass discriminatory acts motivated by sex-related traits of the target. With that broader understanding of what constitutes “because of sex,” the following rationales could link sex and sexual orientation discrimination in a way that creates a cause of action under Title VII, but does not reinforce either the gender-binary nor monosexist ideas by focusing on the comparative impact of discrimination between men and women.

#### A. Focus on Flaum: Creating a “Reliance on Sex-Based Considerations” Standard

In his *Hively* concurrence, Judge Flaum suggests that the proper inquiry is not *Harris*’s focus on “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,” but is instead whether “gender was a *factor* in the employment decision.”<sup>129</sup> He suggests this reading is supported not only by the plurality in *Price Waterhouse* but is also faithful to the 1991 amendments to the Civil Rights Act.<sup>130</sup> The Pregnancy Discrimination Act and the 1991 amendments were meant to codify some of the dicta of *Price Waterhouse* and overturn the court’s narrowing of Title VII’s applicability to racial discrimination cases in *Wards Cove Packing v. Atonio*.<sup>131</sup> The relevant language from the 1991 amendment reads: “[a]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a *motivating factor for any employment practice, even though other factors also*

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of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam).

128. Mark Joseph Stern, *A Thunderbolt From the 7th Circuit*, SLATE (Apr. 5, 2017), <https://slate.com/news-and-politics/2017/04/the-7th-circuit-rules-that-anti-gay-employment-discrimination-is-illegal.html> [<https://perma.cc/2YNX-MK4Y>].

129. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 359 (7th Cir. 2017) (Flaum, J., concurring) (emphasis in original).

130. *See id.* at 358–59.

131. “The purposes of this act are . . . to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” The Civil Rights Act of 1991, S. 1745, 102d Cong. § 3 (1992).



*motivated the practice.*”<sup>132</sup> This language, Judge Flaum wrote, establishes a lower threshold for how much “sex” must factor into the adverse employment decision for there to be Title VII liability. This lower threshold effectuates the *Price Waterhouse* plurality’s note that Congress meant to establish Title VII liability whenever an employer has “relied upon sex-based considerations.”<sup>133</sup> It also bears some resemblance to the language from the Brennan dissent in *Gilbert* that helped shape the Pregnancy Discrimination Act — that pregnancy is at the very least “strongly sex-related.”<sup>134</sup>

The “sex-based considerations” or “strongly sex-related trait” standards, articulated in dicta by the *Price Waterhouse* plurality,<sup>135</sup> and arguably endorsed by Congress in both 1979 and 1991,<sup>136</sup> help establish liability for sexual orientation and gender identity discrimination in a way that effectively captures a wider variety of sexual orientations. One cannot identify the sexual orientation of a person unless one knows the sexes to which they are attracted.<sup>137</sup> This includes non-monosexual orientations.<sup>138</sup> In short, to consider someone’s sexual orientation when making a hiring decision always involves considering their sex. Considering sexual orientation therefore runs afoul of Title VII’s intent to make “sex” *irrelevant* to the selection, evaluation, or compensation of any employee.<sup>139</sup>

Focusing on whether an individual experiences discrimination based on consideration of their sex, rather than how the alleged discrimination itself comparatively disadvantaged one sex, is both

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132. *Id.* (emphasis added).

133. *Hively*, 853 F.3d at 359 (Flaum, J., concurring) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241–42 (1989)).

134. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 148–49 (1976) (Brennan, J., dissenting).

135. *Price Waterhouse*, 490 U.S. at 240–42.

136. See Pregnancy Discrimination Act, Pub. L. No. 95-555, 42 U.S.C. § 2000 (1978); The Civil Rights Act of 1991, S. 1745, 102d Cong. § 3 (1992).

137. See *Homosexual*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/homosexual> (last visited Jan. 17, 2020) (“[O]f, relating to, or characterized by a tendency to direct sexual desire toward another of the *same sex*.”) (emphasis added); see also *Homosexual*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Of relating to, or characterized by sexual desire for a person of the *same sex*.”) (emphasis added).

