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Heteronormativity in Employment Discrimination Law

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This symposium Essay responds to the EEOC's new decision to interpret federal employment discrimination law's ban on discrimination on the basis of sex to include a ban on discrimination on the basis of sexual orientation. It argues that although the EEOC's decision does provide cause to celebrate, ongoing heteronormativity in federal employment discrimination law will continue to stand as a barrier to equal employment opportunity for gay workers. First, Title VII provides an exception to the sex discrimination ban in the context of intimate spaces, allowing, for example, only women to be hired to serve as labor and delivery nurses. This exception proceeds on the assumption that same-sex spaces are no-sex spaces, furthering the presumption that all employees are heterosexual. Second, Title VII provides an exception to the ban on sex discrimination in the context of role-modeling for children, allowing, for example, only women to be hired as counselors to serve as role models for female clients. This exception assumes that sex dictates the ability to fulfill particular parenting roles, furthering the notion that heterosexual couples have a parenting advantage over same-sex couples. Finally, Title VII's ban on sexual harassment generally treats male-on-female harassment as sex discrimination by assuming that harassers are heterosexual, reinforcing heteronormative assumptions with every such case. So while the EEOC's decision will provide some protection for gay workers, a more searching inquiry of the law to root out bias on the basis of sexual orientation will be necessary for employment discrimination law to achieve its promise of equal employment opportunity for these workers.

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I. INTRODUCTION

Even before *Obergefell v. Hodges*[1] found a right to same-sex marriage in the U.S. Constitution, it was remarked with surprise that we were more likely to get gay rights in the family before we got them in the market. And this prediction has come true. We now have a federal right to gay marriage, but we have no nationwide right to nondiscrimination on the basis of sexual orientation in employment.[2]

The EEOC has stepped in to try to change this. It has announced an interpretation of federal employment discrimination law's ban on sex discrimination to include discrimination on the basis of sexual orientation.[3] This position was not new. Scholars had long advocated for it,[4] and some courts had reached this outcome some of the time, especially in circumstances when plaintiffs, although gay, had evidence that they were discriminated against (especially harassed) because of their failure to conform to sex stereotypes.[5] However, many courts rejected claims by gay plaintiffs because they were trying to shoehorn protection under the sex discrimination ban that Congress clearly did not intend.[6] The EEOC's move here has thus been rightly applauded. A blanket ban on sexual orientation discrimination would mark significant progress for gay workers.

While recognizing the progress that a ban on transgender or sexual orientation discrimination under Title VII would make,[7] this brief symposium

* 135 S. Ct. 2584 (2015).

2. After the EEOC changed its position on the issue, the circuits split as to whether Title VII bans discrimination on the basis of sexual orientation. *Compare, e.g.*, Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 339 (7th Cir. 2017) (en banc) (yes), *with* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1256–57 (11th Cir. 2017) (no). Almost half the states grant such protection, as well as many cities. *See Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, ACLU, https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country?redirect=node/40573 [http://perma.cc/88RL-74E4].

3. The EEOC interprets the sex discrimination ban to include a ban of sexual orientation discrimination on two grounds: (1) that a person (e.g., woman) who is discriminated against because of an attraction to persons of the same sex (women) is discriminated against because of her sex because if she were a different sex (i.e., a man) and thus attracted to a person of the opposite sex, she would be treated differently, and (2) that discriminating on the basis of sexual orientation amounts to sex stereotyping held to violate Title VII under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241–42 (1989), because a person who is attracted to a person of the same sex fails to conform to sex stereotypes (of being attracted to the opposite sex). *See, e.g.*, Baldwin v. Foxx, EEOC Decision 0120133080, 2015 WL 4397641 (July 16, 2015); Lusardi v. McHugh, EEOC Decision 0120133395, 2015 WL 1607756 (Apr. 1, 2015); Macy v. Holder, EEOC Decision 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

4. *See generally* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

5. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068–69 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (explaining that sexual harassment of a gay man was sex discrimination because the man was harassed for failing to meet masculine stereotypes).

