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# What is Sexual Orientation?

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# What is Sexual Orientation?

Mary Ziegler<sup>1</sup>

## ABSTRACT

*At a time when the Supreme Court seems closer than ever before to treating sexual orientation as a suspect classification, consideration of the legal definition of sexual orientation is both timely and important. The Court's 2015 decision in Obergefell recognizes two guideposts for defining sexual orientation: its immutability and normalcy. While other scholars offer rich and nuanced accounts of the fight for gay, lesbian, transgender, and bisexual rights, they do not fully analyze the history of sexual orientation as a legal category. This Article closes that gap, illuminating the hidden costs of the definition of sexual orientation that Obergefell endorses.*

*In the past, definitions of sexual orientation based on immutability helped courts turn away equal protection arguments because of the "real" biological differences between same-sex and opposite sex couples. In the context of sexual orientation, arguments based on immutability admit the possibility that other "real" differences will undermine an otherwise promising equal protection claim, particularly with respect to reproduction.*

*Immutability-based definitions also raise the possibility of discrimination on the basis of conduct. The conduct-status distinction has cropped up as courts weigh conscience-based objections to otherwise applicable civil rights protections for gays and lesbians. While conscience claims resting on the conduct-status distinction have failed so far, the history of sexual orientation as a legal category, together with Supreme Court jurisprudence on the subject, offers reason for concern. The Supreme Court has been less willing to equate conduct and status when discriminators invoke what the courts describe as a legitimate moral or religious objection to a particular act, like abortion. In describing homosexuality as an immutable sexual orientation rather than partly as a legitimate choice, the Obergefell Court assumes the validity of moral objections to both same-sex marriage and homosexuality. Immutability arguments do not address whether individuals' choices deserve respect or tolerance, making it harder to argue against conscience-based objections. In the aftermath of the Court's Obergefell decision, it will be just as important to promote a proper understanding of sexual orientation as it will to expand antidiscrimination protections.*

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## INTRODUCTION

At a time when the Supreme Court seems closer than ever before to treating sexual orientation as a suspect classification, consideration of the legal definition of sexual orientation is both timely and important.<sup>1</sup> The Court's 2015 decision in *Obergefell v. Hodges* recognized two guideposts for defining sexual orientation: its immutability<sup>2</sup> and normalcy.<sup>3</sup> The Court thus seems poised to define sexuality in the terms long championed by the GLBTQ movement.<sup>4</sup> However, sexual orientation as a legal category has a long and troubled history that is mostly missing from current scholarship. While other scholars offer rich and nuanced accounts of the fight for gay, lesbian, transgender, and bisexual rights, they offer an incomplete analysis of the history of sexual orientation as a legal category.<sup>5</sup> This Article closes

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<sup>1</sup> *Obergefell* did not directly address the question of sexual orientation discrimination, and the majority's ruling relied as much on the definition of the fundamental right to marry as on the issue of sexual orientation discrimination. See, e.g., Marcia Coyle & Tony Mauro, *Marriage Ruling Historic, but Not Final Word on Gay Rights*, NAT. L.J., June 29, 2015, 2015 LNSDUID-ALM-NTLAWJ-1202730710519 (available on LexisNexis). On the possibility that the courts will treat sexual orientation as a suspect classification, see, for example, Lydia DePillis, *This Is the Next Front in the Battle for Gay Rights*, WASH. POST, June 26, 2015, [https://www.washingtonpost.com/news/wonk/wp/2015/06/26/this-is-the-next-frontier-in-the-battle-for-gay-rights/?utm\\_term=.8fc5700f9305](https://www.washingtonpost.com/news/wonk/wp/2015/06/26/this-is-the-next-frontier-in-the-battle-for-gay-rights/?utm_term=.8fc5700f9305) [<https://perma.cc/876C-9B8F>]; Timothy M. Phelps, *Next Frontier for Gays Is Employment and Housing Discrimination*, L.A. TIMES, June 26, 2015, <http://www.latimes.com/nation/la-na-gays-employment-20150626-story.html> [<https://perma.cc/T5F8-TYHD>]; David G. Savage & Timothy M. Phelps, *Same-Sex Marriage Ruling Creates New Constitutional Liberty*, L.A. TIMES, June 26, 2015, <http://www.latimes.com/nation/la-na-supreme-court-gay-marriage-decision-20150626-story.html> [<https://perma.cc/6U8W-8KV7>].

<sup>2</sup> An immutable characteristic has been defined as “a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.” *In re Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

<sup>3</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (describing “sexual orientation [as] both a normal expression of human sexuality and immutable”).

<sup>4</sup> See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 504 (1994) (arguing that “[t]he claim that sexual orientation is biologically determined has become increasingly salient in legal arguments that lesbians and gay men comprise a minority population warranting meaningful constitutional protection”); Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1502–03 (2009) (arguing that “[c]onservative opponents of LGBT rights tend to argue that homosexuality is nothing more nor less than a series of behavioral choices[,]” while “[a]dvocates for LGBT rights have seized upon—and catalyzed—scientific research . . . to contend that homosexuality has a basis in biology or is otherwise determined by factors outside of individual control”); Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 598 (2014) (stating that the “general ‘argument from etiology’ for LGB rights—what I call the ‘born that way’ and ‘not a choice’ arguments—are so popular that dissent from the idea that LGB people’s sexual orientations are innate and immutable is, in many contexts, treated as tantamount to opposing LGB rights”).

<sup>5</sup> For a sample of scholarship on the history of the movement for gay and lesbian rights, see, for example, MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009); JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (3d ed. 2012); JOHN D’EMILIO, *SEXUAL*

that gap, illuminating the hidden costs of the definition of sexual orientation that *Obergefell* endorses.

The rhetoric of sexual orientation first became prominent during the Cold War, when paranoia about Communist infiltration of the federal government led to a moral panic about homosexuals in the State Department.<sup>6</sup> Cold warriors borrowed from an existing psychological dialogue about homosexuality, insisting that homosexuality was a mental illness.<sup>7</sup> Lawmakers incorporated versions of this definition into the law of immigration and employment discrimination.<sup>8</sup>

Founded in the 1950s, homophile organizations like the Mattachine Society and the Daughters of Bilitis (“DOB”) developed the concept of sexual orientation as an alternative to the view that homosexuality was a mental illness.<sup>9</sup> Reasoning

POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES

1940–1970 (2d ed. 1998) [hereinafter *SEXUAL POLITICS, SEXUAL COMMUNITIES*]; VICKI L. EAKLOR, *QUEER AMERICA: A GLBT HISTORY OF THE 20TH CENTURY* (2008); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* (2008); LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* (2015); MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* (2012) [hereinafter *RETHINKING THE GAY AND LESBIAN MOVEMENT*]. Some scholars recognize that the term “sexual preference” once served as the preferred term among supporters of gay, lesbian, transgender, and queer rights but offer little explanation of either why this was the case or how sexual orientation as an alternative gained prominence. See, e.g., DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 265 (1999); JOHN D’EMILIO, *THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE* 156–57 (2002) [hereinafter *THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE*]; Angela M.L. Pattatucci & Dean H. Hamer, *The Genetics of Sexual Orientation: From Fruit Flies to Humans*, in *SEXUAL NATURE SEXUAL CULTURE* 155 (Paul R. Abramson & Steven D. Pinkerton eds., 1995); Clark A. Pomerleau, *Consorting with the Enemy? Women’s Liberation Rhetoric About Sexuality*, in *SEXUAL RHETORICS: METHODS, IDENTITIES, PUBLICS* 197 (Jonathan Alexander & Jacqueline Rhodes eds., 2016); EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 41 (1999) [hereinafter *MISMEASURE OF DESIRE*]. These scholars touch on the fluidity of legal and political understandings of homosexuality in the twentieth century but do not focus on its evolution or larger stakes. This Article offers a comprehensive look at the history only briefly addressed in existing scholarship.

