Dissenting Statement of Commissioner Gail Heriot

I have sympathy for some of the goals of the basic legislative proposal discussed in this Report. In a different world, I might have been able to support at least a more modest version of it. I continue to support Title VII of the Civil Rights Act of 1964’s provisions prohibiting discrimination in employment on the basis of race, color, religion, sex and national origin. But, alas, given the ways in which that legislation has been misapplied over the years, I worry about the wisdom of expanding it further unless the expansion comes packaged with general Title VII reform.

For example, under current interpretations of Title VII, employers must endeavor to prevent their employees from engaging in the sexual harassment of their colleagues. That is a worthwhile goal. But the concept of sexual harassment has been given such a broad and vague construction that its effect has been to force employers to squelch not just sexual harassment, but free expression at the workplace. By extending the reach of anti-discrimination laws to sexual orientation and gender identity, the proposed legislation would only compound this problem.

Quite apart from my concerns over the proposed legislation, I have concerns over this report’s usefulness as a guide to Congress. The data are not always presented fairly and in context. For example, by focusing on employee perceptions of discrimination, it almost certainly overstates the

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1 A good example of this is the recent firing of Google software engineer James Damore, which I discuss infra at Part IB(2).

2 The report is unsatisfying in part because of an unbalanced record. Given that I had no fixed view on this particular issue—that is, I am not categorically against all anti-discrimination laws of this kind—I was looking forward to a balanced panel that could help me clarify my thinking. A balanced briefing on this topic should have had about the same number of witnesses who are generally for, as well as generally against, federal prohibitions on sexual orientation and gender identity discrimination in employment. Yet this briefing had 15 panelists generally in favor of such prohibitions and two generally against them. The Commission secured one of the two witnesses against—Ryan Anderson—at the very last minute, only after Commissioner Kirsanow and I complained vociferously about panel imbalance.

Although I was told that staff made a good-faith effort to secure a balanced panel and that the panel was imbalanced only because too many opponents declined to testify, that appears to be untrue. At a Commission business meeting on February 20, 2015, about three weeks before the briefing, the then-head of the Commission’s Office for Civil Rights Research and Evaluation (“OCRE”) happily said that she had already confirmed 13 witnesses and was looking to fill only two more slots.

See United States Commission on Civil Rights, Transcript of Business Meeting, February 20, 2015, 19-21, available at http://www.usccr.gov/calendar/transcript/UNEDITEDCommissionMeetingTranscript_02-20-15.pdf. After that meeting, OCRE agreed to provide us with a list of witnesses who had already been invited.

That list showed that only two critics of sexual orientation discrimination laws had been invited as of then. OCRE then tried to argue that the briefing was balanced because some potential panelists from the Human Rights Campaign and the Center for American Progress criticized the proposed federal Employment Non-Discrimination Act for not going far enough. These organizations are nonetheless strong supporters of ENDA’s core prohibition on sexual orientation discrimination; the Human Rights Campaign at the time had a large banner on its website that said “Pass ENDA Now,” and the proposed witness Gene Robinson of the Center for American Progress has gone so far as to assert that Christian opposition to ENDA would embarrass Jesus. See http://www.huffingtonpost.com/bishop-gene-robinson/enda-vote-jesus b 4234440.html.

The notion that these panelists were interchangeable with conservatives and libertarians or made the panels more balanced was risible. I am forced to conclude that there never was a plan in place for a balanced briefing.
extent of discrimination based on sexual orientation. It states, for example, that “[s]tudies have found that anywhere from 21\(^3\) to 47\(^4\) percent of LGBT adults faced employment discrimination because they were gay or transgender.” Rep. at 10. But the cited studies were all based on the perceptions of job applicants/employees (and the latter figure was for transgender/gender-nonconforming persons only). When one looks at the Equal Employment Opportunity Commission’s statistics on the matter, one learns that “charges” of discrimination are not the same as actual discrimination. The vast majority of charges filed by job applicants/employees with the EEOC are found to be without merit. For Fiscal Year 2016, the EEOC found “No Reasonable Cause” for 67.6% of all LGBT-based charges. It found “Reasonable Cause” for only a tiny number—3.7% of LGBT-based charges. An additional 17.1% of charges were not pursued by the charging party.\(^5\)

To be sure, this problem is not unique to LGBT-based charges of discrimination. EEOC data for Fiscal Year 2016 are similar for race-based charges (No Reasonable Cause 73.7%, Reasonable Cause 2.1%), religion-based charges (No Reasonable Cause 70.7%, Reasonable Cause 3.2%), and sex-based charges (No Reasonable Cause 64.2%, Reasonable Cause 3.2%).\(^6\) Dealing with non-meritorious charges is part of the price we pay for our protections against employment discrimination, and it is a price we should be willing to pay in a well-functioning system that seeks to root out non-meritorious claims quickly and efficiently.\(^7\) But in deciding whether to extend Title

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3 The 21 percent figure appears to be taken from a Pew Research Survey: http://www.pewresearch.org/fact-tank/2013/11/04/as-congress-considers-action-again-21-of-lgbt-adults-say-they-faced-workplace-discrimination/. The actual question was whether the respondent had been “treated unfairly by an employer because of their sexual orientation or gender identity (5% say this happened within the past year and 16% report that this happened but not within the past year).” Note that some of what respondents consider unfair treatment may not violate employment discrimination laws.

4 See Jaime M. Grant, Lisa A. Mottet & Justin Tanis, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 51 (2011)(“Forty-seven percent (47%) said they had experienced an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender/gender non-conforming”), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf. For a criticism of the methodology in this survey, see infra at 107.

5 The rest of the cases were as follows: In 7.2%, some sort of settlement was arrived at without a finding of reasonable cause on the part of the EEOC. An additional 4.5% were classified as “withdrawals with benefits” in the sense that, while no official findings were ever arrived at, the employer gave the employee at least something in return for the withdrawal. Rep. at 13.


7 Note that as discrimination becomes more rare, the ratio of non-meritorious cases to meritorious cases likely gets higher. Since our system of rooting out non-meritorious cases leaves something to be desired, the downside of having a law against discrimination becomes more prominent. Commissioner Kladney argues that “even if discrimination were rare, we should still have a federal law prohibiting it because it is wrong each and every time it happens.” Kladney Statement at 79. I wonder if he really means that. There are all sorts of ways in which an employer can act arbitrarily. Suppose, for example, I refuse to hire Commissioner Kladney because his given name is “David” and my ex-husband’s name is David. Or I refuse to hire him because he rooted for the Indians instead of my beloved Cubs in the 2016 World Series . . . or because his wristwatch keeps better time than mine. All are bad reasons to deny someone a job. But the obvious solution for each would be for him to go onto the next opportunity. Since my hypothetical reasons for declining to hire him are so idiosyncratic, he is unlikely to be worse off. Just as there are a lot of fish in the sea, there are a lot of employers out there. If discrimination on the basis of sexual
VII’s coverage, it is important that we understand that perceptions of discriminations on the part of job applicants/employees are just that—perceptions. To get a real estimate of the size of the problem of discrimination, one must try to dig deeper.

The misidentified statistics concerning “perceptions” of discrimination are not the only example. Parts of the Report positively bristle with statistics about various aspects of life in the LGBT community. But rather than take those statistics at face value, I would urge the reader to drill down to the material in the footnotes and to approach that material with a critical eye. Gathering statistics on the LGBT community requires researchers to find a broad, representative sample. That isn’t as easy as it sounds, particularly for the transgender subset of the population, given its extremely small size. Some of the surveys cited in the report try to get around the difficulty by using problematic methodologies.

One survey cited in this report—The National Transgender Discrimination Survey—“decided to pay stipends to workers in homeless shelters, legal aid clinics, mobile health clinics and other service settings to host ‘survey parties’ to encourage respondents whose economic vulnerability, housing insecurity, or literacy level might pose particular barriers to participation.” While I respect the researchers’ efforts to try to find hard-to-reach persons, it should not have been surprising that looking in these places tended to uncover lots of respondents with low incomes, spotty employment histories, and other personal difficulties. Would a different approach have yielded a brighter picture of what it is like to be transgender? That question cannot be answered with certainty, though it seems likely. But the Report makes no effort to grapple with these orientation were rare to the point of being idiosyncratic, it’s hard to see how Kladney could support its being outlawed, unless he would favor laws that employers can’t make stupid decisions.

Commissioner Kladney makes another point in his Statement that deserves comment: He writes that most employers “are corporations, large and small, who take advantage of the legal protections and shields the government affords them” and that “[a]s such, they should be required to not discriminate against any qualified United States citizen in employment. To do so is not consistent with . . . American values.” This is another one that I have a hard time believing an easy-going guy like Commissioner Kladney really means. I can’t imagine anything more inconsistent with American values than to demand that every employer who uses the corporate form (i.e. practically all private employers) act consistently with American values. A tolerant, plural society does not impose the values of the majority on everyone. That’s what liberalism is supposed to be about (and what I thought it was about back in the days when I was a liberal).

8 Approximately 500 out of a total of about 7,500 responses came from such efforts. The rest came through an online survey, which was evidently brought to the attention of potential respondents “through direct contacts with more than 800 transgender-led or transgender-serving community based organizations in the U.S.” and “through 150 active online community listserves.” See Jaime M. Grant, Lisa A. Mottet, & Justin Tanis, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey at 12 (2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf. This methodology, of course, has its own problems.

