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--

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.
⁵. See infra Part I.
⁶. See infra Part I.
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based, discrimination. 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. Orientation-based categories also threatened to leave out people who did not fit into the rigid categories defined by law.

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. 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.

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. 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. A perceived-orientation strategy

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.
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
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.” 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. Notwithstanding its more pragmatic stance, GAA also presented sexuality partly as a matter of choice. 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.”

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. 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.’” The proposal did not entirely abandon the idea that sexuality was freely chosen. Indeed, Int. No. 475 defined sexual orientation as “the choice of sexual partner according to gender.”

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. The threat of discrimination only made them vulnerable to blackmail. Soon, however, the bill stalled, and GAA members had to reconsider the definition of sexual orientation. Over time, it became clear that supporters of the bill seemed unwilling to protect either

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).
20. Id.
22. Pamphlet, Gay Activists Alliance, Civil Rights for Homosexuals (1971) (on file with author and in 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. 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. However, the bill retained a ban on any “transvestites” entering a cabaret for teenagers.

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. 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.” 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.” 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. 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.” 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. 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


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.


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

35. Id.

sexual orientation. 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.”

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. 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.” 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.

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. Twenty prominent activists met with sympathetic mental health professionals and attorneys to develop a model civil-rights ordinance. Some of those present “felt that words like ‘homosexual’ or ‘sexual orientation’ ought to be used” because “everybody knew what they meant.” Others worried that an orientation-based approach would inevitably leave many without protection. As one attendee explained: “Gay people get hassled not for what they do in bed, but for publicly expressing their affection—holding hands, dancing or even for projecting an image which society does not usually associate with ‘masculine’ or ‘feminine’ roles.”

Ultimately, the attendees settled on a definition first proposed by clinical psychologist Gary Schoener who favored the language of “affectional or sexual preference.” Schoener argued that the language of sexual orientation wrongly suggested “that you can be put into one box based on your behavior.” While sexual orientation implied that relationships and identities were “static,” Schoener favored a definition that recognized the fluidity of relationships. 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.
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).
56. Id. at 2.
57. See, e.g., id.
58. Id. at 3.
59. Id.
61. See, e.g., id.
62. See, e.g., id.
treat homosexuality as a mental illness.\footnote{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.} 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.”\footnote{Lyons, supra note 63, at 25.}

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?\footnote{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.} 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 “dysfunctional” but reached consensus on very little else.\footnote{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 47. For a sample of Bieber’s work, see IRVING BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS (1962).} 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.\footnote{See Brody, supra note 66, at 1.} In the early 1970s, even the generally sympathetic \textit{New York Times} reported that 25 to 50 percent of gays and lesbians could become straight with proper treatment.\footnote{For a summary of the work of those holding this view, see, for example, Could, supra note 65.}

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.\footnote{See, e.g., id.} These experts argued that at least some gays and lesbians were healthy and well-adjusted.\footnote{See, e.g., id.} The outcome of this debate was far from clear. A \textit{New York Times} headline captured this ambiguity: \textit{What We Don’t Know About Homosexuality: If it Isn’t an Illness, What Is It?}\footnote{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).}

\textbf{B. Movement Leaders Argue the Virtues of “Affectional or Sexual Preference”}

Initially, members of NGLTF 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.\footnote{See, e.g., CLENDINEN & NAGOURNEY, supra note 14, at 265–66.} Women in NGLTF argued that preference language was more affirming, legitimizing the very conduct that New York legislators had found unacceptable.\footnote{See, e.g., id.} Ultimately, leaders of the group decided that preference language better served the movement’s goals for several reasons.\footnote{See, e.g., id.}

First, the language of preference seemed to make a cleaner break with
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.\footnote{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.} 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.\footnote{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).} Friedan and her allies argued that the idea of lesbian rights would be used to discredit the entire women’s movement.\footnote{See supra Part I.}