<sup>6</sup> On the Cold War anti-gay panic, see, e.g., ROBERT J. CORBER, *HOMOSEXUALITY IN COLD WAR AMERICA: RESISTANCE AND THE CRISIS OF MASCULINITY* (1997); George Chauncey, Jr., *The Postwar Sex Crime Panic*, in *TRUE STORIES FROM THE AMERICAN PAST* 160–78 (William Graebner ed., 1993); John D’Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in *PASSION AND POWER: SEXUALITY IN HISTORY* 226–40 (Kathy Peiss & Christina Simmons eds. with Robert A. Padgug, 1989) [hereinafter *The Homosexual Menace: The Politics of Sexuality in Cold War America*]; DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); CRAIG M. LOFTIN, *MASKED VOICES: GAY MEN AND LESBIANS IN COLD WAR AMERICA* (2012).

<sup>7</sup> See, e.g., K.A. CUORDILEONE, *MANHOOD AND POLITICAL CULTURE IN THE COLD WAR* 36 (2005); CORBER, *supra* note 6, at 136; JOHNSON, *supra* note 6, at 159–60 (describing stories of men who tried to “straighten [themselves] out” to rid themselves of their sexual tendencies).

<sup>8</sup> See CANADAY, *supra* note 5, at 56–58 (discussing the collaboration between immigration and military officials to identify gay persons).

<sup>9</sup> See DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* 7 (2012) (describing the formation of the Mattachine Society and the Daughters of Bilitis); *Comment on*

from race, gay activists framed sexual orientation as inborn and involuntary.<sup>10</sup> By contrast to race, however, activists also described sexual orientation as private and unrelated to personally-held moral views.<sup>11</sup> In this way, in the short term, homophile activists could tackle discrimination against gays and lesbians without questioning the legitimacy of moral or religious opposition to homosexuality.

Over time, however, courts and lawmakers developed their own definition of sexual orientation, and the legal definition advanced by homophile groups had the unintended consequence of justifying discrimination based on public identity or conduct rather than status.<sup>12</sup>

Recognizing the risks associated with sexual orientation as a legal category, activists in the 1970s developed an alternative approach based on sexual or affectional preference.<sup>13</sup> This category promised to protect those victimized because of public identity, conduct, stereotyping, or misperception.<sup>14</sup> Additionally, by contrast to some definitions of sexual orientation, sexual preference as a category explicitly challenged the legitimacy of private, anti-gay bias.<sup>15</sup> After the advent of the AIDS epidemic and the rise of the Religious Right and New Right, lawyers and activists would once again make sexual orientation the centerpiece of legal and political strategy.<sup>16</sup>

The history of sexual orientation exposes the hidden costs of the victory achieved in *Obergefell* and the cases likely to follow it. Today, characterizing sexual identity as voluntary is a foundational element for arguments against the creation of strong civil rights laws for GLBTQ individuals. But contrary to what contemporary politics would suggest, the idea of an immutable sexual orientation has been used to limit equal treatment and justify intolerance on moral grounds.

In particular, examining the history of sexual orientation gives cause for concern about any definition of sexual orientation, like *Obergefell*'s, based on immutability. Arguments from immutability carry familiar disadvantages associated with reasoning from race. For instance, with respect to sex discrimination, an analogy to race helped conservative courts turn away equal-protection arguments involving

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*SEXOLOGY's Symposium: The Causes of Homosexuality*, MATTACHINE REV., July–Aug. 1955, at 32 (discussing the opinions of an expert who believed homosexuality was an orientation “properly and deeply-implanted” in one’s nature); *id.* at 33 (“[H]omosexuals should not be considered as persons affected by a disease.”); *Purpose of the Daughters of Bilitis*, LADDER, Dec. 1964, at 1, 2. (stating that one of the purposes of the Daughters of Bilitis was educating “the public at large through acceptance first of the individual, leading to an eventual breakdown of erroneous taboos and prejudices”).

<sup>10</sup> See RETHINKING THE GAY AND LESBIAN MOVEMENT, *supra* note 5, at 597–98, 614–15.

<sup>11</sup> See *infra*, notes 99, 101 and accompanying text.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part II.

reproduction because of the biological differences between men and women with respect to gestation.<sup>17</sup>

*Obergefell* emphasizes that same-sex couples are similarly situated to opposite-sex couples with respect to their ability to parent, carry on committed relationships, and appreciate the value of marriage as an institution.<sup>18</sup> But arguments from immutability admit the possibility that other “real” differences will undermine an otherwise promising equal protection claim. In the context of cases involving parental rights, same-sex couples (although not same-sex individuals) arguably differ biologically in their ability to reproduce in vivo rather than turning to assisted reproduction. Laws regulating same-sex adoption, parenting, and access to assisted reproductive technologies (ART) may be affected by the kind of “real” differences logic often associated with arguments from immutability.

Arguments from immutability set an additional trap. To make progress under politically challenging circumstances, gay rights activists emphasized that sexual orientation was not only immutable but also expressed in private. This strategy opened the door to penalties based on conduct rather than status. In particular, the conduct-status distinction has cropped up as courts weigh conscience-based objections to otherwise applicable civil-rights protections for gays and lesbians. While these claims have not yet had much success, the history of sexual-orientation arguments, together with the Supreme Court’s jurisprudence on the subject, offer reason for concern.<sup>19</sup> The Supreme Court has more often protected conduct-based discrimination when discriminators invoke what the courts view as a legitimate moral objection to a behavior.<sup>20</sup> *Obergefell* assumes that moral and religious objections to same-sex marriage are defensible and even protected.<sup>21</sup> As the Court’s opinion suggests, immutability arguments do not address whether individuals’ choices deserve respect, making it harder to argue against the kind of conscience-based objection now championed by individuals and businesses opposed to same-sex marriage.

The Article proceeds in three parts. Part I traces the emergence of a sexual-orientation based strategy to homosexuality, which arose in the 1950s and 1960s. At the height of the Cold War, politicians transformed psychological arguments that homosexuality was a mental illness. Reformist therapists pushed back, insisting that sexual orientation—defined as an unchanging propensity<sup>22</sup>—could not be altered by criminal penalties and that sodomy bans were both pointless and

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<sup>17</sup> See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 63–68, 94–95, 217–18 (2011); see also Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1792–93, 1796–97 (2008).

<sup>18</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601–08 (2015).

<sup>19</sup> See *infra* Part III.

<sup>20</sup> *Id.*

<sup>21</sup> See *Obergefell*, 135 S. Ct. at 2602.

<sup>22</sup> *Homosexuality and Prostitution: B.M.A. Memorandum of Evidence for Departmental Committee*, 2 Brit. Med. J. 165, 165 (Supp. 1955).

inhumane. Starting in the 1950s, homophile groups defined sexual orientation in a similar way, but their approach delivered mixed results.<sup>23</sup>

Part I explains that in the 1950s and 1960s, courts and bureaucrats used the distinction between status and conduct to limit antidiscrimination protections. Assuming that sexual orientation, like race, was an immutable status, skeptical courts often rejected the claims of those who “flaunt[ed]” their sexual orientation.<sup>24</sup> Additionally, in early cases involving same-sex marriage, courts drew on the idea of real, biological differences developed in the context of race and sex. Because gay and lesbian couples were not similarly situated with respect to reproduction and biology, courts identified a rational basis for state restrictions on same-sex marriage.

Part II explores the rise of the concept of sexual preference or choice as an alternative to sexual orientation. In early cases involving sexual orientation and privacy, judges used the distinction between orientation and conduct to justify employment discrimination against persons who publicly identified as gay or lesbian.<sup>25</sup> As an alternative, activists in both national and state organizations defined a new legal category based on sexual or affectional preference.<sup>26</sup> As Part II shows, enthusiasm for this legal approach waned in the face of the AIDS epidemic and the Religious Right and the New Right.<sup>27</sup> Despite diminishing support for the concept of sexual preference, the reemergence of the concept of sexual orientation was neither inevitable nor a logical step in the growing tolerance of homosexuality.

Part III studies the lead up to the *Obergefell* decision and the legal and political consequences of the different ideas of orientation following the decision. In particular, Part III focuses on the unintended costs of immutability arguments. Part IV briefly concludes.

## I. THE INVENTION OF SEXUAL ORIENTATION AS A LEGAL CATEGORY

Prior to the 1950s, the rhetoric of sexual orientation did not refer to a status or apply disproportionately to homosexuality, but instead described sexually explicit materials or criticized individuals, gay or straight, who were particularly interested in sexual intercourse.<sup>28</sup>

In the early 1950s, however, Cold War politics, new developments in sexology and psychology, and the emergence of homophile organizations changed the popular meaning of sexual orientation. Starting in 1950, Senator Joseph McCarthy

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<sup>23</sup> See *infra* Part I.