6. *See, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

7. Indeed, recognizing discrimination on the basis of sexual orientation or transgender identity as sex discrimination rather than on a protected-trait theory (i.e., an express statutory ban on discrimination on the basis of sexual orientation or transgender identity) has the promise to bring *more* progress for equal employment opportunity. First, a sex-stereotyping rather than a protected-trait approach has the promise to reaffirm and expand a broad reading of Title VII's ban on sex stereotyping, which could aid gender-nonconforming plaintiffs, regardless of their sexual orientation, and which could spill over into other areas of law that ban sex discrimination, such as education, without requiring amendments to those laws. Second, a sex-stereotyping rather than a protected-trait approach would likely avoid the concern that only those

Essay takes a more skeptical view of the law's progress for gay workers, by looking at the whole of Title VII. A more comprehensive survey of Title VII's attitude and approach towards sexuality reveals that even if courts were to adopt the EEOC's interpretation—indeed, even if Congress were to pass protection against sexual orientation discrimination in employment at the federal level—aspects of Title VII would continue to reinforce the second-class status of gay workers. Although the EEOC's decision has the potential to make progress in this realm,[8] the status of gay workers will be held back by other features of Title VII. To return to *Obergefell*, not only have we achieved gay rights in the family before the market, but historical inequality from the family is continuing to spill over into the market, despite current equality in the family, and despite the move towards equality in the market.

This Essay explores the ways in which, notwithstanding recent developments in interpreting Title VII to protect the rights of gay workers, Title VII remains deeply inflected with heteronormative assumptions that are in tension with the full equality of gay people, both at work and beyond. This essay proceeds in three Parts. The first Part addresses the sex-based bona fide occupation qualification (BFOQ) as a doctrinal feature of Title VII that rests upon and reinforces heteronormative assumptions in two ways: by assuming that same-sex spaces are no-sex spaces, and by crediting "role-model" theories of childcare that rely on sex-matching between worker and child that are in tension with the full legitimacy of same-sex marriage. The second Part addresses sexual harassment as another feature of Title VII that rests upon and reinforces heteronormative assumptions, in two ways: by assuming that male-on-female sexual harassment is based in sexual desire, and by scrutinizing same-sex sexual harassment through the lens of heteronormative expectations of sexuality and desire. The third Part briefly considers the harms of these heteronormative assumptions as well as what advocates for gay workers could

plaintiffs whose gender nonconformity is so serious and verifiable that it can be fit within the boxes of sexual orientation or gender identity disorder will have claims, leaving out the effeminate man who just likes to wear skirts, or the masculine woman who does not want to wear make-up. *See* 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. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1336 (2009) ("[A] turn toward [protection on the basis of sexual orientation and transgender identity] and away from Title VII could privilege those gender benders who can and do claim an identity as transgender or gay, but could increasingly leave out those who cannot or do not choose to claim such an identity, including those whose transgression of conventional gender norms is less extreme, consistent, or unidirectional. Such a result would be a step backward for the freedom of gender expression and from sex stereotyping for all individuals, betraying the promise of Title VII and making it harder for many employees to give their actual personal best."). Finally, a sex-stereotyping rather than a protected-trait approach would avoid the concern that plaintiffs are denied protection based on a narrow reading of the protected class. *See* Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. (forthcoming 2017); Jessica A. Clarke, *Protected Class Gatekeeping*, 91 N.Y.U. L. REV. (forthcoming 2017).

8. Given the relatively little deference courts tend to afford the EEOC, the EEOC's change in position on the issue itself will not likely be dispositive, but rather can serve as one among many bases on which to ask courts to reconsider their position on the issue. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1118 (2008) (finding low levels of deference to EEOC).

do to remedy these barriers to equality.

II. HETERONORMATIVITY AND THE BFOQ

Title VII's exception to intentional sex discrimination—a BFOQ for sex—means that there are certain circumstances in which federal employment discrimination law validates the salience of sex to employment.[9] Given the entanglement between sexual orientation discrimination and sex stereotypes, the existence of an exception recognizing the salience of sex in employment, which only furthers normative sex stereotypes,[10] might be seen as at odds with a law recognizing the full equality of gay workers. This is because same-sex sexual orientation challenges one of the most fundamental sex stereotypes: that men are attracted to women, and that women are attracted to men.

