Perceiving Orientation: Defining Sexuality After *Obergefell*

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In the aftermath of the Supreme Court's recent decision in Obergefell v. Hodges, constitutional jurisprudence will have to more clearly define sexual orientation itself. The Obergefell majority describes sexuality as binary and suggests that any sexual orientation is immutable, normal, and constitutive of individual identity. Other scholars have shown how the kind of binary created by Obergefell excludes those with more fluid sexual identities and experiences from legal protection.

This Article illuminates new problems with Obergefell's approach to sexuality by putting that definition in historical context. While describing sexuality as a matter of orientation may now seem inevitable, this Article shows that nothing could be further from the truth. In the 1970s, leading GLBTQ activists considered and rejected the language of sexual orientation. Instead, movement members battled for civil-rights laws banning discrimination on the basis of sexual or affectional preference.

The rhetoric of preference gained support for reasons that remain relevant to sexual-orientation jurisprudence today. Drawing on the history of debates about sexual orientation, this Article proposes a definition that protects individuals on the basis of actual or perceived sexual orientation. A perceived-orientation approach addresses problems mentioned in leading studies as well as those spotlighted by activists in over time. First, this strategy will make it harder for discriminators to separate conduct and status. This approach also protects those who do not fit within established heterosexual or homosexual categories, but does not depend for its success on the rejection of those entrenched binaries. Perhaps most importantly, a perceived-orientation approach promises relief to all victims of orientation-based stereotyping, not only to those who can prove their "true" status.

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INTRODUCTION

In the aftermath of the Supreme Court's recent decision in *Obergefell v. Hodges*,[1] the future of sexual-orientation jurisprudence seems open.[2] As the courts come closer to outlawing sexual-orientation discrimination, constitutional jurisprudence will have to more clearly define sexual orientation itself. The *Obergefell* majority describes sexuality as binary and suggests that sexual orientation is immutable, normal, and constitutive of individual identity.[3] As scholars from Kenji Yoshino to Elizabeth Glazer have shown, the kind of binary definition of sexuality articulated by *Obergefell* promises to exclude those with more fluid sexual identities and experiences.[4]

This Article illuminates new problems with *Obergefell*'s approach to sexuality by putting that definition in historical context. While describing sexuality as a matter of orientation may now seem inevitable, this Article shows that nothing could be further from the truth. In the 1970s, leading GLBTQ activists considered and rejected the language of sexual orientation.[5] Instead, movement members battled for civil-rights laws banning discrimination on the basis of sexual or affectional preference.[6]

The rhetoric of preference gained support for reasons that remain relevant to sexual-orientation jurisprudence today. Activists in the 1970s worried that orientation-based categories left open the door for conduct, rather than status--

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. On the future of sexual-orientation discrimination litigation after *Obergefell*, see Timothy M. Phelps, *Next frontier for gays is employment and housing discrimination*, L.A. TIMES (June 26, 2015, 7:23 AM), http://www.latimes.com/nation/la-na-gays-employment-20150626-story.html; Lydia DePillis, *This Is the Next Front in the Battle for Gay Rights*, WASH. POST: WONKBLOG (June 26, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/26/this-is-the-next-frontier-in-the-battle-for-gay-rights/.

3. *See* Obergefell, 135 S. Ct. at 2596 (describing "sexual orientation [as] both a normal expression of human sexuality and immutable"). Part III *infra* further discusses *Obergefell*'s definition of sexuality.

4. *See, e.g.*, Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 998–1026 (2012); Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 STAN. L. REV. 353 (2000); RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 15–38 (1996) [hereinafter COLKER, HYBRID] (introducing a perspective that "reject[s] conventional bipolar categories in the areas of gender, race, and disability . . . "); Ruth Colker, Bi: Race, Sexual Orientation, Gender, and Disability, 56 OHIO ST. L.J. 1, 1–3 (1995) [hereinafter Colker, *Bi*]; Naomi Mezey, Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts, 10 BERKELEY WOMEN'S L.J. 98, 100–03 (1995).

5. *See infra* Part I.

6. *See infra* Part I.

based, discrimination.[7] Laws protecting individuals on the basis of status did nothing to address cases involving either false positives—individuals wrongly believed to be gay or punished for gender nonconformity—or false negatives—individuals who could not prove that a discriminator knew about their orientation.[8] Orientation-based categories also threatened to leave out people who did not fit into the rigid categories defined by law.[9]

Movement leaders ultimately embraced the orientation-based approach that is familiar to us because of new legal and political challenges. Confronting an energetic Religious Right and the AIDS epidemic, movement leaders in the 1980s recognized underappreciated costs associated with describing sexuality as a choice.[10] At a time when many did not accept anything but heterosexuality as legitimate, describing sexuality as a choice undermined early calls for antidiscrimination protections and the repeal of sodomy bans.[11]

Drawing on the history of debates about sexual orientation, this Article proposes a definition that protects individuals on the basis of actual or perceived sexual orientation—one that focuses not only on "true" orientation but on what a discriminator believes an individual to be. This strategy draws on disability jurisprudence under the Americans with Disabilities Act (ADA), which prohibits discrimination against those regarded as disabled.[12] In a variety of doctrinal areas, including Title VII employment discrimination and equal-protection, a perceived-orientation approach would address some of the problems tackled by existing studies. First, orientation-based approaches do not explicitly address discrimination on the basis of conduct. A photographer refusing to cover a same-sex ceremony could claim not to be discriminating on the basis of sexual orientation (orientation-based discrimination) but rather expressing discomfort with a same-sex couples' decision to marry (conduct-based discrimination). However, conduct troubles discriminators partly because of what they believe it implies about the victim's status. An approach that recognizes the relationship between conduct and perceived orientation will make it harder for discriminators to separate conduct and status.

A perceived-orientation approach also promises a unique degree of protection to those who do not adhere strictly to the gay-straight binary. To protect these individuals, other scholars propose antidiscrimination laws that focus on conduct or that add new categories to cover anyone who falls somewhere between the gay-straight binary.[13] A perceived-orientation strategy

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7. *See infra* Part I.

8. *See infra* Part I.

9. *See infra* Part II.

10. *See infra* Part II.

11. *See infra* Part II.

12. On regarded-as theories, see, for example, John M. Vande Walle, Comment, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 897–905 (1998); Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993 (2010); Sarah J. Parrot, *The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?*, 67 OHIO ST. L.J. 1495, 1495–532 (2006).

13. *See, e.g.*, Glazer, *supra* note 4, at 998–1026; Yoshino, *supra* note 4, at 353–80; COLKER, HYBRID, *supra* note 4, at 15–38.

may work better than these alternatives. In simply creating new orientation categories, the law almost inevitably replicates the problem created by the gay-straight binary, leaving out those who do not clearly belong to any of the existing categories. However, it would be hard to convince courts to reject categories altogether, particularly given the resonance of a gay-straight binary. A perceived-orientation strategy avoids both of these problems.

Finally, a perceived-orientation approach addresses the harms tied to sexual-orientation stereotyping. Strategies focused on "true" conduct or identity neglect victims targeted for acting queer or violating expected gender norms. By addressing orientation stereotyping, laws reaching perceived orientation would offer more robust protection. Moreover, such an approach recognizes that stigmatizing outsider communities damages not just GLBTQ Americans but also anyone whose conduct defies standard expectations about sex, gender, and sexuality.

The argument for a perceived-identity approach proceeds in four parts. Part I begins tracing the history of debates about the framing of sexuality. This Part explores the problems activists working in the 1970s identified with the language of sexual orientation. Part II examines the reasons for the decline of the language of "sexual or affectional preference." Part III uses this history to analyze the definitions of sexuality at work in the *Obergefell* majority, as well as in the dissents of Chief Justice Roberts and Justice Scalia. Part IV evaluates *Obergefell*'s definition of sexuality against leading scholarly proposals redefining sexuality. This Part proposes a perception-based alternative, and Part V concludes.

I. PREFERENCE OR ORIENTATION: THE HISTORY OF FRAMING SEXUALITY

After the 1969 Stonewall riots, the early GLBTQ movement began developing a reform agenda.[14] Members of some organizations, like the Gay Liberation Front (GLF), urged their colleagues to fight for revolution alongside other New Left groups, including those advocating for Black Power and women's rights.[15] Other groups, like the Gay Activists Alliance (GAA), the Gay Rights National Lobby (GRNL), and the National Gay Task Force (later the National Gay and Lesbian Task Force/NGLTF), prioritized a pragmatic, law-reform agenda.[16]

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14. On the history of the early movement, see, for example, ELIZABETH A. ARMSTRONG, FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950-1994, 70–100 (2002); DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 222–42 (2010); DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 50–62, 83–84 (1999).

15. For an example of GLF's involvement with other New Left groups, see Will Lissner, *New Left Groups in Session Here*, N.Y. TIMES, July. 19, 1970, at 33. For more on the connection between GLF and the New Left, see JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 233 (2d ed., 1998); ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 32–33 (2015).

16. On the early history of GAA, see, for example, CLENDINEN & NAGOURNEY, *supra* note 14, at 50–74; CHRISTINA B. HANHARDT, SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE 89–90, 121–22 (2013). On the early history of GRNL, see, for example, TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 48 (2008); CLENDINEN & NAGOURNEY, *supra* note 14, at 263–79. On the early history of NGLTF, see, for example, MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 28–32 (2012); CLENDINEN & NAGOURNEY, *supra* note 14, at 196–98.

Both movement radicals and reformers fought about how best to describe sexuality to an often-hostile public. GLF members contended, as member Allen Young put it, that "[g]ay . . . means not homosexual, but sexually free."[17] By 1969, former GLF members started the GAA as a splinter group that would prioritize antidiscrimination protections for gays and lesbians over a broad New Left agenda.[18] Notwithstanding its more pragmatic stance, GAA also presented sexuality partly as a matter of choice.[19] Members described a right to sexual freedom that would protect gays and lesbians: individuals' "right to control [. . .] [their] bodies," "to make love with anyone, anytime, anyway, provided only that such action be freely chosen."[20]

A. The Fight for the Nation's First Civil Rights Ordinance Sparks Debate

By 1971, when GAA leaders first campaigned for an antidiscrimination ordinance in New York City, debate about the proposed law forced members to more clearly explain sexuality to voters and politicians.[21] As the GAA stated in a press release, the proposal, Int. No. 475, "would amend the omnibus Human Rights Law of New York City by adding the words 'sexual orientation' to all parts of the law which currently outlaw discrimination on the basis of 'race, color, creed, national origin, ancestry, or physical handicap.'"[22] The proposal did not entirely abandon the idea that sexuality was freely chosen.[23] Indeed, Int. No. 475 defined sexual orientation as "the choice of sexual partner according to gender."[24]

The GAA and its allies on the city council first focused on what seemed to be the easy issues. Supportive city council members argued that gays and lesbians already held positions all over the city.[25] The threat of discrimination only made them vulnerable to blackmail.[26] Soon, however, the bill stalled, and GAA members had to reconsider the definition of sexual orientation.[27] Over time, it became clear that supporters of the bill seemed unwilling to protect either

17. Allen Young, *Out of the Closets, Into the Streets*, *in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 28 (Karla Jay & Allen Young eds., 1992).

18. On the founding of GAA, see, for example, ARMSTRONG, *supra* note 14, at 87; MARC STEIN, RETHINKING THE GAY AND LESBIAN MOVEMENT 100–10 (2012); SIMON HALL, AMERICAN PATRIOTISM, AMERICAN PROTEST: SOCIAL MOVEMENTS SINCE THE SIXTIES 40 (2011).

19. *See Preamble to the Constitution and Bylaws of Gay Activists Alliance, Inc. (1971), in* SPEAKING FOR OUR LIVES: HISTORIC SPEECHES AND RHETORIC FOR GAY AND LESBIAN RIGHTS (1892-2000) 148–50 (Robert B. Ridinger ed., 2012).

20. *Id.*

21. On the push for the civil-rights law in 1971, see, for example, FETNER, *supra* note 16, at 36; HALL, *supra* note 18, at 44; ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S 236–40 (2013).

22. Pamphlet, Gay Activists Alliance, Civil Rights for Homosexuals (1971) (on file with author and in the Columbia University Rare Book & Manuscript Library).

23. Council Int. No. 475 (N.Y.C. 1971) (on file with author and the Columbia University Rare Book & Manuscript Library).

24. *Id.*

25. *See, e.g.*, Eleanor Blau, *Repeal of Laws on Sex Is Urged Here*, N.Y. TIMES, Jan. 8, 1971, at 29.

26. *See, e.g.*, *id.*

27. On the stalling of the bill, see, for example, Edward Ranzal, *Homosexuals Bill Protecting Rights Is Killed by Council*, N.Y. TIMES, Jan. 28, 1972, at 1.

public expressions of affection between gay and lesbian couples or gender nonconformity. Even sympathetic lawmakers seemed reluctant to protect "transvestites"—defined as those cross-dressing in public—particularly in situations in which they would interact with minors.[28] In 1971, while debate about the civil-rights ordinance continued, New York removed a ban prohibiting gays and lesbians from working or congregating in cabarets.[29] However, the bill retained a ban on any "transvestites" entering a cabaret for teenagers.[30]

As the next several years would make clear, legislators' persistent discomfort with "transsexuals" would raise hard questions about the language of sexual orientation. In January 1972, a committee killed the civil-rights bill, shocking GAA leaders.[31] Some in the legislature blamed the defeat on disgust with the conduct of those who were openly gay. One lawmaker explained: "Those who were undecided found [activists'] behavior generally repugnant in flaunting their gay liberation instead of stressing their civil rights."[32] While some supporters of the bill favored protection for those with a private, hidden orientation, they could not stomach the equality demands of those who were open and unapologetic.