138. See *Bisexual*, MERRIAM-WEBSTER DICTIONARY, <http://unabridged.merriam-webster.com/unabridged/bisexual> (last visited Oct. 20, 2019) (“[O]f, relating to, or characterized by a tendency to direct sexual desire toward both *sexes*.”) (emphasis added); *Pansexual*, MERRIAM-WEBSTER DICTIONARY, <http://unabridged.merriam-webster.com/collegiate/pansexual> (last visited Oct. 20, 2019) (“Pansexual people are attracted to all kinds of people, regardless of their *gender, sex* or presentation.”) (emphasis added)).

139. *Price Waterhouse*, 490 U.S. at 240.

consistent with Title VII and would conclusively end the absurdity of the bisexual harasser defense.<sup>140</sup> First, as Judge Flaum noted in his *Hively* concurrence, the Supreme Court stated in *City of Los Angeles, Dep’t of Water & Power v. Manhart* that Title VII’s “focus on the individual is unambiguous.”<sup>141</sup> A focus on the individual who experiences an act of discrimination, rather than on their experiences compared to those of their colleagues, would eliminate the need to determine if other sexes had experienced sex-based discrimination. While this focus on the individual seems to conflict with the *Harris v. Forklift Systems* standard reaffirmed in *Oncale v. Sundowner Offshore Services*, neither *Harris* nor *Oncale* rebuked *Manhart*, and the need for a comparator remained ambiguous.

Elimination of the bisexual harasser defense is another reason to reject the *Harris* “disparate treatment” standard in favor of a more individualized inquiry that focuses on discrimination experienced by the employee suggested by *Price Waterhouse* and *Manhart*. If the focus of the inquiry turns on how an *individual* experiences discrimination, “each [affected] employee’s claim satisfies Title VII on its face, no matter the sex of any other employee who experienced discrimination.”<sup>142</sup> The bisexual harasser defense would fail under this inquiry as each act of discrimination or harassment by the hypothetical bisexual harasser would constitute a complete claim under Title VII. This shift would bring about the long called-for “adjustment in subsidiary doctrines” embraced by Judges Bork and Scalia in their *Taylor* dissent.<sup>143</sup> Elimination of a comparison requirement would resolve the circuit split over application of *Price Waterhouse*, making it clear sex-stereotyping affecting an employment decision is actionable even if it puts “equal” burdens on men and women. This conceptual shift would shore-up the sex-stereotyping theory advanced by the *Hively* and *Zarda* courts by eliminating the argument that a stereotype of heterosexuality imposes that kind of “equal” burden.

### **B. Sexual Orientation Discrimination Is a Function of Sex Discrimination**

A second way to link sexual orientation discrimination to sex discrimination is to define “sex” as inclusive of “sexuality” because

140. See Applebaum, *supra* note 50.

141. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 359 n.2 (7th Cir. 2017) (Flaum, J., concurring) (quoting *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978)).

142. *Id.*

143. *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985).

sexuality is a function of sex. This interpretation is not only contemporary;<sup>144</sup> definitions of “sex” contemporaneous to the passage of Title VII included phrases such as “the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.”<sup>145</sup> This analysis is related to the inability to define sexual orientation without reference to “sex,” but goes further to consider how sexuality and its regulation have been historically tied in the United States to maintaining gender roles. To a certain extent, this analysis mirrors (and certainly supports) the third theory advanced by the circuit courts,<sup>146</sup> that punishing homosexuals is a form of sex-stereotyping, but rather than focusing on defining stereotypes it focuses on the way that “sex” and “sexual orientation” have been defined and linked by the state and individuals.

While some courts, including the Supreme Court, consider discrimination against transgender persons and sexual minorities discrete phenomena,<sup>147</sup> early discriminatory laws targeted the entirety of the LGBT community using shared labels and tactics in pursuit of one goal: regulation of sex and gender norms. Early American sexologists classified cross-dressing persons and sexual minorities alike as having a “perverted sex” such that “they hate the opposite sex and love their own; men become women and women become men.”<sup>148</sup> Having an “inverted” sex described the *individual* in totality, and their sexual conduct was only one aspect of that larger *sex* inversion.<sup>149</sup> The

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144. Sex can be defined as either “one’s identity as either female or male” or “especially the collection of characteristics that distinguish [the sexes],” both contemporary definitions that support application to gender identity and sex stereotypes. *Sex*, AMERICAN HERITAGE DICTIONARY (5th ed. 2019).