But the tension between Title VII and the equal status of gay workers goes beyond this general concern surrounding the salience of sex under the BFOQ. Rather, particular applications of the BFOQ rely on heteronormative assumptions about the salience of sex that are in direct conflict with a law that fully recognizes gay workers as equal members of the workforce. These assumptions relate to the role of sex in sexuality and the respective roles of men and women in the family in ways that directly contradict equality on the basis of sexual orientation at work and in the family. These are discussed in turn.

A. Same-Sex Spaces as No-Sex Spaces

Title VII provides an exception to its ban on sex discrimination in the context of intimate spaces, allowing, for example, only women to be hired as labor and delivery nurses.[11] This exception often plays out in the context of sex-segregated spaces, such as prisons and bathrooms: the BFOQ allows employers to match workers by sex so that workers, such as correctional officers or janitors, do not muddy the otherwise neat division of the sexes in these spaces.[12] The segregation of these spaces, and by extension, the application of the sex-based BFOQ in them, relies on a deeply heteronormative assumption: that same-sex spaces are no-sex spaces.[13]

9. *See* 42 U.S.C. § 2000e-2(e)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification . . . .").

10. A stereotype is "any imperfect proxy," or "any overbroad generalization." Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000).

11. *See id.*; Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1190 (2015).

12. *See, e.g.*, Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410 (N.D. Ill. 1984) (attendants responsible for cleaning bathrooms); Brooks v. ACF Indus., Inc., 537 F. Supp. 1122 (S.D. W. Va. 1982) (janitor responsible for cleaning bathrooms).

13. *See* Schoenbaum, *supra* note 11, at 1190.

Sex segregation is a regulatory tool used to remove sexuality from segregated spaces. This tool achieves its goal only when we assume that all persons in these spaces are heterosexual. As sociologists Kristen Schilt and Laurel Westbrook explain,

> [t]his assumption [of heterosexuality] makes gender-segregated spaces seem safe because they are then "sexuality-free zones." . . . Gender-segregated spaces . . . can be conceived of as both homophobic and heterophobic, as the fear is about unwanted sexual acts in supposedly sex-neutral spaces. Unlike normative sexual interactions, where gender difference is required to make the interaction acceptable, in gender-segregated spaces, gender difference is a source of discomfort and potential sexual threat and danger.[14]

Take bathrooms, for example.[15] There are multiple understandings behind the sex segregation of bathrooms.[16] Importantly for our purposes, one of the reasons behind sex-segregated bathrooms is the heteronormative assumption that same-sex spaces will not entail sexuality or acts of sex. As Professor Terry Kogan has recognized, the sex segregation of public restrooms is premised in a view of women as "inherently vulnerable and in need of protection when in public" and men as "inherently predatory."[17] This is sexist, in that it assumes that women are always prey and never predators, and that men are always predators and never prey.[18] This is also heterosexist, in that it ignores that men may sexually prey on other men, or that women may sexually prey on other women.

In the construction of this fiction, gay men and lesbians are obscured from view. "Because there are only two gender categories, gay men and lesbians must share gender-segregated [bathrooms] with heterosexual men and women, respectively, an entrance that is tolerated as long as such entrants demonstrate the appropriate visual cues for admittance and use the bathroom for the 'right' purpose (waste elimination)."[19]

So too with the sex segregation of prisons, which are one of—if not the most—sex-segregated institutions in the modern world. Prisons were segregated by sex largely for the safety of female inmates.[20] If male sexual

14. Laurel Westbrook & Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOCIETY 32, 49 (2014).

15. Interestingly, the first same-sex bathroom law in the U.S. passed in 1887 in Massachusetts regulated bathrooms in employment: "Wherever male and female persons are employed in the same factory or workshop, a significant number of separate and distinct water-closets, earth-closets, or privies shall be provided for the use of each sex and should be plainly designated." Terry S. Kogan, *Sex Separation: The Cure-All for Victorian Social Anxiety*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 145, 145 n.1 (Harvey Molotch & Laura Norén, eds., 2010). Mixed use of such facilities is prohibited. *See id.*

16. *Id.* (arguing that sex-segregated bathrooms came about in part because of anxiety about women's role in public); *see also* Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights,* 7 WM. & MARY J. WOMEN & L. 5, 16 (2000) ("Two common explanations for sex-segregated bathrooms are privacy and safety.").