Concern about the distinction between conduct and orientation raged on. In 1972, when New York City Mayor John Lindsay acted to ban discrimination against GLBTQ workers in the civil service, he outlawed discrimination only on the basis of "private sexual orientation."[33] In 1973, when several state bar associations came out in favor of the bill, lawyers leading the groups insisted that many gays and lesbians did nothing in public that would offend anyone.[34] As bar-association representatives explained: "Much of the resistance to legislation prohibiting discrimination against homosexuals stems from the belief that all homosexuals behave in a stereotype[d] fashion which is often identified with eccentric dress and conduct."[35] Protection against sexual orientation discrimination seemed likely to do little for gender nonconforming New Yorkers, GLBTQ radicals, and others whose conduct still offended even those supporting a civil-rights ordinance.

The conduct-status distinction again took center stage when the civil rights law finally made it out of committee. "Soberly dressed" proponents of the bill focused on fairly abstract issues of equality.[36] When opponents charged that the bill would put gays and lesbians in the city's police force, fire department, and schools, proponents responded that gay teachers could do nothing to change

28. For examples of the later fixation on "transsexuals," see, for example, Alfonso A. Narvaez, *City Acts to Let Homosexuals Meet and Work in Cabarets*, N.Y. TIMES, Oct. 12, 1972, at 35 (referring to them as "transvestites"); Edward Ranzal, *Bar Groups Back Homosexual Bill*, N.Y. TIMES, Feb. 11, 1973, at 62 [hereinafter Ranzal, *Bar Groups*]; Edward Ranzal, *Homosexual Bill Gains in Council*, N.Y. TIMES, Apr. 19, 1974, at 1 (referring to transsexuals as "transvestites").

29. *See, e.g.*, Narvaez, *supra* note 28, at 35.

30. *See, e.g.*, *id.*

31. *See, e.g.*, Ranzal, *supra* note 27.

32. *Id.*

33. *New City Directive Bars Hiring Bias on Homosexuals*, N.Y. TIMES, Feb. 8, 1972, at 35.

34. *See* Ranzal, *Bar Groups*, *supra* note 28, at 62.

35. *Id.*

36. Maurice Carroll, *City Council's Bill on Homosexual Rights*, N.Y. TIMES, May 5, 1974, at L70.

sexual orientation.[37] Marc Rubin, an openly gay teacher, asserted: "Most authorities feel sexual orientation is imprinted by 3 years old and it is so deep that it is simply not touched by the school."[38]

Nevertheless, opponents used the distinction between private orientation and public conduct to defeat the bill. Whereas GLBTQ activists presented Intro 475 as a modest civil-rights measure, Catholic leaders opposed to the bill argued that it would legitimize not only private sexual orientation but also public gay conduct.[39] *Catholic News*, the mouthpiece of the state Catholic conference, charged that the bill would be "interpreted by many as public license to uninhibited manifestations of sexual preference."[40] The New York debate helped to establish orientation as shorthand for private status. While legislators might support protection for something that a person could not change, opponents of the bills insisted that the law should leave discrimination on the basis of conduct untouched.[41]

When the New York bill failed again, activists across the country considered alternative definitions of sexuality. Early in 1973, one particularly influential effort unfolded in Minneapolis-St. Paul.[42] Twenty prominent activists met with sympathetic mental health professionals and attorneys to develop a model civil-rights ordinance.[43] Some of those present "felt that words like 'homosexual' or 'sexual orientation' ought to be used" because "'everybody [knew] what they mean[t].'"[44] Others worried that an orientation-based approach would inevitably leave many without protection.[45] As one attendee explained: "Gay people get hassled not for what they do in bed, but for publicly expressing their affection—holding hands, dancingor even for projecting an image which society does not usually associate with 'masculine' or 'feminine' roles."[46]

Ultimately, the attendees settled on a definition first proposed by clinical psychologist Gary Schoener who favored the language of "affectional or sexual preference."[47] Schoener argued that the language of sexual orientation wrongly suggested "that you can be put into one box based on your behavior."[48] While sexual orientation implied that relationships and identities were "static," Schoener favored a definition that recognized the fluidity of relationships.[49] Attendees also approved of the language of sexual or affectional preference because it dignified the relationships of GLBTQ couples and highlighted the non-

37. *See, e.g.*, Gene I. Maeroff, *Homosexuals Declare Right to Teach*, N.Y. TIMES, May 20, 1974, at 63.

38. *Id.*

39. *See, e.g.*, *id.*; *see also* Maurice Carroll, *Homosexual Bill Protest Draws Small Crowd Here*, N.Y. TIMES, May 1, 1974, at 49.

40. Carroll, *supra* note 36, at L70.

41. *See, e.g.*, *id.*

42. *See, e.g.*, Mailgram from Jack Baker, Chair Person, and Tom Higgins, President, The Gay Imperitive Inc. to Bella Abzug, U.S. Congresswoman (Sept. 26, 1974) [hereinafter Mailgram from Baker & Higgins] (on file with author and the Columbia University Rare Book & Manuscript Library).

43. *See id.* at 1.

44. *Id.*

45. *See id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

sexual dimensions of those relationships.[50]

Minnesota activists used the language of sexual or affectional preference in two radical ways. First, local advocates used preference language to mount the first major legal demand for marriage equality.[51] In a pamphlet called *A New Face for Love*, Minnesota activists spotlighted committed same-sex marriage and demanded constitutional access to marriage.[52] Jack Baker, a Minnesota attorney, later took the argument for marriage equality to court.[53] Although the Minnesota Supreme Court rejected Baker's argument in *Baker v. Nelson* and the U.S. Supreme Court dismissed Baker's appeal for "want of a substantial federal question," the Minnesota approach played a central role in efforts to dignify committed same-sex relationships.[54]

The Minnesota strategy also explicitly recognized the fluidity of sexuality. "We all develop a certain capacity for caring for women and men—therefore, we all possess some degree of Gayness and Straightness," *A New Face for Love* argued.[55] "[T]hese two attributes do exist simultaneously."[56] The pamphlet argued that a preference-based approach would both recognize the fluidity of sexual attraction and require tolerance for public conduct.[57] "The right to live as we desire includes the right to love out loud—we will no longer accept mistreatment for loving other people," *A New Face for Love* explained.[58] "The law must not sanction discrimination against any person on the basis of 'affectional or sexual preference.'"[59]

After prevailing in the Twin Cities, GLBTQ activists successfully pushed for city-level referenda in over nine other cities.[60] Some cities, like Detroit, developed laws focused on sexual orientation.[61] Other cities used sexual preference as an alternative framework.[62]

With two models on offer, activists debated whether orientation and preference could be used interchangeably and whether one better served the movement's goals. At the national level, the orientation-versus-preference debate defined the work of NGLTF, a group that worked heavily on civil-rights legislation. The issue of defining sexuality first came to the NGLTF's attention in 1973, when the American Psychiatric Association ("APA") voted to no longer

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50. *See id*.

51. *See, e.g.*, *id.* at 1–3; *see also* Memorandum, *A New Face for Love* 1–3 (c. 1972) [hereinafter *A New Face for Love*] (on file with author and in the Columbia University Rare Book and Manuscript Library).

52. On Baker's suit, see, for example, CLENDINEN & NAGOURNEY, *supra* note 14, at 56–57, 71–74; KLARMAN, *supra* note 16, at 18–19.

53. *See supra* note 52 and accompanying text.

54. For the Minnesota Supreme Court's decision, see Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). For the Supreme Court's appeal dismissal, see Baker v. Nelson, 409 U.S. 810 (1972).

55. *A New Face for Love*, *supra* note 51, at 2.

56. *Id*. at 2.

57. *See, e.g.*, *id.*

58. *Id*. at 3.

59. *Id.*

60. *See, e.g.*, Judith Cummings, *Homosexual-Rights Laws Show Progress in Some Cities, but Drive Arouses Considerable Opposition*, N.Y. TIMES, May 13, 1974, at 17.

61. *See, e.g.*, *id.*

62. *See, e.g.*, *id.*

treat homosexuality as a mental illness.[63] NGTF hailed the step as "the greatest gay victory," stating that "[t]he diagnosis of homosexuality as an illness has been the cornerstone of oppression of a tenth of our population."[64]

However, in the wake of the APA action, NGLTF members realized that simply opposing the mental-illness label would not be enough. If homosexuality was not a sickness, then what was it? Fights about this question had already begun in the psychiatric community. Therapists generally agreed that having a gay or lesbian orientation was at least sometimes "dysfunction[al]" but reached consensus on very little else.[65] Led by researchers like Dr. Irving Bieber, an influential school of experts no longer categorized homosexuality as a mental illness, but argued that those unhappy with their sexual orientation could easily change it through therapy.[66] In the early 1970s, even the generally sympathetic *New York Times* reported that 25 to 50 percent of gays and lesbians could become straight with proper treatment.[67]

Other psychiatrists responded not only that sexual orientation was resistant to change but also that gays and lesbians had no reason to pursue a transformation.[68] These experts argued that at least some gays and lesbians were healthy and well-adjusted.[69] The outcome of this debate was far from clear. A *New York Times* headline captured this ambiguity: *What We Don't Know About Homosexuality; If it Isn't an Illness, What Is It?*[70]

B. Movement Leaders Argue the Virtues of "Affectional or Sexual Preference"

Initially, members of NGTLF disagreed about how best to answer that question. Believing that sexuality could not be changed, most of the organization's male leaders favored the rhetoric of orientation.[71] Women in NGLTF argued that preference language was more affirming, legitimizing the very conduct that New York legislators had found unacceptable.[72] Ultimately, leaders of the group decided that preference language better served the movement's goals for several reasons.[73]

First, the language of preference seemed to make a cleaner break with

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63. On the APA's new position, see, for example, Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES, Dec. 16, 1973, at 1; Peter Kihss, *8 Psychiatrists Are Seeking New Vote on Homosexuality as Mental Illness*, N.Y. TIMES, May 26, 1974, at 39.

64. Lyons, *supra* note 63, at 25.

65. *See, e.g.*, Robert E. Could, *What we don't know about homosexuality; If it isn't an illness, what is it?*, N.Y. TIMES, Feb. 24, 1973, at 213.

66. For discussion of Bieber's work, see, for example, *id.* and Jane E. Brody, *More Homosexuals Aided to Become Heterosexual*, N.Y. TIMES, Feb. 28, 1971, at 1, 47. For a sample of Bieber's work, see IRVING BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS (1962).

67. *See* Brody, *supra* note 66, at 1.

68. For a summary of the work of those holding this view, see, for example, Could, *supra* note 65.

69. *See, e.g.*, *id.*

70. *Id.*

71. *See, e.g.*, CLENDINEN & NAGOURNEY, *supra* note 14, at 265–66; *see also* HEATHER MURRAY, NOT IN THIS FAMILY: GAYS AND THE MEANING OF KINSHIP IN POSTWAR NORTH AMERICA 64–65, 81–82, 107–19, 179 (2012).

72. *See, e.g.*, CLENDINEN & NAGOURNEY, *supra* note 14, at 265–66.

73. *See, e.g.*, *id.*

arguments about dysfunction and mental illness still circulating in the psychiatric community. Avoiding stigma mattered particularly to lesbian feminists, many of whom had long used the language of sexual preference to fend off attacks by other members of the women's liberation movement.[74] In the early 1970s, when the National Organization for Women (NOW) first considered the issue of lesbian rights, veteran feminists like Betty Friedan opposed the idea.[75] Friedan and her allies argued that the idea of lesbian rights would be used to discredit the entire women's movement.[76]

Feminists like Robin Morgan and Gloria Steinem responded that lesbian rights were central to all women's liberation insofar as lesbians rejected the phallocentric, male-dominated hierarchy that had subordinated women.[77] Using the language of preference allowed advocates like Morgan to present same-sex attraction as a legitimate, if not superior, alternative.[78] As late as 1980, NOW defined lesbians as women who had a "primary psychological, emotional, social, and sexual preference for other women."[79] As lesbian feminists recognized, presenting sexuality as a matter of choice more directly challenged the stigma surrounding gay and lesbian sex. Rather than avoiding any discussion of the desirability of gay and lesbian relationships, the rhetoric of preference suggested that Americans could reasonably—and beneficially—choose same-sex relationships.

Moreover, movement leaders believed that preference language promised broader protection than did the rhetoric of orientation. As the New York experience indicated, some lawmakers facing orientation bans still claimed the authority to discriminate on the basis of conduct.[80] In other cities, the conduct-orientation distinction posed a similar risk. In Ann Arbor, Michigan, when prosecutors pursued a lesbian couple observed dancing at a night club, local prosecutors denied that they discriminated on the basis of sexual orientation.[81] Assistant District Attorney Edward Pear explained: "It was our feeling that it was their conduct that was unacceptable."[82]

Sometimes, movement leaders also hoped that sexual-preference laws would protect those targeted because of gender non-conformity.[83] In 1974, when

74. On lesbian feminists' use of the language of sexual preference, see, for example, MURRAY, *supra* note 71, at 81–82; WINIFRED BREINES, THE TROUBLE BETWEEN US: AN UNEASY HISTORY OF WHITE AND BLACK WOMEN IN THE FEMINIST MOVEMENT 104–105 (2006). For contemporary uses, see Judy Klemesrud, *The Lesbian Issue and Women's Lib*, N.Y. TIMES, Dec. 18, 1970, at 60; Robin Morgan, *The Media and Male Chauvinism*, N.Y. TIMES, Dec. 22, 1970, at 33.

75. On the history of anti-lesbian rhetoric in NOW, see, for example, KARLA JAY, TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION 137–47 (2000); NANCY F. COTT, NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 561 (2004); SARA EVANS, TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY'S END 51–52, 102, 122 (2010).

76. *See, e.g.*, *id.* at 51–52; COTT, *supra* note 75.

77. *See, e.g.*, MURRAY, *supra* note 71, at 81–82.

78. *See, e.g.*, *id.*

79. Pamphlet, Boston National Organization for Women, "Lesbians: A Consciousness-Raising Perspective" (1980) (on file with the author).

80. *See supra* Part I.

81. *See, e.g.*, Cummings, *supra* note 60, at 17.

82. *Id.*

83. *See, e.g.*, Madeleine Janover, *Colorado Women*, OFF OUR BACKS, May 31, 1974, at 12.