145. William Eskridge, *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 338 (2017) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2296 (2d unabridged ed. 1961)).

146. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 119 (2d Cir. 2018).

147. The Supreme Court granted certiorari in three different cases, slating the cases about sexual orientation discrimination for argument before argument about transgender discrimination cases. This suggests that the Court considers the question of whether either form of discrimination is “sex” discrimination as two questions. See *Bostock v. Clayton Cty.*, 139 S. Ct. 2049 (2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 2049 (2019); *Zarda*, 883 F.3d 100.

148. WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 22 (2002).

149. INST. OF MEDICINE OF THE NAT’L ACADEMIES, *COMM. ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH ISSUES AND RESEARCH GAPS AND OPPORTUNITIES, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 33 (2011), [https://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf\\_NBK64806.pdf](https://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf_NBK64806.pdf) [<https://perma.cc/N3L4-CM8B>].

link between gender roles and defining sexuality at this time was so strong that men who engaged in a stereotypically “masculine” or insertive roles during gay sex were not considered “inverts” because they were “psychologically” fulfilling their prescribed biological role.<sup>150</sup> As municipalities increased their regulation (and prosecution) of non-heterosexual sex acts, they at the same time increased their regulation of once-popular drag shows and spaces known to encourage gender-nonconformity, believing gender and sexual deviation to be strongly related.<sup>151</sup> In the Immigration and Naturalization Act, passed the year after the Civil Rights Act, homosexuals, bisexuals, and transgender people alike were described as “sexual deviants.”<sup>152</sup> In short, the history of legally-sanctioned sexual orientation discrimination in this country is one of enforcing traditional sex roles, sex stereotypes, and regulating LGBT persons’ expressions of their own sex.

Discriminatory laws today are more targeted against subsets of the LGBT community who are more vulnerable, but that does not mean that sexual orientation and gender identity discrimination do not share a common foundation. The arguments deployed to deny transgender people the right to use the bathroom consistent with their gender identity bear a startling resemblance to those used to justify anti-gay discrimination. During the debate over a so-called “bathroom bill” in Texas, a letter signed by hundreds of local pastors expressed concern for “the privacy, safety and freedom of our women and children.”<sup>153</sup> This specter of pro-LGBT laws exposing children to violence — and the potential of “recruitment” — matches language used by Anita Bryant during her “Save Our Children” campaign to repeal such laws.<sup>154</sup> Her husband described the campaign to repeal the Miami-Dade anti-LGBT discrimination law as “strictly a defensive measure.”<sup>155</sup>

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150. ESKRIDGE, *supra* note 148, at 38.

151. *Id.* at 45.

152. Immigration and Naturalization Act, PUB. L. No. 89-236, 79 Stat. 911, 920 (1965) (codified as amended at 8 U.S.C. § 1101 (2014)).

153. R.G. Ratcliff, “*Our Daughters*” Used as the Bathroom Bill’s Protection, TEX. MONTHLY (Aug. 1, 2017), <https://www.texasmonthly.com/burka-blog/daughters-used-bathroom-bills-protection/> [https://perma.cc/2FGK-X4A9].

154. Jay Clark, *Gay Rights Fight Shaping Up in Miami*, WASH. POST (Mar. 27, 1977), <https://www.washingtonpost.com/archive/politics/1977/03/27/gay-rights-fight-shaping-up-in-miami/e4f596c1-f8e0-4785-b528-599077a478ba> [https://perma.cc/3DJQ-HJK7].

155. *Id.*

There is also abundant social science research that indicates attitudes about LGBT people are primarily driven by one's beliefs about and adherence to proper gender roles. Numerous studies have found that one's adherence or belief in "traditional" gender roles are among the strongest predictors, if not the strongest, of one's attitudes towards LGBT persons.<sup>156</sup> Some studies have found the link between traditional gender roles and homophobia to be stronger than between homophobia and both one's sexual conservatism and gender role self-concept.<sup>157</sup> In short, at the *psychological level*, sex and gender are a consideration when one engages in sexual orientation discrimination.