The Report cites this survey for a variety of purposes. For example, it cites the survey in stating that “90 percent of transgender employees report experiencing some form of harassment or mistreatment on the job”—a figure it terms “staggering.” Report at 11, n.54.
methodological issues, instead accepting at face value these surveys’ assertions about the problems faced by transgender persons.9

A second example is the U.S. Transgender Survey, which is the largest survey of transgender persons taken to date, conducted in 2015.10 The researchers responsible for it relied heavily on transgender advocacy organizations to disseminate the survey. That, of course, can lead to problems. We have no way of knowing whether transgender persons who have suffered from discrimination are more likely to respond to such surveys than those who have had no problems. But intuitively it certainly seems likely. The study’s authors therefore cautioned readers:

Although the intention was to recruit a sample that was as representative as possible of transgender people in the U.S., it is important to note that respondents in this study were not randomly sampled and the actual population characteristics of transgender people in the U.S. are not known. Therefore, it is not appropriate to generalize the findings in this study to all transgender people.11

This warning about the survey’s limitations didn’t make it into this Report. For this and other reasons, some of which I will have the opportunity to detail below, many of the factual assertions in this Report need to be taken with a grain of salt.

I. THE CASE FOR ANTI-DISCRIMINATION LEGISLATION FOR SEXUAL ORIENTATION IS SOMEWHAT WEAKER THAN THAT FOR RACE, COLOR, RELIGION, SEX AND NATIONAL ORIGIN IN 1964 AND HAS BEEN MADE WEAKER STILL BY SUBSEQUENT EVENTS. THE CASE FOR ANTI-DISCRIMINATION LEGISLATION FOR GENDER IDENTITY HAS BEEN RENDERED EVEN WEAKER ON ACCOUNT OF OVER-BROAD DRAFTING.

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9 The methodological problem with the use of the General Social Survey (“GSS”) in this Report is less dramatic, but nonetheless serious. The GSS surveys a large random sample of the country, and its findings concerning the views of Americans in general can usually be considered methodologically sound. But the Williams Institute chose to rely on its data to look at the employment experiences of sexual minorities in particular. Unfortunately, the number of GSS respondents who qualify as members of sexual minorities is tiny—57 self-identified as lesbian, gay or bisexual. In addition, 23 did not identify as lesbian, gay or bisexual, but nonetheless disclosed that they had had same-sex sexual partners. This is out of a total of 3,559 respondents. Even if one can assume that 3,359 respondents can be broadly representative of the American population as a whole, it is not at all clear that 80 can represent lesbian, gay and bisexual Americans.

10 Rep. at n. 96 and 98.

11 Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma’ayan Anafi, The Report of the 2015 U.S. Transgender Survey, National Center for Transgender Equality at 26 (2016) available at https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf. This Report cited the 2015 U.S. Transgender Survey for the proposition that “Transgender individuals are three times as likely to be unemployed and are more than twice as likely to live in poverty compared to the rate in the U.S.” Rep. at 15, n.71.
A. A Presumption in Favor of Freedom of Association Should Always Be Applied When Anti-Discrimination Legislation Is Proposed; While that Presumption Can Be (and Has Been) Overcome in the Right Cases, It Takes A Convincing Argument to Do So.

The report quotes Professor Andrew Koppelman for this: “The general principle governing transactions between private parties should be freedom of association, for reasons of both liberty and efficiency. Any departure from that rule, such as a prohibition of discrimination, has the burden of proof.”

Koppelman is no conservative. But nearly all conservatives as well as most moderates and liberals would likely agree: If one is going to depart from the ordinary rule that in a free society private parties get to decide for themselves how to order their activities, including how to hire employees for their businesses, one must have a good reason.

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13 Interestingly, despite widespread agreement that race and sex discrimination are wrong, no one argues that prospective employees (as opposed to employers) should be prohibited from considering the race or sex of a prospective employer in deciding whether to apply for or accept an offer of employment.

14 One person who seems not to agree is Commissioner Narasaki. Her statement seems to be premised on the notion that the freedom at stake in this area of the law is “freedom from discrimination” rather than freedom of association. Narasaki Statement at 81. As much as I respect Commissioner Narasaki, our views on the meaning of the word “freedom” and hence on the principles she identifies as fundamental to the founding of our nation could not be more different. Sometimes it is appropriate for the federal or state governments to coerce cooperation from private individuals (i.e. limit their freedom of association). But it is important not to lose sight of the fact that we are engaging in coercion, and dressing up coercion as providing “freedom from” this or that for others promotes unclear thinking. A free society must be ever vigilant before it encroaches on the freedom of private individuals (including employers) to choose the persons with whom they are willing to associate. As Koppelman put it, the “burden of proof” must always be on the advocates of departures from the basic rule of freedom of association.

As an American, I enjoy the Constitutional right to the free exercise of my religion. But I have no Constitutional right to require particular churches to accept me as one of their own. I have a right of free speech, but that does not include the power to coerce private individuals into buying my book.

Commissioner Narasaki uses Obergefell v. Hodges, 576 U.S. ___ (2017), as the starting point for her argument in favor of the proposed Employment Non-Discrimination Act. Since discrimination against same-sex marriage was prohibited in that case, it should be prohibited in employment as well—or so her argument goes. But Obergefell was not about the coercion of private individuals. It establishes a right of same-sex couples to marry, but it does not establish a right for individuals to marry someone who doesn’t wish to marry them for reasons deemed arbitrary by the state.

For a law coercing individuals to marry someone they don’t wish to marry, even if the reason given is arbitrary and capricious, would (I hope) take one heck of a reason. Coercing private employers to hire someone they don’t wish to hire, even if their reason is rock stupid, presumably requires a lesser showing of necessity, but the presumption is still against it. In 1964, in passing Title VII to the Civil Rights Act, Congress decided that the problem of race, sex, religion, and national origin discrimination was so serious that the usual presumption in favor of freedom of association was overcome. But note that Congress did not decide that all wrongheaded decisions not to hire should be outlawed. It is still perfectly legal for an employer to be stupid. An employer can choose not to hire a job applicant because the applicant’s hairstyle is too old-fashioned, the applicant used to date the employer’s weird Cousin Cedric, the applicant is a Republican, the applicant is active in the Sierra Club, or the applicant is a devoted Star Trek fan.

How strong the presumption in favor of freedom of association should be is a question upon which reasonable minds will disagree. I’m not always sure myself. Reasonable individuals are on both sides of the question of whether
The reason for departing from that rule cannot be just that private parties are making bad decisions not to associate (or not to hire). If individuals are free only to make “good” decisions (i.e. decisions approved by the government), then they are not free at all. Nor can the reason be that by declining to associate with someone, private individuals have somehow “harmed” that person. While no one is free to physically attack another or to take, destroy, or otherwise injure another’s property, declining to confer a benefit on someone (including the benefit of one’s association) cannot be equated with imposing a harm. If it could be, the concept of freedom of association would evaporate. Something more is needed to overcome the presumption of freedom.\footnote{As Koppelman recognizes, it is not just the value of freedom that drives the presumption in favor of freedom of association. What he calls “efficiency,” too, is at stake. It is sometimes tempting for governments to believe that they can make better decisions on behalf of individuals. But it often doesn’t turn out the way they thought it would. Sometimes the individuals know more about their particular situation than the government does. What may look to outsiders like invidious discrimination may turn out to be something else entirely.}

So under what circumstances is the presumption in favor of free association overcome? A traditional example might be the common law rule that common carriers and public utilities must provide service to all who could pay. These entities were considered special because they tended toward monopoly. If a natural gas utility refuses service to anyone for a reason other than failure to pay, that individual has no practical alternative. If he relies on the free market to provide him with natural gas, he will be waiting a long time, since the town where he resides will likely have only one natural gas provider.

Anti-discrimination laws are a more recent addition to the list of exceptions. Because Title VII applied broadly to the conduct of private employers, it was by far the most controversial part of the Civil Rights Act of 1964. But there was nevertheless a strong argument for Congressional action—especially in the case of discrimination against African Americans. In the view of members of Congress, irrational race discrimination had become so pervasive, it could only be corrected through national legislation: Sometimes extraordinary steps are necessary.

It wasn’t just that \textit{some} employers in the South were discriminating on the basis of race: Essentially, all employers of any size were. The complex web of Jim Crow laws made it difficult for Southern employers to employ African-American workers on an equal basis even if they wanted to. If employers had to provide separate bathrooms, shower facilities and even pay
windows for each race, it is not remarkable that many employers didn’t hire African Americans at all or did so only on a limited basis.\footnote{This point tracks an observation made by C. Vann Woodward in The Strange Career of Jim Crow (1955)—the book Martin Luther King called “the bible” of the civil rights movement. Many people argued at the time that Southern culture had always and would always favor racial separation. It didn’t matter whether the law required segregation or not; it would have happened without the law. Woodward disputed this. He showed there was lots of early opposition to Jim Crow laws and without the power of the State to \emph{require} segregation, it would likely not have become as ingrained in Southern culture as it did. To use Woodward’s vocabulary, folkways did not dictate stateways. Instead, stateways—that is state laws—profundely shaped Southern folkways—that is Southern culture. And as long as those laws remained unaltered, southern culture would be frozen in place. The Civil Rights Act of 1964, including Title VII, was a way of uprooting them. While it would be difficult to say that it was the perfect solution to the country’s complex race problems, it did manage to accomplish the task of displacing those laws.}

That was the intent of those laws—to ensure that whites were hired first into the best jobs. This is what happens when an entire segment of the population is effectively disfranchised. Those who can vote pass laws designed to benefit themselves; those who cannot will be on the losing end of the deal. Discrimination was so pervasive that help wanted ads in newspapers customarily were divided into “Help Wanted—White” and “Help Wanted—Colored.” This wasn’t subtle stuff.