<sup>24</sup> See, e.g., *Singer v. U.S. Civil Serv. Comm’n*, 530 F.2d 247, 251–54 (9th Cir. 1976); *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 856–57 (D. Md. 1973).

<sup>25</sup> See *Acanfora*, 359 F. Supp. at 856–57.

<sup>26</sup> See *infra* notes 264, 269, 286, 289–90 and accompanying text.

<sup>27</sup> See *infra* Part II.

<sup>28</sup> For illustrations of this earlier, more general use of sexual orientation, see, for example, Albert Eide Parr, *Sex Dimorphism and Schooling Behavior Among Fishes*, 65 AM. NATURALIST 173, 176–80 (1931); David Riesman, *Psychological Types and National Character: An Informal Commentary*, 5 AM. Q. 325, 325–43 (1953).

(R-WI) and his allies in Congress targeted alleged gays and lesbians in the State Department.<sup>29</sup> The Red Scare brought unprecedented political attention not only to the presence of homosexuals in the government but also to the definition of homosexuality.<sup>30</sup> McCarthy and his colleagues helped to forge a discourse based on mental illness, weakness, vulnerability, and political progressivism.<sup>31</sup> Because homosexuals were sick and morally weak, McCarthy argued that they were far more likely to endorse Communism or fall prey to blackmail schemes.<sup>32</sup>

The conflation of Communism and homosexuality sparked debate about whether McCarthy's vision of gays and lesbians rang true. For some time, sexologists and psychologists had debated whether people could choose not to be gay.<sup>33</sup> Since the nineteenth century, researchers had discussed whether homosexuality was immutable, either the result of genetics, hormones, or a combination of the two.<sup>34</sup> The Red Scare transformed this dialogue into a political and legal battle. In Britain and the United States, with the politicization of debate, psychologists took fresh interest in the subject of sexuality, publishing new studies distinguishing sexual behavior from what therapists called sexual orientation.<sup>35</sup> While psychologists maintained that gays or lesbians could refrain from homosexual behavior, the new studies affirmed that sexual orientation—a person's ingrained preference or propensity—would not change after therapy.<sup>36</sup>

This Part traces the development of sexual orientation as a legal category. First, this Part explores the political debate about the origins and nature of homosexuality that emerged during the Cold War, as McCarthy and his allies transformed arguments that same-sex sexuality signaled mental illness. Next, this Part traces the development of sexual orientation arguments in the homophile movement. Finally, the Part illuminates how some courts used the idea of sexual orientation to limit demands for equal treatment made by gays and lesbians.

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<sup>29</sup> See *infra* pp. 7–9.

<sup>30</sup> See *infra* pp. 7–9.

<sup>31</sup> See *infra* pp. 7–9.

<sup>32</sup> See *infra* pp. 7–9.

<sup>33</sup> See *infra* p. 7.

<sup>34</sup> For a summary of the state of the pre-1970s debate among psychiatrists and psychologists about the nature of homosexuality, see Albert Ellis, *Constitutional Factors in Homosexuality: A Re-Examination of the Evidence*, 1 ADVANCES IN SEX RESEARCH 161, 161–79, 182 (1963).

<sup>35</sup> See, e.g., Desmond Curran & Denis Parr, *Homosexuality: An Analysis of 100 Male Cases Seen in Private Practice*, 1 BRIT. MED. J. 797, 797–801 (1957) (studying a group of patients that had demonstrated homosexual tendencies to better define the characteristics of homosexuals); *Homosexuality and Prostitution: B.M.A. Memorandum of Evidence for Departmental Committee*, 2 BRIT. MED. J. 165, 165–70 (Supp. 1955) (discussing the “causes and nature of homosexuality and prostitution”); *Treatment of Homosexuality*, 1 BRIT. MED. J. 1347, 1347 (1958) (assessing medical interventions for treating homosexuality).

<sup>36</sup> See *Homosexuality and Prostitution: B.M.A. Memorandum of Evidence for Departmental Committee*, *supra* note 35, at S165–69.

### A. Cold War Politics Redefine Homosexuality

The definition of homosexuality had long been a subject of fascination for psychologists and sexologists. Sexologists including Richard von Krafft-Ebing (1886),<sup>37</sup> and Albert Havelock Ellis (1897)<sup>38</sup> argued that homosexuality was an inborn, genetic condition.<sup>39</sup> Others maintained that homosexuality resulted from a hormonal imbalance.<sup>40</sup> Another line of disagreement touched on whether effective treatment could eliminate homosexuality.<sup>41</sup>

In 1950, when Senator McCarthy went public with arguments about a connection between homosexuality and Communism, political interest in the nature of sexuality intensified considerably.<sup>42</sup> In speaking to the media, McCarthy told a story about a “flagrant homosexual” who had worked at the State Department and won reinstatement, notwithstanding concern that the employee would be a security risk.<sup>43</sup> McCarthy suggested that closeted homosexuals posed a particularly pernicious threat to the nation because of the potential for blackmail.<sup>44</sup> Given that sodomy was against the law,<sup>45</sup> McCarthy insinuated that gays and lesbians would sacrifice the nation’s security rather than risk public exposure.<sup>46</sup>

Republicans soon realized that the supposed threat of homosexuality was a powerful political weapon. With Democrat Harry Truman in the White House, McCarthy and his allies suggested that neither the administration nor the Democratic Party could protect the nation.<sup>47</sup> If the Democratic Party was unwilling or unable to keep “sexual perverts” out of important, sensitive national positions, how could Truman meaningfully fight the Cold War?<sup>48</sup>

In 1950, Guy George Gabrielson, the chairman of the Republican National Committee, played up what he called “the homosexual angle,” arguing that the “sexual perverts who have infiltrated our government” were as “dangerous as the

<sup>37</sup> See RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS, WITH ESPECIAL REFERENCE TO CONTRARY SEXUAL INSTINCT: A MEDICO FORENSIC STUDY* (Charles Gilbert Chaddock, trans., F.A. Davis Co. 1892) (1886).

<sup>38</sup> See HAVELOCK ELLIS & JOHN ADDINGTON SYMONDS, *SEXUAL INVERSION* (1897).

<sup>39</sup> See Ellis, *supra* note 34, at 161 (summarizing studies of Krafft-Ebing and Albert Havelock Ellis).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 175–80 (offering an overview of scholarly field).

<sup>42</sup> On preoccupation with homosexuality during the Cold War, see, for example, D’EMILIO & FREEDMAN, *supra* note 5, at 294–97; *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *supra* note 6, at 226–32.

<sup>43</sup> See, e.g., JOHNSON, *supra* note 6, at 26–27; William S. White, *McCarthy Says Miss Kenyon Helped 28 Red Front Groups*, N.Y. TIMES, Mar. 9, 1950, at 1; see also CARPENTER, *supra* note 9, at 6; BYRNE FONE, *HOMOPHOBIA: A HISTORY* 390–91 (2000).

<sup>44</sup> See RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* 167 (1990); JOHNSON, *supra* note 6, at 24; HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 244 (2014).

<sup>45</sup> CARPENTER, *supra* note 9, at 1–6.

<sup>46</sup> See, e.g., *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *supra* note 6, at 227–28, 230.

<sup>47</sup> *Id.* at 227.

<sup>48</sup> See *id.*

Communists [themselves].<sup>49</sup> A Senate committee investigating the issue in 1950 concluded that thousands of homosexuals worked in the federal government and put Americans at risk.<sup>50</sup>

The Senate investigation produced a new analysis on the connection between homosexuality and Communism. McCarthy and his allies had previously played up the risk of blackmail.<sup>51</sup> Prominent senators argued that gays and lesbians were also especially likely to be Communists because homosexuality was a profound mental disturbance.<sup>52</sup> Senator Clyde Hoey (D-NC) explained to the *New York Times*, “The lack of emotional stability which is found in most sex perverts, and the weakness of their moral fiber, makes them susceptible to the blandishments of foreign espionage agents.”<sup>53</sup> McCarthy had argued that Communism itself resulted from mental illness.<sup>54</sup> By connecting homosexuality to the Red Scare, some Senators, especially Republicans, crafted a new image of gays and lesbians as mentally unbalanced, selfish, and vulnerable to the influence of foreign foes.

