THE INVISIBLE MINORITY: DISCRIMINATION AGAINST BISEXUALS IN THE WORKPLACE

INTRODUCTION

The Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ+") community has won major legal victories in the last twenty years, but at least one group remains left behind in those victories. The bisexual population is often ignored, erased, and discriminated against by both homosexual and heterosexual individuals and communities.[1] This is true despite the fact that bisexuals outnumber both lesbian women and gay men.[2]

This erasure and discrimination affects bisexuals in different areas of life and the law, including the employment context. Title VII of the Civil Rights Act of 1964 ("Title VII"), which protects against employment discrimination on the basis of sex, has long been used as a tool for legal activists to protect the LGBTQ+ community from employment discrimination. For years, this strategy had mixed success in lower courts and no success in circuit courts or with the Equal Employment Opportunity Commission ("EEOC").[3]

Then, in 2015, the EEOC reversed its long-held position that claims of sexual orientation discrimination are not actionable under Title VII in *David Baldwin*.[4] Two years after *Baldwin*, in 2017, the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana* became the first circuit court to declare that sexual orientation discrimination is actionable discrimination under Title VII.[5]

Both the *Baldwin* and *Hively* opinions endorsed or discussed three legal theories to support their holdings: an expansive statutory interpretation of Title VII, the affiliate discrimination theo-

1. *See infra* Part I.C.
2. *See infra* Part I.B.
3. *See infra* Part II.A.
4. David Baldwin, EEOC Appeal No. 0120133080, at 15 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf.
5. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 341 (7th Cir. 2017) (en banc).

ry, and the sex stereotyping theory.[6] However, all three of these theories suffer serious flaws and fail to protect bisexual employees. These theories fail to take notice of how discrimination against bisexuals differs from discrimination against homosexuals and other key differences between bisexuals and monosexuals.

To ensure full protection of the law for bisexuals, LGBTQ+ advocates must urge Congress to amend Title VII to explicitly prohibit discrimination based on sexual orientation. The LGBTQ+ community and the legal community must also acknowledge the bisexual population in their legal analyses and advocacy.

I. BACKGROUND

A. *Bisexuality Defined*

Defining bisexuality is an important and challenging task; appropriate naming is a matter of substance and not merely style.[7] The simplest way to define bisexuality is in contrast to monosexuality;[8] that is, an attraction to more than one gender, sex, or gender identity. There are various axes upon which to define sexual orientation. Kenji Yoshino, in his seminal work on bisexual erasure, describes three different axes on which one can define sexual orientation: desire, conduct, and self-identification.[9] Yoshino explains that a desire-based definition is the best definition for discussing bi erasure because it includes individuals with desires that they have not yet acted upon, likely because of stigma.[10] Another way to conceptualize bisexuality is by reference to Alfred Kinsey's sexual orientation spectrum.[11]

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6. *See id.* at 341–44; *Baldwin*, EEOC Appeal No. 0120133080, at 8–10, 13.

7. *See, e.g.*, Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1062 (2012) (discussing the philosophers of language and the debate over the importance of naming). Conscientious language use is especially important in the context of LGBTQ+ scholarship and legal history, where the terms "gays and lesbians" and "homosexuals" are often used as shorthand for all sexual orientation minorities. While the use of these phrases may seem innocuous, they indicate the larger issue of bisexual erasure and invisibility. *See id.* at 1062–64.

8. Monosexuality is defined as "[a]ttraction to a single gender." ASHLEY MARDELL, THE ABC'S OF LGBT+ 11 (2016).

9. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 371 (2000).

10. *Id.* at 373. Yoshino also narrowly defines desire as sexual appetite or lust that is "more than incidental." *Id.* at 373, 377.

11. *Id.* at 380–81. Kinsey famously posited that rather than using strict dichotomies, sexual orientation is best explained as a continuum. *Id.* at 380. The Kinsey scale spans

The term "bisexual," as used here, applies to any person that does not define himself or herself as monosexual. For the purposes of this paper, the term "bisexual" includes those identifying as pansexual, polysexual, omnisexual, or fluid.[12] The English language, while on the one hand vast and ever changing, is on the other hand not entirely accurate in describing the complex nature of human relationships.[13]

B. *Bisexual Population*

Virtually all reliable studies of sexual orientation populations have found that the population of bisexual individuals is equal to or greater than the population of gay men or lesbians.[14] This is true despite the fact that researchers are concerned that bisexuals are underreported in studies on sexual orientation.[15]

Nearly all sexual orientation studies conducted have found that "the incidence of nonexclusive orientation toward members of the same sex was 'greater than or comparable to the incidence of homosexuality'"[16]—starting as early as Kinsey's studies in 1948 and 1953.[17] Kinsey found that the percentage of the population that

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from zero to six, with zero representing heterosexuality (with no desire for the same sex), and six representing homosexuality (with no desire for the opposite sex). *Id.* For purposes of his research, Yoshino categorizes Kinsey scale numbers two, three, and four as individuals that would be bisexual: (2) "[m]ore than incidental homosexual contacts; but more frequent heterosexual contacts;" (3) "[e]qual homosexual and heterosexual contacts;" and (4) "[m]ore than incidental heterosexual contacts; but more frequent homosexual contacts." *Id.* at 380–81.