And it wasn’t just employers. Formally or informally, unions were frequently whites only, not just in the South, but also in the North. And employers were obliged to play by union rules. This angle of the discrimination problem was compounded by the Davis-Bacon Act, Pub. L. 71-798, 40 Stat. 1494, 40 U.S.C. §§ 3141-48, which requires the federal contractors on public works projects to pay the “prevailing wage” in a given locality. Prevailing wage in practice meant (and continues to mean) union-scale wage. Since union members would ordinarily be more experienced than non-union members, if one had to pay union-scale wages, one might as well hire union members. When these unions were whites only, the system worked to the detriment of African-American workers.\footnote{Note that to supporters of the Davis-Bacon Act, this was a feature, not a bug. Rep. Robert Bacon, who represented a Long Island House District and for whom the law was named, was motivated in large part by race. In 1927, a contractor from Alabama won a bid to build a Veteran’s Bureau in Long Island and brought an African American construction crew with him up from Alabama. Bacon was appalled and began his push to outlaw such competition. \textit{See} David Bernstein, Roots of the Underclass: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation, 43 Am. U. L. Rev. 85, 115 (1993). He was not alone. In supporting the proposed legislation, Rep. John J. Cochran of Missouri stated in connection with the proposal that he had “received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South.” \textit{Hearings on H.R. 7995 and H.R. 9232 Before the House Committee on Labor, 71t Cong. 2d Sess. 17 (26-27). Rep. Clayton Allgood agreed, complaining of “cheap colored labor” that “is in competition with white labor throughout the country.” 74 Cong. Rec. 6513 (1931).}}

In the view of many members of Congress at the time, the case for protection against sex discrimination may have been somewhat weaker, but it was nevertheless strong. Like race discrimination, sex discrimination was so pervasive it was the norm for help wanted advertisements to separate “Help Wanted—Male” from “Help Wanted—Female.”
Some of this tendency was frozen in place by the law. Progressive Era state legislation often purported to make distinctions between men and women in order to protect the health of the supposedly weaker sex, but at least some of the motivation behind such laws was the desire to exclude women from the most desirable jobs. And while the hey-day of such laws was the early part of the 20th century (at a time when many women could not vote), many remained in place at the time Title VII was passed.\footnote{The EEOC took the position that Title VII overruled all discriminatory statutes of this kind unless sex is a \textit{bona fide} occupational qualification. But it took some work to uproot them. In \textit{Megelkoch v. Industrial Welfare Commission}, 442 F.2d 1119 (9th Cir. 1971), a woman employee had to challenge California’s maximum hour statute for women when her employer refused to promote her on the ground that she couldn’t work the same hours as her male colleagues. She won. In \textit{Weeks v. Southern Bell}, 408 F.2d 228 (5th Cir. 1969), the court held that a Georgia law imposing weightlifting limits of 30 pounds on women was void under Title VII. \textit{Rosenfeld v. Southern Pacific Co.}, 293 F. Supp. 1219, 1223 (C.D. Cal. 1968), aff’d 444 F.2d 1219 (9th Cir. 1971), was similar.}

In \textit{Muller v. Oregon}, 208 U.S. 412 (1908), the Supreme Court had unanimously upheld the constitutionality of an Oregon statute restricting women from working for more than 10 hours a day. Justice Josiah Brewer’s opinion for the Court stated:

\begin{quote}
That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
\end{quote}

208 U.S. at 412.

As such laws multiplied during the Progressive Era and beyond, some feminists, like Suzanne LaFollette, voiced their objections:

\begin{quote}
[I]f discriminative laws and customs are to continue to restrict the opportunities of women and hamper them in their undertakings, it makes little difference for whose benefit those laws and customs are supposed to operate, whether for the benefit of men, of the home, of the race, or of women themselves; their effect on the mind of woman and her opportunities will be the same. While society discriminates against her sex, for whatever reason, she can not be free as an individual.

\ldots Laws which fix fewer hours of work for women than for men may result \ldots in the substitution of men—or children—for women in factories where but few have been employed. Laws prohibiting night-work may reduce the chances of women to get much-needed employment, and may sometimes shut them out of work which would offer higher returns on their labor than anything they might get to do during the day \ldots
\end{quote}
Suzanne LaFollette, Concerning Women 19-20 (1926).

Sexual orientation provides an interesting comparison to race and sex. There is no doubt that racial minorities, sexual-orientation minorities, and women (as well as others) have suffered significant discrimination in employment. But there are interesting differences too, and these differences sometimes cut in different directions. For example, members of sexual orientation minorities have traditionally mitigated the effects of discrimination by declining to disclose their membership in a minority to their employer. For most women and members of racial minorities, that was never an option. On the other hand, the stigma associated with membership in a sexual orientation minority has in some ways been greater than the stigma associated with being female or with being a member of a racial minority.

Another interesting contrast: Unlike women and racial minorities, sexual orientation minorities have never been disfranchised on the ground of their sexual orientation. On the other hand, sexual orientation minorities tend to be very small and except in a small number of localities their voting power has been small.

This may be the most significant contrast: Few actual state laws have discriminated on the basis of sexual orientation in employment. Those that have existed have disappeared. This is in contrast to the situation with regard to race and even sex in 1964 when Title VII was promulgated. This is not to say that no government policies ever existed that hampered LGBT individuals from getting desired employment. As the Report indicates, for a time, the federal government took the position that the social stigma suffered by LGBT individuals made them vulnerable to blackmail and hence security risks. Rep. at 61. LGBT individuals applying for some federal jobs therefore had to hide their sexual orientation. If they were hired, their troubles were not over. If their sexual orientation became known, they would be fired.\(^\text{19}\) To be fair, however, one must point out that this policy was abandoned decades ago.\(^\text{20}\)

\(^{19}\) For a more detailed discussion of the federal policy, see Yaki Statement at 87-96. At this point in time it is unclear how many LGBT individuals were discouraged from applying for, were screened out from, or were fired from a federal job on account of their sexual orientation. But my own mother, who was working for the Department of Defense in the 1950s, remembers a colleague of hers being unceremoniously removed from his job when his sexual orientation was apparently discovered for the first time. She is 92 years old today and has not forgotten the unfairness of it.

\(^{20}\) The relationship of military serviceman or servicewomen to the federal government is not one of employment. The various legislative proposals discussed in this Report therefore do not apply. But it should be pointed out that it was not until the 1990s that the policy of “Don’t Ask, Don’t Tell” was implemented, thus allowing closeted gays, lesbians and bisexuals to join the military. Department of Defense Directive 1304.26 (December 21, 1993). It was not until 2011 that openly gay, lesbian and bisexual individuals were permitted to join the military. See Pub. L. 111-321, 124 Stat. 3515, 10 U.S.C. § 654 (2010)(policy went into effect September 20, 2011).

Policies that gave better benefits to married rather than unmarried discriminate on the basis of marital status, not sexual orientation. Most of those who end up with the short end of the stick are not LGBT. But nevertheless at a time that same-sex marriage was unrecognized in most states, LGBT individuals were disproportionately affected. Since Obergefell v. Hodges, 576 U.S. ___ (2015), however, all states have recognized same-sex marriage.
The bottom line, as far as I can see, is that the case for an anti-discrimination law for sexual orientation is weaker than the case for race or sex. But, given the history of stigma associated with LGBT status, it is not insubstantial. That makes it a tough decision. What makes it somewhat easier to decide is the fact that Title VII has been misapplied so much over the years, it may be unwise to expand it before reforms are put into place. Will it be possible to draft legislation that will make some version of the proposed Employment Non-Discrimination Act a good idea? I think so. Indeed, it is clear that some members of Congress have been working on the problem. But, in my view, we are not there yet.

On the other hand, the case for “gender identity” coverage is weak—not on the ground that transgender persons have not been historically discriminated against (they have been), but on the ground that the treatment of gender identity in the legislative proposals in this area to date have been overbroad to the point of incoherence.

21 Some have argued that only immutable characteristics should form the basis of anti-discrimination laws. In response those who support the proposed legislation have argued that sexual orientation is an immutable characteristic. I have no need to resolve that dispute, since I do not believe that only immutable characteristics should form the basis of anti-discrimination laws (although immutability might well be a factor to consider in determining whether the argument for banning discrimination on that basis is strong enough to overcome the presumption against coercing private parties to associate). From the beginning, Title VII contained a provision banning discrimination based on religion, and yet religion is not an immutable characteristic. Religion and sexual orientation also have something in common in the sense that some employers may have religious or moral objections to working with persons of religious persuasions or sexual orientations they consider to be sinful or otherwise problematic. That raises important and interesting questions that need careful consideration. Rather than attempt to address them here, I refer the reader to my Commission Statement in Peaceful Co-Existence: Reconciling Nondiscrimination Principles with Civil Liberties at (September 2016)(Statement of Gail Heriot), available at http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF. The Statement is also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897849.