This new understanding of homosexuality soon justified a dramatic expansion of efforts to legally surveil and punish gays and lesbians.<sup>55</sup> Shortly after his 1953 inauguration, President Dwight Eisenhower signed into law an executive order making homosexuality sufficient grounds for dismissal from federal employment.<sup>56</sup> New applicants for federal jobs faced a rigorous screening process that kept many gays and lesbians out of federal jobs.<sup>57</sup> Many state and local governments largely copied the federal approach, as did private industries.<sup>58</sup> The Armed Services also stepped up its efforts to police homosexuality, developing a more elaborate policy concerning when and why gays and lesbians posed a threat to the morale and security of the nation’s troops.<sup>59</sup>

The crackdown on gays and lesbians spawned new legal definitions of homosexuality. One such definition took shape between 1950 to 1952, when

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<sup>49</sup> *Perverts Called Government Peril*, N.Y. TIMES, Apr. 19, 1950, at 25.

<sup>50</sup> See, e.g., William S. White, *Inquiry by Senate on Perverts Asked*, N.Y. TIMES, May 20, 1950, at 8 [hereinafter *Inquiry by Senate on Perverts Asked*]. The press would regularly report on the total number of State Department employees dismissed as being “sexual perverts.” See, e.g., *384 Ousters Listed in State Department*, N.Y. TIMES, Nov. 6, 1953, at 15; *126 Perverts Discharged: State Department Reports Total Ousted Since Jan. 1, 1951*, N.Y. TIMES, Mar. 26, 1952, at 25.

<sup>51</sup> See *supra* note 44 and accompanying text.

<sup>52</sup> See, e.g., *Federal Vigilance on Perverts Asked*, N.Y. TIMES, Dec. 16, 1950, at 3; *Inquiry by Senate on Perverts Asked*, *supra* note 50.

<sup>53</sup> *Federal Vigilance on Perverts Asked*, *supra* note 52, at 3.

<sup>54</sup> See JOHNSON, *supra* note 6, at 16.

<sup>55</sup> See, e.g., CHAUNCEY, *supra* note 6, at 160–78; JOHNSON, *supra* note 6, at 63; *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *supra* note 6, at 226–40.

<sup>56</sup> RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* 107–08 (2005); PHIL TIEMEYER, *PLANE QUEER: LABOR, SEXUALITY, AND AIDS IN THE HISTORY OF MALE FLIGHT ATTENDANTS* 62–63 (2013).

<sup>57</sup> *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *supra* note 6, at 229.

<sup>58</sup> *Id.*

<sup>59</sup> *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *supra* note 6, at 229; see generally CANADAY, *supra* note 5, at 180–205.

Senator Patrick McCarran (D-NV) spearheaded an overhaul of the nation's immigration law.<sup>60</sup> McCarran promised a unifying approach to immigration based on “color-blind” citizenship and shared values.<sup>61</sup> While the 1952 McCarran-Walter Act preserved “the national origins quota system” that favored immigrants from Northern and Western Europe,<sup>62</sup> the law assumed that all Americans citizens shared an aversion to sexual deviance.<sup>63</sup> In addition to carrying forward the policy of excluding aliens on the basis of “crime of moral turpitude,” the drafters of the act wanted to exclude persons afflicted with “psychopathic personalities,” or persons who were “homosexuals or sex pervert[s].”<sup>64</sup> After the Public Health Commission reassured members of Congress that the language of “psychopathic personality” was broad enough to encompass homosexuality, the final version of the McCarran-Walter Act only implicitly addressed sexual behavior.<sup>65</sup>

After 1944, the military also developed new tools to identify, discharge, and discipline homosexual personnel.<sup>66</sup> Previously, servicemen and women could face dishonorable discharge for violent or consensual homosexual acts.<sup>67</sup> Starting in the 1950s, the military also investigated and censured service members for “homosexual ‘tendencies,’” a strategy that allowed officers to target those only suspected of being gay or lesbian.<sup>68</sup>

### *B. Homophile Groups Use Scientific Uncertainty as an Argument Against Discrimination*

As Margot Canaday has shown, the law helped to shape the public understanding of homosexuality, defining it not only as a statutory category but also as an identity citizens adopted, resisted, and helped to shape.<sup>69</sup> However, starting in the 1950s, medical professionals and homophile activists resisted the definition of homosexuality emerging in immigration and military law.<sup>70</sup> Groups advocating for the rights of gays and lesbians organized earlier in the decade in

<sup>60</sup> See, e.g., CANADAY, *supra* note 5, at 215–211; ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882, at 113–28 (2004); BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 73–74 (2004).

<sup>61</sup> CANADAY, *supra* note 5, at 216–17.

<sup>62</sup> *Id.* at 217.

<sup>63</sup> See *id.* (noting “non-deviant citizens” were “strengthened by their common opposition” to homosexuals).

<sup>64</sup> See CANADAY, *supra* note 5, at 218–19. See also, e.g., 8 U.S.C. § 1182(a)(4) (2012) (prohibiting admission of aliens who committed a “crime involving moral turpitude”).

<sup>65</sup> See S. REP. NO. 1137–82, at 9 (1952); H.R. 2379, 82d Cong. § 212(a) (1951). See also 8 U.S.C. § 1182(a)(2) (2012).

<sup>66</sup> See generally CANADAY, *supra* note 5, at 177–211 (providing overview of the development of strict military policies against homosexuals).

<sup>67</sup> *Id.* at 186–87.

<sup>68</sup> *Id.* at 186–89.

<sup>69</sup> See generally CANADAY, *supra* note 5.

<sup>70</sup> See *infra* pp. 13–16.

response to the federal and state repression of homosexuality.<sup>71</sup> One of the first organizations, the Mattachine Society, took inspiration from the publicity surrounding Alfred Kinsey's controversial work on sexuality.<sup>72</sup> In 1948, Kinsey, a zoologist at Indiana University, and his colleagues published *Sexual Behavior in the Human Male*.<sup>73</sup> Kinsey reported that 46% of male subjects had reacted sexually to persons of the same sex, and nearly 40% had had at least one homosexual experience.<sup>74</sup>

Encouraged by the Kinsey Report, Harry Hay, a former Communist and labor activist, proposed that gay men organize to demand better treatment.<sup>75</sup> By December 1950, Hay led the first meeting of the Mattachine Society in California.<sup>76</sup> Over the course of the next decade, chapters of the Mattachine Society formed in several major metropolitan areas, and the organization replaced any connection to Communism with a focus on civil rights.<sup>77</sup> In 1952, a group of Mattachine members formed ONE, Inc., another gay rights group, and three years later, a lesbian couple, Del Martin and Phyllis Lyons, helped to form the first lesbian rights organization, the Daughters of Bilitis (DOB).<sup>78</sup>

Early homophile organizations primarily provided a social outlet for individuals who could face criminal sanctions for publicly expressing themselves.<sup>79</sup> However, ONE, Mattachine, and DOB soon started working toward an alternative definition of homosexuality, one that would challenge the anti-gay assumptions increasingly being written into law.<sup>80</sup> From the start, homophile publications experimented with

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<sup>71</sup> On the rise of the homophile movement, see, for example, FADERMAN, *supra* note 5, at 53–90; RETHINKING THE GAY AND LESBIAN MOVEMENT, *supra* note 5, at 42–74; SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 57–125 (discussing the “homosexual emancipation movement” that began to take root in the 1950s).

<sup>72</sup> See FADERMAN, *supra* note 5, at 55–66; see also SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 58–62 (discussing the early beginnings of the Mattachine Society).

<sup>73</sup> See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

<sup>74</sup> *Id.* at 84.

<sup>75</sup> See FADERMAN, *supra* note 5, at 55–68; see also SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 58–62.

<sup>76</sup> FADERMAN, *supra* note 5, at 58.

<sup>77</sup> See, e.g., FADERMAN, *supra* note 5, at 55–68; LOFTIN, *supra* note 6, at 7–9 (reflecting on the civil rights impact of homophile activist organizations); SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 62–77, 74–84 (discussing the evolution of the Mattachine Society and its break from the Communist views of its founders).