12. See MARDELL, *supra* note 8, at 8,12, for definitions:

"Pansexual/romantic a.k.a. Omnisexual/romantic: Capable of being attracted to any or all gender(s)."

"Polysexual/romantic: Someone who experiences attraction to multiple, but not necessarily all, genders."

"Fluid: Not fixed, able to change."

13. The term "bisexual" is used in this comment because it is the term used most often in research and legal scholarship, and is "widely understood as describing those whose attractions fall outside an either/or paradigm." LINDASUSAN ULRICH, SAN FRANCISCO HUMAN RIGHTS COMM'N, BISEXUAL INVISIBILITY: IMPACTS AND RECOMMENDATIONS iii (2011).

14. *See id*. at 2–3 (providing a comprehensive review of recent studies showing population totals for gays, lesbians, and bisexuals).

15. Yoshino, *supra* note 9, at 383. There is evidence to support underreporting, as studies have found that bisexuals are less likely to be "out" to important people in their lives and less likely to self-identify as bisexual on a confidential human resources survey. HUMAN RIGHTS CAMPAIGN FOUND., BISEXUAL VISIBILITY IN THE WORKPLACE (2016), http://assets.
hrc.org//files/assets/resources/Bi_Inclusion_One_Sheet_FINAL_2016.pdf?_ga=1.92999320.
440168641.1486155417.

16. Glazer, *supra* note 7, at 1008 & n.54; Yoshino, *supra* note 9, at 386.

17. Yoshino, *supra* note 9, at 380–82.

was bisexual was one-and-one-half times the percentage of the population that is homosexual.[18] Subsequent studies all found the same—that the population of bisexuals was equal to or greater than the gay or lesbian population.[19] Bisexual individuals represent a significant segment of the population, yet have been largely ignored in legal scholarship and the court system.

C. *Bi Discrimination and Erasure*

Bisexual individuals face unique challenges and varied forms of discrimination and erasure. While bisexuals face many of the same hardships that gays and lesbians encounter, bisexuals face the additional burden of "double discrimination": they face discrimination by both heterosexuals and homosexuals.[20] Bisexual people are often seen by monosexuals (both straight and gay) as "greedy" and "promiscuous," as having not "picked a side," or as just "going through a phase."[21] Some people refuse to believe that bisexuality exists at all.[22]

Bisexuals are relatively invisible because most people have a tendency to presume that all individuals are either gay or straight, depending on the gender of their current partner.[23] Bisexuals are also less visible because they are less likely than their gay and lesbian peers to come out: overall, bisexuals are "less than half as likely as gays and lesbians to have told most or all of the important people in their lives about their sexual orientations."[24] This invisibility is especially evident in the fact that only

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18. *Id.* at 382.

19. *E.g.*, *id.*

20. Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. OF WOMEN & L. 699, 702–03 (2015); Robyn Ochs, *Biphobia: It Goes More Than Two Ways*, *in* BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY 217, 217 (Beth A. Firestein ed., 1996).

21. Yoshino, *supra* note 9, at 374, 391, 398.

22. *See, e.g.*, Benoit Denizet-Lewis, *The Scientific Quest to Prove Bisexuality Exists*, N.Y. TIMES, (Mar. 20, 2014), https://www.nytimes.com/2014/03/23/magazine/the-scientific-quest-to-prove-bisexuality-exists.html ("I can't tell you how many people have told me, 'Oh, I wouldn't date a bisexual.' Or, 'Bisexuals aren't real.'"); Loraine Hutchins, *Bisexuality: Politics and Community, in* BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY 240, 240–41 (Beth A. Firestein ed., 1996); Ochs, *supra* note 20, at 224 ("A primary manifestation of biphobia is the denial of the very existence of bisexual people.").

23. Ochs, *supra* note 20, at 225. For example, two women holding hands "read as gay," while a man and a woman holding hands "read as straight," but both or all of them could be bisexual. ULRICH, *supra* note 13, at 3.

24. Tweedy & Yescavage, *supra* note 20, at 704. The stigma of bisexuality discourages people from coming out, which further contributes to their invisibility. *See* HUMAN RIGHTS

twenty-nine percent of respondents to a 2017 GLAAD survey reported knowing someone that is bisexual.[25]

In addition to invisibility and "double discrimination," Yoshino explains that bisexuals also face *erasure* from heterosexuals and homosexuals.[26] Heterosexuals seek to erase same-sex desire and keep it silenced, but homosexuals also have an interest in "privileg[ing] the straight/gay binary."[27]

Fritz Klein states that one reason that bisexuals are discriminated against by both heterosexuals and homosexuals is that "the bisexual . . . opens up the possibility of their own sexual ambiguity. They cannot understand the bisexual's ability to share their own preferences but not their own aversions."[28] Further, bisexuals face distinct discrimination from homosexuals. One reason for this, Robyn Ochs theorizes, is that homosexuals may see bisexuals as possessing a form of privilege not afforded to homosexuals because of their ability to "pass" as straight.[29]

In 2000, Yoshino demonstrated the extent of bi erasure by showing the "striking discrepancy" in the mentions of homosexuality and bisexuality in major newspapers.[30] An updated version of Yoshino's media experiment shows that between January 1, 2010, and December 31, 2016: the Los Angeles Times had 694 documents mentioning the term "homosexuality," and 29 mentioning "bisexuality;"[31] and the Wall Street Journal had 306 documents mentioning "homosexuality," and 8 mentioning "bisexuality."[32] While one may be led to believe things have improved since 2000, the striking discrepancy still exists.