Commissioner Narasaki makes a different argument—that a characteristic’s immutability should not drive whether anti-discrimination laws are appropriate for it (I agree with this part), but that whether the characteristic is “central to a person’s identity” should. Narasaki Statement at 81-2. But that dog won’t hunt. That notion that “characteristics that are fundamental and essential to one’s identity,” id. at 1, should be made the subject of anti-discrimination laws, without any further justification, runs into the problem of human complexity.

Some people consider their race fundamental to their identities; others regard their race as literally skin deep. Indeed, up until fairly recently, it was the fashion among right-thinking liberals to believe exactly that—that race was unimportant. A few days ago I overheard a young man say to an elderly woman that he had no idea about the origins of his surname and didn’t know his ethnicity. On the other hand, I’ve known individuals who regard their astrological sign, their musical ability, their sense of humor, their extremist political ideology, their artistic ability, their entrepreneurial spirit, their Myers-Briggs personality type, and their facility with the written word to be central to their identities. One could always argue with them about what is fundamental to their identities. But usually, if persons say that something is fundamental to their identity, it’s best to just accept that it is.

Do individuals regard sexual orientation as central to their identity? The answer is almost certainly that some do and some don’t. In some surveys, some individuals acknowledge frequent consensual same-sex activity, but nonetheless do not identify themselves as lesbian, gay or bisexual.

22 I have expressed no opinion on the extent to which Title VII, through the Supreme Court’s decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), already offers protection to those who have been discriminated against on the basis of sexual orientation or gender identity. This issue became more of a front-burner issue for the Commission after this Report was approved. At the point of this writing, the Commission is preparing to address the Department of Justice’s conclusion that Title VII does not cover sexual orientation and gender identity. Since I have not yet had time to consider the Commission’s proposed amendments, I have not addressed them in this Statement.
Prior to 2007, the various versions of the proposed Employment Non-Discrimination Act applied only to sexual orientation and not to gender identity. Since then, however, a number of versions have been introduced that do cover gender identity. Typical of these proposed Employment Non-Discrimination Act of 2013 (S. 815), which defines “gender identity” thusly:

(7) GENDER IDENTITY.—The term “gender identity” means the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.

The proposed Act goes on to declare it to be “an unlawful employment practice for an employer” “to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual’s actual or perceived . . . gender identity.”

That won’t work. Race, sex, and sexual orientation (at least where sexual orientation is defined narrowly) are statuses that for the most part are unrelated to how one does a particular job. Gender identity, however, at least as it is defined here, is not a single thing, but a whole range of things. Any “gender-related” “mannerisms” or “characteristics” constitute “gender identity.”

The problem is that huge numbers of mannerisms and characteristics are gender-related, and some of them are commonly job-related. In general, we regard aggressiveness to be more characteristic of males than females. That was the whole point of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The plaintiff in that case alleged that she was not promoted because she was thought to have an aggressive and hence “unladylike” personality, but that she would have been promoted if she had been a male with the same kind of personality. The Court agreed that if she would have been promoted if she had been male, she was discriminated against on the basis of sex within the meaning of Title VII.

By making gender-related characteristics (rather than sex itself) the subject of anti-discrimination laws, the proposed law would radically change the law. Right now it is a violation to fail to promote a woman with an aggressive personality if a man with the same personality would have been promoted. Under the proposed law, it would be a violation to fail to promote someone with a passive personality, if someone with an aggressive personality would have gotten the job.

But there are lots of jobs for which an aggressive personality is a legitimate job qualification, just as there are lots of jobs where a more passive, but nurturing, personality is the right fit. If the federal government prohibits employers from making hiring decisions on the basis of “gender-related characteristics,” it will be prohibiting a lot of rational behavior.

24 In the proposed Employment Non-Discrimination Act of 2013 (S. 815), “sexual orientation” was defined this way: “(10) SEXUAL ORIENTATION.—The term “sexual orientation” means homosexuality, heterosexuality, or bisexuality.” It does not include such things as pedophilia, necrophilia, or sexual sadism.
I rather suspect this is not what the drafters of the proposed Employment Non-Discrimination Act had in mind. But it is what they wrote. Its supporters may not have thought this out very well. One version actually passed the Senate in 2013. What were they thinking?

**B. Expansions of Title VII and Why They Have Made It Risky to Add Sexual Orientation to the Already-Existing List of Race, Color, Religion, Sex and National Origin.**

(1) Preferential Treatment

If there is one thing you can depend on it’s that the 88th Congress banned both discrimination against women and minorities and discrimination in favor of them. It’s not just that the text of Title VII makes this clear (though it does):

It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.


Title VII easily could have been drafted to ban “discrimination against women” or “discrimination against racial minorities.” But if it had been, it almost certainly wouldn’t have passed. Instead the text proudly declares that discrimination on the basis of race, color, religion, sex, or national origin is prohibited.

If the text hadn’t been crystal clear, then the legislative history would have easily clarified matters. For example, when H.R. 7152 reached the floor of the House of Representatives, the very first speech in support of it was delivered by the bill’s chief sponsor, Committee on the Judiciary Chairman Emanuel Celler. Part of his speech responded to arguments against the bill, one of which was that it would lead to discrimination against whites. He responded that these arguments were “entirely wrong” and stated:

Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment only of members of a specific racial or religious group is therefore patently erroneous.

. . . The Bill would do no more than prevent . . . employers from discriminating against or in favor of workers because of their race, religion, or national origin.

110 Cong. Rec. 1518 (emphasis added).
Celler’s sentiments were echoed repeatedly in the Senate. In their well-known interpretative memorandum on Title VII, Senators Joseph Clark and Clifford Case, bipartisan floor managers for the bill, wrote:

Title VII would have no effect on established seniority rights. Its effect is prospective, and not retrospective. Thus, for example, if a business has been discriminating in the past and, as a result, has an all-white working force, when the title comes into effect, the employer’s obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 Cong. Rec. at 7213 (emphasis added).

This is why the 5-4 decision in United Steelworkers v. Weber, 443 U.S. 193 (1979), was shocking to many. In Weber, the Court decided that, despite all this, it was permissible for Kaiser Aluminum and Chemical Corp. and the United Steelworkers to enter into a collective bargaining agreement that permitted whites to enter into their training program only on a one-to-one basis with African Americans (regardless of the applicants’ comparative credentials and despite the fact that white applicants were more numerous).

The majority decision in Weber triggered one of the most devastating dissents in Supreme Court history:

[B]y a tour de force reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, “uncontradicted” legislative history and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions.


Justice Rehnquist’s take-no-prisoners prose showed step by step how Title VII could not fairly be construed to allow racial preferences of any kind, including those practiced by Kaiser and the United Steelworkers. See also Bernard D. Meltzer, The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment, 47 U. Chi. L. Rev. 423 (1980).

What does Weber have to do with the legislative proposals that would prohibit discrimination on the basis of sexual orientation? Perhaps a lot. Americans have learned that when they pass laws that forbid discrimination, what they sometimes get are laws that give preferential treatment to the group that is perceived by those in power as the underdog. For those who oppose preferential treatment, that obviously seems bad. For those who support it, it may seem good. But that may be only at a superficial level. When executive agencies and courts interpret laws to go far beyond
what was originally intended by a statute, no one should be surprised that moderate legislators become gun shy. Further legislative action becomes more difficult.\textsuperscript{25}

At least one version of the legislative proposal appears to specifically eschew the use of affirmative action preferential treatment. But after \textit{Weber}, such efforts would need to be ironclad. This one doesn’t seem to be.

The proposed Employment Non-Discrimination Act of 2013 (S. 815) states:

\begin{itemize}
\item \textbf{(f)} NO PREFERENTIAL TREATMENT OR QUOTAS.—Nothing in this Act shall be construed or interpreted to require or permit . . .
\item (1) any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation or gender identity of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation or gender identity employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such actual or perceived sexual orientation or gender identity in any community, State, section, or other area, or in the available work force in any community, State, section, or other area; or
\item (2) the adoption of implementation by a covered entity of a quota on the basis of actual or perceived sexual orientation or gender identity.
\end{itemize}

But note that this prohibits preferential treatment only in the context of efforts to match the proportions of those hired or promoted to the proportions found in some outside “community, State, section or other area.” Aggressive lawyers might claim that preferential treatment designed to reap the unspecified benefits of diversity rather than to mimic the demographics of any particular “community, State, section or other area” are permissible.