<sup>78</sup> On the formation of ONE, see, for example, WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 75 (2002); LOFTIN, *supra* note 6, at 7, 19–20, 39–69; C. TODD WHITE, *PRE-GAY L.A.: A SOCIAL HISTORY OF THE MOVEMENT FOR HOMOSEXUAL RIGHTS* 39–43, 89–113 (2009).

<sup>79</sup> See, e.g., EAKLOR, *supra* note 5, at 95–99; MARCIA M. GALLO, *DIFFERENT DAUGHTERS: A HISTORY OF THE DAUGHTERS OF BILITIS AND THE RISE OF THE LESBIAN RIGHTS MOVEMENT* 29–32 (2006) (illustrating the Daughters use of a newsletter to provide “civil liberties education” and other advice on homosexuality to their followers); SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 108–13, 203–04 (discussing each homophile organization’s publications and their efforts to “acquire political influence”).

<sup>80</sup> See, e.g., FADERMAN, *supra* note 5, at 63–66 (discussing Mattachine’s efforts to support a homosexual test case in court to “make clear to the world that homosexuals were not ipso facto lewd and

alternative definitions of homosexuality. In 1955, for example, the *Mattachine Review* published a piece asking, “Why not regard homosexuality as merely a difference in the direction of the sexual instinct?”<sup>81</sup> In the mid-1950s, DOB’s magazine, *The Ladder*, proposed a similar understanding of lesbianism.<sup>82</sup> DOB Leader, Del Martin, argued, “The Lesbian is a woman endowed with all the attributes of any other woman,” the “only difference lies in her choice of a love partner.”<sup>83</sup>

In the mid-1950s, led by ONE, homophile groups publicized research on the causes and treatment of homosexuality.<sup>84</sup> Given the scientific uncertainty surrounding homosexuality, ONE and its allies argued that lawmakers should not seek to define a term even the experts failed to understand.<sup>85</sup> “Because we will grapple with such controversial question as: causes, cure[s], social adjustments, personal behavior, ethical standards, [and] prejudices,” ONE explained, “it is not to be expected that pat and immediate answers will be easily achieved, if at all.”<sup>86</sup>

The Mattachine Society similarly relied on this tactic to push back against the persecution of gay men. Consider the strategy Mattachine used in responding to a scandal in Boise, Idaho. In the mid-1950s, a private investigator hired to look into gay sex in the town claimed to have exposed a “homosexual underground” operating in the city.<sup>87</sup> The Boise investigation led to over 1400 interviews and a handful of arrests, convictions, and sentences of life imprisonment.<sup>88</sup>

To defuse intense public anger, the leaders of the Mattachine Society argued that scientific experts, not lawmakers, should define homosexuality.<sup>89</sup> Without understanding homosexuality, lawmakers could not hope to effectively regulate it.<sup>90</sup>

dissolute”); LOFTIN, *supra* note 6, at 7–21 (discussing how ONE “nudg[ed] gay people in a more liberal direction” in the midst of McCarthyism’s efforts to “crack[] down on homosexuals” and “reinforce conventional sexual morality”); *see also infra* pp. 9–12 (discussing the influence of the Red Scare on employment, military, and immigration laws and policies).

<sup>81</sup> Luther Allen, *Homosexuality: Is It a Handicap or a Talent?*, MATTACHINE REV. July–Aug. 1955, at 4, 8.

<sup>82</sup> *See* Del Martin, *The Positive Approach*, LADDER, Nov. 1956, at 8, 8.

<sup>83</sup> *Id.*

<sup>84</sup> On the emphasis put on research, *see*, for example, GALLO, *supra* note 79, at 104; HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* 55–57, 93–95, 205–36 (2002); MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* 139–40 (2010) [hereinafter *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE*].

<sup>85</sup> *See* Ken Burns, *Homosexuality in Boise—Let’s Get at the Causes!*, MATTACHINE REV., Feb. 1956, at 2, 2, 30 (urging lawmakers and community leaders to objectively consider homosexuality and “treat the causes” rather than the “symptoms”); *One Institute: A SPECIALIZED SCHOOL*, LADDER, June 1957, at 9, 9–12 (discussing ONE’s mission to critically examine and understand the definition of homosexuality).

<sup>86</sup> *One Institute: A SPECIALIZED SCHOOL*, *supra* note 85, at 13.

<sup>87</sup> D’EMILIO & FREEDMAN, *supra* note 5, at 294; JOHNSON, *supra* note 6, at 97–98; *SEXUAL POLITICS, SEXUAL COMMUNITIES*, *supra* note 5, at 51.

<sup>88</sup> D’EMILIO & FREEDMAN, *supra* note 5, at 294; JOHNSON, *supra* note 6, at 97–98; *SEXUAL POLITICS, SEXUAL COMMUNITIES*, *supra* note 5, at 51.

<sup>89</sup> *See* Burns, *supra* note 85, at 2, 30.

<sup>90</sup> *See id.*

Writing on the Boise scandal, Ken Burns, a Mattachine leader, argued, “We have to get at the root of this social problem before we can solve it judiciously . . . .”<sup>91</sup>

Later in the decade, the Mattachine Society argued that lawmakers should not criminalize homosexual sex until scientists could understand or treat it. For example, Burns explained in 1956, “The solution of the problems of persons yet to be born who will become homosexual—who are maybe even destined to be homosexual—lies in preventative means.”<sup>92</sup> Scientific uncertainty became a key argument against the criminalization of sexual conduct. Burns suggested that punishing gays and lesbians was fruitless until scientists knew what defined homosexuality.<sup>93</sup> Burns explained, “The Mattachine Society is prepared to sit down with legislators, law enforcement officers, judges and others in the legal field to work out an objective program to meet the legal problems affecting homosexuality and to constructively administer to the causes and not the symptoms of the problem.”<sup>94</sup>

As importantly, a focus on research lent credibility to homophile groups whose very existence many questioned. In 1956, to advance this effort, ONE created the ONE Institute, an entity committed to research on homosexuality.<sup>95</sup> In the mid-to-late 1950s, participants at the institute entertained a variety of opinions about the causes of homosexuality.<sup>96</sup> While the appearance of objectivity was vital, research had a clear political aim. As one institute attendee explained, “[W]e must show the public that homosexuality is not a contagious disease or a great threat to the body politic as it is so often feared or purported to be . . . .”<sup>97</sup>

### C. Sexual Orientation Becomes Part of an Argument for Equal Treatment

Starting in the late 1950s, DOB and Mattachine began promoting their own definitions of sexual orientation.<sup>98</sup> At the time, homophile groups celebrated the recommendation by blue ribbon commissions in the United States and Britain that homosexuality should be decriminalized.<sup>99</sup> In 1962, the American Law Institute (ALI) recommended that private acts of sodomy no longer be governed by criminal

<sup>91</sup> *Id.*

<sup>92</sup> Ken Burns, *The Homosexual Faces a Challenge*, MATTACHINE REV., Aug. 1956, at 18, 25.

<sup>93</sup> *See id.* at 19.

<sup>94</sup> *Id.*

<sup>95</sup> On the creation of the ONE Institute, see, for example, LOFTIN, *supra* note 6, at 40–41; WHITE, *supra* note 78, at 74.

<sup>96</sup> *See, e.g., Mattachine Looks at Life—Life Talks Back*, LADDER, Sept. 1957, at 3, 5–9 (offering different experts insights on defining and characterizing homosexuality); *ONE Symposium: Homosexuality—A Way of Life*, THE LADDER, Feb. 1958, at 7–8 (offering various views in a debate on whether “[h]eterosexual [l]iving [i]s [b]etter [t]han [h]omosexual” living); *ONE Symposium: The Homosexual in the ‘Round’*, LADDER, Dec. 1957, at 6, 6–8 (discussing various presentations given at a symposium sponsored by the Daughters of Bilitis).

<sup>97</sup> *Mattachine Looks at Life—Life Talks Back*, *supra* note 96, at 9.

<sup>98</sup> *See infra* pp. 19, 22.