The linking of sex, sexuality, and gender identity as sharing a common motivation and history of discrimination prevents the absurd result that could occur if the Supreme Court were to find either sexual orientation or gender identity discrimination actionable, but not the other. While the Supreme Court has decided to separate these questions between *Altitude Express v. Zarda* for sexual orientation discrimination and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* for gender identity discrimination, a pro-LGBT ruling in one case requires a pro-LGBT ruling in the other to effectuate it. According to the National Center for Transgender Equality, a mere 12% of transgender persons identify as heterosexual.<sup>158</sup> Therefore, if the Supreme Court in *R.G. & G.R. Harris Funeral Homes* were to find that discrimination based on gender identity was actionable under Title VII, but sexual orientation discrimination is not, it would leave open a permissible basis to effectively discriminate against 88% of transgender persons by proxy.<sup>159</sup> Considering that those who harbor anti-transgender animus often also harbor animus against sexual minorities,<sup>160</sup> the ineffectiveness of only finding one form of discrimination actionable is not merely a hypothetical problem.

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156. See Aubrey Lynne DeCarlo, *The Relationship between Traditional Gender Roles and Negative Attitudes Towards Lesbians and Gay Men in Greek-Affiliated and Independent Male College Students* 59 (2014) (unpublished Ph.D. dissertation, Lehigh University) (on file with Lehigh Preserve), <https://preserve.lehigh.edu/cgi/viewcontent.cgi?article=2469&context=etd> [<https://perma.cc/ZV27-6NHQ>]; see also Julie Nagoshi et al., *Gender Differences in Correlates of Homophobia and Transphobia*, 59 *SEX ROLES* 521, 529 (2008).

157. Michael Stevenson & Barbara Medler, *Is Homophobia a Weapon of Sexism?*, 4 *J. MEN'S STUDIES* 1, 2 (1995).

158. See NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 15, at 246.

159. *Id.*

160. Amy B. Becker et al., *Moral Politicking: Public Attitudes toward Gay Marriage in an Election Context*, 14 *INTL J. PRESS/POL.* 186, 186–92 (2009) (finding that attitudes about same-sex attraction predicted attitudes about transgender persons).

Ironically, at oral argument, the Court appeared willing to link the fate of the sexual orientation and gender identity cases — but for the wrong reason: in a word, bathrooms. During the arguments in *Bostock*, one of the sexual orientation cases, the only hypotheticals posed to counsel that actually involved behavior in the workplace — rather than abstractions from behind the veil of ignorance — were about trans people using bathrooms consistent with their gender identity. Bathrooms are mentioned 18 times in *Bostock*, which is one *more* time than “bathroom” was mentioned in the immediately following gender identity case, *R.G. & Martin Funeral Homes*.<sup>161</sup> The irony is only heightened when one considers that while sexual minorities’ use of restrooms is no longer of legislative interest to the states, the cruel and false specter of predators in the “wrong” restroom was historically deployed against gay men, lesbians, and racial minorities.<sup>162</sup>

The linking of sex, gender identity, and sexual orientation discrimination under an umbrella of discrimination meant to reinforce sex-norms, however, would effectively capture non-omnisexual orientations and non-binary gender identities. Discrimination against each of these persons, from the bisexual man to the asexual transgender woman, is sex-discrimination because that *discrimination* itself is historically and psychologically a means of regulating sex and its expression. If the discrimination is inherently based on sex, and consideration of traditional gender roles, no comparisons to other parties are needed, rendering disparate impact inquiries irrelevant.

### C. Statistics to Establish Sex-Specific Impacts of Discrimination

If the Supreme Court were to perpetuate the *Harris* inquiry, as employer’s counsel at oral argument urged, requiring the sexes to be exposed to different disadvantageous terms, it could remain possible to sustain a claim of sex discrimination by looking to data about the different impacts of anti-LGBT discrimination depending on one’s sex. While a stereotype of heterosexuality could impose the same *command* on both sexes, it does not mean both sexes feel the *effects* of that command equally. For instance, gay men on average are paid between

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161. *Bostock* Transcript of Oral Argument, *supra* note 99 with Transcript of Oral Argument, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, 139 S. Ct. 2049 (2019).

162. Sarah Frostenson & Zachary Crockett, *It’s Not Just Transgender People: Public Restrooms Have Bred Fear for Centuries*, VOX (May 27, 2016), <https://www.vox.com/2016/5/27/11792550/transgender-bathroom> [https://perma.cc/R3RS-JRFK].