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.\footnote{See, e.g., Cummings, supra note 60, at 17.} Using the language of preference allowed advocates like Morgan to present same-sex attraction as a legitimate, if not superior, alternative.\footnote{See, e.g., MURRAY, supra note 71, at 81–82.} As late as 1980, NOW defined lesbians as women who had a “primary psychological, emotional, social, and sexual preference for other women.”\footnote{See, e.g., id.} 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.\footnote{See supra Part I.} 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.\footnote{See, e.g., Cummings, supra note 60, at 17.} Assistant District Attorney Edward Pear explained: “It was our feeling that it was their conduct that was unacceptable.”\footnote{Id.}

Sometimes, movement leaders also hoped that sexual-preference laws would protect those targeted because of gender non-conformity.\footnote{See, e.g., Madeleine Janover, Colorado Women, OFF OUR BACKS, May 31, 1974, at 12.} In 1974, when
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
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

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.
102. See, e.g., PIERCESON, supra note 99, at 71-72.
104. See, e.g., PIERCESON, supra note 99.
106. 217 S.E. 2d 669 (N.C. 1975). On the litigation of Enslin, see, for example, Eskridge, supra note 105, at 187-90.
108. See, e.g., ESKRIDGE, supra note 105, at 185-86.
Hoping for backlash to the Court’s ruling, Voeller and his co-director Jean O’Leary attacked Doe in the New York Times.\textsuperscript{111} They argued that by not protecting private sexual preferences, the Court threatened both straight and gay Americans.\textsuperscript{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.”\textsuperscript{113} According to Voeller and O’Leary, Doe “compromise[d] the Court’s earlier [privacy] decisions and should raise great fears.”\textsuperscript{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.\textsuperscript{115} “When you talk about sex preference,” she explained, “you must include all women, prostitutes or lesbians.”\textsuperscript{116} NGLTF also presented sexuality as a matter of preference in 1976 when lobbying the Democratic Party for support.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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 “affective or sexual preference.”\textsuperscript{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

\textsuperscript{111} See Jean O’Leary and Bruce Voeller, Implications of the Supreme Court Decision on Sodomy, N.Y. TIMES, May 15, 1976, at 20.
\textsuperscript{112} See id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} See, e.g., Lesbians Offer Support for Hookers, THE CHILDRESS INDEX, Nov. 22, 1976, at 5.
\textsuperscript{116} Id.
\textsuperscript{118} National Gay Task Force Recommendations, supra note 117, at 1.
\textsuperscript{119} Id.
\textsuperscript{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, 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. 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. Calling her group Save Our Children, Bryant implied that predatory gay men threatened families. Bryant and her allies first argued that civil-rights ordinances would simply allow gays to convert children to a deviant lifestyle. 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.” Bryant’s arguments appeared to
resonate; Miami residents voted against the ordinance by a two-to-one margin.\footnote{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.}

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.”\footnote{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.} 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.\footnote{See id.}

Internally, however, NGLTF members worried that Bryant had exposed the weaknesses of the organization’s existing strategy.\footnote{See id. at 4-5.} 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.\footnote{See id.} Brydon reminded those present that “abortion [was] also a choice.”\footnote{Id. at 4.} Voeller initially agreed that a preference or choice-based strategy spoke to deeply-held American values, including the “strength of diversity.”\footnote{Id.}

However, board members, Voeller among them, identified serious costs associated with describing sexuality as a matter of preference.\footnote{Id. at 4-5.} At a minimum, Voeller suggested that NGTF “pull away from ‘right to choose’ [arguments] in the short term.”\footnote{Id.} 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.\footnote{Id.} ‘‘Right of Choice’ is not a rallying point,” one board member reasoned. “People have a right to try to prevent children from being homosexual.”\footnote{Id.}

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

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. Between 1978 and 1979, prominent evangelicals founded organizations to advance their interests, including Christian Voice (1978) and the Moral Majority (1979).

Linking opposition to abortion and gay rights, leaders of the New Right and Religious Right described both as bad choice. 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.” In either case, Schlafly claimed that ERA proponents used the language of a right to choose to camouflage their true desires. Choice was “the code word for abortion,” she alleged, “much as ‘different lifestyles’ [is] the code word for homosexuality.”