<sup>99</sup> *See infra* notes 100–03, 115–16 and accompanying text.

law.<sup>100</sup> But a different rhetoric of sexual orientation first emerged from a related dialogue about law reform in 1954 in the United Kingdom, when a government-sponsored committee of fifteen, known as the Wolfenden Committee, considered whether prostitution and homosexuality should still be criminalized.<sup>101</sup> The committee asked the British Medical Association (BMA) to provide an evidence report on the science of homosexuality.<sup>102</sup> In 1955, the BMA reported, “Homosexuality is popularly understood to mean the commission of homosexual practices. This is not so . . . . Most people, if not all, possess in different degrees both homosexual and heterosexual potentialities.”<sup>103</sup>

The BMA used the term “sexual orientation” to describe the limits of treatment.<sup>104</sup> To be sure, the BMA endorsed any effective measure to reduce the prevalence of homosexuality.<sup>105</sup> “The real safeguard against homosexual activity is public opinion,” the BMA reasoned, “and measures to promote a healthy attitude toward[] sex should be promoted and supported by all possible means.”<sup>106</sup> Nevertheless, the BMA asserted that sexual orientation—an individual’s inborn propensity—could not be changed.<sup>107</sup> “[The medical profession] is in a position to do valuable work in enabling the individual to overcome his disability, even if it cannot alter his sexual orientation,” the BMA explained.<sup>108</sup> Before and after the committee issued its final report, the BMA frequently used sexual orientation as shorthand to distinguish an individual’s conduct from her identity or feelings of attraction.<sup>109</sup>

After the release of the Wolfenden Report in 1957, homophile groups immediately identified the use of the term sexual orientation as a promising rhetorical strategy.<sup>110</sup> The BMA had legitimized arguments that sexual orientation, however defined, did not change as a result of treatment. This finding fit well with

<sup>100</sup> MINTON, *supra* note 84, at 241; SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 144.

<sup>101</sup> On the work of the Wolfenden Committee, see, for example, Nicholas C. Edsall, *Toward Stonewall: Homosexuality and Society in the Modern Western World* 315–16 (2003); Stephen M. Engel, *The Unfinished Revolution: Social Movement Theory and the Gay and Lesbian Movement* 71–72 (2001).

<sup>102</sup> See, e.g., DEBORAH COHEN, *FAMILY SECRETS: SHAME AND PRIVACY IN MODERN BRITAIN* 171 (2013); LESLEY A. HALL, *SEX, GENDER AND SOCIAL CHANGE IN BRITAIN SINCE 1880*, at 163 (2012); ALKARIM JIVANI, *IT’S NOT UNUSUAL: A HISTORY OF LESBIAN AND GAY BRITAIN IN THE TWENTIETH CENTURY* 118 (1997).

<sup>103</sup> *Homosexuality and Prostitution: B.M.A. Memorandum of Evidence for Departmental Committee*, *supra* note 35, at S165.

<sup>104</sup> *Id.* at S168 (“In treatment the medical profession has no panacea to offer, but it is in a position to do valuable work . . . even if it cannot alter his sexual orientation.”).

<sup>105</sup> See *id.* at S168–69 (discussing potential treatments for homosexuality).

<sup>106</sup> *Id.*

<sup>107</sup> See *id.*

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., Curran & Parr, *supra* note 35, at 799 (finding that patients were unlikely to change their “orientation” despite receiving various medical treatment interventions); J.A. Hadfield, *The Cure of Homosexuality*, *BRIT. MED. J.* 1323, 1324 (1958).

<sup>110</sup> See *infra* pp. 19–24.

the conclusion, often stressed at homophile gatherings, that law enforcement could not legitimately target someone for being gay or lesbian because that person could not be blamed for her own sexual attractions.<sup>111</sup> Confirming that gays and lesbians should not be punished for something they could not control, sympathetic attorneys reminded homophile activists that the law criminalized sodomy, not homosexual status.<sup>112</sup>

Splitting off conduct from status helped gays and lesbians win limited support from the American Civil Liberties Union (ACLU). In the 1950s, the ACLU refused to take a stand against regulations of consensual sex.<sup>113</sup> Instead, the group insisted that homosexuals were unfairly denied due process and disproportionately punished for violating sodomy laws that applied to everyone else.<sup>114</sup> Targeting unequal treatment allowed both the ACLU and homophile groups to expand legal protections without challenging the legitimacy of morals regulations. At the same time, homophile groups distinguished public conduct, including solicitation and indecency, from private behavior that should not offend anyone.<sup>115</sup> This move proved especially valuable to activists trying to distance themselves from the negative stereotypes surrounding “flagrant” homosexuality.<sup>116</sup>

The idea of an unchangeable orientation seemed to be a potent argument against the selective application of the law to gays and lesbians. In the late 1950s, for example, DOB emphasized the idea of an unchangeable status in lobbying for the repeal of California’s criminal vagrancy statute.<sup>117</sup> First introduced in the

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<sup>111</sup> See, e.g., *Mattachine Breaks Through the Conspiracy of Silence*, LADDER, Oct. 1959, at 5, 5–7 (urging a reevaluation of the treatment of homosexuals in light of the fact that they cannot change their orientation); *Mattachine Conference*, LADDER, Nov. 1962, at 4, 4–7 (discussing abuses in the application of sex crime laws).

<sup>112</sup> See *Mattachine Conference*, *supra* note 111, at 4–7 (providing ACLU lawyer’s commentary on the disparate application of sexual crime statutes against homosexual persons); see also *SEXUAL POLITICS, SEXUAL COMMUNITIES*, *supra* note 5, at 144–46 (discussing lawyers’ favorable views toward repealing sodomy laws).

<sup>113</sup> See, e.g., *Mattachine Breaks Through the Conspiracy of Silence*, *supra* note 111, at 7 (discussing the ACLU taking “no position on states having the right to pass laws on sex actions”); *Mattachine Conference*, *supra* note 111, at 5, 9 (discussing the ACLU’s position on legislators regulating sex and its impact on homosexuals); *The ACLU Takes a Stand on Homosexuality*, LADDER, Mar. 1957, at 8, 8.

<sup>114</sup> See, e.g., *Mattachine Breaks Through the Conspiracy of Silence*, *supra* note 111, at 7 (discussing the ACLU’s desire that pro-homosexual groups receive “just treatment”); *Mattachine Conference*, *supra* note 111, at 4–5 (“Sexual crime[] [statutes] . . . apply to both heterosexual and homosexual alike, but in practice are more often applied to the homosexual.”); *The ACLU Takes a Stand on Homosexuality*, *supra* note 113, at 9 (discussing “registration laws” and the “social validity of laws aimed at suppression . . . of homosexuals”).

<sup>115</sup> See *Quotable Quote*, MATTACHINE REV., Sept.–Oct. 1955, at 2, 2 (arguing that “legal prohibitions against [private] adult homosexual behavior” should be eliminated “altogether”); *Mattachine Convention: The Diagnosis Is Hopeful*, LADDER, Sep. 1958, at 24–25 (providing examples of homophile activists’ endorsement of bans on non-consensual and violent sexual conduct).

<sup>116</sup> This Part later addresses concerns about individuals being targeted because of inaccurate stereotypes based on the conduct of a small group of actors.

<sup>117</sup> See Del Martin, *Open Letter to Assemblyman John A. O’Connell*, LADDER, Sept. 1958, at 5, 5–7 [hereinafter *Open Letter to Assemblyman John A. O’Connell*] (urging the California legislature to

nineteenth century, the law often applied to those suspected of having a propensity to commit victimless sex crimes, including prostitutes and gay men.<sup>118</sup> In arguing against the law, DOB borrowed from and refined the idea of sexual orientation that had come to the fore during debate about the Wolfenden Report:

Experts in the field [generally concede] that the cause of homosexuality is still an unknown quantity, that it is a process of development and not a matter of choice, that the incidence cannot be controlled by legislation, that the fear and insecurity imposed upon the homosexual by prejudiced and outmoded laws hamper the therapist in his efforts to help the individual make his adjustment to himself and society, and finally that [the laws] benefit no one but the blackmailers.<sup>119</sup>

For DOB, the language of sexual orientation reinforced that criminal laws could never do any good. Even if legislators viewed homosexuality as harmful, no criminal law or therapy could change a status that was “not a matter of choice.”<sup>120</sup> Nor, if status was immutable, could legislation meaningfully reduce the frequency of sodomy. Without challenging the legitimacy of morals laws, DOB argued that they were too ineffective to support.<sup>121</sup>

An intersecting debate about pornography, censorship, and obscenity reinforced interest in arguments involving sexual orientation.<sup>122</sup> Since the introduction of the Comstock Act in 1873, federal law had prohibited the mailing of “obscene” materials, created a new federal position to monitor the mail, and treated violations as a felony.<sup>123</sup> After World War II, the spread of pornography brought on new concern about the effect of sexually explicit material.<sup>124</sup> Soldiers’ consumption of

consider the homosexual minority and society’s grave misunderstandings about the causes of homosexuality in overturning California’s vagrancy laws).