Boulder, Colorado, considered a civil-rights ordinance, a sociologist testifying in favor of the measure implied that the reform would help anyone targeted on the basis of orientation-based stereotyping.[84]

NGLTF leaders promoted city ordinances as a way of building support for an amendment to the federal Civil Rights Act of 1964 that would protect gays and lesbians.[85] In 1974, Representative Bella Abzug (D-NY) introduced a bill amending Title VII to protect against discrimination on the basis of sex, sexual orientation, or marital status.[86] Minnesota activists urged Abzug to change the bill to cover "sexual or affectional preference."[87] Jack Baker contacted Abzug and argued strongly for a preference-based approach, explaining: "The way [that the] media interprets legal semantics eventually shapes public attitude[s] and can go far in showing that gayness implies much more than sexual conduct."[88] "Please amend your bill to recognize that physical intimacy is only one albeit important part of human affections," argued Michael McConnell, another Minnesota advocate.[89] "Holding hands and other public expressions of [a]ffection costs more jobs than private sexual behavior."[90]

NGLTF leader Bruce Voeller travelled to Washington, DC to ask Abzug to change the bill's language.[91] Voeller "very strong[ly]" urged Abzug to frame sexuality as a matter of "affectional [or sexual] preference."[92] In explaining his reasoning, he emphasized that sexual-orientation protections left some without protection.[93] He cited a case from Minneapolis-St. Paul in which police officers had harassed a couple for holding hands.[94] Because these men were targeted because of their conduct, Voeller argued, "under the phrase 'sexual orientation' it would not be clear that they would be protected from harassment."[95] The bill failed to make it out of committee, but Voeller and NGLTF asked that it be reintroduced in December.[96] This time, the bill focused exclusively on sexual-preference discrimination, but it fared no better in Congress.[97]

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84. *See, e.g.*, *id.*

85. *See, e.g.*, Cummings, *supra* note 60, at 17.

86. *See, e.g.*, HANHARDT, *supra* note 16, at 165; SUSAN GLUCK MEZEY, QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY 215 (2007); JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 319 (2009).

87. *See, e.g.*, Mailgram from Baker & Higgins, *supra* note 42; Mailgram from Michael McConnell to Bella Abzug, U.S. Congresswoman (Sep. 26, 1974) [hereinafter Mailgram from McConnell] (on file with author and the Columbia University Rare Book and Manuscript Library).

88. Mailgram from Baker & Higgins, *supra* note 42.

89. Mailgram from McConnell, *supra* note 87.

90. *Id.*

91. *See, e.g.*, Memorandum from Marilyn to Bella Abzug, U.S. Congresswoman (Sep. 24, 1974) (on file with author and the Columbia University Rare Book and Manuscript Library) [hereinafter Memorandum from Marilyn]..

92. *Id. See also* Memorandum from Jay to Bella Abzug, U.S. Congresswoman (Dec. 4, 1974) (on file with author and the Columbia University Rare Book and Manuscript Library).

93. *See* Memorandum from Marilyn, *supra* note 91, at 1–2.

94. *See, e.g.*, *id.*

95. *Id.*

96. *See* Memorandum, *supra* note 92, at 1–2.

97. On Abzug's reframing of the bill, see, for example, Letter from Bella Abzug, U.S. Congresswoman, to Stephen L. Rosenquist, Instructor in Classics, Sw. Mo. State Univ. (Feb. 6, 1975) (on file with author and the Columbia University Rare Book and Manuscript Library) (describing a

In spite of these setbacks, NGLTF continued describing sexuality as a matter of preference. In 1975, when the group invested more in litigation, a preference-based strategy seemed to fit better with the substantive due process arguments stressed in court.[98] Shortly after the *Roe v. Wade* decision, Bruce Voeller and gay-rights attorneys met privately with Supreme Court Justice William O. Douglas.[99] *Roe* and its companion case, *Doe v. Bolton*, invalidated the vast majority of abortion laws on the books, recognizing a right to privacy broad enough to cover a woman's abortion decision.[100] Activists took heart from *Roe*, and Douglas predicted that NGLTF could successfully challenge sodomy bans in the Supreme Court.[101] NGLTF members soon took him up on the idea.[102] In *Doe v. Commonwealth's Attorney*, NGLTF worked with ACLU board member Philip Hirschkop, a prominent attorney known for his work on *Loving v. Virginia*,[103] to organize a class action challenging Virginia's sodomy ban, and Voeller's lover served as one of the plaintiffs.[104] On appeal, Hirschkop focused on arguments that the right to privacy recognized in *Roe* and its progeny protected the sexual behavior of consenting adults.[105] At the same time, Marilyn Haft of the ACLU Sexual Privacy Project litigated her own challenge to sodomy bans in *Enslin v. North Carolina*.[106]

Although they lost in the lower courts, Hirschkop convinced one judge that the privacy right recognized in *Roe* extended to a "mature individual's choice of an adult sexual partner."[107] When Hirschkop appealed, Haft also asked the Court to grant certiorari in *Enslin*, and NGTF filed an amicus curiae brief.[108] However, the Court refused to hear *Enslin* and affirmed the lower court's decision in *Doe* without issuing an opinion.[109] NGLTF immediately issued a press release condemning the Court for "its insensitivity to the right to privacy of all Americans."[110]

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preference-based bill as a "more effective mechanism" for protecting gay rights). On the failure of Abzug's bill, see, for example, SEAN CAHILL & SARAH TOBIAS, POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILIES 45 (2007); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 131 (2009).

98. *See supra* Part I.

99. *See, e.g.*, JASON PIERCESON, COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANDADA 71–72 (2005).

100. Roe v. Wade, 410 U.S. 113, 150-51 (1973); Doe v. Bolton 410 U.S. 179 (1973).

101. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 105 (2009).

102. *See, e.g.*, PIERCESON, *supra* note 99, at 71–72.

103. Loving v. Virginia, 388 U.S. 1 (1967). *Loving* struck down anti-miscegenation laws. *See id.*

104. *See, e.g.*, PIERCESON, *supra* note 99.

105. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003 185–86 (2008); LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY ix (2012).

106. 217 S.E. 2d 669 (N.C. 1975). On the litigation of *Enslin*, see, for example, ESKRIDGE, *supra* note 105, at 187–90.

107. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203–05 (E.D. Va. 1975) (Mehrige J., dissenting).

108. *See, e.g.*, ESKRIDGE, *supra* note 105, at 185–86.

109. For the Court's decision, see Doe v. Commonwealth's Attorney for Richmond, 425 U.S. 985 (1976). The Court denied certiorari in *Enslin*. *See* Enslin v. North Carolina, 425 U.S. 903 (1976).

110. Robert D. McFadden, *Homosexuals and A.C.L.U. Dismayed by Court Ruling*, N.Y. TIMES, Mar. 30, 1976, at 17.

Hoping for backlash to the Court's ruling, Voeller and his co-director Jean O'Leary attacked *Doe* in the *New York Times*.[111] They argued that by not protecting private sexual preferences, the Court threatened both straight and gay Americans.[112] They asserted that previously, "the right to one's own body and the right to the privacy of one's own home have been vigorously protected by the Court."[113] According to Voeller and O'Leary, *Doe* "compromise[d] the Court's earlier [privacy] decisions and should raise great fears."[114]

As the press release indicated, sexual-preference arguments continued to figure in NGLTF's efforts to build allies outside of the GLBTQ community. O'Leary used similar reasoning in endorsing the decriminalization of prostitution.[115] "When you talk about sex preference," she explained, "you must include all women, prostitutes or lesbians."[116] NGLTF also presented sexuality as a matter of preference in 1976 when lobbying the Democratic Party for support.[117] "Millions of women and men in this country are subject to severe social, economic, psychological, and legal oppression because of their sexual preference," the platform proposal stated.[118] "We affirm the right of all persons to define and express their own sensibility, emotionality, and sexuality and choose their own lifestyle, so long as they do not infringe upon the rights of others."[119] In 1977, when Representative Ed Koch (D-NY) again introduced a gay-rights amendment to Title VII, activists in the NGLTF and an allied organization, the Gay Rights National Lobby (GRNL), continued to depend on the language of "affectional or sexual preference."[120]

For much of the 1970s, leading GLBTQ reformers defined sexuality as a matter of preference rather than orientation. After some dispute, the leaders of state and national organizations promoted statutes that used a similar definition. Using the language of preference appealed to lesbians actively combatting the stigma surrounding same-sex attraction. As NGLTF members concluded, the rhetoric of preference seemed to offer more protection, because when cities prohibited sexual-orientation discrimination, public and private actors claimed the right to target GLBTQ individuals because of conduct or gender non-conformity.

In the later 1970s, however, leaders of groups like NGLTF began to question the wisdom of a preference-based definition. After the mobilization of the

111. *See* Jean O'Leary and Bruce Voeller, *Implications of the Supreme Court Decision on Sodomy*, N.Y. TIMES, May 15, 1976, at 20.

112. *See id.*

113. *Id.*

114. *Id.*

115. *See, e.g.*, *Lesbians Offer Support for Hookers*, THE CHILDRESS INDEX, Nov. 22, 1976, at 5.

116. *Id.*

117. *See* National Gay Task Force Recommendations for the 1976 Democratic Party Platform (1976) [hereinafter National Gay Task Force Recommendations] (on file with author and the Columbia University Rare Book and Manuscript Library); *see also* Bruce Voeller, Exec. Dir., National Gay Task Force, to Bella Abzug, U.S. Congresswoman (May 3, 1976) (on file with author and the Columbia University Rare Book and Manuscript Library).

118. National Gay Task Force Recommendations, *supra* note 117, at 1.

119. *Id.*

120. *See, e.g.*, Joe Totten to GRNL Board, Status of Gay Rights Legislation (Dec. 9, 1977) (on file with author and the Cornell University Library).

Religious Right,[121] a loose coalition of organizations angry about recent legal and cultural changes involving gender roles, school prayer, and abortion, social conservatives coopted arguments that sexuality was a choice. In campaigning to defeat or repeal local civil-rights ordinances, activists argued that gays and lesbians needed behavior modification, not protection from discrimination. At the same time, anti-gay activists exploited arguments about the fluidity of sexuality. While repeating arguments conflating pedophilia and homosexuality, Religious Right leaders also insinuated that children close to gays and lesbians would change their sexual orientation.

Facing a new challenge from the Right, activists in groups like NGLTF reconsidered the value of defining sexuality as a matter of choice. Over the course of the late 1970s, activists again began describing sexuality in terms of orientation.

II. BACKLASH AND THE RISE OF AN ORIENTATION-BASED FRAMEWORK

Religious Right leaders began exploiting preference-based definitions after a setback in Miami in 1977.[122] After local leaders passed a civil-rights ordinance, Anita Bryant, a former beauty queen and gospel recording artist, founded a group dedicated to repealing the ordinance.[123] Calling her group Save Our Children, Bryant implied that predatory gay men threatened families.[124] Bryant and her allies first argued that civil-rights ordinances would simply allow gays to convert children to a deviant lifestyle.[125] As Bryant told the *New York Times* in March 1977: "What these people really want [. . .] is the legal right to propose to our children that there is an acceptable alternative way of life—that being a homosexual or lesbian is not really wrong."[126] Bryant's arguments appeared to

121. First coined by the media, the term describes a loose coalition of socially conservative, generally (although not uniformly) Christian organizations that first took shape in the late 1970s to transform law and policy on issues including abortion, sex discrimination, school prayer, and gay rights. *See, e.g.*, DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 160–169 (2010) (explaining the origins of the term "religious right" and the coalition's early work); J. BROOKS FLIPPEN, JIMMY CARTER, THE POLITICS OF THE FAMILY, AND THE RISE OF THE RELIGIOUS RIGHT 14–20 (2011) (describing debates about the definition of the Religious Right); David W. Moore, *The "Religious Right": Definition and Measurement*, THE PUBLIC PERSPECTIVE, Apr.–May 1995, https://ropercenter.cornell.edu/public-perspective/ppscan/63/63011.pdf.

122. *See, e.g.*, CLENDINEN & NAGOURNEY, *supra* note 14, at 296; PHIL TIEMEYER, PLANE QUEER: LABOR, SEXUALITY, AND AIDS IN THE HISTORY OF MALE FLIGHT ATTENDANTS 131 (2013); WILLIAMS, *supra* note 121, at 109, 147–51.

123. On the founding of Save Our Children, see, for example, MICHAEL STEWART FOLEY, FRONT PORCH POLITICS: THE FORGOTTEN HEYDAY OF AMERICAN ACTIVISM IN THE 1970S AND 1980S 88 (2013); CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 127 (2002); WILLIAMS, *supra* note 121, at 109.

124. *See, e.g.*, FOLEY, *supra* note 123, at 88; RIMMERMAN, *supra* note 123, at 127; WILLIAMS, *supra* note 121, at 109.

125. *See, e.g.*, *Anita Bryant Scores White House Talk with Homosexuals*, N.Y. TIMES, Mar. 28, 1977, at 56; B. Drummond Ayres Jr., *Miami Debate Over Rights of Homosexuals Directs Wide Attention to a National Issue*, N.Y. TIMES, May 10, 1977, at 18.