17. Kogan, *supra* note 15, at 164.

18. *Id.*

19. Westbrook & Schilt, *supra* note 14, at 49.

20. Note, *The Sexual Segregation of Prisons*, 82 YALE L. J. 1229 (1973); Jennifer Sumner & Valerie

predators were removed from their female sexual prey, the problem of sex (and especially procreative sex and sexual assault) would be removed from prisons. As with bathrooms, this relies on the same assumption of heterosexuality: that men would prey only on female targets (and that no women would sexually prey on their sistren). This fiction has persisted despite widespread recognition of sexuality and sexual assault in sex-segregated prisons.[21]

The assumption of the same-sex space as the no-sex space can be seen perhaps most clearly in the concern raised by the entrance of transgendered people into sex-segregated spaces, especially transgender women into women's bathrooms. It is what one might call a "sex panic" due to the fear that transgender women will sexually assault women, or that men will dress up as transgender women to do so.[22] The entrance of biological "men" into these spaces injects sexuality into a space where it did not exist before. Transgender women's "presence transforms a nonsexual space into a dangerously (hetero) sexual one. Within this heteronormative logic, all bodies with male anatomies, regardless of gender identity, desire female bodies, and many of them (enough to elicit concern from the public) are willing to use force to get access to those bodies."[23]

By applying the sex-based BFOQ to uphold sex segregation in spaces like bathrooms and prisons, Title VII relies on and furthers the heteronormative assumption of same-sex spaces as no-sex spaces. Sometimes the cases even make this explicit. For example, in *EEOC v. Mercy Health Center*,[24] the employer successfully advanced a BFOQ defense to its all-female hiring policy for labor and delivery nurses out of concerns of "molestation."[25] In this way, the application of the sex-based BFOQ

Jenness, *Gender Integration in Sex-Segregated U.S. Prisons: The Paradox of Transgender Correctional Policy*, *in* HANDBOOK OF LGBT COMMUNITIES, CRIME, AND JUSTICE 229 (Dana Peterson & Vanessa R. Panfil, eds., 2013).

21. One might posit then that the core concern is not sexuality per se but procreative sex or the sexual violation of women.

22. *See* Jeff Brady, *When A Transgender Person Uses A Public Bathroom, Who Is At Risk?*, NPR (May 15, 2016), http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk [http://perma.cc/XA8P-JZ9Z]. Consider, for example, North Carolina officials' justification for the state's sex-segregated bathroom law against a challenge of transgender discrimination by federal government: "It's unacceptable for the Obama administration to try to intimidate North Carolina taxpayers into accepting their radical reinterpretation of a law meant to protect women from discrimination into a law that would actually deny women their right to basic *safety* and privacy."
Mark Berman et al., *North Carolina, Justice Dept. File Dueling Lawsuits Over Transgender Rights*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/09/north-carolina-justice-dept-face-monday-deadline-for-bathroom-bill/?utm_term=.b56b51e5f85b [http://perma.cc/9ZHG-3W9K].

23. Westbrook & Schilt, *supra* note 14, at 48–49 ("The 'safe' (read: gender-segregated) space is transformed into a dangerous, sexual situation by the entrance of an 'improper body.' . . . That these imagined sexual assaults occur only in women-only spaces is worth further analysis, as women share space with men daily without similar concerns.").

24. No. Civ-80-1374-W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982).

25. *Id.* at *3 (explaining that "Mercy also has maintained a 'chaperon' policy to provide protection from claims of molestation for the physicians by providing a female 'chaperon,' " which "requires that a female staff member be present during the examination of a female patient by a male physician" or a "male

shoehorns even employment discrimination law into furthering heterosexist assumptions, regardless of the protections it affords gay and lesbian workers.