Using similar arguments, anti-gay leaders in the Religious Right and New Right expanded their campaign for the repeal of local civil-rights ordinances. In St. Paul, Minnesota, Reverend Richard Angwin, a fundamentalist preacher from Kansas, headed the repeal campaign. Angwin used the idea of sexual preference to argue for repeal. “[B]eing a pervert is like being a thief,” Angwin explained. “[B]oth are wrong and both can continue or repent.” Angwin’s supporters carried the day. St. Paul voted to repeal its ordinance by a vote of 54,046 to 31,694.
Religious Right groups mounted signature petition drives in Wichita, Kansas, and Eugene, Oregon. In both cities, local pastors argued that homosexuality was an illegitimate preference. 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. “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. Rosalie Butler, a sympathizer of the Religious Right and a member of the St. Paul City Council, backed Adrian’s assessment. “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.

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. Barely more than two weeks later, a partial tally in Eugene showed that 13,838 voters preferred repeal, with only 7,685 in opposition. 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.”

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. The article accused NGLTF of “calling for an end to choice.” 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.”

153. See infra Part II.
154. See Wichita Repeals Homosexual Law, supra note 152.
155. Id.
156. See Sheppard, Jr., supra note 147, at 27.
157. Id.
158. See Wichita Repeals Homosexual Law, supra note 152.
159. 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.
160. See supra note 158 and accompanying text.
161. See supra note 158 and accompanying text.
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 legitimize 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.

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.
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...
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.
186. See id.
187. Id.
188. See Dannemeyer Outlines His View, supra note 178, at 5.
189. Id.
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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,

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).
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).
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).
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. These arguments took center stage in *Bowers v. Hardwick*, 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.” Those challenging the law relied on cases like *Roe v. Wade*, 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.” In 1986, the *Bowers* Court flatly rejected these claims. 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.”

When *Bowers* temporarily seemed to foreclose a privacy strategy, movement attorneys began experimenting more vigorously with alternatives. 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.

These arguments gained attention in 1992, when the Supreme Court heard *Romer v. Evans*, a case involving the constitutionality of Colorado’s Amendment Two. That measure prohibited any local government from passing antidiscrimination protections for gays and lesbians. 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

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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).
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.
209. COLO. CONST. art. II, §30, subsec. b.
orientation was suspect to strike down Amendment Two. However, the group maintained that sexual orientation should qualify as a suspect classification.

HRC recognized that the crucial problem was the requirement that a trait be immutable. 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.” According to HRC, sexual orientation was just such a characteristic.

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. 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. Ultimately, in 2003, activists used both privacy and equality arguments in litigating Lawrence v. Texas. This strategy seemed to pay off when a majority struck down the Texas sodomy ban. 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. After Lawrence, demonstrating that sexual orientation was a suspect classification remained a movement priority.

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. Roughly two-thirds of those...
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

222. See, e.g., id.
223. See, e.g., id.
224. See infra Part II.
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].
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)
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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.\footnote{See id. at 2602-05.} 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."\footnote{Id. at 2604.}

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.\footnote{See id. at 2616 (Roberts, J., dissenting) (describing the majority as “indefensible as a matter of constitutional law”).} In describing the goals of same-sex couples, he strikes a more conciliatory note.\footnote{See id. at 2626.} “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.\footnote{Id.} 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.\footnote{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?”).} 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.\footnote{See id.} 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.\footnote{See id.}

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.\footnote{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).} For the most part,
contemporary debate treats polyamory as a mere lifestyle preference. 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. When discussing sexuality itself, Scalia studiously avoided the language used by the same-sex couples and their attorneys. He wrote dismissively: “The law can recognize as marriage whatever sexual attachments and living arrangements it wishes.” For Scalia, sexuality might not rise to the level of an orientation that cannot be changed. Instead, gays and lesbians have only one of several possible “sexual attachments” that the law could recognize.

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. 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. 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.
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-
status distinction with respect to sodomy bans.\textsuperscript{277} For the \textit{Elane Photography} Court, the connection between status and conduct seemed just as close.\textsuperscript{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 \textit{Elane Photography}, the New Mexico statute was written in extremely broad terms.\textsuperscript{279} A narrower statute may make the conduct-status distinction harder to overcome.