126. *Anita Bryant Scores White House Talk with Homosexuals*, *supra* note 125, at 56. For more on the work of Save Our Children, see, for example, JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 143 (2002); JEFFREY D. HOWISON, THE 1980 PRESIDENTIAL ELECTION: RONALD REAGAN AND THE SHAPING OF THE AMERICAN CONSERVATIVE MOVEMENT 84

resonate; Miami residents voted against the ordinance by a two-to-one margin.[127]

Pleased by the publicity Bryant brought to the issue of anti-GLBTQ discrimination, NGLTF and its allies publicly argued that Bryant was "the best thing that happened to gays."[128] To some extent, these arguments reflected the reality. For NGLTF, for example, the Bryant campaign apparently increased NGTF's membership, fundraising, and volunteers by a factor of five.[129]

Internally, however, NGLTF members worried that Bryant had exposed the weaknesses of the organization's existing strategy.[130] At a strategy meeting, NGLTF member Charles Brydon spoke up in favor of arguments based on preference and choice, suggesting that they connected the cause to policies favored by progressive movements.[131] Brydon reminded those present that "abortion [was] also a choice."[132] Voeller initially agreed that a preference or choice-based strategy spoke to deeply-held American values, including the "strength of diversity."[133]

However, board members, Voeller among them, identified serious costs associated with describing sexuality as a matter of preference.[134] At a minimum, Voeller suggested that NGTF "pull away from 'right to choose' [arguments] in the short term."[135] The Anita Bryant controversy had exposed some of the risks posed by a preference-based definition. If Bryant stoked fears about the spread of homosexuality, choice arguments could only exacerbate the problem.[136] "'Right of Choice' is not a rallying point," one board member reasoned. "People have a right to try to prevent children from being homosexual."[137]

As an emerging Religious Right and New Right coalition attacked other civil-rights ordinances, NGLTF leaders had more reason to question preference-based arguments.

Led by activists like Richard Viguerie and Paul Weyrich, the New Right mobilized conservatives angry at the Republican establishment.[138] Weyrich and his allies promised a political insurrection, led by "radical[s] committed to sweeping changes."[139]

(2014).

127. *See* B. Drummond Ayres, Jr., *Miami Votes 2 to 1 to Repeal Law Barring Bias Against Homosexuals*, N.Y. TIMES, Jun. 8, 1977, at 1.

128. *Id.*; *see also* B. Drummond Ayres, Jr., *Miami Vote Increases Activism on Gay Rights*, N.Y. TIMES, Jun. 9, 1977, at 1; *Homosexuals March for Equal Rights*, N. Y. TIMES, Jun. 27, 1977, at 1.

129. *See* NGLTF Board of Directors Meeting Minutes (Jul. 11, 1977) (on file with author and in the Harvard University Schlesinger Library).

130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.* at 4–5.

134. *See id.*

135. *Id.*

136. *See id.*

137. *Id.*

138. *See, e.g.*, LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974-1980 162 (2010); MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 12 (2015).

139. WILLIAM C. MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 135 (2005). For more on the motivations of major players in the New Right, see WILLIAMS, *supra* note 121, at 167–70; DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE

As New Right leaders sought to take out congressional liberals, activists like Viguerie and Weyrich identified issues like gay rights as a way of mobilizing previously disengaged conservative evangelical Protestants.[140] Between 1978 and 1979, prominent evangelicals founded organizations to advance their interests, including Christian Voice (1978) and the Moral Majority (1979).[141]

Linking opposition to abortion and gay rights, leaders of the New Right and Religious Right described both as bad choice.[142] During the fight for an Equal Rights Amendment (ERA) to the Constitution, Phyllis Schlafly, the most prominent opponent of the ERA, told her supporters that the amendment would entrench abortion and "give homosexuals all the rights of husbands and wives."[143] In either case, Schlafly claimed that ERA proponents used the language of a right to choose to camouflage their true desires.[144] Choice was "the code word for abortion," she alleged, "much as 'different lifestyles' [is] the code word for homosexuality."[145]

Using similar arguments, anti-gay leaders in the Religious Right and New Right expanded their campaign for the repeal of local civil-rights ordinances.[146] In St. Paul, Minnesota, Reverend Richard Angwin, a fundamentalist preacher from Kansas, headed the repeal campaign.[147] Angwin used the idea of sexual preference to argue for repeal.[148] "[B]eing a pervert is like being a thief," Angwin explained.[149] "[B]oth are wrong and both can continue or repent."[150] Angwin's supporters carried the day. St. Paul voted to repeal its ordinance by a vote of 54,046 to 31, 694.[151]

POLITICAL HISTORY 127–35 (2007); WILLIAM A. LINK, RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM 180–95 (2008).

140. *See, e.g.*, WILLIAMS, *supra* note 121 at 169–171; LYDIA BEAN, THE POLITICS OF EVANGELICAL IDENTITY: LOCAL CHURCHES AND PARTISAN DIVIDES IN THE UNITED STATES AND CANADA 32 (2014); KALMAN, *supra* note 138 at 162.

141. On the early years of Christian Voice, see, for example, DEAL WYATT HUDSON, ONWARD, CHRISTIAN SOLDIERS: THE GROWING POLITICAL POWER OF CATHOLICS AND EVANGELICALS IN THE UNITED STATES 6–10, 56 (2008); ELIZABETH ANNE OLDMIXON, UNCOMPROMISING POSITIONS: GOD, SEX, AND THE U. S. HOUSE OF REPRESENTATIVES 95 (2005); Paul Boyer, *The Evangelical Resurgence in 1970s American Protestantism*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 45 (Bruce J. Schulman and Julian E. Zelizer eds., 2008). On the founding of the Moral Majority, see HUDSON, *supra*, at 15; KALMAN, *supra* note 138, at 274; WILLIAMS, *supra* note 121, at 171, 174–75.

142. *See, e.g.*, *The Hypocrisy of ERA Proponents*, THE SCHLAFLY REPORT, Jun. 1975, vol. 8, no.12, sec. 2 (on file with author and in the Harvard University Schlesinger Library).

143. *Id.*

144. *See id.*

145. *Id*. For more on Schlafly's anti-gay rhetoric, see, for example, DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 225–29 (2005); HUDSON, *supra* note 141, at 64; DAVID FARBER, THE RISE AND FALL OF MODERN AMERICAN CONSERVATISM: A SHORT HISTORY 155 (2005).

146. *See infra* Part II.

147. *See, e.g.*, Nathaniel Sheppard, Jr., *After Repeal of Homosexual Bias Law, St. Paul Debates the Implications*, N. Y. TIMES, Apr. 27, 1978, at A20.

148. *See, e.g.*, *id.*

149. *Id.*

150. *Id.*

151. *Id.* For more on the St. Paul campaign, see Nathaniel Sheppard, *Law on Homosexuals Repealed in St. Paul*, N.Y. TIMES, Apr. 26, 1978, at A1. For more on Angwin's campaign, see CLENDINEN & NAGOURNEY, *supra* note 14, at 326.

Religious Right groups mounted signature petition drives in Wichita, Kansas, and Eugene, Oregon.[152] In both cities, local pastors argued that homosexuality was an illegitimate preference.[153] Reverend Ron Adrian, the head of Concerned Citizens for Community Decency in Wichita, rejected the idea that the ordinance had anything to do with civil rights.[154] "We think it's an effort on the part of a small group of people to ask us to approve their immoral lifestyle," Adrian asserted.[155] Rosalie Butler, a sympathizer of the Religious Right and a member of the St. Paul City Council, backed Adrian's assessment.[156] "Those who choose a perverted lifestyle, whether it's a homosexual [or] a robber, can't expect the full rights [. . .] that people who live in step with society get," she explained.[157]

Arguments about immoral preferences apparently spoke to voters in Wichita and Eugene. On May 10, Reverend Adrian celebrated a huge margin of victory in Wichita, with voters repealing the city's ordinance by a margin of 29,402 to 6,153.[158] Barely more than two weeks later, a partial tally in Eugene showed that 13,838 voters preferred repeal, with only 7,685 in opposition.[159] In the wake of the defeats, the media described a bleak future for supporters of gay and lesbian rights. As the *New York Times* put it: "[I]t seems likely that few supporters of homosexual rights support them as vigorously as opponents oppose them."[160]

A. NGLTF Reconsiders Preference-Based Definitions

Between 1978 and 1980, NGLTF leaders worried that preference-based definitions had done more harm than good, and organizational leaders began developing an alternative. *Lesbian Tide*, a movement publication, put out an article highlighting NGLTF's use of an orientation-based definition.[161] The article accused NGLTF of "calling for an end to choice."[162] Instead of refuting this charge, NGLTF leaders sent a letter "clarifying its position and [. . .] reiterating that sexual orientation and sexual preference are both useful terms to different segments of the community."[163]

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152. *See, e.g.*, Sheppard, Jr., *supra* note 147, at 27; *see also Witchita Repeals Homosexual Law*, N.Y. TIMES, May 10, 1978, at A18; Grace Lichtenstein, *Laws Aiding Homosexuals Face Rising Opposition Around Nation*, N.Y. TIMES, Apr. 27, 1978, at A1.

153. *See infra* Part II.

154. *See Witchita Repeals Homosexual Law*, *supra* note 152.

155. *Id.*

156. *See* Sheppard, Jr., *supra* note 147, at 27.

157. *Id.*

158. *See Witchita Repeals Homosexual Law*, *supra* note 152.

159. *See, e.g.*, Wallace Turner, *Voters in Eugene, Ore., Repeal Ordinance on Homosexual Rights*, N.Y. TIMES, May 24, 1978, at A18.

160. *Voters Reject Homosexual Rights But Why?*, N.Y. TIMES, May 28, 1978, at E16.

161. *See, e.g.*, NGLTF Board of Directors Meeting Minutes (Feb. 11-12, 1978), 14 (on file with author and the Cornell University Library). For the article, see *Feminist, Gay Leaders Call for an End to 'Choice'?* LESBIAN TIDE, Sep.-Oct. 1977, at 21.

162. *See supra* note 158 and accompanying text.

163. NGLTF Executive Committee Meeting Minutes (Jun. 1978) (on file with author and the Cornell University Library) [hereinafter June NGLTF Meeting Minutes]; NGLTF Executive Committee Meeting Minutes (Aug. 3, 1980) (on file with author and the Cornell University Library).

In part, the organization's use of orientation rhetoric reflected fresh skepticism about trying to build common ground with liberal groups also challenging morals regulations.[164] At a June NGLTF meeting discussing the referenda, movement leaders questioned whether liberals "were really with [the movement]."[165] "The liberals' support is not nearly as strong as many say it is," one activist asserted.[166] "As [. . .] the right wing's power grows[,] panic will set in. The liberals will try to save themselves by remaining silent on issues that don't affect them directly."[167]

In August 1978, the NGLTF Executive Committee again discussed "how to deal with the upcoming referenda and, in general, with the 'new right wing.'"[168] Many present felt that potential progressive partners "did not want to deal with the gay issue, even though the groups battling gay rights were also battling other liberal causes"[169]

Contemporary politics stoked these fears. The *New York Times*, the bible of many left-leaning groups, favored protections for gay and lesbian teachers only because there was no proof that they could change a child's sexual orientation, explaining: "The desire for parents for reassurance that their children will not be somehow 'converted' to homosexuality at school is understandable."[170] In 1983, members of NOW and the NOW Legal Defense and Education Fund publicly argued that "sexual preference should be protected by the right to privacy" but insisted that the ERA "would not legitimate same-sex marriages."[171]

As the AIDS epidemic hit the GLBTQ community, sexual-preference arguments became even more of a liability. Exploiting uncertainty about the transmission of the disease, anti-gay activists described AIDS as a disease resulting from a selfish lifestyle preference. In fighting for funding for AIDS research, confidentiality for AIDS victims, and antidiscrimination protections, GLBTQ activists responded that sexual orientation was not a preference and could not be changed.

B. The AIDS Crisis Creates New Reason to Reframe Sexuality

In 1981, the *New York Times* reported on a handful of cases of a rare illness that disproportionately affected gay men.[172] Between 1982 and 1983, the number of patients with AIDS nearly tripled.[173] Panic followed the spread of the disease.

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164. *See* June NGLTF Meeting Minutes, *supra* note 163, at 6.

165. *Id.*

166. *Id.*

167. *Id.* at 4.

168. August NGLTF Executive Committee Meeting Minutes, *supra* note 163, at 4.

169. *Id.*

170. *The Homosexual in the Classroom*, N.Y. TIMES, Oct. 24, 1977, at 28.

171. Letter from Marsha Levick, Legal Director of the NOW Legal Defense and Education Fund, to Staff (1983) (on file with author and the Harvard University Schlesinger Library). For a sample of similar arguments made by ERAmerica, see *Homosexual Marriage: Not True*, ERAMERICA NEWSLETTER (1978) (on file with University of Missouri-St. Louis); COMMON CAUSE, THE EQUAL RIGHTS AMENDMENT: A REPORT ON THE 27TH AMENDMENT TO THE U.S. CONSTITUTION (1979) (on file with University of Missouri-St. Louis).

172. *See, e.g.*, *2 Fatal Diseases Focus of Inquiry*, N.Y. TIMES, Aug. 29, 1981, at 1.

173. On the rapid spread of the disease, see, for example, *AIDS: A New Disease's Deadly Odyssey*,

In 1983, the media ran stories suggesting that people infected with the disease could transmit it by casual contact.[174]

The federal government responded slowly, forcing local GLBTQ groups to pick up the slack.[175] Even when Congress appropriated money for AIDS research for the first time in 1983, President Reagan threatened to veto a bill that would have dedicated only $12 million for addressing the epidemic.[176]

Beyond governmental neglect, examples of discrimination against gays and lesbians proliferated. Conservative writer William Buckley proposed that people with AIDS be tattooed so that others could easily avoid them.[177] In 1985, Congressman William Dannemeyer (R-CA) proposed a series of bills that would make it a felony for any person with AIDS to give blood, deny federal funds to cities that did not close down gay bathhouses, and prohibit persons with AIDS from either working in the health care industry or attending public schools.[178] Even cosmopolitan cities like New York and San Francisco shuttered bath houses rather than focusing on education about safe sex.[179]

Religious Right activists used the idea of sexual preference to justify anti-gay bias. In testifying before Congress, Reverend Charles McIlhenny, a California-based anti-gay activist, argued that "homosexuality [was] not caused by a constitutional, glandular, hormonal, or genetic factor" but rather "a learned behavior."[180] If gays and lesbians made a voluntary choice, McIlhenny argued, they could not be true victims of discrimination. "Granting special legislation to a group because of behavior—let alone immoral behavior—opens the floodgates

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N.Y. TIMES, Feb. 6, 1983, at A6.