CAMPAIGN FOUND., *supra* note 15.

25. GLAAD, ACCELERATING ACCEPTANCE 4 (2017), https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf.

26. Yoshino, *supra* note 9, at 361.

27. *Id.* at 367.

28. FRITZ KLEIN, THE BISEXUAL OPTION 11 (2d ed. 2013).

29. Ochs, *supra* note 20, at 217. Another reason that bisexuals face discrimination from the homosexual community is the HIV epidemic of the 1980s. *Id.* at 231. Many homosexuals, particularly lesbians, believed that bisexual women were the conduit from which HIV spread to lesbians from the heterosexual community. *Id.*

30. Yoshino, *supra* note 9, at 368.

31. Search of LexisNexis, News Library (narrow search results to "News"; then search in search bar for "homosexuality"; then narrow by "sources > Los Angeles Times"; then narrow by "Timeline > 01/01/2010 to 12/31/2016").

32. Search of LexisNexis, News Library (narrow search results to "News"; then search in search bar for "homosexuality"; then narrow by "sources > The Wall Street Journal"; then narrow by "Timeline > 01/01/2016 to 12/31/2016").

Bi discrimination and erasure have a significant impact on the bi community. Recent data shows that bisexual men and women face more mental and physical health problems than gay men or lesbians: bisexuals have a higher rate of suicide ideation and bisexual women are more likely to "experience frequent mental distress" and have "poorer general health" than lesbians.[33]

D. *Bisexual Individuals in the Workplace*

A majority of bisexual individuals face discrimination and harassment in the workplace because of their sexual orientation.[34] One United Kingdom study found that bisexuals reported they "endure more scrutiny about their relationships from their colleagues" than their homosexual colleagues do.[35] Twenty-five percent of heterosexual respondents in a 2016 study said they were uncomfortable seeing a LGBTQ+ coworker's wedding picture.[36]

Bi invisibility and erasure are also present in the workplace. A recent study found that bisexuals are "less likely to self-report their sexual orientation in [a] confidential human resource survey than their gay and lesbian peers" by eighteen to twenty percent.[37] Another study found that bisexual individuals are "roughly one third as likely as gays and lesbians to feel comfortable being out in the workplace."[38] For bisexual employees, not being out in the workplace undermines their "engagement and retention" and leads to lower levels of satisfaction with their workplace.[39]

A recent study by Ann Tweedy and Karen Yescavage found that bisexuals face significant levels of discrimination in the workplace.[40] Their study revealed that 51.7% of bisexual respondents reported experiencing employment discrimination, and the number was even higher for bisexual respondents of color, at

33. Tweedy & Yescavage, *supra* note 20, at 703–04.

34. *Id.* at 724. The most common type of discrimination bisexual employees experience is inappropriate jokes or insults, with nearly sixty percent of bisexuals saying they have faced this sort of harassment. *Id.* at 727.

35. Glazer, *supra* note 7, at 1001.

36. GLAAD, *supra* note 25, at 6.

37. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 15.

38. Tweedy & Yescavage, *supra* note 20, at 704. A person who is "out" is "a person who is open about being bisexual, gay, lesbian, or transgender." Further, "[c]oming out is a lifelong process of self-acceptance of one's sexual orientation and/or gender identity." ULRICH, *supra* note 13, at 38.

39. *See* HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 15.

40. Tweedy & Yescavage, *supra* note 20, at 707.

68.8%.[41] Their study revealed that 12.8% of bisexual respondents felt they had not been hired for a position because of their sexual orientation, and 7.7% of respondents reported being terminated because of their sexual orientation.[42] Other reported forms of discrimination included verbal sexual harassment (experienced by 30.8% of bisexuals) and unfair access to fringe benefits (experienced by 27.4% of bisexuals).[43]

Despite high instances of employment discrimination, bisexual plaintiffs bring very few employment discrimination cases, and succeed even more rarely.[44] Tweedy and Yescavage's study included a survey of employment discrimination cases brought by bisexual plaintiffs, finding only eleven cases on WestLaw, four or five of which were based on state laws, and the only successful suit was out of the United Kingdom.[45]

E. *The Courts' Treatment of Bisexuals*

Discrimination and erasure follow bisexuals into the courtroom, where they are ignored, erased, or negatively stereotyped by the courts. One of the most prominent cases involving bisexual plaintiffs is *Apilado v. North American Gay Amateur Athletic Alliance*, in which a gay softball league discriminated against bisexual plaintiffs.[46] The league implemented a limit of two heterosexual members per team, and the league contested one team's inclusion of bisexual players as contributing to their heterosexual player limit. Those players were subject to invasive questions about their sexual orientation.[47]

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41. *Id.* at 724. Tweedy and Yescavage's study is the "first descriptive, quantitative study designed to specifically measure the subjective experiences of bisexuals with employment discrimination." *Id.* at 718.