<sup>118</sup> See *Open Letter to Assemblyman John A. O’Connell*, *supra* note 117, at 5; see also JOSH SIDES, *EROTIC CITY: SEXUAL REVOLUTIONS AND THE MAKING OF MODERN SAN FRANCISCO* 127 (2009) (discussing California statutes attacking vagrancy and loitering “in or about public toilets in public parks”).

<sup>119</sup> *Open Letter to Assemblyman John A. O’Connell*, *supra* note 117, at 5–6.

<sup>120</sup> *Id.* at 6.

<sup>121</sup> *Id.*

<sup>122</sup> NICOLA KAY BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* 76–103 (1997).

<sup>123</sup> See 18 U.S.C. §§ 1461–1462 (2012); see, e.g., Beisel, *supra* note 123 at 76–78, 80, 86–95 (outlining Comstock’s efforts to control the circulation of “obscene literature” and attempts to censor and control discussion of sexuality); ANDREA TONE, *DEVICES & DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA* 4–24 (2002) (discussing the passage of the Comstock Act and the history of Congress criminalizing obscenity); LEIGH ANN WHEELER, *AGAINST OBSCENITY: REFORM AND THE POLITICS OF WOMANHOOD IN AMERICA, at 1873–1935*, at 3–5, 9–12 (2004) (discussing Comstock’s urging for the adoption of a “federal anti-obscenity law” that “forbade using the postal system to distribute obscene materials”).

<sup>124</sup> See, e.g., JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 397–400 (2003) (discussing the rising concern about pornography after the Second World War); WHITNEY STRUB, *PERVERSION FOR PROFIT: THE POLITICS OF PORNOGRAPHY AND THE RISE OF THE NEW RIGHT* 86–90 (2011) (discussing post-World War II First Amendment protection of sexual foreign films and the growing television market).

pornography worried legislators, as did the spread of comic books.<sup>125</sup> In 1955, psychiatrist Frederic Wertham published *Seduction of the Innocent*, indicting comic books for corrupting the sexual morals of the nation's youth.<sup>126</sup> Wertham expressed particular concern about the possibility that "normal" children exposed to comics would become homosexual, and he maintained that Batman, the popular superhero, was "psychologically homosexual."<sup>127</sup>

Fears about the effect of pornography soon gave rise to political action. In 1954, parent-teacher associations in several states, demanded laws outlawing sex, violence, and crime in the comic books read by teenagers.<sup>128</sup> The same year, a congressional subcommittee on juvenile delinquency led by Senator Estes Kefauver (D-TN) pursued the theory that pornographic materials changed the sexual behavior of American youth.<sup>129</sup> As one of Kefauver's allies in Congress testified, pornography had been tied to "related problems such as juvenile delinquency, the rise in crime rate, teenage discontent and rebellion, and even certain trends in the field of mental illness."<sup>130</sup> The same year, the solicitor for the Postmaster General argued that sexually explicit materials would convert "juveniles, and persons who have not the intelligence, nor the background, to withstand it."<sup>131</sup>

Homophile groups used the idea of sexual orientation to defuse the danger of censorship of their own publications. In 1957, when the Los Angeles Postmaster refused to mail a copy of *ONE Magazine*, GLBTQ movement attorneys argued that it was not obscene under the Comstock Act or related federal regulations.<sup>132</sup> In an extremely brief per curiam opinion, the Supreme Court reversed a lower court decision holding *ONE* to be obscene,<sup>133</sup> but for movement members, the issue of pornography reached beyond the issue of censorship. Central to the Kefauver

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<sup>125</sup> See, e.g., D'EMILIO & FREDMAN, *supra* note 5, at 280–84 (discussing Congress's influential role in combating the spread of pornographic materials); RICHARD F. HIXSON, PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM 15–16 (1996) (regarding soldier's consumption of pornography post World War II); see also *infra* note 129 and accompanying text (discussing the panic surrounding comic books).

<sup>126</sup> See ANN MARIE KORDAS, *THE POLITICS OF CHILDHOOD IN COLD WAR AMERICA* 132 (2013) (detailing Wertham's belief that comics were a "source of temptation" that triggered homosexual fantasies in youth); STRUB, *supra* note 124, at 18–19 ("Blaming comics for everything from delinquency to murder to drug addiction."); BRADFORD W. WRIGHT, *COMIC BOOK NATION: THE TRANSFORMATION OF YOUTH CULTURE IN AMERICA* 161 (2001) (highlighting the connection Wertham drew between comics and the spread of homosexuality).

<sup>127</sup> STRUB, *supra* note 124, at 19.

<sup>128</sup> See, e.g., *Jersey School Unit Urges 'Comics' Curb*, N.Y. TIMES, Oct. 23, 1954, at 17.

<sup>129</sup> See *Mailing of Obscene Matter: Testimony Before Subcomm. 1 of the H. Judiciary Comm.*, 84th Cong. (1955); DAVID HAJDU, *THE TEN-CENT PLAGUE: THE GREAT COMIC-BOOK SCARE AND HOW IT CHANGED AMERICA* 172, 174 (2008) (detailing Sen. Kefauver's committee reports on juvenile delinquency and comics); WRIGHT, *supra* note 126, at 157, 165–74 (discussing Sen. Kefauver's committee findings on the impact of comic books on juvenile delinquency).

<sup>130</sup> *Mailing of Obscene Matter: Testimony Before Subcomm. 1 of the H. Judiciary Comm.*, *supra* note 129, at 12 (statement of Rep. Charles Keating).

<sup>131</sup> *Id.* at 15 (statement of A. McGregor Goff).

<sup>132</sup> *ONE, Inc. v. Olesen*, 241 F.2d 772, 773–74 (9th Cir. 1957).

<sup>133</sup> *ONE, Inc. v. Olesen*, 355 U.S. 371, 371 (1958) (per curiam).

hearings was an assumption that sexual identity changed if an individual was exposed to the wrong magazine.<sup>134</sup>

Groups like the Mattachine Society seized on the idea of sexual orientation to explain that tolerance of gays and lesbians would not increase the odds that other Americans, particularly juveniles, would become homosexual. As Curtis Dewees explained in the *Mattachine Review* in 1958, “Most of my readers will realize that . . . one’s personality orientation is not changed by the mere reading of books.”<sup>135</sup> A year later, William Reynard, of the ACLU, criticized legislators for refusing to recognize their “inability to change the orientation of [homosexuals].”<sup>136</sup>

#### *D. The Mattachine Society of Washington Promotes Sexual Orientation as a Legal Category*

The rhetoric of sexual orientation took on new importance after 1961, when Frank Kameny, a former astronomer dismissed from his federal position, founded a more militant chapter of Mattachine in Washington, DC.<sup>137</sup> While earlier leaders and other Mattachine chapters had mostly used scientific uncertainty as an argument against the aggressive persecution of gays, Kameny’s Mattachine Society of Washington (MSW) publicized a legal definition of sexual orientation designed to help gays and lesbians take on the federal government. “Our movement, whether we like it to be so or not, is primarily one of a political, public-relations, and social-action nature, and only to a limited degree, a scientific one,” Kameny explained.<sup>138</sup> “For these reasons of fact, of logic, and of strategy and tactics, I, personally, take the position that . . . homosexuality, per se, is neither a sickness, a defect, a disturbance, nor a malfunction of any sort.”<sup>139</sup>

MSW leaders argued that gays and lesbians, not psychologists or bureaucrats, had the most expertise about homosexuality.<sup>140</sup> Even so, MSW leaders defined

<sup>134</sup> See *supra* notes 109–11 and accompanying text.