174. For discussion of the theory that AIDS spread by casual contact, see, for example, Bob Nelson, *"Casual Contact" Theories Incite AIDS Panic*, GAY COMMUNITY NEWS, Jun. 18, 1983, at 3; Dudley Clendinen, *AIDS Spreads Pain and Fear Among Ill and Healthy Alike*, N.Y. TIMES, Jun. 17, 1983 at A1; Larry Goldsmith, *New Studies Further Speculation on AIDS*, GAY COMMUNITY NEWS, May 21, 1983, at 3.

175. On the slow and incomplete federal response, see, for example, RIMMERMAN, *supra* note 123, at 89; DEBORAH B. GOULD, MOVING POLITICS: EMOTION AND ACT UP'S FIGHT AGAINST AIDS 92 (2009); RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 154, 324–30 (2007). RE Note: I think the author cited to the Twentieth Anniversary Edition, hence I corrected the Staff Editors' deletion here.

176. On Reagan's veto threat, see, for example, Bob Nelson, *AIDS Funding Jeopardized by Veto Threat*, GAY COMMUNITY NEWS, Jun. 25, 1983, at 3; Sue Hyde, *Task Force to Meet with Presidential Aide*, GAY COMMUNITY NEWS, Jun. 18, 1983, at 1.

177. *See, e.g.*, William F. Buckley, Jr., Opinion and Editorial, *Crucial Steps in Combating the AIDS Epidemic; Identify All Carriers*, N.Y. TIMES, Mar. 18, 1986, at A27.

178. On Dannemeyer's proposals, see E. R. Shipp, *Concern Over Sp[re]ad of AIDS Generates a Spate of New Laws Nationwide*, N.Y. TIMES, Oct. 26, 1985, at 1; Marlene Cimons, *AIDS Workplace Guidelines Win Praise But Dannemeyer Vows to Continue Fight to Restrict Victims' Jobs*, L.A. TIMES, Nov. 15, 1985, at 6; *Dannemeyer Outlines His View on AIDS*, L.A. TIMES, Feb. 8, 1986, at 2 [hereinafter *Dannemeyer Outlines His View*].

179. On the bathhouse regulations, see Marilyn Chase, *Doctors' Efforts to Control AIDS Spark Battles Over Civil Liberties*, WALL ST. J., Feb. 8, 1985, at 23*; N.Y. Bans Sexual Activities Tied to AIDS Bathhouses, Other Establishments Face Closure for Violations*, L.A. TIMES, Oct. 26, 1985, at 12; Kevin Roderick & Marlene Cimons, *U.S., County Support Curbs on Bathhouses*, L.A. TIMES, Nov. 8, 1985, at A1.

180. *Hearing on the Civil Rights Amendments Act of 1981 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 97th Cong. 32 (1982) (statement of Rev. Charles McIlhenny).

to any group that wants minority status," he concluded.[181]

At the national level, Religious Right figures echoed this reasoning. In opposing an amendment to the Civil Rights Act, Connie Marshner, a close ally of Weyrich's, contended that privacy rights militated against protections for gays and lesbians.[182] "What we are advocating," she explained, "is that our right to privacy be respected: That the homosexual lifestyle not be flaunted in our neighborhoods and shouted from the housetops."[183] The opposition made sexual-preference arguments shorthand for the libertinism and selfishness of which Religious Right activists accused gay men.[184]

The politics of AIDS reinforced social conservatives' effort to equate selfishness and sexual preference. Judy Welton of Parents United Because Legislators Ignore Children (PUBLIC), a group that campaigned for the expulsion of infected children from public schools, argued against increased funding for research, public education, or drug trials related to AIDS.[185] Framing sexuality as a mere preference, Welton argued that gay men and lesbians put their wellbeing above everyone else's.[186] "What kind of compassion," she asked, "allows a disease such as AIDS to go on, knowing the causes are selfish, immoral behavior patterns that affect all of us?"[187]

Dannemeyer, one of the most visible anti-gay leaders, happily discussed the idea of sexual preference.[188] In response to accusations of bigotry, Dannemeyer wrote to the *Los Angeles Times*: "Whether the public health response to AIDS should be compromised because of the perceived sensitivities of the male homosexual community, or whether gay rights should be given 'equal treatment,' comes down to basic value choices in a free society.I speak for those who favor traditional family values."[189]

Leaders of the NGLTF responded that sexual-orientation discrimination, not sexual preference discrimination, was the real issue. Virginia Apuzzo, the new leader of NGLTF, described AIDS as a "public health crisis [that] has struck minorities who have traditionally been the victims of officially sanctioned discrimination."[190] As Jeff Levi, Apuzzo's replacement at NGLTF, later explained: "Hiding behind a false mask of concern about public health, there have been efforts to use the fear of AIDS to oppose or repeal civil rights protections for gay men and lesbians."[191] NGLTF leaders also attributed

181. *Id*.

182. *See id*. at 40–41 (statement of Connaught Marshner).

183. *Id*.

184. *See id*.

185. *See AIDS Issues Part II: Testimony Before the Subcommittee on Health and Environment of the House Committee on Energy and Commerce*, 100th Cong. 683–84 (1987) (statement of Patricia Welton).

186. *See id*.

187. *Id*.

188. *See Dannemeyer Outlines His View, supra* note 178, at 5.

189. *Id*.

190. *Federal Response to AIDS: Testimony before the Subcommittee on Intergovernmental Relations and Human Resources of the House Committee on Governmental Relations*, 98th Cong. 24 (1983) (statement of Virginia Apuzzo).

191. *Federal and Local Government's Response to the AIDS Epidemic: Testimony Before the Subcommittee on Intergovenmental Relations and Human Relations of the House Committee on Human Resources*, 99th Cong.237–38 (1985) (statement of Jeff Levi).

governmental indifference to anti-gay bias. As Apuzzo stated, "The failure of government to recognize and deal with the health issues facing gays and lesbians is a reflection of the oppression we face in American society ."[192]

Concerned about the advances of the Religious Right and blowback from the AIDS crisis, members of NGLTF and GRNL began defining sexuality as an unchangeable orientation rather than a matter of preference. In renewing the push for federal civil-rights legislation, GRNL created a public education campaign to "analyze barriers in public thinking to the enactment of effective public policy measures ending discrimination based on sexual orientation" and "[t]o educate the public on the nature of homosexuality."[193] Recognizing the downsides of sexual-preference arguments, members of the group planned to "counter" special-preference claims.[194] To do so, GRNL almost exclusively used the language of orientation. "Our goal," the group stated, "[is] equal justice under the law regardless of sexual orientation."[195] In testifying in favor of an amendment to Title VII, Jean O'Leary, then a member of GRNL, also insisted civil-rights protections were not "designed to approve a lifestyle or create a special minority—but simply to prohibit discrimination [. . .] based on sexual orientation."[196]

NGLTF also cast aside sexual-preference rhetoric. In lobbying inside and outside of Congress, the organization convinced the Mayors' Conference to "[r]ecogniz[e] the right of all citizens, regardless of sexual orientation, to full participation in American society."[197] AIDS and the discrimination it unleashed bolstered arguments about sexual-orientation discrimination. As NGLTF argued in the period, "90% of lesbians and gay men have been victimized at some point in their lives solely because of their sexual orientation."[198]

C. Orientation, Suspect Classification, and the Courts

As GLBTQ activists renewed the push for protection in the Supreme Court,

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192. Press Release, National Gay Task Force, Gay/Lesbian Community to Discuss Health Issues with Reagan Administration (June 12, 1983) (on file with author and the Cornell University Library).

193. Press Release, Gay Rights National Lobby, Gay Rights National Lobby Creates Education and Research Foundation (Nov. 22, 1981) (on file with author and the Cornell University Library); *see also* Memorandum, Rick Davis, Education and Research Director, Right to Privacy Foundation, on Sharing Right to Privacy Goals and Objectives with leaders of other community organizations to Steve Endean, President, Right to Privacy Foundation 1–4 (1983) [hereinafter Davis to Endean] (on file with author and the Cornell University Library).

194. Davis to Endean, *supra* note 193, at 2.

195. Proposal, Gay Rights National Lobby, Grant Proposal to Playboy Foundation (Feb. 15, 1983) (on file with author and the Cornell University Library).

196. *Hearing on the Civil Rights Amendments Act of 1981 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 97th Cong. 8 (1982) (statement of Jean O'Leary). For more on the strategy behind amending the Civil Rights Act, *see* JOHN-MANUEL ANDRIOTE, VICTORY DEFERRED: HOW AIDS CHANGED GAY LIFE IN AMERICA 222 (1999); MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 262 (2009); CLENDINEN & NAGOURNEY, *supra* note 14, at 240–42, 258.

197. "Mayors' Conference Favors Gay and Lesbian Civil Rights" (Jan. 27, 1984) (on file with author and the Cornell University Library).

198. Press Release, National Gay and Lesbian Task Force, National Gay Task Force Position Statements on AIDS-Related Issues (Apr. 14, 1985) (on file with author and the Cornell University Library).

activists identified another reason for using the language of sexual orientation. As the movement explored arguments that sexual orientation was a suspect classification, it became more important to describe sexual identities and behaviors as unchangeable. The political and legal justifications for using the rhetoric of sexual orientation aligned.

In the 1980s, when movement attorneys focused on a challenge to sodomy regulations, attorneys for organizations like NGLTF and Lambda often prioritized substantive due process arguments based on the right to privacy.[199] These arguments took center stage in *Bowers v. Hardwick*,[200] when activists challenged the constitutionality of sodomy bans. Acting as amicus curiae, the National Lesbian Rights Project and allied groups argued: "[T]he right of privacy, as derived from the U.S. Constitution and Bill of Rights, readily and reasonably includes the right of an adult person of whatever sexual orientation (to wit., [sic] whether heterosexual, bisexual, gay or lesbian) to choose to engage in physically private, consenting, non-violent sexual activities with another adult person."[201] Those challenging the law relied on cases like *Roe v. Wade*,[202] arguing that the Court had mandated "heightened scrutiny not of state restrictions on procreative sex, but rather of restrictions on non-procreative sex—sex solely as a facet of associational intimacy—whether between married partners or between unmarried individuals."[203] In 1986, the *Bowers* Court flatly rejected these claims.[204] The majority stated bluntly: "[T]o claim that a right to engage in [sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[205]

When *Bowers* temporarily seemed to foreclose a privacy strategy, movement attorneys began experimenting more vigorously with alternatives.[206] While continuing to push privacy arguments in state court, movement lawyers began putting more emphasis on claims that sexual orientation was a suspect classification, much like race.[207]

These arguments gained attention in 1992, when the Supreme Court heard *Romer v. Evans*, a case involving the constitutionality of Colorado's Amendment Two.[208] That measure prohibited any local government from passing antidiscrimination protections for gays and lesbians.[209] In its amicus brief, Human Rights Campaign (HRC), a major movement organization formed in the early 1980s, argued that the Court would not have to address whether sexual

199. On the emphasis on privacy arguments, see, for example, MEZEY, *supra* note 86, at 230; ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 32 (2009).

200. 478 U.S. 186 (1986).

201. Brief Amicus Curiae for Lesbian Rights Project et al. at 3, *Bowers*, 478 U.S. 186 (No. 85-140).

202. Roe v. Wade, 410 U.S. 113 (1973).

203. Brief for Respondent at 12, *Bowers*, 478 U.S. 186 (No. 85-140).

204. *See Bowers*, 478 U.S. at 190–205.

205. *Id.* at 194.

206. On litigation strategy after *Bowers*, see, for example, ANDERSEN, *supra* note 199, at 120–26; ESKRIDGE, *supra* note 105, at 329–48, 422–57.

207. *See, e.g.*, RON BECKER, GAY TV AND STRAIGHT AMERICA 65–74 (2006).

208. Romer v. Evans, 517 U.S. 620 (1992).

209. COLO. CONST. art. II, §30, subsec. b.

orientation was suspect to strike down Amendment Two.[210] However, the group maintained that sexual orientation should qualify as a suspect classification.[211]

HRC recognized that the crucial problem was the requirement that a trait be immutable.[212] The group insisted that immutable-trait analysis "revolves around the concept of 'lack of responsibility' and relates to the premise that it is unfair to penalize an individual for a characteristic over which the individual has had no responsibility in acquiring."[213] According to HRC, sexual orientation was just such a characteristic.[214]

As many predicted, *Romer* did not conclude that sexual orientation was a suspect classification, but the Court still held that Amendment Two failed rational basis review and struck it down.[215] After *Romer*, equal protection reasoning raised the stakes of proving sexual orientation to be a suspect classification. Indeed, when developing a new challenge to sodomy bans, some activists believed that the movement should focus exclusively on equality reasoning.[216] Ultimately, in 2003, activists used both privacy and equality arguments in litigating *Lawrence v. Texas*.[217] This strategy seemed to pay off when a majority struck down the Texas sodomy ban.[218] Rhetorically, *Lawrence* invoked the ideas of both liberty and equality but left open questions about the precise doctrinal foundation and scope of the Court's ruling.[219] After *Lawrence*, demonstrating that sexual orientation was a suspect classification remained a movement priority.[220]

At the same time that the outcome of equal-protection litigation seemed to depend on whether sexual orientation was immutable, popular support seemed to be influenced by the same considerations. Between 1977 and 2012, Gallup polls asked respondents both if they believed sexual orientation was immutable and if they favored equality for gays and lesbians.[221] Roughly two-thirds of those

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210. *See* Brief of the Human Rights Campaign Fund et al., as Amici Curiae in Support of Respondents at 21, *Romer*, 517 U.S. 620 (No. 94-1039) [hereinafter Brief of the HRCF]. Other major movement groups concluded that the Court would not yet recognize sexual orientation as a suspect classification and did not press this claim; instead, organizations like the ACLU contended that Amendment 2 failed even rational basis review. *See, e.g.*, ESKRIDGE, *supra* note 105, at 282–84; ESKRIDGE, *supra* note 97 at 208.