42. *Id.* at 725.

43. *Id.* at 727–28.

44. *See id.* at 709–10.

45. *Id.* at 709–10 n.51, 710 n.52.

46. Apilado v. N. Am. Gay Amateur Athletic All., 792 F. Supp. 2d 1151, 1155–56 (W.D. Wash. 2011).

47. *Id.* In response to one player's admission that he was attracted to men and women, one committee member said, "this is not a bisexual world series—this is a gay world series." Tweedy & Yescavage, *supra* note 20, at 712. This case—and those statements—are indicative of the discrimination faced by bisexuals by the gay and lesbian community, despite the fact that the league's mission statement "explicitly included promotion of the participation of bisexuals." *Id.* The court ultimately focused on the league's intrusive questions, and not on the discriminatory definition of "gay" or "straight" that excluded bisexuals, essentially ignoring the question of bisexual discrimination. *See Apilado*, 792 F. Supp. 2d at 1156; Tweedy & Yescavage, *supra* note 20, at 712–13.

In the immigration context, bisexuals have fared no better. Just last year, the Seventh Circuit denied the claim of Ray Fuller, a bisexual asylum seeker who claimed he was persecuted for his sexual orientation in his home country of Jamaica.[48] The immigration judge expressed disbelief that bisexuals were persecuted, despite evidence that Fuller was the victim of extreme forms of sexual harassment and violence, including being stoned and stabbed.[49] The judge also refused to believe that Fuller was bisexual; Fuller provided letters from ex-boyfriends but the judge was concerned that he was once married to a woman.[50] As Judge Posner put it in his scathing dissent in the Seventh Circuit case, "[a]pparently the immigration judge does not know the meaning of *bi*sexual."[51]

In the employment law context, bisexuals are primarily visible as a hypothetical "bisexual harasser," brought up to demonstrate the absurdity of the now-foregone requirement that harassment need be desire-based to be actionable under Title VII.[52] Even cases that have extended rights to the LGBTQ+ community ignore and erase bisexuals. In the landmark case challenging California's Proposition 8, Plaintiff's attorney, Ted Olson, pressed his client, Sandy Stier—a woman seeking to marry her female partner—because she had previously been married to a man.[53] Olson questioned his client, saying, "Some people might say, 'Well, it's this and then it's that and it could be this again.' Answer that."[54] Olson's comments implied that it was impossible for Stier to be attracted to both men and women and still deserve recognition for her marriage.

One possible reason for bisexual erasure is the strategies adopted by the LGBTQ+ legal community. The LGBTQ+ community, in the fight to obtain rights for sexual orientation minorities,

48. Fuller v. Lynch, 833 F.3d 866, 867 (7th Cir. 2016).

49. *Id.* at 872 (Posner, J., dissenting).

50. *Id.* at 873–74.

51. *Id.* at 879.

52. *See, e.g.*, Regina L. Stone-Harris, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269, 283–84 (1996).

53. Glazer, *supra* note 7, at 1001 (referencing Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)).

54. Glazer, *supra* note 7, at 1001 (quoting Transcript of Record at 166–67, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292_VRW), http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-1-1-11-10.pdf).

has adopted a model referred to as the "homo kinship" model.[55] The homo kinship, or "like straight," model has been employed by advocates to show that "but for gays' and lesbians' differences, they are just like" straight people.[56] This strategy attempts to normalize the LGBTQ+ community so that heterosexuals are more likely to accept them.[57] However, this model has left behind bisexuals, because bisexuals are not "like straight," in that they are attracted to more than one sex. Bisexuals challenge the monosexual paradigm on which our society insists. In this way, the LGBTQ+ community has left bisexuals behind in their legal strategy.

F. *Changing Tides: EEOC Recognition and an Emerging Circuit Split*

In 2015, the EEOC changed its longstanding practice of not recognizing sexual orientation discrimination under Title VII.[58] In *David Baldwin*, Baldwin, a male air traffic controller, filed an EEOC complaint alleging that he was discriminated against on the basis of his sexual orientation.[59] Baldwin alleged that he was not selected for a position because he was homosexual and that his supervisor made negative comments regarding his homosexuality.[60] The EEOC held that Baldwin's allegations of discrimination were actionable claims under Title VII's prohibition of sex discrimination.[61]

The EEOC gave three reasons to support its assertion that sexual orientation discrimination is sex discrimination: (1) sexual orientation "cannot be defined or understood without reference to sex,"[62] (2) it is associational discrimination on the basis of sex,[63] and (3) it involves sex-stereotyping.[64]