Even those advocating for the rights of gay, lesbian, and transgender workers under Title VII, including the EEOC, have failed to target this heterosexist logic, and instead have reinforced it. The progressive response to advancing the rights of transgender workers has not been to challenge the sex segregation of bathrooms or the heterosexist assumptions on which they rest. Rather, plaintiffs in these cases and the EEOC accept the sex-segregated bathroom, and instead seek access to bathrooms for transgender workers on the basis of identified rather than biological sex.[26] Challenging heteronormativity in the workplace would require challenging the sex binary entirely, including sex-segregated bathrooms.[27]

There are surely reasons to sex segregate intimate spaces aside from eliminating sexuality, including comfort, safety, and cleanliness concerns.[28] But many of these justifications are still, at bottom, concerns about sex. The reason why women feel more comfortable and safer in sex-segregated intimate spaces is in large part precisely because of the assumption that sex will not be a part of those spaces. If we were to remove this heteronormative assumption, there may still be some residual comfort from sex-segregating such spaces. But we should question how much of this comfort derives from the path dependence of preferences. We may feel more comfortable with sex-segregated intimate spaces simply because that is what we have always known. The law played a role in constructing these preferences, and the law can play a role in deconstructing them.[29]

Evidence on sex preferences in intimate spaces suggests that preferences here are susceptible to change and the force of law. For example, while women currently prefer female gynecologists, this preference arose only relatively recently.[30] Until just a few decades ago, when gynecology was a

student nurse[]"). I thank Naomi Cahn for this reference.

26. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 841 (E.D. Mich. 2016) (in a case of a male-to-female transgender plaintiff who was terminated because she "intended to 'dress as a woman,' " the EEOC did "not challenge the [employer]'s sex-specific dress code" but rather "takes the position that [plaintiff] has a Title VII right to 'dress as a woman' (*ie.*, dress in a stereotypical feminine manner) while working at the [employer], in order to express [her] gender identity"). Indeed, once a transgender worker can gain access to the bathroom (or locker room or dress code) of her choice, the sex binary actually *helps* the transgender worker in her transition. The ways in which the transgender rights legal movement reinforces the sex binary and thus undermines sex equality is the subject of a separate project. *See* Naomi Schoenbaum, *(Trans)gender Trouble* (unpublished manuscript).

27. This will be no small feat, given that sex segregated bathrooms are typically required under state law and OSHA. *See, e.g.*, Sanitation, 29 C.F.R. § 1910.141(c)(1)(i) (2016) (requiring sex-separated toilets).

28. *See* Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING xx (Harvey Molotch & Laura Norén, eds., 2010); Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORD. URB. L.J. (forthcoming 2017).

29. *See* Kogan, *supra* note 15, at 156–64 (reviewing the role of law in developing the norm of same-sex bathrooms in public, especially at work).

30. *See* Tamar Lewin, *Women's Health Is No Longer a Man's World*, N.Y. TIMES, Feb. 7, 2001, at A14. For further discussion of the construction of intimate preferences, see Schoenbaum, *supra* note 11, at 1187–98.

male profession, women saw male gynecologists without complaint. This shift in preference for female gynecologists, of course, was prompted in large part by Title VII opening up the medical profession to women. There is reason to believe then that preferences even in these most intimate of spaces can be responsive to law.

B. Sex-Based Role-Modeling

Until the constitutional sex equality revolution, the Constitution enshrined a law of sex-based roles in the family.[31] Under this view, "[i]t was man's lot, because of his nature, to be breadwinner, head of household, representative of the family outside the home; and it was woman's lot, because of her nature, not only to bear, but also to raise children, and keep the home in order."[32] In the 1970s, the Equal Protection Clause's prohibition on sex discrimination dismantled these legally enforced role differentiation in marriage.

Even while the Constitution policed laws enforcing sex roles in the family, sex-based family roles remained a basis for rejecting same-sex marriage.[33] The idea that gay parents were not adequate to raise children was not only or always because they were *gay* parents, but at least sometimes because they were two parents of the same sex, rather than a man and woman. The argument ran that for children to develop properly, they needed the influence of both the feminine traits of a mother and the masculine traits of a father.[34] While this flavor of the argument emphasized the need for a child of *any* sex to have one parent of each sex, sometimes the argument had a more sex-specific flavor: that it was important developmentally for girls to have a mother around, and for boys to have a father around.