211. *See* Brief of the HRCF, *supra* note 210, at 21.

212. *See, e.g.*, *id.*

213. *Id.*

214. *See, e.g.*, *id.*

215. *See Romer*, 517 U.S. at 628–36.

216. *See, e.g.*, ANDERSEN, *supra* note 199, at 127.

217. *See, e.g.*, *id.* at 127–35.

218. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

219. On the connection between liberty and equality in *Lawrence*, see, for example, Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1458–59 (2004); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97–100 (2003); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 863 (2014) ("As many scholars have noted, *Lawrence* was a constitutional hybrid, drawing on both strands of Fourteenth Amendment doctrine.").

220. *See* ANDERSEN, *supra* note 199, at 127–35.

221. *See, e.g.*, JOHN R. HIBBING, KEVIN B. SMITH & JOHN R. ALFORD, PREDISPOSED: LIBERALS, CONSERVATIVES, AND THE BIOLOGY OF POLITICAL DIFFERENCES 253 (2014).

who believed that homosexuality was a lifestyle choice viewed gay lifestyles as unacceptable.[222] By contrast, more than three-quarters of those who thought sexual orientation was immutable found gay lifestyles acceptable.[223]

As marriage equality made its way into federal court, the use of clashing definitions of sexual orientation signaled deeper disagreement about the legitimacy of marriage equality. Whereas conservative groups continued to insist that homosexuality was an illegitimate preference, GLBTQ groups and their allies maintained that sexual orientation was immutable.[224] In 2013-2014, GLBTQ litigators challenged the constitutionality of Proposition 8, a state constitutional ban on marriage equality, and the federal Defense of Marriage Act (DOMA), a law denying federal benefits and recognition to married same-sex couples. Liberty Counsel, a leading socially conservative public interest group, used sexual-preference arguments in defending same-sex marriage bans. Manipulating psychiatric evidence, the group stressed how much sexual identity could change.[225] Because sexuality was chosen, Liberty Counsel argued, sexual orientation could not be a suspect classification.[226] "If homosexuality is properly understood as a behavior or lifestyle choice, and is well-recognized as fluid and developing," the group argued, "then certainly it cannot be said to be immutable."[227]

A year later in *Obergefell v. Hodges*, the American Psychological Association (APA) and other allied groups supporting marriage equality argued that homosexuality was "normal, generally not chosen, and [. . .] highly resistant to change."[228] GLMA, a gay-rights health advocacy group, agreed: "All credible study of sexual orientation establishes that genetic, hereditary and biological influences are major factors in determining sexual orientation."[229] So did leading constitutional scholars, who maintained that "[g]ay and lesbian individuals share a common 'immutable' characteristic, both because sexual orientation is fundamental to their identity, [. . .] and because one's sexual orientation is not changeable through conscious decision, therapeutic intervention, or any other method."[230] By contrast, some socially conservative amici in *Obergefell* even refused to use the language of sexual orientation, referring to homosexuality as a "sexual preference."[231]

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222. *See, e.g.*, *id.*

223. *See, e.g.*, *id.*

224. *See infra* Part II.

225. *See* Brief of Amici Liberty Counsel, Inc. and Campaign for Children and Families in Support of Petitioners at 35, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

226. *See id.* at 35–36.

227. *Id.*

228. Brief of the American Psychological Association et al. as Amici Curiae in Support of Petitioners at 7, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter Brief of the APA].

229. Brief of Amicus Curiae GLMA: Health Professionals Advancing LGBT Equality in Support of Plaintiffs-Appellees and In Support of Affirmance at 4, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574).

230. Brief of Constitutional Law Scholars Ashutosh Bhagwat et al., Amici Curiae Supporting Petitioners at 9, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574).

231. *See, e.g.*, Brief for the National Coalition of Black Pastors and Christian Leaders as Amici Curiae in Support of Respondents at 4, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574)

The language of sexual orientation has become a cornerstone of progressive arguments for GLBTQ equality—a way of maximizing support for the cause and strengthening equal-protection arguments in the courts. By contrast, those skeptical of the GLBTQ movement draw on the language of sexual preference to challenge both legal and political demands for equal treatment. This political alignment now seems natural, but the politics and law of defining sexuality have changed significantly over time. In the 1970s, leading activists stayed away from the rhetoric of sexual orientation. Groups at the state and federal level argued that orientation-based definitions offered too little protection. Only after the AIDS epidemic and the rise of the Religious Right did arguments about sexual preference come to seem to be a staple of social conservatism advocacy. By drawing on this history, Part III next evaluates the definition of sexuality at work in *Obergefell* itself.

III. SEXUAL ORIENTATION IN *OBERGEFELL*

Although *Obergefell* revolutionized access to marriage for gays and lesbians, Justice Kennedy's majority says surprisingly little about sexual orientation. Nevertheless, a close reading of both the majority and dissents in *Obergefell* reveals that the Court increasingly treats orientation as clearly identifiable, binary, and unchangeable.

Kennedy first discusses the nature of orientation in relating the history of gays and lesbians in the United States.[232] In describing the rise of sodomy bans, *Obergefell* explains that other Americans did not "deem homosexuals to have dignity in their own distinct identity."[233] At a minimum, the Court suggests that sexual orientation is not simply a behavior or lifestyle but rather something more meaningful—a distinct identity.[234]

Later, after describing the recent history of the GLBTQ movement, *Obergefell* describes clearer evidence of how the Court sees sexual orientation.[235] "Only in more recent years," Kennedy writes, "have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable."[236]

Here, *Obergefell*'s definition of sexual orientation is revealing. Kennedy cites the American Psychological Association (APA)'s definition for support.[237] In amicus briefs in both *Windsor* and *Obergefell*, the APA has described sexuality in the following terms:

("It is Amici's position that the government should never classify or discriminate against another human being based on who they are. A person's sexuality and sexual preferences, however, are not their state of being, or even an immutable aspect of who they are, as race is. The truth is that sexual conduct is an activity."); Amicus Curiae Brief of Leaders of the 2012 Republican National Convention Committee on the Platform and Others Supporting Respondents at 13, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574).

232. *See Obergefell*, 135 S. Ct. at 2596.

233. *Id.*

234. *See id.*

235. *See id.*

236. *Id.*

237. *See id.*

> Sexual orientation refers to an enduring disposition to experience sexual, affectional, and/or romantic attractions to one or both sexes. It also encompasses an individual's sense of personal and social identity based on those attractions, on behaviors expressing those attractions, and on membership in a community of others who share those attractions and behaviors. Although sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual, it is usually discussed in three categories: heterosexual (having sexual and romantic attraction primarily or exclusively to members of the other sex), homosexual (having sexual and romantic attraction primarily or exclusively to members of one's own sex), and bisexual (having a significant degree of sexual and romantic attraction to both sexes).[238]

Kennedy partly echoes the APA's description of sexuality. *Obergefell* highlights that sexuality is constitutive of individual identity.[239] Like the APA, the Court's opinion also presents homosexuality and bisexuality as normal.[240] However, the majority goes further than the APA in describing sexuality as immutable.[241] The APA defines sexual orientation as enduring and highly resistant to change.[242] However, the organization also emphasizes the diversity and fluidity of sexual identities, attractions, and relationships—something that drops out of *Obergefell* entirely.[243] While the opinion is far from clear, the Court seems to have adopted fairly clean, bright-line binaries to describe sexuality.

Obergefell describes sexual orientation as distinct and immutable but also largely irrelevant, at least to the question of marriage. While Kennedy borrows some of the APA's language about gay and lesbian identity, *Obergefell* never hints at the existence of a distinctive culture or community. Instead, in every way that counts, the gay and lesbian couples described in the opinion resemble their heterosexual counterparts.[244] For example, in analyzing a potential due process claim, *Obergefell* emphasizes the ways in which same-sex couples resemble opposite-sex couples.[245] "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality," the Court explains.[246] "This is true for all persons, whatever their sexual orientation."[247] Whatever is distinctive about gays and lesbians, Kennedy makes clear that it has nothing to do with couples' ability to raise loving families or legitimately desire marriage.[248]

Obergefell leaves many questions unanswered. Kennedy does little to resolve the standard of scrutiny applied to sexual-orientation classifications.[249] While *Obergefell* explicitly concludes that same-sex marriage bans in some way violate

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238. Brief of the APA, *supra* note 228, at 7–9 (emphasis in the original).

239. *Compare Obergefell*, 135 S. Ct. at 2596, *with* Brief of the APA, *supra* note 228, at 7–9.

240. *Supra* note 239.

241. *Id.*

242. *Id.*

243. *Id.*

244. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2599.

245. *See, e.g.*, *id.*

246. *Id.*

247. *Id.*

248. *See id* at 2599–601 ("There is no difference between same- and opposite- sex couples with respect to this principle.").

249. *See generally id.* at 2596–601.

both the Due Process and Equal Protection Clauses, the decision provides no real map for lower courts dealing with sexual-orientation classifications.[250] Nevertheless, *Obergefell* suggests that same-sex couples resemble opposite sex couples in every salient way—indeed, in every way actually discussed by the majority. The Court also spotlights the harms of treating same-sex couples differently without reason. "Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm," Kennedy writes. "The imposition of this disability on gays and lesbians serves to disrespect and subordinate them."[251]

In spite of the ambiguity of *Obergefell*, the Court's understanding of sexual orientation differs significantly from the ones used in Justice Roberts and Scalia's dissents. Roberts frames his opinion as an attack on the overreach of the Court.[252] In describing the goals of same-sex couples, he strikes a more conciliatory note.[253] "If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision," he writes.[254] It might be telling that Roberts uses the language of sexual orientation, rather than sexual preference, in spite of the implicit invitation by some conservative amici to do so.

At other times, however, Roberts at least implies that sexual orientation is something less than immutable. In criticizing the breadth of the Court's opinion, Roberts notes that much of the logic of *Obergefell* could easily apply to polyamorous relationships.[255] Roberts notes several possible themes uniting the interests of those in polyamorous and same-sex relationships: a desire to avoid harming children by denying their parents access to marriage, the constitutional importance of decisional autonomy, and the importance of dignifying alternative relationships.[256] While acknowledging that there may be distinctions between same-sex couples and those in polyamorous relationships, Roberts does not say what the majority treats as obvious. For the majority, same-sex marriage differs from polyamorous unions because sexual orientation is immutable.[257]

While an autonomy argument for marriage equality may apply effectively to polyamorous relationships, an equality argument seems harder to make at present. Few scholars have argued that the desire to be in a polyamorous relationship is immutable, although some evidence supports the idea that a preference for polyamory is at least partly biological.[258] For the most part,

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250. *See id.* at 2602–05.

251. *Id.* at 2604.

252. *See id.* at 2616 (Roberts, J., dissenting) (describing the majority as "indefensible as a matter of constitutional law").

253. *See id.* at 2626.

254. *Id.*

255. *See id.* at 2622 ("If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

256. *See id.*

257. *See id.*

258. *See, e.g.*, Ann Tweedy, *Polyamory as a Sexual Orientation*, 79 U CIN. L. REV. 1461, 1484 (2011) (summarizing leading views of polyamorous preferences); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 343–45 (2004) (same).

contemporary debate treats polyamory as a mere lifestyle preference.[259] Comparing polyamorous relationships to those of gay and lesbian couples at least raises the question of whether Roberts sees sexual orientation as a mere matter of choice.

Justice Antonin Scalia also described sexuality in ambiguous terms. Like Roberts, Scalia trained his fire on the majority and its willingness, in his view, to impose the views of the Court on the public.[260] When discussing sexuality itself, Scalia studiously avoided the language used by the same-sex couples and their attorneys.[261] He wrote dismissively: "The law can recognize as marriage whatever sexual attachments and living arrangements it wishes."[262] For Scalia, sexuality might not rise to the level of an orientation that cannot be changed.[263] Instead, gays and lesbians have only one of several possible "sexual attachments" that the law could recognize.[264]

The clues in each opinion notwithstanding, *Obergefell* leaves many questions unanswered. The majority avoided announcing a standard of scrutiny or deeming sexual orientation a suspect classification. Partly for this reason, litigation of sexual-orientation classifications will likely follow closely after the Court's decision. Some of these lawsuits will stem directly from *Obergefell* itself. Even the majority foreshadowed the likely suits brought by vendors and other public accommodations wishing to deny service to same-sex couples or GLBTQ individuals for reasons of religion or conscience.[265] Other suits will likely force the Court to clarify whether sexual-orientation classifications do in fact warrant strict scrutiny.

This litigation will require the courts to develop a sharper definition of sexual orientation. Other scholars have recognized that courts often treat sexuality as a binary—and with deeply problematic results.[266] The history of the framing of sexuality illuminates some underappreciated costs of this binary. Drawing on the risks recognized by movement members in the 1970s, Part IV begins by analyzing these costs. Next, Part IV develops an alternative to reduce these costs.

IV. PERCEIVED SEXUAL ORIENTATION

Although the Court's analysis on the issue is far from lucid, the *Obergefell* majority seems to describe sexual orientation by reference to immutable, fixed categories. Nevertheless, after *Obergefell*, the lower courts will have not only to clarify the standard of review for sexual-orientation discrimination but also to plainly define sexual orientation itself. *Obergefell* included, existing precedent

259. *See supra* note 258 and accompanying text.

260. *Obergefell*, 135 S. Ct. at 2628–31 (Scalia, J., dissenting).

261. *See id.* at 2626–27.

262. *Id.*

263. *See id.*

264. *See id.*

265. *See id.* at 2607 ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.").

266. *See supra* note 4 and accompanying text.

offers no such clear definition. In federal court, this should be no surprise. The federal courts have not yet established that sexual orientation is a suspect classification.[267] Nor does Title VII of the Civil Rights Act of 1964 treat sexual orientation as a protected class.[268] By contrast, the state and city-level protections that first appeared in the 1970s offer some idea of how lawmakers have defined sexual orientation.