The first reason supporting the EEOC's conclusion is that sex-

55. *Id.* at 1014.
56. *Id.*
57. *Id.* at 1016.
58. David Baldwin, EEOC Appeal No. 0120133080, at 5–6, 14 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf.
59. *Id.* at 1–2.
60. *Id.* at 2. His supervisor commented about "that gay stuff," and told Baldwin that he was causing "a distraction" any time he mentioned his partner. *Id.*
61. *Id.* at 14.
62. *Id.* at 6.
63. *Id.* at 8.
64. *Id.* at 9.

ual orientation is "inherently a 'sex-based consideration'" and that discrimination based on sexual orientation "necessarily alleges" that the complainant's sex was taken into account.[65] The EEOC stated that the connection between "sex" and sexual orientation is an "inescapable link."[66] Second, the EEOC endorsed the affiliative theory of sexual orientation discrimination, following court decisions regarding racial affiliations.[67] Third, the EEOC relied on the Supreme Court's decision in *Price Waterhouse v. Hopkins* in holding that sexual orientation discrimination is a form of sex-stereotyping.[68]

Two years later, in April 2017, the Seventh Circuit reviewed Kimberly Hively's case and came to the same conclusion as the EEOC.[69] Hively was a lesbian adjunct professor at Ivy Tech Community College who was "out" to her colleagues.[70] After working at the college for fourteen years, her contract was not renewed; she alleged that it was due to her sexual orientation.[71] The eight-judge majority cited the same three arguments cited by the EEOC in *Baldwin*: statutory interpretation, affiliative discrimination, and sex-stereotyping.[72]

While *Baldwin* and *Hively* represent a victory for sexual orientation minorities, the theories they rely upon are flawed in several ways, and all fail to account for the existence of bisexuals.

II. THEORIES SUPPORTING PROHIBITION OF SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII

A. *Statutory Interpretation and the Comparative Method*

One argument in favor of interpreting "sex" to include sexual orientation comes from the history of the statute and its later interpretations. Proponents such as Judge Posner argue that the role of the court is to "mak[e] old law satisfy modern needs and understandings."[73] The argument is that we often interpret

65. *Id.* at 6.
66. *Id.*
67. *Id.* at 8.
68. *Id.* at 9.
69. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 350, 359 (7th Cir. 2017) (en banc).
70. *Id.* at 341.
71. *Id.*
72. *Id.* at 343, 345.
73. *Id.* at 352 (Posner, J., concurring).

statutes to mean something that the drafters of the statute did not intend, and that courts have done so with Title VII repeatedly.[74]

The dearth of legislative history on the definition of "sex" in Title VII fuels these claims.[75] The history of the addition of "sex" to Title VII is strange and virtually unparalleled in modern legislative history, and leaves behind interpretive questions: how does one interpret a term in a statute, knowing that the term was introduced with the *expectation* that the term would cause the statute to fail?[76] Because there is so little guidance from the legislative history, the argument goes, one can look at the history of interpreting the term "sex." The court's interpretation of "sex" over the years has stretched far beyond adverse employment actions because of gender to include hostile workplace claims, sexual harassment claims by individuals of the same sex, and even sex stereotyping claims.[77] This evolution shows a willingness on the part of the Supreme Court to extend Title VII beyond the drafters' intentions, and some argue that this trend should continue to extend protection to sexual orientation minorities.

In *Baldwin*, the EEOC offered its own interpretation of Title VII, noting that the question is whether the employer "relied on sex-based considerations" and that sexual orientation "cannot be defined or understood without reference to sex."[78] The EEOC held that sexual orientation discrimination "necessarily entails treating an employee less favorably because of the employee's sex" and cited *Heller v. Columbia Edgewater Country Club* for the proposition that "[o]ne way . . . [to allege discrimination] is to inquire whether the harasser would have acted the same if the gender of the victim had been different."[79] This method is referred to as the

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74. *See, e.g.*, *id.* at 352–53.

75. Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender Non-Conforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 470 (2004); *see, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (noting that "[t]here is a dearth of legislative history" regarding Title VII).

76. *See* Kramer, *supra* note 75, at 469.

77. *See generally id.* (discussing the history and development of sexual discrimination claims).

78. David Baldwin, EEOC Appeal No. 0120133080, at 6 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf. This opinion provides definitions of "gay," "lesbian," and "heterosexual" to illustrate that point, but notably provides no definition of "bisexual."

79. *Id.* at 7 (citing Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002)).