The final rejection of the idea that a child needs both a male and a female parental role model came with *Obergefell v. Hodges*, which in recognizing a federal right to same-sex marriage rejected the notion that there was anything inferior about parenting by same-sex couples, and thus anything

31. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQUALITY 17, 19 (1988).

32. *Id.*

33. Discrimination against gay men and lesbians has been rooted in the challenges they pose to traditional sex roles more broadly. *See* Case, *supra* note 10, at 1488 ("[P]rohibitions on homosexuality rely on stereotypes in the sense that they are based on 'fixed notions concerning the roles and abilities of men and women.' These notions have some subordinating taint, in that among their normative premises are that women should not be free of men and that men should not behave sexually as women do—receptively in anal intercourse or fellatio."); EEOC v. Scott Med. Health Ctr., P.C., Civil Action No. 16-225, 2016 WL 6569233, at *1 (W.D. Pa. Nov. 4, 2016) (" 'I don't understand how you fucking fags have sex,' and 'Who's the butch and who is the bitch?' ")

34. *See* Douglas NeJaime, Elizabeth Rosenblatt, & Deborah Widiss, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence,* 30 HARV. J.L. & GENDER 461, 463 (2007) (documenting that courts "have upheld different-sex marriage requirements on the grounds that men and women, simply by virtue of their gender, provide distinct role models for children" and "that men and women play 'opposite' or 'complementary' roles within marriage").

necessary (or even materially beneficial) about having one parent of each sex.[35] If two men or two women can be just as good parents as a man and a woman, sex has been fully decoupled from parenting as a matter of constitutional law.

Even though constitutional law has rejected the idea that a parent of a particular sex, or one parent of each sex, is important for the proper development of children, employment discrimination law relies on precisely this logic in recognizing exceptions to the ban on sex discrimination under the BFOQ.[36] Courts have recognized that employers are entitled to a sex-based BFOQ for jobs that require workers to serve as "role models" to children on the theory that only men can serve as appropriate role models to boys and only women can serve as appropriate role model to girls.[37] Title VII provides an exception to the ban on sex discrimination in the context of role-modeling for children, allowing, for example, only women to be hired as counselors to serve as role models for female clients.[38] This exception assumes that sex dictates the ability to fulfill particular caregiving roles, furthering the notion that heterosexual couples have a parenting advantage over same-sex couples.

To be sure, the cases identified here address caregiver sex roles in the therapeutic rather than the standard parenting context. Notably, though, the Third Circuit specifically references "parental" role-modeling in approving the application of the sex-based BFOQ to these caregiving jobs.[39] Even in the therapeutic context, recognizing sex as relevant to providing care or guidance to children is highly evocative of arguments that have been relied on to reject equal rights to marriage for same-sex couples and calls into question the ability of same-sex couples to provide the same quality of family life that heterosexual couples can provide.

35. Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).

36. While constitutional law requires that the state not mandate sex roles in private families, families still retain the right to choose how to arrange themselves, including along traditional gender lines. The law recognizes the interests at stake in employment to be quite different, and does not afford employers the same liberty.

37. *See* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996) (holding that sex was a BFOQ for staff members of a psychiatric hospital serving children on the basis that "Southwood has presented expert testimony that staffing both males and females on all shifts is necessary to provide therapeutic care. 'Role modeling,' including parental role modeling, is an important element of the staff's job, and a male is better able to serve as a male role model than a female and vice versa."); Leggett v. Milwaukee Cty., No. 04-C-422, 2006 WL 3289371, at *2 (E.D. Wis. Nov. 8, 2006) (holding that sex was a BFOQ for juvenile correction officer because to allow for "the implementation of same-gender role modeling and mentoring," as "[s]tudies have demonstrated that same-gender role modeling provides greater rehabilitative success"); EEOC Decision No. 76-130, 2 Empl. Prac. Guide (CCH) P 6692 (1976) (finding that sex was a BFOQ for counseling the mentally handicapped, in part to provide appropriate sex-role models); *cf.* Jatczak v. Ochburg, 540 F. Supp. 698, 704 (E.D. Mich. 1982) (acknowledging that "the ability to . . . provide sex-role models . . . might, in some situations, justify a preference for one sex," but rejecting the BFOQ in that case based on the facts concerning the particular job in question).