When viewed in historical perspective, these laws shed some light on the problems with the kind of bright-line definition the Court seems to have adopted. The first set of problems involves the conduct-status distinction. On one hand, as activists experienced in the past, protecting a supposedly immutable status may open the door to justifications for conduct-based discrimination. This possibility seems very real in the context of public accommodations discrimination for same-sex couples.

Consider the example of *Elane Photography v. Willock*. In that case, a photographer challenged a recent New Mexico statute that banned discrimination on the basis of sexual orientation in state court.[269] The New Mexico law defined sexual orientation as "heterosexuality, homosexuality or bisexuality, whether actual or perceived."[270] The proprietors of Elane Photography argued, among other things, that the law violated the Free Exercise Clause.[271] As a threshold matter, however, the proprietors argued that they had not violated the statute at all.[272] The owners of Elane Photography claimed that they objected not to the sexual orientation of same-sex couples but rather to their conduct—celebrating marriages that ran contrary to the religious beliefs of the proprietors.[273] The owners also maintained that they would refuse to photograph heterosexual couples endorsing same-sex marriage.[274]

Ultimately, the New Mexico Supreme Court rejected this argument, but the lengths the court went to do so makes clear how difficult the status-conduct distinction might be to overcome in the future. The court identified three reasons for refusing a distinction between conduct and status. First, the court reasoned: "The difficulty in distinguishing between status and conduct in the context of sexual orientation discrimination is that people may base their judgment about an individual's sexual orientation on the individual's conduct."[275]

Here, the court compared its case to *Lawrence v. Texas*, a Supreme Court decision striking down sodomy bans.[276] The *Lawrence* Court rejected a conduct-

267. *See, e.g.*, Herbert C. Brown, Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 21 WM. & MARY J. WOMEN & L. 603, 640–50 (2015) (detailing how the courts have stopped short of recognizing sexual orientation as a suspect classification).

268. *See, e.g.*, Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 GEO. J. GENDER & L. 103, 112–14 (2015).

269. *See* Elane Photography L.L.C. v. Willock, 309 P.3d 53, 58–59 (N.M. 2013).

270. N.M. STAT. ANN. § 28-1-2(P) (West 2007).

271. *See Elane Photography*, 309 P.3d at 63.

272. *See id.* at 61–62.

273. *See id.*

274. *See id.*

275. *Id.* at 61.

276. Lawrence v. Texas, 539 U.S. 558 (2003).

status distinction with respect to sodomy bans.[277] For the *Elane Photography* Court, the connection between status and conduct seemed just as close.[278] To other judges, this may not be obvious. Entering into, appearing to enter into, or endorsing same-sex marriage bears a much less close relationship to sexual orientation than would same-sex sexual conduct itself. As the court recognized in *Elane Photography*, the New Mexico statute was written in extremely broad terms.[279] A narrower statute may make the conduct-status distinction harder to overcome.

Second, *Elane Photography* stressed that the proprietors refused to photograph any displays of affection between same-sex couples.[280] As the court recognized, the connection between sexual orientation and conduct at issue in the case was particularly close.[281] The proprietors seemed willing to offer services to GLBTQ customers only so long as they concealed their sexual orientation.[282] If Elane Photography had narrowed its objections—say to photographs of same-sex marriages—the connection between conduct and status might have been far less close, and the proprietors' arguments might have been more compelling.

The history of framing sexuality illuminates another danger tied to the conduct-status distinction. If a law protects individuals on the basis of actual status, plaintiffs often struggle to prove that the discriminating party knew of their orientation. Consider the example of *Brennan v. Metropolitan Opera*.[283] There, plaintiff, a heterosexual female, began working at the Metropolitan Opera as a secretary.[284] She later moved up in the ranks, becoming an assistant director. She eventually began working under David Kneuss, a gay man.[285] Not long after her tenure began, however, Brennan was fired, and she believed she had been targeted because of her sexual orientation.[286] She brought suit under a New York law outlawing sexual-orientation discrimination.[287] As part of her case, Brennan pointed out that RG, whom she identified as a gay man, had been hired to replace her.[288]

The *Brennan* Court ultimately concluded that the plaintiff could not make out the elements of her prima facie case because she could not prove that Kneuss knew either that Brennan was straight or that RG was gay.[289] Identifying sexual orientation might not be a problem in cases like *Elane Photography* involving

277. *Id.* at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . .") (emphasis added).

278. *See Elane Photography*, 309 P.3d at 62–63.

279. *See id.* at 61.

280. *See id.* (stating that the owners "testified that they would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other.").

281. *See id.*

282. *See id.*

283. Brennan v. Metro. Opera Ass'n 192 F.3d 310 (2d Cir. 1999).

284. *See id.* at 313–16.

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. *See id.* at 317–18.

displays of commitment or affection. In other settings, like employment, recognizing sexual orientation may be problematic. This would be especially tricky in cases involving those with fluid identities, like bisexuals and others who do not see their orientation as fixed over time.

The history of framing sexuality highlights the problems involved not only in proving "authentic" sexuality but also the probability of orientation-based stereotyping. Because individual sexuality does not conform to the limited, clearly defined categories often embraced by courts, individuals may face discrimination because of their perceived, rather than actual, identity. Much as the courts do, many individuals assume those around them are either gay or straight. This categorization may affect those who do not fit into the neat binary, as well as misidentify non-gender conforming individuals. People make judgments about sexual orientation based on a variety of cues, including body motion, dress and hairstyle, behavior, and relationship status, and some of these judgments are inaccurate.[290] As a result, discriminators victimize some individuals not because of sexual conduct or identity but because of the stereotypes surrounding sexual orientation.

Washington state law illustrates the problem with false positives of this kind. In *Davis v. Fred's Appliance*, the plaintiff worked as a delivery truck driver for a Spokane appliance store.[291] Although the plaintiff identified as a heterosexual, a local store supervisor began repeatedly calling plaintiff "Big Gay Al," a prominent gay television character.[292] The supervisor knew nothing of plaintiff's personal life but appeared to react to plaintiff's personality and appearance.[293] Plaintiff repeatedly asked the supervisor to stop, but when he persisted, plaintiff exploded and was ultimately terminated.[294]

Washington law banned discrimination on the basis of sexual orientation, defined as "heterosexuality, homosexuality, bisexuality, and gender expression or identity."[295] The law further defined gender expression as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."[296] Plaintiff argued that the law protected against discrimination on the basis of real *and* perceived sexual orientation.[297] The court rejected this argument.[298] Because the statute specifically mentioned perceived identity with respect to gender identity, the court reasoned that the omission of perceived sexual orientation was deliberate, and plaintiff's claim failed.[299]

False positives like those in *Fred's Appliance* seem likely to impact a broad

290. *See infra* Part IV.
291. Davis v. Fred's Appliance, Inc., 287 P.3d 51, 54 (Wash. Ct. App. 2012).
292. *See id.*
293. *See id.*
294. *See id.*
295. WASH. REV. CODE ANN. § 49.60.040 (West 2009).
296. *Id.*
297. *See Fred's Appliance*, 287 P.3d at 57.
298. *See id.* at 57–58.
299. *See id.*

group of people. Those affected by sex stereotyping might be targeted because of sexual-orientation stereotyping. So too might those who do not identify with one of the clean categories adopted in statutes and by the courts.

A. Toward a Solution

Other scholars have recognized some of these problems and responded with new approaches to defining sexual orientation. Commentators like Kenji Yoshino, Naomi Mezey, Ruth Colker, and Elizabeth Glazer have all criticized the gay-straight binary many use to describe sexuality.[300] Yoshino criticizes the neglect of bisexuality and develops his own analysis of it.[301] He defines bisexuality by reference to desire, conduct, and self-identification.[302] For Yoshino, bisexuals experience discrimination partly because law, politics, and culture have erased them from the conversation.[303] By developing a more robust definition of bisexuality and foregrounding the issue of bisexual erasure, Yoshino suggests fundamental changes to existing doctrine, particularly in the area of sexual harassment.[304] More radically, he proposes that "bisexuality's destabilizing force may be a powerful means of contesting" the authority of government to regulate sexuality.[305]

Rather than developing a new category, Naomi Mezey emphasizes the downsides of status-based definitions of sexual orientation.[306] She argues that "the social and rhetorical categories of heterosexual and homosexual fail even remotely to approximate the actual range of human sexual activity, let alone human sexual desire."[307] Moreover, she argues that status-based categories have become "definitionally and doctrinally incoherent."[308] As an alternative, Mezey argues for protections based primarily on sexual behavior—protections that she believes would more accurately reflect human sexuality and offer help to a broader group.[309] Mezey rejects any solution based on the creation of a new category insofar as "bisexuality works no better than the other two categories in accurately describing concrete sexual *behavior*, and that a new conceptualization of sexual identities, such as one based on acts, is needed."[310]

By contrast, Ruth Colker contends that the problem lies not in the existence of categories but in their current application.[311] Colker urges the adoption of a third, "bi" category that "reject[s] conventional bipolar categories in the areas of

300. *See supra* note 4 and accompanying text.

301. *See generally* Yoshino, *supra* note 4.

302. *See id.*at 371–77, 380–85.

303. *See id.* at 361–62 (arguing that "[bisexual] erasure occurs because the two dominant sexual orientation groups—self-identified straights and self-identified gays—have shared investments in that erasure").

304. *See id.* at 440–60.

305. *Id.* at 461.

306. *See* Mezey, *supra* note 4, at 99–104.

307. *Id.* at 101.

308. *Id.* at 132.

309. *See id.* at 99.

310. *Id.*

311. *See, e.g.*, COLKER, HYBRID, *supra* note 4, at 15–38; *see also* Colker, Bi, *supra* note 4, at 1–3 .

gender, race, and disability."[312] She focuses on the unique harms tied to binaries rather than to categories.[313] Binary thinking not only renders invisible but also stigmatizes those with more fluid identities.[314] Nonetheless, Colker argues for the creation of a new category that would "broaden people's understanding of identity" and facilitate the introduction of civil-rights protections.[315] "We have to define who is 'gay, lesbian or bisexual,'" Colker writes, "if we are to create nondiscrimination statutes, same-sex partner registration, or affirmative action."[316]

More recently, Elizabeth Glazer has proposed a different solution. Glazer breaks sexual orientation down into two sub-categories, general and specific orientation.[317] General orientation describes "the sex toward which the individual is attracted as a general matter."[318] Specific orientation involves "the sex of the individual's chosen partner."[319] In many cases the two orientations are identical, but for many bisexuals, the two differ.[320]

To explain how her approach would work, Glazer draws an analogy to the sex-stereotyping theory derived from *Price Waterhouse v. Hopkins*, a case holding that plaintiffs could prove sex discrimination under Title VII when they were victimized by sex stereotyping.[321] Glazer argues that the law can protect orientation nonconformity much as it protects gender nonconformity under *Price Waterhouse*.[322] Glazer's approach would prohibit discrimination against an individual because her specific orientation differs from her general orientation.[323]

She predicts that doing so will offer several advantages not available through other efforts to redefine sexuality.[324] First, Glazer emphasizes the necessity of naming.[325] While other scholars focus on the downsides of categorization, Glazer contends that "naming is the first step toward making visible those who are not, and making people visible is arguably the first step in securing for them civil rights."[326] Second, Glazer argues that because binary definitions of sexual orientation are so entrenched, focusing on orientation nonconformity will be more effective than strategies dependent on undermining established categories.[327] Finally, Glazer hopes that her illumination of specific orientation will better reflect the lived experience of those with fluid identities

312. COLKER, HYBRID, *supra* note 4, at 15.
313. *See, e.g.*, *id.*
314. *See id.* at 15–26.
315. *Id.* at 26–32.
316. *Id.* at 32.
317. *See* Glazer, *supra* note 4, at 1002.
318. *See, e.g.*, *id.*
319. *Id.*
320. *Id.*
321. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).
322. *See* Glazer, *supra* note 4, at 1052–58.
323. *Id.* at 1054–59.
324. *See id.* at 1059–66.
325. *See id.* at 1059–62.
326. *Id.* at 1059 (quoting Carlos A. Ball, The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath, 14 WM. & MARY BILL RTS. J. 1493, 1534 (2006)).
327. *See id.* at 1064–65.

and behaviors.[328]

Each approach acknowledges the inaccuracy of binary categories and adds a new dimension to existing ideas about sexual orientation. Drawing on the history of debates about sexuality, this Article advocates for a different approach—one that would protect against discrimination on the basis of perceived or actual sexual orientation. The laws of some states and localities already include such protections, and they deserve serious consideration elsewhere.

Like Glazer or Mezey's proposals, a perceived-identity approach will not easily fall prey to the conduct-status distinction. Glazer notes that by recognizing general and specific orientation, the law would make it harder for those like the owners of Elane Photography to justify conduct-based discrimination. So too would a perceived-orientation approach. Conduct seems to be one of the major reasons an individual would face perceived-orientation discrimination. Recall the men holding hands in the Minnesota bar mentioned by Bruce Voeller in the 1970s. By separating status and conduct, local officials claimed the authority to target people on the basis of conduct. A perceived-orientation approach would prevent this. Discriminators would likely target the men Voeller described because they were perceived to be gay. By including hypothetical, as well as actual identity, perceived-identity strategies would protect those singled out because of their conduct.

Weaving this support into common law and constitutional jurisprudence offers unique advantages. Perceived-identity approaches are already familiar to many judges under the federal Americans with Disabilities Act (ADA).[329] The ADA defines a disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment.[330] The Equal Employment Opportunity Commission (EEOC) has set out several ways to prove that an individual is regarded as disabled.[331] First, a defendant may regard an individual as disabled if she has a real impairment that does not substantially limit her ability to function so long as the defendant believes the impairment to be substantially limiting.[332] Second, someone may be regarded as disabled when her condition is limiting only because of the fears surrounding it.[333] Finally, an individual may be regarded as disabled even if she has no impairment whatsoever so long as the defendant does not believe that to be the case.[334]

The logic of regarded-as approaches would easily extend to sexual

328. *See id.* at 1065–68.