"comparative method."[80]

To demonstrate the comparative method, the EEOC gave the following example: an employer suspended a female employee for displaying a photo of her wife but did not suspend a male employee for displaying a photo of his wife.[81] Because the first employee was only suspended because she was a woman, the discrimination was because of the employee's sex.[82]

The majority in *Hively* also discussed the comparative method and insisted that the critical step in comparing employees is that all variables but the employee's sex remain the same, especially the sex of the employee's partner.[83] The proper test, the majority insisted, is how a female employee who has a wife fares compared to a male employee who has a wife.[84]

However, as the dissent in *Hively* pointed out, the majority "distorts" the comparative method: the appropriate comparison is between a female *homosexual* employee and a male *homosexual* employee.[85] According to the dissent, that is the only way to isolate the single characteristic (sex); otherwise, the comparison is between a gay woman and a straight man, which changes two variables at once (sex and sexual orientation).[86]

The comparative method has another serious flaw: it ignores the existence of bisexuals. When one applies the comparative method to bisexuals, it becomes clear that discrimination based on an employee's sexual orientation is not "because of sex." Presumably, a woman with female and male partners *and* a man with female and male partners would both be discriminated against. When the test is applied to bisexual employees, it becomes clear that the discrimination is truly because of sexual orientation and not sex.

Further, the comparative method puts the focus of analysis on the current partner of the employee, which may hurt bisexuals. A bisexual may be discriminated against even if their current partner is of a different sex. If a bisexual woman has both male and female partners, and is discriminated against while she has a

80. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 345 (7th Cir. 2017) (en banc).
81. *Baldwin*, EEOC Appeal No. 0120133080, at 7.
82. *Id.*
83. *Hively*, 853 F.3d at 345.
84. *See id.*
85. *See id.* at 366 (Sykes, J., dissenting).
86. *Id.*

male partner, this discrimination would "fail" the comparative method test.

The EEOC and the court in *Hively* ignored the possibility of discrimination against bisexual employees, and that is a fatal flaw in their analyses. Overall, the statutory interpretation adopted by the EEOC and the *Hively* majority falls short in serious ways, and fails to protect—or even recognize—bisexuals.[87]

B. *Associational Discrimination*

Another theory advanced by both the EEOC and the *Hively* court is the associational discrimination theory, also referred to as "relational discrimination" or "affiliative discrimination."[88] This theory posits that sexual orientation discrimination is prohibited under Title VII because it involves looking to the sex of the employee in relation to the sex of the individuals with whom that employee associates.[89]

This theory of protection stems from case law involving race and national origin discrimination under Title VII.[90] It has been suggested that because Title VII "treats each of the enumerated categories . . . exactly the same," the same interpretation that applies to race and national origin should also apply to sex.[91]

The first case to apply this relational theory to race discrimination was *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, in the Southern District of New York in 1975.[92] Plaintiff Whitney was discharged "because she, a white woman, associated with a black."[93] The court in *Whitney* held that her discharge as a white woman, because of her association with a black man, fit within Title VII's prohibition against discrimination "because

87. *But see id.* at 355 (Posner, J., concurring) (mentioning bisexuals, but incorrectly defining bisexuality "as having both homosexual and heterosexual orientations").

88. *See id.* at 347, 349; David Baldwin, EEOC Appeal No. 0120133080, at 8 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf; Pierce G. Hand IV, *Affiliative Discrimination Theory: Title VII Litigation Within the Sixth Circuit*, 32 GA. ST. U.L. REV. 541, 543–44 (2016); Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 211 (2012).

89. *See, e.g.*, *Baldwin*, EEOC Appeal No. 0120133080, at 8.

90. *See Hively*, 853 F.3d at 347–49; Schwartz, *supra* note 88, at 221–23.

91. *See, e.g.*, *Baldwin*, EEOC Appeal No. 0120133080, at 8–9 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989)).

92. Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975); Schwartz, *supra* note 88, at 217.

93. *Whitney*, 401 F. Supp. at 1366.

of . . . race."[94] Following *Whitney*, district courts in several other states began to accept the relational discrimination theory as to race, and now the Second, Sixth, and Eleventh Circuits have adopted this approach.[95] Only one district court has extended the relational theory to sex discrimination cases.[96]

One argument for viewing sexual orientation in a relational context is consistency; for example, it would be "structurally inconsistent" to treat some of the protected characteristics relationally, but not others.[97] Victoria Schwartz argues that one benefit to this interpretation is that it does not require the term "sex" to mean anything other than its intended meaning.[98] Sexual orientation discrimination, Schwartz posits, is discrimination on the basis of sex because one must look at an individual's sex in relation to others.[99] Schwartz explains that "sexual orientation is an inherently relational concept" because the discrimination occurs where the individual "is of the wrong sex in relation to the sex of the people she generally associates with romantically."[100]

Sexual orientation relates to an individual's sex in relation to his or her partner, but only if that individual is monosexual. Bisexuals are not the "wrong sex" in relation to their partners because their partners are not a single sex; this is especially true of a bisexual individual whose current partner is of a different sex. Further, for bisexuals, discrimination is not because of their sex vis-à-vis another person, but rather other persons.

Similarly, in *Baldwin*, the EEOC stated that Title VII prohibits sexual orientation discrimination based on the fact that "such individuals are in a same-sex marriage or because the employee has

94. *Id*.