10 and 32% less than their heterosexual counterparts.<sup>163</sup> While lesbian women do not report similar rates of pay discrimination compared to their heterosexual counterparts, they experience other forms of discrimination, such as harassment, at similar rates.<sup>164</sup> Internationally, evidence suggests that gay men are disproportionately discriminated against in traditionally male-dominated fields, and lesbians are disproportionately discriminated against in traditionally women-led fields.<sup>165</sup> This data again suggests that, in fact, anti-LGBT discrimination is driven primarily by sex stereotypes and does not impact lesbians and gay men the same way within a single workplace. Bisexuals experience workplace discrimination differently as well, being uniquely vulnerable to hyper sexualization in the workplace and experiencing biphobia, sometimes at the hands of gay or lesbian employees.<sup>166</sup> In other words, because of how sexual orientation and sex discrimination interact, there are, in fact, differences in how sexual orientation discrimination manifests itself across sex-based lines that create different “disadvantageous terms” for different sexes.

Ultimately, this solution is sub-optimal because by preserving a “disparate impact on the sexes” requirement, discrimination based on sexual orientation may be actionable, but it also allows the absurdity of the bisexual harasser defense to persist. Further, it is unclear if these sorts of population-based studies of how different segments of the LGBT community experience discrimination would be sufficient to satisfy the *Harris* inquiry, as different manifestations of discrimination may not constitute “disadvantageous *terms* of employment.”

### CONCLUSION

Discrimination against LGBT Americans in the workplace is a longstanding phenomenon. While the specter of a “Briggs Initiative”<sup>167</sup> designed to categorically deny LGBT persons the right to

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163. BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., DOCUMENTING THE IMPACT OF LGBT DISCRIMINATION 14 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf> [<https://perma.cc/7UDR-9DDG>].

164. *Id.*

165. Ali Ahmed et al., *Are Gay Men and Lesbians Discriminated Against in the Hiring Process?*, 79 S. ECON. J. 565, 565 (2013).

166. Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 731 (2015).

167. The Briggs Initiative was a proposal by California State Senator John Briggs that would have mandated the firing of any gay teacher or any teacher who supported gay rights. Initially, the ballot initiative received a significant majority of support in public opinion polls. However, the measure was eventually defeated 58% to 42% after

hold a particular job is no longer front of mind, the reality remains that an LGBT person can now “be married on a Sunday and fired on a Monday” in most states.<sup>168</sup> Even if the majority of LGBT Americans live in urban areas with generally more accepting attitudes of sexual and gender minorities, they are still regularly victimized regardless.<sup>169</sup> The opinions of the *Hively* and *Zarda* courts represent encouraging recognition that Title VII’s broad text reaches more than discrimination that only targets men or women in a vacuum. However, lasting success before the Supreme Court may require elimination of the longstanding disparate impact requirement in sex discrimination cases. This shift in doctrine, which can be rooted in precedent and later congressional amendments, opens the door for other theories of sexual orientation discrimination as sex discrimination that do not perpetuate the Court’s silence on non-monosexual identities. The new *individualized* inquiries — either (1) whether a person was discriminated against and their sex was a factor; or (2) whether the discrimination experienced by the individual was driven by adherence to traditional sex-roles — not only will protect the previously invisible bisexual victim of employment discrimination but would also finally erase the bisexual harasser defense.

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a coalition of LGBT and other activists, notably including Sally Miller Gearhart and Harvey Milk, worked to build public opposition. See Trudy Ring, *The Briggs Initiative: Remembering a Crucial Moment in Gay History*, *ADVOCATE* (Aug. 31, 2018), <https://www.advocate.com/politics/2018/8/31/briggs-initiative-remembering-crucial-moment-gay-history> [<https://perma.cc/9CGH-QDVN>].

168. Gene Robinson, *State of LGBT Rights: Married on Sunday, but Fired on Monday*, *DAILY BEAST* (Dec. 14, 2014), <https://www.thedailybeast.com/state-of-lgbt-rights-married-on-sunday-but-fired-on-monday> [<https://perma.cc/7LJ7-VDWF>].

169. Sejal Singh & Laura Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, *CTR. FOR AM. PROGRESS* (May 2, 2017), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/> [<https://perma.cc/XM5P-73YP>].