329. *See* 42 U.S.C. § 12102(1). The EEOC also advocates for regarded-as theories under Title VII, and in some circuits, regarded-as theories may apply in this context. *See* EEOC Compl. Man. § 13-II(B) (2002); *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm (last visited June 27, 2014). For a sample of cases on the subject, see, for example, Equal Emp't Opportunity Comm'n v. WC&M Enter. Inc., 496 F.3d 393, 396–97 (5th Cir. 2007); Jones v. UPS Ground Freight, 683 F.3d 1283, 1288 (11th Cir. 2012).

330. *See* 42 U.S.C. § 12102(1).

331. *See* EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(l). RE Note to Christine: I think R14.2(a) allows for the title to be included, so I wrote it back in.

332. *See id.*

333. *See id.*

334. *See id.*

orientation. In some states, perceived-as approaches already apply.[335] Elsewhere, courts interpreting state and federal disability laws are already familiar with regarded-as approaches.[336] Importing similar reasoning into sexual-orientation law will require less of judges than the recognition of a new sexual-orientation category.

Moreover, a perceived-identity approach can work without requiring judges and policymakers to cast aside established ideas about sexuality. Perceived-identity approaches like the ones at work in New Mexico assume that some persons, or even many, fall into the conventional gay or straight paradigm.[337] These categories resonate deeply, even with those aware of their shortcomings.[338] Statutes focused on perceived discrimination do not require legislators or judges to think beyond the gay-straight binary. Indeed, by focusing on perception, such an approach recognizes that discriminators will often mistakenly identify a victim as either gay or straight. Perceived-identity approaches recognize this reality while acknowledging that individual experience can be far more fluid.

At least under certain circumstances, a perceived-orientation approach also seems likely to offer more protection than the strategies described by Glazer, Yoshino, Mezey, and Colker. Colker and Yoshino develop bisexual categories that protect those whose desires deviate from the heterosexual-homosexual paradigm.[339] Mezey prefers to protect anyone whose conduct triggers discrimination.[340] Finally, Glazer sets out two dimensions of identity and uses them to protect those singled out for orientation nonconformity.[341]

All of these approaches promise some protection to those who do not fit the gay-straight binary. However, each leaves out some of those about whom activists worried during the 1970s. First, by offering protection on the basis of some combination of conduct, self-identification, and desire, no approach explicitly addresses orientation-based stereotypes. Individuals like the delivery driver in *Fred's Appliance* suffer on the job not because of their lived sexual experience but rather because of orientation stereotyping. As the federal courts have recognized in the Title VII context, discriminators often conflate sexual-orientation and sex stereotyping.[342] Perceived-orientation approaches recognize

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335. *See, e.g.*, N.M. STAT. ANN.§§ 28-1-1 to -13 (West 1978); N.Y.C. Admin. Code § 8-107.

336. *See, e.g.*, N.M. STAT. ANN. §§ 28-1-1 to -13 (West 1978) (defining sexual orientation as "heterosexual, bisexual, or homosexual"); UTAH CODE ANN. § 57-21-2 (West 1953) (defining sexual orientation as "an individual's actual or perceived orientation as heterosexual, homosexual, or bisexual").

337. *See supra* notes 329–30 and text accompanying.

338. *See, e.g.*, COLKER, HYBRID, *supra* note 4, at xiii ("[C]ategorization under the law . . . is inevitable."); Yoshino, *supra* note 4, at 391, 461 ("[B]isexuals remain invisible because both self-identified straights and self-identified gays have overlapping political interests in bisexual erasure."); Glazer, *supra* note 4, at 1064 ("Our current vocabulary cannot save even the most well-intentioned individual from the trap of the heterosexual/homosexual binary.").

339. *See, e.g.*, COLKER, HYBRID, *supra* note 4, at 15, 86; Yoshino, *supra* note 4, at 459–61.

340. *See, e.g.*, Mezey, *supra* note 4, at 126–32.

341. *See, e.g.*, Glazer, *supra* note 4, at 1059–68.

342. *See, e.g.*, Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 764 (2014) (analyzing cases to show that "[p]laintiffs who 'look gay' succeed under Title VII while those merely known or thought to be gay do not"); Rotondo, *supra* note 268, at 107 ("LGBT

this reality and offer a potential solution to it.

It is worth exploring why an approach that focuses partly on sexual conduct, like Mezey or Glazer's, would not capture all of the discrimination covered by a perceived-orientation approach. As Mezey and Glazer envision, individuals deserve protection from discrimination based partly on specific sexual relationships—not just their general preference for one group of individuals or another. Mezey highlights the importance of stigma associated not only with "erotic and sexual desires [but] also about sexual acts."[343] For victims like those in *Fred's Appliance*, however, the problem is not sexual conduct. Instead, in these cases, discriminators fall back on generalizations about the mannerisms, dress, appearance, or behavior associated with a specific sexual orientation. Often correlated with gender nonconformity, these stereotypes do not always track an individual's romantic or sexual behavior, either in public or in private.

Nor would Glazer's protection of specific orientation necessarily reach plaintiffs like those in *Fred's Appliance*. Glazer separates general orientation—an individual's typical preference or type—from specific orientation, an individual's desire for or relationship with a particular partner.[344] As Glazer explains, some individuals face discrimination not because of their general orientation but because of incidents tied to their specific orientation. As she explains, "bisexual discrimination can be understood as discrimination on the basis of an individual's conduct (for example, sleeping with a member of the same sex) failing to conform to an individual's status (for example, heterosexual)."[345] Glazer would outlaw discrimination against those who sexual conduct deviates from their general orientation or identity.[346]

Like Mezey's strategy, Glazer's method would protect the sexual behavior of those who do not fit comfortably within the standard categories used to define sexual orientation. However, like Mezey, Glazer also focuses on discrimination based partly on sexual conduct. As Voeller and his colleagues understood in the 1970s, orientation-based discrimination often involves biases triggered not by sexual behavior but rather by what an individual does in public. Displays of affection may trigger orientation-based stereotyping, but so too may a variety of more subtle cues, including a plaintiff's lack of a known same-sex significant other[347] or gender non-conformity.[348] Sexual-orientation discrimination harms

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plaintiffs have found success by building upon the sex stereotyping theories of discrimination articulated by the Supreme Court in Price Waterhouse v. Hopkins.").

343. Mezey, *supra* note 4, at 126.

344. *See* Glazer, *supra* note 4, at 1054–58.

345. *Id*. at 1057.

346. *See id*. at 1055–59.

347. Several same-sex sexual harassment cases involve individuals targeted for not taking of advantage of sexual opportunities with opposite sex partners. *See, e.g.*, Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1452–56 (N.D. Ill. 1988) (involving discriminator targeting plaintiff because of his lack of a wife or girlfriend); Mowery v. Escambia Cty. Util. Auth., 2006 WL 327965, at *4 (N.D. Fl. 2006) (involving discriminators stereotyping victim because of his age, economic status, and lack of an opposite-sex partner); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (involving plaintiff who was targeted because he did not have sex with a female friend).

348. *See, e.g.*, *Nichols*, 256 F.3d at 874 (describing harassment plaintiff suffered because he carried a tray "like a woman"); Doe by Doe v. City of Belleville, Ill., 119 F.3d 563, 568, 576–77 (7th Cir.

victims for reasons unrelated to private sexual behavior, and a perceived-orientation approach promises to remedy some of these injuries.

Scholars who seek to create a new bisexual category face different problems. Yoshino and Colker each define bisexuality in compelling ways. However, neither addresses how a plaintiff would prove her actual orientation. The example of Title VII litigation helps to illustrate this point. Under Title VII, to prove a disparate treatment claim based on actual orientation, a victim would have to establish first that she belonged to a protected class.[349] For individuals whose conduct does not fit within classic, binary categories of sexual orientation, this requirement may prove fatal to a claim.

In either a direct or indirect disparate treatment claim, plaintiffs may also have difficulty finding circumstantial evidence to establish that the employer acted because of their orientation. In direct disparate treatment cases, a plaintiff may prevail if she establishes direct or circumstantial evidence of discrimination, including evidence that those not in the protected class systematically received better treatment or that plaintiff lost an opportunity to someone not in the protected class.[350] In indirect disparate treatment cases, after the plaintiff makes out a prima facie case, she can rebut the employer's legitimate non-discriminatory justification using statistical evidence, direct evidence of discrimination, or proof that an individual outside of the protected class but otherwise similar to the plaintiff received better treatment.[351]

In either direct or indirect cases, evidence of this kind may be as hard to come by as it was for the plaintiff in *Brennan*. Unlike race or sex, sexual orientation is not always visible or publicly known.[352] Plaintiffs may struggle to prove, as in *Brennan*, that a discriminator knew of their true orientation, particularly when a victim does not fit within the gay-straight binary. Nor, given that sexual conduct and identity are often kept private, will plaintiffs easily identify comparators or compile statistical evidence. If the law reached perceived discrimination, plaintiffs would be relieved of the burden of proving the real orientation of potential comparators or the employer's larger workforce.

Moreover, new categories may not effectively protect those victimized by orientation stereotyping. Symbolically, protecting only "true" orientation sends the message that negative stereotypes tied to particular behaviors or identities are not deeply problematic in and of themselves. Perceived-orientation approaches help ameliorate this concern by asking courts to focus on what discriminators believe rather than to which category an individual belongs.

1997), vacated, 523 U.S. 1001 (1998) (describing harassment plaintiff suffered because he wore an earring and did not conform to gender expectations).

349. *See, e.g.*, Jackson v. Frisco Indep. Sch. Dist., 789 F.3d 589, 597 (5th Cir. 2015).

350. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994); Marshall v. Am. Hosp. Ass'n., 157 F.3d 520 (7th Cir. 1998).

351. *See, e.g.*, Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 558 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); BARBARA T. LINDEMANN , PAUL GROSSMAN & PAUL W. CANE, EMPLOYMENT DISCRIMINATION LAW 27 (3d ed. 1996).

352. *See, e.g.*, *Definition of Terms*, BERKELEY GENDER EQUITY RESEARCH CENTER, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#invisible_minority (last visited Feb. 18, 2016) (defining an "invisible minority" as a "group whose minority status is not always immediately visible, such as some disabled people and LGBTIQ people").

Finally, perceived-orientation approaches allow for additional protection without adding another category. Scholars have documented the problems with sexual-orientation categories. Quite simply, such categories often leave a group of people without protection, much as the gay-straight binary left out many with more fluid identities. A perceived-orientation approach avoids the exclusion inevitably involved in categorization.

To be sure, a perceived-orientation approach will not solve every problem tied to sexual-identity discrimination jurisprudence. As Title VII and ADA jurisprudence makes clear, plaintiffs often struggle to prove the intent of a discriminator in taking a particular act.[353] A perceived-orientation approach would require victims to offer some proof of what a discriminator is thinking, and this will often prove to be no easy task. At the same time, an approach focused on perceived orientation captures the reality that individuals face orientation-based discrimination for a variety of reasons, including but not limited to conduct.

CONCLUSION

To the extent *Obergefell* defines sexual orientation, the Court has divided along conventional political lines. By defining sexual orientation as normal and immutable, the majority echoes the position taken by GLBTQ groups. To the extent that Justice Roberts and Scalia cast doubt on the immutability of sexual orientation, their dissents took up ideas used by religious conservatives and other opponents of same-sex marriage.

As *Obergefell* exemplifies, the contemporary politics of orientation have become so familiar that they seem inevitable. History shows instead that the current alignment is recent—the product of several decades of political and social change. In the mid-1970s, as psychiatrists stopped defining homosexuality as an illness, mental-health professionals and GLBTQ activists debated how sexuality should be redefined. Within local, state, and national organizations, the issue divided activists. While some preferred the language of sexual orientation and effectively advocated for civil-rights ordinances that used that rhetoric, most movement leaders ultimately settled on the definition proposed by Jack Baker and his allies in Minnesota—one based on sexual or affectional preference.

A preference-based definition gained support for both practical and ideological reasons. As a matter of principle, lesbian feminists favored language that expressed faith in the legitimacy of homosexuality and pride in GLBTQ identity. As a practical matter, movement leaders believed that preference-based definitions would offer more protection, particularly for those targeted because of conduct and orientation stereotyping.

Later, when preference-based definitions lost influence, movement leaders responded to a hostile new political climate. As the Religious Right and New Right mobilized, conservative evangelicals refined arguments describing sexuality as a preference. At first, such arguments served primarily to undermine

353. *See, e.g.*, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and the ADEA Cases*, 34 B.C. L. REV. 203, 215 (1993) ("[U]nder the disparate treatment theory must prove that the defendant intended to discriminate, and intent is generally difficult to prove absent a smoking gun.") (emphasis in the original).

demands for civil-rights protections. If homosexuality was nothing more than a preference, as the argument went, then creating civil-rights protections would represent an unfair form of special treatment for GLBTQ individuals. After the start of the AIDS epidemic, preference arguments also exploited public fear of the disease.

As preference-based definitions became a political liability, groups like the NGLTF and GRNL stopped emphasizing them. By the 1990s, the language of sexual orientation had become legally as well as politically advantageous. When *Bowers* seemingly foreclosed privacy arguments, movement attorneys channeled more energy into equal-protection strategies, gradually building the case that sexual orientation was a suspect classification. This history is relevant to the challenge courts face in defining sexual orientation. Any solution deserving support should address all of the problems identified during the debates of the 1970s.

This Article proposed a perceived-orientation approach as a way of resolving some of the issues raised by activists in the 1970s. Laws that reach perceived orientation should guard against discrimination on the basis of conduct rather than status. Such an approach would protect those with fluid identities without requiring the courts to adopt a novel jurisprudential approach or think beyond an ingrained gay-straight binary. Moreover, perceived-identity laws would provide crucial protection for those victimized by orientation-based stereotyping. Re-conceptualizing sexual orientation would thus offer a valuable opportunity for courts and legislatures to explore the ways in which sexual-orientation discrimination, like sex discrimination, harms not only outsider groups but also the larger community.