95. Schwartz, *supra* note 88, at 223–28.

96. In the *Hustedt Chevrolet* cases, two male employees of a car dealership claimed that their supervisor harassed a female co-worker, and then harassed them "based on what can fairly be characterized as [the defendant's] perception of his association with [the female co-worker]." The court reasoned that "but for his sex, male, his relationship with his coworker, female, . . . would not have been an issue." This, of course, is only true if one assumes all parties are heterosexual. Ventimiglia v. Hustedt Chevrolet, No. 05-4149, 2009 U.S. Dist. LEXIS 24834, at *28–33 (E.D.N.Y. Mar. 25, 2009); *see also* Weiss v. Hustedt Chevrolet, No. 05-4230, 2009 U.S. Dist. LEXIS 59408, at *28–34 (E.D.N.Y. July 13, 2009); Pratt v. Hustedt Chevrolet, No. 05-4148, 2009 U.S. Dist. LEXIS 26312, at *24–29 (E.D.N.Y. Mar. 27, 2009).

97. Schwartz, *supra* note 88, at 247.

98. *Id.* at 248.

99. *See id.*

100. *Id.* at 248, 249.

a personal association with someone of a particular sex."[101] This analysis notably uses the terms "same-sex marriage" and "a particular sex" which narrows the scope of protected employees to exclude bisexual individuals in different-sex marriages and employees that do not associate with "a particular sex," but rather with multiple sexes.

For bisexuals, discrimination is more complex than being the "wrong" sex in contrast to their partner. Bisexual discrimination is often due to failure to conform to monosexuality, rather than the sex of a current or future partner. A bisexual female employee may be discriminated against even if she has a male partner, the "right" sex. Schwartz and the EEOC describe the problem in a way that ignores bisexuals and ignores the ways that discrimination against bisexuals is different than discrimination against gays and lesbians.

C. *Sex Stereotyping*

The third theory advanced by the EEOC and the Seventh Circuit is that sexual orientation discrimination is a form of sex stereotyping, based on the Supreme Court's holding in *Price Waterhouse v. Hopkins*.[102] *Price Waterhouse* established that employees can bring Title VII claims for discrimination based on failure to conform to gender stereotypes.[103]

Ann Hopkins was a senior manager at Price Waterhouse who was proposed for partnership but was ultimately denied the position.[104] Hopkins received glowing references from some colleagues, yet reviews from other colleagues contained harsh personal critiques of Hopkins, saying she was "overly aggressive," "macho," and needed a "course at charm school."[105]

The court held that Hopkins was discriminated against because of her sex, reasoning that Title VII's prohibition of sex discrimination is a broad prohibition that "forbids employers [from

101. David Baldwin, EEOC Appeal No. 0120133080, at 9 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf.

102. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 342 (7th Cir. 2017) (en banc) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)); *Baldwin*, EEOC Appeal No. 0120133080, at 5–6 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

103. Price Waterhouse v. Hopkins, 490 U.S. 228, 272–73 (1989). It is worth noting that the lead opinion in *Price Waterhouse* was not a majority, but a four-Justice plurality.

104. *Id.* at 231–32.

105. *Id.* at 235.

even making] gender an indirect stumbling block to employment opportunities."[106] The court framed the required analysis as: "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."[107] Applying this analysis, the court found that a man would not have been discriminated against for exhibiting the same traits.[108]

Homosexual plaintiffs have used the sex-stereotyping theory to bring claims of harassment or discrimination under Title VII with limited success.[109] Plaintiffs advancing the sex-stereotyping theory allege that they were impermissibly "judged against the standard of how a stereotypical person of the same sex should look and act"[110] and discriminated against because of that judgment. For example, in a Massachusetts case, Stephen Centola, a homosexual man, brought a claim against his employer for discrimination based on sex stereotyping for harassment he experienced at work.[111] Applying the sex-stereotyping theory, the court held that Centola was "discriminated against . . . because he failed to meet their gender stereotypes of what a man should look like, or act like."[112]

The court in *Centola* struggled with whether the harassment was because of Centola's sexual orientation or his failure to conform to gender stereotypes.[113] The court illustrated the intertwined nature of sexual orientation discrimination and sex stereotyping:

> The harasser may discriminate against an openly gay co-worker, or a

106. *Id.* at 242. *Price Waterhouse* is also a formative case for its discussion of mixed-motive discrimination, like here, where the employer had both legitimate reasons and discriminatory reasons for the adverse employment decision. *Id.* at 252. Congress amended the statute later to reflect that but-for causation is not required when there is at least one discriminatory motive. Civil Rights Act of 1991, § 107(m), 42 U.S.C. § 2000e–2(m) (2012).

107. *Price Waterhouse*, 490 U.S. at 250.

108. *Id.* at 258.

109. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 34–35 (2d Cir. 2000) (holding that Title VII does not prohibit discrimination based on sexual orientation); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (holding that Title VII does not prohibit discrimination based on sexual orientation); Centola v. Potter, 183 F. Supp. 2d 408, 400 (D. Mass. 2002) (holding that Title VII does not prohibit discrimination based on sexual orientation).

110. Kramer, *supra* note 75, at 485.

111. *Centola*, 183 F. Supp. 2d at 406.

112. *Id.* at 406, 409.

113. *See id.* at 408.