38. *Healey*, 78 F.3d at 133.

39. *Id.*

III. HETERONORMATIVITY AND SEXUAL HARASSMENT

Title VII's ban on sexual harassment generally treats male-on-female harassment as sex discrimination by assuming that harassers are heterosexual, reinforcing heteronormativity with each decision. This assumption arose in response to one of the core challenges in recognizing sexual harassment as a wrong that comes within the ambit of employment discrimination law. For it to be so, sexual harassment had to be discrimination "because of sex"—that is, because the plaintiff was female rather than male.[40] Courts initially rejected this contention on the ground that the practice of supervisors subjecting employees to unwanted sexual advances did not systematically distinguish between workers on the basis of sex.[41]

As Professor Reva Siegel recounts, the answer to this doctrinal puzzle came in 1977 in *Barnes v. Costle*[42] by "locat[ing] the act of class-categorical discrimination in the presumed [straight] sexual orientation of the harasser."[43] The *Barnes* court understood the male supervisor to have allegedly conditioned the female employee's job "upon submission to sexual relations *an extraction which the supervisor would not have sought from any male*," as "there is no suggestion that appellant's allegedly amorous supervisor is other than heterosexual."[44] So while *Barnes* paid lip service to applying this understanding of harassment "because of sex" to cases where the supervisor is "homosexual," heterosexuality is the default.[45] When there is "no suggestion" otherwise, courts will simply assume heterosexuality.[46]

This assumption has persisted, even in the Supreme Court. In cases of male-on-female harassment in the presence of any sexual content, courts typically do not require that plaintiffs allege, much less prove, the sexual orientation of the harasser. Instead, courts simply assume the harasser is heterosexual, and that the conduct is based in sexual desire. As the Supreme Court explained in *Oncale v. Sundowner Offshore Services, Inc.*: [47] "Courts and juries have found the inference of discrimination [because of sex] easy to draw in most male-female sexual harassment situations, because the

40. Unlawful Employment Practices, 42 U.S.C. § 2000e-2(a)(2) (2012).

41. *See* Reva Siegel, *A Short History of Sexual Harassment Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 11 (Catharine A. MacKinnon & Reva Siegel, eds. 2003). For example: "In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this assignment of parties. The gender lines might as easily have been reversed or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse." Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976).

42. 561 F.2d 983 (D.C. Cir. 1977).

43. *Id.* at 989–90; Siegel, *supra* note 41, at 12.

44. *Tomkins*, 561 F.2d at 989–90 n.49.

45. Although not for the "bisexual supervisor," for whom "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." *Id.* at 997 n.55. Although the oral argument in *Oncale* was preoccupied with this question, according to a 2013 study of the post-*Oncale* cases, this defense has succeeded only once. *See* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 539–40 n.57 (2013).

46. *Tomkins*, 561 F.2d at 989–90 n.49.

47. 523 U.S. 75 (1998).

challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual."[48]

Again, the default is heterosexuality. It is "reasonable to assume" that male-female proposals of sexual activity "would not have been made to someone of the same sex."[49] But "[t]he same chain of inference" is only available for male-male or female-female proposals of sexual activity when there is "credible evidence that the harasser [i]s homosexual."[50] While this makes it easier for female plaintiffs to proceed on their claims of sexual harassment, it relies on and reinforces heteronormative assumptions with every such case.

In addition to the general presumption of heterosexuality perpetuated by these cases of male-on-female harassment, Professor Jessica Clarke's study of same-sex harassment cases after *Oncale* reveals how courts assessing evidence of a harasser's "homosexual"[51] identity not only assume but privilege heterosexuality.[52] "Unless a purported harasser identifies as nonheterosexual, courts are loath to characterize same-sex interactions as motivated by desire."[53] As Professor Clarke suggests, the reluctance of courts to attribute same-sex desire to harassers suggests "a negative view of gay identity: the idea that a court should not deviate from the presumption of heterosexuality without overwhelming evidence because homosexuality is thought to be inferior, morally suspect, or stigmatized."[54] And courts' unwillingness to find harassment in cases of same-sex harassment unless the harasser is openly gay or lesbian amounts to a punishment—and thus a disincentive—for coming out.[55]