On a blank slate, I would regard this as a weak argument. But in \textit{Regents of the University of California v. Bakke}, 438 U.S. 265 (1978), a Title VI case, Justice Powell drew exactly this distinction. In his controlling opinion, he rejected the idea that the University of California could grant preferential treatment on the basis of race to medical school applicants in order to better match the student body to the racial composition of California. But he upheld the authority of the

\textsuperscript{25} See Daniel B. Rodriguez & Barry R. Weingast, The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. Penn. L. Rev. 1417, 1535 (2003) (arguing that, after the judicial expansions of Title VII, some Members of Congress “were likely nervous about agreeing [with Members who supported those expansions] on legislative bargains, which, when they came before the courts, would be rewritten”).
University of California to grant preferential treatment on the basis of race in order to reap the pedagogical benefits of diversity.

Justice Rehnquist was right. For the majority in *Weber* to come out as they did required the skills of escape artists like Houdini. Given *Bakke*, however, getting around the proposed Employment Non-Discrimination Act of 2013’s ban on preferential treatment or quotas would not be nearly as difficult.

(2) Harassment

It is difficult to defend *Weber* as a matter of statutory interpretation no matter what one thinks of it as a matter of policy. The interpretation was just plain wrong, and painfully so. It would not be fair to put *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), in the same category. For reasons I hope to write about elsewhere, I believe the basic thrust of *Meritor Saving Bank* decision—that at least in some circumstances sexual harassment can be actionable under Title VII—is surely defensible.

The origins of the problems with current doctrine on sexual harassment are more subtle. Five years after *Meritor Savings Bank*, when the ill-conceived Civil Rights Act of 1991 made ordinary monetary damages available under Title VII, sexual harassment lawsuits became much more common, and employers became more fearful of them.

Their fear was mainly of “hostile environment” cases. Employers could be liable for the cumulative effect of a series of many rude remarks, slights, and inconveniences, each of which might have come from a different employee (or even a customer). The only way to be sure of not being sued was (and is) to prevent as many as possible of them.

If an employee is upset at the photo of her colleague’s bikini-clad wife on his desk, it is in the employer’s interest to make him get rid of it. If another employee doesn’t like to be told by her

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26 The “quid pro quo” kind of sexual harassment case was easier for employers to deal with. These are the cases in which an employee is told that she (or he) must engage in sexual relations if she (or he) wishes to be hired, get a promotion, or avoid dismissal. So long as the employee can demonstrate that a similarly-situated employee of the opposite sex would not have had to submit to this, one can see why such a deal amounts to discrimination on the basis of sex. Note that the shoe can be on the other foot here as well. An employee whose sexual favors are not desired may also have a Title VII complaint, because he (or she) was not given a similar opportunity to be hired, promoted, or avoid dismissal.

To deal with the “quid pro quo” cases, employers need to make it crystal clear to their supervisory personnel that such deals will not be tolerated. As a secondary precaution, they need to make sure that employees know the rules and have someone other than their supervisor to report to if their supervisor breaks those rules.

27 Bonnie Miller Rubin & Judy Peres, Workplace on Edge Over Harassment, Chicago Tribune (April 3, 1998)(“In 1993, a University of Nebraska graduate student was forced to remove a photo of his bikini-clad wife from his desk when two fellow students complained that it offended their sensibilities”).
boss that her hair looks nice today, the employer has every incentive to order him to stop.\textsuperscript{28} And if a copy of Goya’s Naked Maja hanging in the building upsets an employee, the employer’s instinct is unlikely to leave it there for others to enjoy. Rather, the picture is likely to be taken down.\textsuperscript{29} If the other employees start to complain, the safe solution is to tell them to shut up and arrange for them to take a course in sexual harassment once a year.

“Our advise employers not to focus on the legal definition of harassment, but to have zero tolerance for any behavior extraneous to the workplace. There shouldn’t be any touching or sexual joking. Period,” an employment lawyer told the \textit{Chicago Tribune} in 1998.\textsuperscript{30}

When these kinds of actions started to become commonplace, many Americans—indeed a majority—began to wonder if we weren’t going down the wrong road. In a 1997 CNN poll, 57\% of men and 52\% of women agreed that “we have gone too far in making common interactions between employees into cases of sexual harassment.”

Since then, the pressure to avoid saying anything that might be construed as offensive has only increased. Sometimes it had served to suppress serious discussions.\textsuperscript{31} A recent example is the firing of software engineer James Damore at Google.

Damore wrote what was intended to be an internal discussion memorandum entitled “Google’s Ideological Echo Chamber.” Contrary to what some media outlets claimed, it was not an anti-diversity or misogynistic screed. In fact, it went out of its way to suggest helpful ways to make employment at Google more attractive to women.

But it dared to question whether women’s underrepresentation in software engineering and in leadership positions at Google is wholly due to bias against them. It argued—alluding to a large body of scientific evidence—that fewer women than men may aspire to be software engineers. Damore was careful to acknowledge that there is plenty of variation among men and among women, but as a group, women tend to be more interested in people-oriented jobs. And while Damore’s statement says nothing about particular women or particular men, especially those who already work at Google, it happens to be a true statement at the general level. It’s certainly worth talking about whether that might account for some of the under-representation of women at Google.\textsuperscript{32}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Ellison v. Brady}, 924 F.2d 872 (9th Cir. 1991)(“Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action . . . .”).
\item Nat Hentoff, Sexual Harassment by Francisco Goya, Washington Post (December 27, 1991).
\item See David Bernstein, \textit{You Can’t Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws} (2004).
\end{enumerate}
\end{footnotesize}
But instead the author of the memo was fired. And one of the arguments made for his firing was that his memo violates Title VII: He is creating a hostile atmosphere for women, some observers argued; if he isn’t fired, Google may be sued. See e.g., Dan Eaton, Here’s Why Google Had the Right to Fire that Employee over his Diversity Memo, cnbc.com (August 8, 2017)(“Google Vice President of Diversity, Inclusion & Governance Danielle Brown is correct that an employee has no right to engage in workplace discourse that offends anti-discrimination laws; employees may not engage in unlawful harassment under the guise of protected concerted activity or political grievances.”), available at https://www.cnbc.com/2017/08/08/heres-why-google-had-the-right-to-fire-that-employee-over-his-diversity-memo-commentary.html.

Some people at Google might have wanted Damore fired even if they had believed Google didn’t need to worry about Title VII liability. But the culture—an intolerance of serious discussions about issues relating to sex—has been created in part because cautious people err on the side avoiding litigation. All too often that means appeasing extremists.

Google, of course, is a private entity and is not required to honor Damore’s First Amendment rights. But Congress is. Insofar as Title VII liability was what drove Google’s decision, Title VII (as interpreted) itself is unconstitutional.

Expanding Title VII’s reach to other areas, whether it’s to sexual orientation, gender identity or something else, can only compound the problem. Future discussions like that Damore tried to initiate would be squelched.

Consider the following situation: Even ten years ago, if someone had argued that New York City would pass a law requiring landlords to address tenants by the pronouns of the tenant’s choice (rather than the pronouns of the landlord’s choice or the pronouns that correspond to the tenant’s actual anatomical sex), they would have been laughed at. But that has become a reality.33 Would expanding Title VII cause such a rule to be applied to the workplace around the country? It isn’t clear to me why it wouldn’t.

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Unlike the problem of preferential treatment, the problem of harassment overreach is not treated at all in any version of the legislative proposals considered in this Report.

(3) Disparate Impact

This is another one where the Supreme Court has misapplied Title VII, transforming it from a statute that requires equal treatment into one that presumptively requires equal results. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The various iterations of the proposed Employment Non-Discrimination Act have attempted to deal with this problem. But for reasons I will discuss more fully below, at least the version that passed the Senate in 2013 ultimately failed in its attempt to do so. In addition, the proposed Equality Act does allow for disparate impact claims.

To explain how all this fits together, one must start at the beginning:

While the passage of Title VII was important and historic, it was not intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, color, religion, sex and national origin. As Representative William M. McCulloch et al. put it:

> [M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

At the time, this was likely seen as an obvious, but important, point. Free enterprise had always been the engine that drove the nation’s prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, had usually been to allow peaceable and honest individuals the freedom to run their own business affairs. When exceptions become necessary (as they did in 1964), they were understood by most as precisely that—exceptions. They were not intended to swallow the rule.

Congressional leaders assured their colleagues that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex and national origin were not among them. Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill’s co-managers on the Senate floor, emphasized this in an interpretative memorandum:

> There is no requirement in Title VII that employers abandon *bona fide* qualification tests where, because of differences in background and education, members of some

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34 The proposed Employment Non-Discrimination Act of 2013 (S. 815), available at https://www.congress.gov/bill/113th-congress/senate-bill/815/text. It states: “(g) NO DISPARATE IMPACT CLAIMS.—Only disparate treatment claims may be brought under this Act.” For reasons why this language fails to cover disparate impact claims brought under the “gender identity” provisions of the proposal, see infra at 127.

35 Statement of William M. McCulloch, et al., H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964). McCulloch was the House Judiciary Committee’s ranking member and was considered by many to have been indispensable in passing the Act.
groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

Case & Clark Memorandum, 110 Cong. Rec. 7213.

Note that Case and Clark used the term “bona fide qualification tests,” meaning qualification tests adopted in good faith, and not “necessary” or “scientifically valid” qualification tests. To Case and Clark the issue was whether the employer chose a particular job qualification because he believed it would bring him better employees or because he believed it would help him exclude applicants based on their race, color, religion, sex or national origin. See also Case & Clark Memorandum, 110 Cong. Rec. 7247 (Title VII “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.”).