Second, \textit{Elane Photography} stressed that the proprietors refused to photograph any displays of affection between same-sex couples.\textsuperscript{280} As the court recognized, the connection between sexual orientation and conduct at issue in the case was particularly close.\textsuperscript{281} The proprietors seemed willing to offer services to GLBTQ customers only so long as they concealed their sexual orientation.\textsuperscript{282} If \textit{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 \textit{Brennan v. Metropolitan Opera}.\textsuperscript{283} There, plaintiff, a heterosexual female, began working at the Metropolitan Opera as a secretary.\textsuperscript{284} She later moved up in the ranks, becoming an assistant director. She eventually began working under David Kneuss, a gay man.\textsuperscript{285} Not long after her tenure began, however, Brennan was fired, and she believed she had been targeted because of her sexual orientation.\textsuperscript{286} She brought suit under a New York law outlawing sexual-orientation discrimination.\textsuperscript{287} As part of her case, Brennan pointed out that RG, whom she identified as a gay man, had been hired to replace her.\textsuperscript{288}

The \textit{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.\textsuperscript{289} Identifying sexual orientation might not be a problem in cases like \textit{Elane Photography} involving

\begin{itemize}
  \item \textsuperscript{277} \textit{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).
  \item \textsuperscript{278} \textit{See Elane Photography,} 309 P.3d at 62–63.
  \item \textsuperscript{279} \textit{See id.} at 61.
  \item \textsuperscript{280} \textit{See id.} (stating that the owners "testified that they would also have refused to take photographs of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other.").
  \item \textsuperscript{281} \textit{See id.}
  \item \textsuperscript{282} \textit{See id.}
  \item \textsuperscript{283} \textit{Brennan v. Metro. Opera Ass’n} 192 F.3d 310 (2d Cir. 1999).
  \item \textsuperscript{284} \textit{See id.} at 313–16.
  \item \textsuperscript{285} \textit{See id.}
  \item \textsuperscript{286} \textit{See id.}
  \item \textsuperscript{287} \textit{See id.}
  \item \textsuperscript{288} \textit{See id.}
  \item \textsuperscript{289} \textit{See id.} at 317–18.
\end{itemize}
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. 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. Although the plaintiff identified as a heterosexual, a local store supervisor began repeatedly calling plaintiff “Big Gay Al,” a prominent gay television character. The supervisor knew nothing of plaintiff’s personal life but appeared to react to plaintiff’s personality and appearance. Plaintiff repeatedly asked the supervisor to stop, but when he persisted, plaintiff exploded and was ultimately terminated.

Washington law banned discrimination on the basis of sexual orientation, defined as “heterosexuality, homosexuality, bisexuality, and gender expression or identity.” 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.” Plaintiff argued that the law protected against discrimination on the basis of real and perceived sexual orientation. The court rejected this argument. 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.

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

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\(^{300}\) 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.
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.
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). 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. The Equal Employment Opportunity Commission (EEOC) has set out several ways to prove that an individual is regarded as disabled. 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. Second, someone may be regarded as disabled when her condition is limiting only because of the fears surrounding it. 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.

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

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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).
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.
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orientation. In some states, perceived-as approaches already apply. Elsewhere, courts interpreting state and federal disability laws are already familiar with regarded-as approaches. 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. These categories resonate deeply, even with those aware of their shortcomings. 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. Mezey prefers to protect anyone whose conduct triggers discrimination. Finally, Glazer sets out two dimensions of identity and uses them to protect those singled out for orientation nonconformity.

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. Perceived-orientation approaches recognize

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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”); Rottondo, 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." 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. 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).” Glazer would outlaw discrimination against those who sexual conduct deviates from their general orientation or identity.

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 or gender non-conformity. Sexual-orientation discrimination harms 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 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.


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).


352. See, e.g., Definition of Terms, Berkeley Gender Equity Research Center, http://geneq.berkeley.edu/lgbt_resources_definition_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. To 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 challenges 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.