IV. WRONGS AND REMEDIES

So what exactly is the harm of Title VII relying on and reinforcing heteronormative assumptions? Some of the troubling consequences are those referenced above: encouraging the "sex panic" associated with transgender persons accessing locker rooms and bathrooms, furthering the notion that

48. *Id.* at 80.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See* Clarke, *supra* note 45, 528.
53. *Id.* at 530.
54. *Id.* at 549.
55. *Id.* at 550. Professor Clarke notes courts' tendency to protect heterosexuality in two ways: courts are especially reluctant to find an alleged same-sex harasser to be motivated by sexual desire when the harasser is in a heterosexual marriage, and courts are especially prone to finding an alleged same-sex harasser to be motivated by sexual desire when they suggest that they can "turn" heterosexual persons gay or lesbian. *See id.* at 530, 581–82.

lesbian and gay parents are inferior, or more generally stigmatizing gay workers. But I would posit that perhaps the greatest—and most insidious—harm is incurring a cost for being gay or lesbian in the workplace.

Even though some of the heteronormative assumptions discussed above are not reflective of the value of gay or lesbian workers as *workers*, the more that employment discrimination law perpetuates the default of heterosexuality, the harder this makes it for workers who do not match this expectation.[56] Professors Devon Carbado and Mitu Gulati have written about the costs of having to "work" your identity at work.[57] As they explain, because "members of [disadvantaged] groups are often likely to perceive themselves as subject to negative stereotypes, they are also likely to feel the need to do significant amounts of 'extra' identity work to counter those stereotypes."[58] Take, for example, the discomfort that a lesbian worker may face by taking her wife to a work holiday party, or even referring to her wife at work. The more that society assumes that workers are heterosexual, the more that gay workers have to "work" their identities in ways that impose costs that heterosexual workers need not bear.

So what exactly can be done to alleviate the heteronormativity of Title VII? This Essay does not take a position about the direction the law should take, but instead aims to highlight possible responses and their costs. As for the BFOQ, a number of scholars have called for an end to the sex-based BFOQ, particularly as it applies to uphold privacy norms.[59] While heteronormativity alone probably does not justify eliminating the exception, it adds yet another argument to sex stereotyping and other concerns that underlie the case against the BFOQ in these contexts.

As for sexual harassment law, courts could treat opposite-sex and same-sex harassment equally, either by raising the bar for proving that an opposite-sex harasser is heterosexual, or by lowering the bar for proving that a same-sex harasser is gay. The first approach raises concerns about making it more difficult for female plaintiffs alleging sexual harassment by men—the vast majority of sexual harassment claimants—to stake a claim. The second approach raises concerns of evidentiary validity, as the assumption of heterosexuality is far more likely to be correct as a matter of statistical probability than the assumption of homosexuality. Yet another approach would be to move away from a "because of sex" requirement entirely and

56. Although, importantly, queer theorists who have critiqued the mainstreaming of gay identity would find value in the "queerness" of gay identity. *See generally* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

57. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000).

58. *Id.*

59. *See, e.g.*, Schoenbaum, *supra* note 11, at 1237; Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327 (1985); Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L. J. 1257, 1261–62 (2003).

follow in the footsteps of a number of foreign jurisdictions that protect against workplace harassment—often referred to as bullying—more generally.[60] Again, heteronormativity alone might not justify such a shift in the law, but it can add another argument to the case for it.

V. CONCLUSION

Title VII has been celebrated for bringing about major shifts in norms in the workplace and beyond. But evaluating employment discrimination protection for gay workers reveals the limits of a rights-claiming system to bring about such shifts. Granting a right of nondiscrimination to gay workers can be expected to shift norms. But rights-granting falls short of interrogating the internal logic of features of Title VII's protection against sex discrimination that are laced with heteronormativity. Without additional efforts, then, even a nationwide right of nondiscrimination will fail to achieve its promise of full equality for gay workers.

60. *See* David Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000). For a critical take on such an approach, see Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219 (2011).