Congress’s intention to outlaw only discriminatory treatment and not disparate impact is made clear from Title VII’s central prohibition, which bans discrimination against any individual “because of such individual’s race, color religion, sex, or national origin.” As Richard K. Berg, one of the government lawyers who worked on Title VII’s passage, wrote, to “discriminate” against an individual “because of” his “race, color, religion, sex, or national origin” always requires some level of intentionally, whether the intention is conscious or unconscious.36

But just in case Section 703 were to be misinterpreted, the bill was amended in the Senate at the insistence of Republican Leader Everett Dirksen—without whose support the bill likely never would have gotten past the Southern filibuster. Dirksen insisted on adding the word “intentionally” to Section 706(g), which deals with judicial power to enforce the prohibitions of Section 703. As modified, Section 706(g)(1) read:

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.


36 See Richard K. Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brook. L. Rev. 62, 71 (1964) (“Discrimination is by its nature intentional. It involves both an action and a reason for the action. To discriminate ‘unintentionally’ on grounds of race . . . appears a contradiction in terms.”).
In explaining why the term “intentionally” was added here, Senator Hubert Humphrey said, “Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. . . . The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders.” 110 Cong. Rec. 12,723-28 (1964).37

In addition, by denying the newly-created EEOC both substantive rulemaking authority and to issue cease and desist orders, Title VII’s Congressional supporters attempted to ensure Title VII’s reach could not be expanded. The power to issue regulations might be interpreted to authorize limited prophylactic measures, and Congress evidently wished to make it clear that Title VII was already as broad as they intended it to be. The EEOC was to be a mediating agency only.

But EEOC officials soon began issuing guidances as an alternative to substantive regulations. Alfred W. Blumrosen, BLACK EMPLOYMENT AND THE LAW 52 (1971). Given most employers’ eagerness to stay on the right side of the law, these guidances can be as effective (or even more effective) as regulations at influencing employer practices. An advantage from the EEOC’s perspective is that they are not subject to notice and comment requirements and thus tend to receive less public scrutiny or government oversight. They are also difficult to challenge in court.38 They are, of course, supposed to be interpretations of the Act and not extensions of it. But in practice the EEOC went much further.

Blumrosen, the EEOC’s first “Chief of Conciliations” and disparate impact liability’s primary architect, was unabashed in describing the extent to which the EEOC was (and in his view should be) aggressive in its interpretation of Title VII:

Creative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination. . . . [Legal education] rarely deals with the affirmative aspects of administration. Rather, the law schools provide elaborate intellectual equipment to restrict the efforts of administrators. Constitutional law and administrative law are still largely concerned with what government may not do, rather than with how it should decide what it may do. Students impatient with the negativism of present legal education would be better equipped as lawyers if they would focus sharply on the question of “how we can best fulfill the purposes which brought our agency into being” rather than on the question of “whether the courts will sustain this course of action.”

37 Dirksen’s amendment and Humphrey’s explanation are not in perfect harmony, since the amendment applied only to judicial remedies, while Humphrey’s explanation applies generally. Dirksen might possibly have intended to foreclose courts from intervening even in the case of unconscious disparate treatment and to leave such cases entirely to the EEOC’s mediation efforts. An employer who engaged in unconscious discrimination would essentially be allowed “one free bite.” If the employer continued its practices after EEOC mediation efforts, it would be difficult for the employer to maintain that its actions were unconscious.

38 The fact that Title VII makes EEOC investigations and mediations confidential, 42 U.S.C. 2000e-8(e), adds to the degree to which EEOC policymaking has tended to escape both public scrutiny and government oversight.
Blumrosen was part of the generation of civil rights policymakers profoundly influenced by the turbulence of the late 1960s—something that is easy to forget today. He urgently pushed the EEOC to interpret Title VII with an eye toward effectuating what he perceived as a higher purpose—increasing African-American employment as quickly as possible—rather than with an eye towards what the courts would be likely to uphold as consistent with Congressional intent as well as the statute’s text. In particular, he pushed a “disparate impact” approach to Title VII. Under it, employer intent didn’t matter. If, given the job qualification required by an employer, proportionately fewer African Americans than whites qualify, the employer is in violation of Title VII unless it can demonstrate that it essentially had no choice.

Historian Hugh Davis Graham wrote concerning this period in the EEOC’s history:

“The EEOC legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts [based on disparate impact theory] against employers who used either professionally developed tests or bona fide seniority systems. The EEOC’s own official history of these early years records with unusual candor the commission’s fundamental disagreement with its founding charter, especially Title VII’s literal requirement that the discrimination be intentional.”


In Griggs v. Duke Power Co., the Supreme Court deferred to the EEOC’s disparate impact approach to Title VII liability. It held, therefore, that under Title VII, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” Id. (emphasis supplied). “The touchstone is business necessity,” it stated. “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” Id. at 431.39

As explained above, this was certainly a misinterpretation of Title VII. See Hugh Davis Graham, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY at 387 (1990)(“Burger’s interpretation in 1971 of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964”); Daniel Rodriguez & Barry R. Weingast, The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. Penn L. Rev. 1417 (2003) (also arguing that the 88th Congress would have been astonished at the result in Griggs).

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39 The facts of Griggs may well have involved intentional discrimination. But if so, it should have been incumbent upon the plaintiffs to prove their case on that theory.
After *Griggs*, Title VII was interpreted to demand two things: (1) Employers must provide equality of opportunity to all persons regardless of race, color, sex, religion or national origin (the traditional interpretation of Title VII); and (2) In deciding upon job qualifications, employers must provide at least equal results for women and minorities unless they can prove they were driven by business necessity to do otherwise (the disparate impact interpretation). For decades, few remarked on it, but these dual requirements were at war with each other from the beginning. Equality of treatment and equality of results are very different.\(^{40}\)

One problem with disparate impact theory is that all job qualifications have a disparate impact. It is no exaggeration to state that there is always some protected group that will do comparatively poorly with any particular job qualification. As a group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinental Indian Americans are disproportionately more likely to have experience in motel management than Norwegian Americans, who more likely have experience growing durum wheat. African Americans are over-represented in many professional athletics as well as in many areas of the entertainment industry. Unitarians are more likely to have college degrees than Baptists. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(recognizing that disparate impact liability applies to subjective as well as objective job qualifications).

Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more likely to have experience in that industry when it is called for by an employer. See Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. Times, May 26, 1995. The reasons behind other disparities may be more obvious: Non-Muslims are more likely than Muslims to have an interest in wine and hence develop qualifications necessary to get a job in the winemaking industry, because Muslims tend to be non-drinkers.

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\(^{40}\) The problem was compounded by establishing a stringent standard of proof for “business necessity” that few employers can dream of achieving in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The employer there had hired an expert industrial psychologist to conduct a validation study to justify its use of standardized tests to hire and promote its employees. But the Court found the expert’s report was not sufficiently scientifically rigorous. Among other things, the job qualifications had not been validated at the micro-level, i.e. for each of an employer’s job categories. But it is nearly impossible for any but the largest employers to generate enough data for statistically significant validation studies. Under *Albemarle*, unless a bank could scientifically prove that high-school graduates make better tellers than high-school dropouts, it could not require a high-school diploma for tellers, since proportionally more whites than African Americans possess such a diploma. Indeed, its proof would have to apply specifically to its own tellers, including its minority tellers, not just to tellers in general. It was Justice Blackmun in his concurrence who tentatively sounded the alarm: “I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection.” 422 U.S. at 449 (Blackmun, J., concurring in the judgment). While *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), appeared to overrule *Albemarle*, the Civil Rights Act of 1991 restored the law to its pre-*Wards Cove* condition.
The result is that the labor market is anything but free and flexible. At any moment, the EEOC—an agency Congress designed to have very limited power—can declare an employer’s long-standing job requirements to be a violation of Title VII.41

The upshot of this is that hiring and firing practices must be shrouded in secrecy. Employers seldom advertise clear job qualifications for fear they will attract a lawsuit. Performance tests, indeed any kind of innovative hiring practices, are invitations to a lawsuit. Wise employers try to be on good terms with the EEOC, knowing that when everything is potentially illegal, the name of the game is to avoid antagonizing the regulator.

Passing any version of the employment discrimination legislative proposal discussed in this Report can only make the problem worse. Even the proposed Employment Non-Discrimination Act of 2013, which specifically eschews the application of disparate impact liability, has the problem. By defining “gender identity” as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth,” the proposal embeds disparate impact into the proposal’s core prohibition.

There is no way to define “gender-related” mannerisms and characteristics except by disparate impact. Not all women wear make-up or skirts, but those characteristics are more commonly associated with women than with men. Not all men sing baritone, have short hair, enjoy watching sports on television, own guns, or wear boxer shorts, but these are all characteristics that are to a greater or lesser extent more common among men than among women.

If a statute prohibits employers from discriminating on the basis of characteristics that have a disparate effect on men and women, there is no need for a separate ability to bring lawsuits based on a disparate impact theory.