> co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do.[114]

The court's analysis here suggests, although in dicta, one route to Title VII protection for gay men or lesbians who otherwise conform to gender stereotypes. This has given some scholars and proponents of LGBTQ+ rights reason to hope.[115]

In the wake of *Price Waterhouse*, some scholars have advanced a theory that would enable gay and lesbian employees—regardless of their gender conformity—to assert Title VII claims: the "ultimate gender stereotype" theory.[116] Proponents of the ultimate gender stereotyping theory argue that there is "a common gender stereotype in play for both gender-conforming and gender-non-conforming gays and lesbians,"[117] which is that "'real' men and women should not be attracted to a member of the same sex."[118]

The first issue with this theory is that sexual orientation stereotyping is not gender stereotyping at all. Zachary Kramer, in his article on this theory, articulates the nature of masculine and feminine stereotypes: "[G]ender stereotyping relies on the existence of both a masculine and a feminine stereotype. These stereotypes are interrelated in that the purpose of either stereotype is to contrast with the other, rendering masculinity and femininity polar opposites on a gender continuum."[119] To be a gender stereotype, the stereotype must be specific to one gender and be in contrast to the stereotype for the opposite gender.

Two examples help elucidate this point. First, it is a gender stereotype that "women should wear makeup at work," but men should not. Those two stereotypes contrast each other and are po-

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114. *Id.* at 410 (citation omitted).

115. *See, e.g.*, Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins, *and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1353–54 (2014).

116. *See generally id.*; Kramer, *supra* note 75, at 489.

117. Kramer, *supra* note 75, at 489.

118. *Id.* at 490.

119. *Id.* at 483.

lar opposites. However, it is *not* a gender stereotype that "women should dress professionally for work," because men should do so also. Sexual orientation falls into the second category.

While Kramer and others have framed the stereotype in a way that makes the two stereotypes seem opposite (men only date women and women only date men),[120] the actual stereotype is "women and men should only be attracted to people of the opposite gender." This is not a gender stereotype, but rather an expression of heterosexism, as it applies to both genders.[121] The dissent in *Hively* echoed this analysis, stating plainly: "heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all."[122]

Another issue with this theory is that it does not always work as applied to bisexuals. Another formulation of the ultimate gender stereotype is that "real men are and should be sexually attracted to women, and real women invite and enjoy that attraction."[123] Under this formulation, bisexuals conform to the stereotype: bisexual men *are* attracted to women and bisexual women *are* attracted to men. This formulation of the stereotype would leave bisexuals unprotected, because they conform to their respective sex stereotypes. This highlights another issue with sex-stereotyping theory: clarifying what the stereotype actually is, and how it is to be framed.

Further, relying on the sex-stereotyping theory is demeaning to sexual orientation minorities and will likely be harmful to the LGBTQ+ movement. The cruel irony of using this theory to protect gays, lesbians, and bisexuals is that it forces them to advance the theory that they are not "real men" or "real women" and that they do not conform to gender stereotypes. It is also plausible that there will come a time when being a "real man" no longer means exclusive sexual attraction to women, and being a "real woman" means something far from the stereotype we now envision.

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120. *See* Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Kramer, *supra* note 75, at 496.

121. *See* I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991) (discussing heterosexism as the "institutional valorization of heterosexual activity").

122. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 370 (7th Cir. 2017) (Sykes, J., dissenting).

123. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988).

III. CONCLUSION AND A POSSIBLE SOLUTION: REVISING TITLE VII

Because all three of the legal theories discussed have fatal flaws and fail to adequately protect bisexual employees, LGBTQ+ advocates must push to protect the full spectrum of sexual orientation minorities by amending Title VII. But more than that, we must also be inclusive in all of our discussions of sexual orientation minorities, and we must recognize the largest sexual orientation minority, or else they will continue to face societal harms.

The legal theories that purport to extend protection to sexual orientation minorities under Title VII fall short in crucial ways, especially for bisexuals, so the LGBTQ+ community must demand amendment of Title VII to include them by name, or passage of the Employment Non-Discrimination Act ("ENDA"). Of the two, amending Title VII is the preferable path.[124]

First, Title VII protects more than just employment discrimination and cures more issues, while the ENDA would cover only employment discrimination.[125] The narrow scope of the ENDA leaves little room for legal protections to "migrate" to other areas of the law, such as education.[126] Further, the ENDA's religious exception and lack of a bona fide occupational qualification exception make it more prone to exceptions and less favorable than amending Title VII.[127]

There is value in declaring that sexual orientation is a protected characteristic and that discrimination on such basis is abhorrent, and thus should be prohibited under the law—rather than piecing together several interpretive theories to provide protection. Congress took a bold stance in 1964 to declare that we as a nation will not tolerate sex, race, or national origin discrimination, and it is time we do the same for all forms of sexual orientation discrimination.

Elizabeth Childress Burneson *

124. *See, e.g.*, Case, *supra* note 115, at 1374–75 (offering a robust discussion of the ENDA's shortfalls).

125. *Id.* at 1373.

126. *Id.*

127. *Id.* at 1374–75.

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