II. DATA ARE NOT ALWAYS ACCURATELY AND FAIRLY PRESENTED IN THIS REPORT

There is a lot that is wrong with this Report simply from the standpoint of accurately and fairly reporting the facts. Consider, for example, the very first sentence of the very first section: “American employees spend the majority of our awake hours at work.” That isn’t true.42 Assuming

41 Note that disparate impact liability applies to promotions and terminations too. See George v. Farmers Electric Cooperative, Inc., 715 F.2d 175 (5th Cir. 1983); Wilmore v. Wilmington, 699 F.2d 667 (3d Cir. 1983).
42 Bureau of Labor Statistics, Department of Labor, American Time Use Survey—2016 Results (June 27, 2017), available at https://www.bls.gov/news.release/pdf/atus.pdf. The data in that report don’t make it easy to calculate exactly how much time American employees spend at work. But it is possible to see or to calculate from Table 4 that full-time workers were 77% of all American workers. They worked just a hair over 5 days a week and an average of 8.15 hours per day on the days they worked (for a total of approximately 40.75 hours). Part-time workers were 33% of the workforce. On average they worked slightly less than 4 days per week and averaged 5.34 hours on the days that they worked.
that the typical American employee sleeps 8 hours a day, that leaves 112 waking hours per week. Assuming a 5-day, approximately 40-hour work week, that is less than half, even before one figures in holidays and vacations. Once one figures in part-time work, the sentence isn’t close to true. The point is trivial . . . but it doesn’t fill one with a lot of confidence to start the Report that way. 43

Other errors are somewhat less trivial. Accurately reporting the results of the 2013 survey conducted by the Centers for Disease Control and Prevention’s National Center for Health Statistics somehow got botched. The report states that “3.4 percent of Americans identify themselves as gay or lesbian (1.6%), bisexual (0.7%) or ‘something else’ (1.1%).” The correct figures are that 2.5% percent of Americans identify themselves gay or lesbian (1.6%), bisexual (0.7%) or “something else” (0.2%).44 Two additional categories were “I don’t know” (0.4%) and refused to provide an answer (0.6%).

There are likely more such errors. But I have time to describe only one significant area. Perhaps the most troubling aspect of the report’s use of data what looks a bit like a purposeful effort to hide the ball concerning income disparities. In the portion of the report entitled “Economic Impacts from Workplace Discrimination,” the report recites, “On average gay men earn from 10 to 32 percent less than similarly qualified heterosexual males.”45 Rep. at 14. By itself, that figure may

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43 After I handed in my Statement (and apparently as a result of my criticism), this problem was corrected (along with several other corrections). It is extremely unusual to make anything other than formatting changes to reports that have already voted on by the Commission, since corrected reports need to be resubmitted to the Commission.

44 The material in the text is as of the date the Commission approved the report. After the due date of the Commission’s statements, but before the deadline for rebuttal material, I learned that the staff planned to alter the passage to read, “A 2013 survey conducted by the Center for Disease Control and Prevention’s National Center for Health Statistics found that 3.4 percent of Americans identify themselves as gay or lesbian (1.6 percent), bisexual (0.7 percent) or ‘other’ (1.1 percent).” This is still wrong. Individuals who refuse to answer the question (0.6 percent) or who have reported that they don’t know (0.4 percent) did not “identify” themselves as “other.” Even those who identify themselves as “something else” may simply mean that they are celibate. Beyond all this, the staff should never make substantive changes to a report after it has been adopted by the Commission without a Commission vote to accept those changes.

45 When the Report says these studies compare gay men to “similarly qualified heterosexual males” it means that they controlled for things like whether the individuals covered in the study had a high school diploma, some college, a college degree or advanced degree and whether they reside in a metropolitan area. The studies also attempt roughly to control for broad job categories. Only then do the numbers begin to suggest that gay men might be “underpaid” relative to heterosexual men.

But the qualifications controlled for are far too rough to be fair. Not all college degrees are equal. An electrical engineering or computer science degree will ordinarily result in a much higher starting salary than a degree in psychology or communications. Similarly, the efforts to control for job category are rudimentary. For example, one article divided up individuals into “executive,” “specialist,” “low-skilled workers,” and “everyone else.” Nathan Berg & Donald Lien, Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?, 20 Contemp. Econ. Pol’y 394 (2002)(Berg & Lien also controlled for race, experience, experience squared, union membership, region of the country, urban status and educational attainment). See also John M. Blandford, The Nexus of Sexual Orientation and Gender in the Determination of Earnings, 56 Indus. & Lab. Rel. Rev. 622, 638-39 (2003)(making the point that controls for job category are rudimentary in these studies).

46 Curiously, the Report does not cite the actual studies it (indirectly) is referring to. Rather, it cites an article that attempts to summarize those studies. Rep. at 14, n.70 (citing M.V. Lee Badgett, Holming Lau, Brad Sears, Deborah
seem to some to indicate discrimination. But a closer examination shows that things are much more complicated.47

The Report’s sin is one of omission. First of all, it fails to make clear that comparisons between lesbians and heterosexual women run strongly in the opposite direction: **On average, lesbians substantially out-earn heterosexual women.** Instead, the Report states only that several studies “show that lesbian or bisexual women do not earn less than heterosexual women.” Rep. at 50 (boldface added).

For example, in *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, among full-time workers, the median income for Lesbian/Bisexual women was almost 18% more than that for married or unmarried women.48 Similarly, *An Investigation into Sexual Orientation Discrimination as an Explanation for Wage Differences* found “women living with partners of the same sex tend to have higher earnings than otherwise similar women.”49 *The Earnings Effects of Sexual Orientation* came to a similar conclusion—that lesbian/bisexual orientation is associated with about a 20% wage premium.50 There is no shortage of such studies.51 In *Measuring the Effect

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47 Gay men are more likely to have college and advanced degrees than heterosexual men. In addition, gay men are more likely to live in metropolitan areas, where wage scales are higher (and living expenses are also higher). See, e.g., Christopher Carpenter, Samuel Eppink, Does it Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States, available at http://onlinelibrary.wiley.com/doi/10.1002/soej.12233/full. The studies referred to by the Report attempt to control for these factors. Some early surveys found that gay men out-earn heterosexual men when such factors are not controlled for. See, e.g., Steve Teichner, Results of Polls, San Francisco Examiner A-19 (June 6, 1989).


49 Suzanne Heller Clain & Karen Leppel, An Investigation into Sexual Orientation Discrimination as an Explanation for Wage Differences, 33 Applied Econ. 37 (2001). Heller & Leppel noted that Badgett came to the opposite conclusion in 1995 (i.e. that lesbian and bisexual women earned less than heterosexual women). They state, however, that Badgett’s “finding was not consistently statistically significant across specifications” and that “Badgett’s sample included only 34 (4.9%) lesbian or bisexual women, . . . so insignificant results are not surprising.” Id. at 37. See M.V. Lee Badgett, The Wage Effects of Sexual Orientation Discrimination, 48 Indus. & Lab. Rel. Rev. 726 (1995).

50 Dan A. Black, Hoda R. Makar, Seth G. Sanders & Lowell J. Taylor, The Earnings Effects of Sexual Orientation, 56 Indus. & Lab. Rel. Rev. 449, 463 (2003) (“Lesbian/bisexual orientation appears to raise earnings of women by about 20%, a result that is both economically and statistically significant”). Comparisons are between full-time workers. “While gays and lesbians had levels of education similar to those of their heterosexual counterparts, they were half as likely to be married, they were more likely to live in the West and Northeast, and they were more likely to live in large cities. Following Badgett, we use regression analysis to control for these background differences.” Id. at 452.

51 See Christopher S. Carpenter, Self-Reported Sexual Orientation and Earnings: Evidence from California, 58 Indus. & Lab. Rel. Rev. 258, 263 (2005) (“[L]esbian full-time workers report higher average earnings last month ($3,816) than do female unmarried bisexuals ($3,247), married bisexuals ($3,329), unmarried heterosexuals ($3070), or married heterosexuals ($3,631)”). This California-based study had interesting results for men too: Gay men earned more than heterosexual men. The authors wrote: “Among full-time working men, married straight men report the highest average earnings last month, $5,207, followed by gay men ($4,504), bisexual married men ($4,076), unmarried straight men ($3,518), and unmarried bisexual men ($3,382).” Id. at 263. But if one combines the heterosexual married men (n=8,810) and heterosexual unmarried men (n=7,158) categories, one gets an average
of Sexual Orientation on Income: Evidence of Discrimination?, the authors found that lesbians, on average, earn more than 30% more than heterosexual women.\(^{52}\)

Why is that important? The data on lesbian earnings put the data on gay men’s earnings in an entirely different light. The Report asks us to take a leap of logic. It tries to suggest that if, once certain basic credentials are controlled for, heterosexual men earn more than gay men, then it must be because of discrimination against gay men. But if lesbians substantially out-earn heterosexual women after such rudimentary controls are put into place, there needs to be an explanation for why. If we are to assume adjusted wage disparities prove gay men are being discriminated against, employers discriminate against gay men, then why don’t we assume that employers are discriminating in favor of lesbians? The most logical explanation for all this is that the initial premise is wrong and that there is a lot more going on with these numbers than discrimination. Indeed, discrimination may not be playing any role at all.

The Report paraphrases Badgett et al. for its attempt at an explanation for why lesbians, in the Report’s language “do not earn less than heterosexual women”:

Badgett et al., argue that this does not imply the absence of employment discrimination. They argue that these findings suggest that since lesbians may not be constrained by the same gender expectations that result from being in relationships with men, they may make different decisions than heterosexual women (e.g. choosing to delay or not have children, invest more into training, go into male-dominated professions) which may hide effects of discrimination.

Report at 48.

Well, yes, of course. But the Report doesn’t seem to realize it has given away the store. Just as lesbians may make different career choices, so might gay men. They may choose a career in nursing instead of a career in mechanical engineering. They may choose not to work overtime in order to earn the money necessary to put a down payment on a five-bedroom house that will fit the children. They may choose to engage in a high-risk entrepreneurial activity—like opening a new restaurant—because they don’t expect to be having to support a family in the near future. Just as the fact that lesbians earn more than heterosexual women doesn’t eliminate the possibility that they have been discriminated against, the fact the gay men earn less (at least after rudimentary income for heterosexual men of $4,450, which is less than the income for gay men (although greater than the income for the two bisexual categories).

controls are used) doesn’t prove they have been discriminated against. There can be lots of other explanations.

If we want to understand the situation, we need to be looking at the different jobs that gay and heterosexual men are undertaking. There is certainly evidence gay men are disproportionately attracted to certain jobs. “Numerous scholars have noted the disproportionately high number of gay and lesbian workers in certain occupations” and that “common to both gay men and lesbians is a propensity to concentrate in occupations that provide task independence or require social perceptiveness, or both.”

We also need to be looking at differences in college major choice. It is not easy to come up with solid empirical data on the differences in college major choices between gay and heterosexual men. But there is lots of data about the differences in college major choices between women and men. For example, according to the American Enterprise Institute, electrical engineering majors (82% of whom are male) can expect to earn an average of $70,000 in their first 5 years of work. By contrast, psychology majors (only 23.3% of whom are male) can expect only $42,000. Given these differences, it would be surprising if gay and heterosexual men made precisely the same college major choices.

In addition, we need to know which households are rearing children. Who has primary responsibility for providing monetary support for children and who doesn’t? Who has primary responsibility for providing direct supervision for children?

The kind of information necessary to undertake such a study is hard to come by. But that is why President Eisenhower and the 85th Congress established the Commission in the first place—in order to conduct research on civil rights issues that otherwise might not get undertaken. Instead of conducting that research, the Commission chose to simply present other people’s research on income disparities without proper context.

Here is what John Blandford had to say on the subject in *The Nexus of Sexual Orientation and Gender in the Determination of Earnings* (a study that found both that gay/bisexual men are paid

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53 Andras Tilcsik, Michel Anteby, and Carly R. Knight, “Concealable Stigma and Occupational Segregation: Toward a Theory of Gay and Lesbian Occupations, 60 Administrative Science Quarterly 446 (2015), available at http://www.michelanteby.net/files/manteby/files/concealable_stigma.pdf. Although Tilcsik et al. argue that bias against gays does influence these preferences—e.g. people who are concerned about being discriminated against are more likely to prefer occupations where they are often able to work independently—the mechanism described in their study is more complex than simple “discrimination drives gays out of certain jobs.”


55 I am not aware of any claims that major choices of gay and heterosexual males are identical. But most of the discussions of the issue involve at least in part informal observations. See Manil Suri, Why Is Science So Straight?, N.Y. Times (September 4, 2015).
less than heterosexual men and that lesbian/bisexual women are paid more than heterosexual women):

The evidence described in this study strains the credibility of the argument that measured wage differentials between heterosexual workers and gay, lesbian, and bisexual workers are owing solely to workplace attitudes about homosexuality. Defending that explanation would require explaining how workplace attitudes could penalize non-heterosexual male workers while simultaneously awarding lesbian and bisexual female workers with a substantial premium. Certainly, workplace attitudes toward sexual orientation may have a gender component; that is, bias against homosexuality and bisexuality may be more strongly expressed against persons of one gender than of another. Nonetheless, it seems unlikely that the wage effects would differ in sign rather than merely in magnitude.

A more probable explanation for the disparate earnings effects of sexual orientation across genders may be found in treating workplace bias as but one orientation-related factor influencing earnings outcomes. Workplace bias that might negatively affect the wages of lesbian and bisexual women appears to be offset by other labor market factors. Most influential among these factors are subtle occupational clustering effects not adequately captured by the two-digit controls in this study or by the one-digit controls employed elsewhere (Badgett 1995). Case-level analysis of occupational patterns associated with sexual orientation points to trends that are both highly nuanced and gender-specific, suggesting that parameter estimates may over-estimate the direct effect of orientation on earnings. Lesbian and bisexual women are revealed to be unusually successful in gaining employment in largely male-dominated—and typically better-remunerated—occupational categories. For gay and bisexual men, in contrast, over-representation in female-identified occupations likely further depresses returns to human capital attributes relative to other male workers.  

There are further anomalies in the literature that should give pause those who would rush to judgment about the prevalence of discrimination. For example, among heterosexual males, married men, cohabiting men, and single men have been repeatedly shown to earn very different wages, with married men far outdistancing cohabiting men who in turn do better than single men. And this is true even when age (or years of work experience) and other factors are controlled for. Yet few argue that the differences are caused by discrimination.

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The premium for married men over single or co-habiting men is comparable to the gap between gay and heterosexual men. Yet no one has ever suggested that the reason is that employers are discriminating against co-habiting men or single men. The actual reasons are likely more complex. Among them we might find the following: (1) High-income men have an easier time finding women willing to marry them; (2) The same attributes that are conducive to success in creating and maintaining stable relationships at home are also conducive to success in one’s professional life and; (3) Men who have or plan to have children are more likely to seek out higher paying jobs and work long hours to support them rather than seek out the jobs they find most interesting or spend their extra time at leisure activities.

Finally, it is important to point out that the most recent empirical studies on income disparities between gay and heterosexual men have been turning out very different from the studies cited in the article that the Report cites for its conclusion that “on average gay men earn from 10 to 32 percent less than similarly qualified heterosexual males.” Indeed, the most recent empirical study of which I am aware—Does It Get Better?: Recent Estimates of Sexual Orientation and Earnings in the United States—comes to precisely the opposite conclusion: Gay men employed full time on average earn almost 10% more than comparable heterosexual men.  

The findings of that study—conducted by Christopher Carpenter and Samuel T. Eppink—are broadly consistent with some other recent research. For example, in The Disappearing Gay Income Penalty, Geoffrey Clarke and Purvi Sevak examined data from the National Health and Nutrition Examination Surveys (NHANES) from 1988 to 2007. They found that while men who reported same-sex sexual activity had lower household income than otherwise similar heterosexual men during the earlier part of the time frame they examined, by the end of that time frame the situation was reversed with the average gay man’s earnings topping those of similar heterosexual men. Similarly, Marieka Klawitter’s meta-analysis of all published studies on sexual orientation and earnings indicated that both the lesbian premium and gay male penalty were decreasing over time. 

One possible explanation for the disappearing wage penalty for gay men is that the stigma associated with being gay. As Carpenter & Eppink put it:

58 This finding was significant at 5%. Christopher S. Carpenter & Samuel T. Eppink, Does It Get Better?: Recent Estimates of Sexual Orientation and Earnings in the United States, 84 Southern Econ. J. 426, 432, tbl. 2 (2017). The authors were working with a database in which individuals had self-identified as either gay, bisexual, other sexual orientation, do not know sexual orientation, or heterosexual, had refused the sexual orientation question, or the sexual orientation information was missing from the data. They controlled for the month of the year in which the answers were given. They also controlled for age and its square, race, Hispanic ethnicity, level of educational attainment, relationship status, young children in the household, older children in the household, region of the country, number of years on the job and its square, firm size, and sector of employment. They also used 26 industry dummies and 26 occupation dummies.


Improved attitudes toward the lesbian, gay, bisexual, and transgender (LGBT) communities have been some of the most striking and rapid social changes in the United States in the past several decades. These improved attitudes are perhaps most evident in the well-documented shift in public attitudes regarding same-sex marriage: The proportion of adults in the United States who favored same-sex marriage increased from 35 to 55% from 2001 to 2016, the year after the U.S. Supreme Court granted nationwide legal access to same-sex marriage in *Obergefell v. Hodges* in 2015. And historical data from the General Social Survey suggest that these shifts in attitudes began in the early 1990s: while in 1991 fully 72% of adults considered homosexual behavior “always wrong,” the associated share reporting this view in 2010 fell to 44%. The share of adults saying homosexual behavior was “not wrong at all” increased over this same period from 14 to 41%.

Ultimately, however, Carpenter & Eppink express doubt that changing attitudes is what is behind their result. They point out that changing attitudes might be expected to decrease the “penalty” for gay men’s earnings, but it is not clear why it would produce a premium or why gay men would continue to have lower employment rates than heterosexual men. In addition, changing attitudes would be expected to help lesbians too (by increasing the premium they have over heterosexual women). Yet the findings in the article are instead that the premium has continued at pretty much the same level.

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61 Carpenter & Eppink at 426.
62 Carpenter & Eppink at 436.