<sup>135</sup> Curtis Dewees, *On the Suppression of Homosexual Literature*, MATTACHINE REV., Sept. 1958, at 6, 11.

<sup>136</sup> *Mattachine Breaks Through the Conspiracy of Silence*, *supra* note 111, at 7.

<sup>137</sup> See, e.g., FADERMAN, *supra* note 5, at 128–68 (discussing Kameny’s background, influence, and authoritative demeanor); *id.* at 146 (“The main purpose of Mattachine Society Washington, as far as Frank Kameny was concerned, was to fight for the rights of the ‘homosexual American citizen.’”); JOHNSON, *supra* note 5, at 179–213 (discussing Kameny’s background and influence in the creation of the Mattachine Society of Washington, particularly his legacy); *id.* at 184 (“Kameny spearheaded the new militancy in the gay movement.”). See generally CLENDINEN & NAGOURNEY, *supra* note 5, at 113–268 (providing broader discussion of Kameny’s background and influence).

<sup>138</sup> *Our President Speaks*, MATTACHINE SOC’Y WASH. GAZETTE, Spring 1964, at 4, 4, <https://rainbowhistory.omeka.net/items/show/4937946> (follow “Files” hyperlink) [<https://perma.cc/G5N8-P2RH>].

<sup>139</sup> *Id.* at 8.

<sup>140</sup> See, e.g., FADERMAN, *supra* note 5, at 282–83 (denouncing psychiatry professionals treatment of homosexuals); explaining Frank Kameny’s views on scientific experts proclaiming they know more about homosexuality than homosexuals); JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 60 (2001) (noting Kameny’s determination to “persuade the nation that homosexuals are the only true experts on homosexuality”); Alan S. Yang,

sexual orientation primarily as a legal alternative to the definitions emerging in medicine, politics, and immigration and employment law.<sup>141</sup> MSW explained its agenda in the following terms:

The Society maintains that, in the absence of valid evidence to the contrary, homosexuality is not a sickness, but is an orientation not different in kind from heterosexuality. It aims primarily to combat prejudice and discrimination by seeking acceptance of the homosexual as a homosexual, not by “rehabilitating” him or converting him to heterosexuality.<sup>142</sup>

In MSW’s analysis, the idea of sexual orientation served as an alternative to both of the major legal attacks on homosexuality. First, by describing homosexuality as an orientation, MSW rejected its categorization as a mental illness, instead defining homosexuality and heterosexuality as equally natural, healthy, and normal. Second, by rejecting the idea that homosexuality was a matter of changeable behavior or preference, MSW built a more compelling case for ending anti-gay discrimination and dispelled rumors that openly gay men could convert others to homosexuality. The rhetoric of sexual orientation signaled that homosexuality was both immutable and largely unrelated to an individual’s adjustment or societal contributions.

The idea of sexual orientation also figured centrally in what one homophile magazine called “the need for salesmanship.”<sup>143</sup> In the early 1960s, sympathetic media outlets provided more coverage of issues related to homosexuality.<sup>144</sup> To benefit from this new media attention, groups like DOB and Mattachine hoped to develop a message that would resonate with those who did not yet hold a strong opinion about homosexuality. One strategy that emerged from Mattachine’s national convention in the early 1960s urged activists to emphasize the following issues:

That the homosexual . . . is willing to look upon society with good will . . . that there are many types of homosexuals and many different

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*Lesbians and Gays and the Politics of Knowledge: Rethinking General Models of Mass Opinion Change*, in *SEXUAL IDENTITIES, QUEER POLITICS* 348 (Mark Blasius ed., 2001) (detailing Frank Kameny’s insistence that gay activists had more authority to “speak on the question of homosexuality” than scientific experts).

<sup>141</sup> See *Our President Speaks*, *supra* note 139, at 4, 8 (urging members of the Mattachine Society to take a bold position on the definition of homosexuality rather than a “carefully weighed, overly-cautious, scientific[ally] neutral[]” position).

<sup>142</sup> THE MATTACHINE SOC’Y OF WASH., <https://rainbowhistory.omeka.net/items/show/4937956> (follow “Files” hyperlink) [<http://perma.cc/G5N8-P2RH>] (last visited Oct. 8, 2017).

<sup>143</sup> See John LeRoy, *The New Publicity Break: Where Do We Go from Here?*, *LADDER*, Nov. 1962, at 16, 17.

<sup>144</sup> See *SEXUAL POLITICS, SEXUAL COMMUNITIES*, *supra* note 5, at 217–18 (“As homophile activists left behind the isolation of the 1950s, they discovered the press responded accordingly. Movement initiatives assumed a newsworthy quality.”).

attitudes about them; that homosexuality is not a remote contagious disease, but a combination of hereditary and environmental conditions.<sup>145</sup>

Significantly, Kameny and MSW made sexual orientation an important part of an analogy MSW drew between race and sexuality.<sup>146</sup> Homophile activists began reasoning from race almost from the outset. In 1955, the *Mattachine Review* highlighted research suggesting “that homosexuality is caused by a physiological predisposition”; “If this is so,” the *Mattachine Review* argued, “a homosexual is no more responsible for his [homosexuality] than are people responsible for the color of their skins.”<sup>147</sup>

By the early 1960s, when the civil rights movement was consistently making headlines, the benefits of reasoning from race seemed clear. As *The Ladder* explained in 1963, “The U.S. is being compelled to listen to and grant rights to all minority groups.”<sup>148</sup> DOB made the case that gays and lesbians counted as a minority, both politically and constitutionally, stating: “[A] minority is a group who are considered . . . to have a trait in common.”<sup>149</sup> The DOB further explained that, “[T]he individual himself is blamed and punished for attributes that rightly or wrongly are placed on the entire group, and the group as a whole is blamed or punished for the transgressions of individuals.”<sup>150</sup> Ultimately, in DOB’s analysis, the threat of stereotyping faced both racial and sexual minorities.

MSW elaborated on DOB’s experimentation with analogies between homosexuality and race. In a 1962 letter to Attorney General Robert Kennedy, Kameny explained, “We feel that for the 15,000,000 American homosexuals, we are in much the same position as the NAACP is in for the Negro, except for the minor difference that . . . we are fighting official prejudice and discriminatory policy and practice . . . at the [f]ederal level.”<sup>151</sup> In support of this argument, Kameny defined the homosexual as “one whose direction of choice of a sexual partner differs from that of the majority of the citizenry in what he is attracted to and chooses partners of his or her own sex.”<sup>152</sup> While gays and lesbians may have control over their conduct or partners, Kameny clarified that no one had control over his orientation. He stated, “Homosexuality is neither a . . . disease . . . nor

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., FADERMAN, *supra* note 5, at 128, 138, 151–54.

<sup>147</sup> *Comment on SEXOLOGY’s Symposium: The Causes of Homosexuality*, *supra* note 9, at 33.

<sup>148</sup> Barbara Gittings, *The Homosexual Minority in America*, LADDER, Mar. 1963, at 5, 7 (reporting on a lecture by Donald Webster Cory).

<sup>149</sup> *Id.* at 5.

<sup>150</sup> *Id.*

<sup>151</sup> Letter from Dr. Franklin E. Kameny, Mattachine Soc’y of Wash. President, to Robert F. Kennedy, Attorney Gen., THE MATTACHINE SOC’Y OF WASH. (June 28, 1962), in The Frank Kameny Papers, Box 41 (on file with The Library of Congress).

<sup>152</sup> The Mattachine Soc’y of Wash., *Discrimination Against the Employment of Homosexuals*, Presentation to the Sub-Comm. on Emp’t D.C. Advisory Comm. of the U.S. Civil Rights Comm’n (Feb. 28, 1963), <https://rainbowhistory.omeka.net/items/show/4937915> (follow “Files” hyperlink) [<https://perma.cc/CN8L-79K2>].

other disturbance, but merely a matter of the predisposition of a significantly large minority of our citizens.”<sup>153</sup>

Later in the 1960s, as MSW became increasingly prominent, the organization continued emphasizing arguments involving sexual orientation. Writing under the pseudonym Warren Adkins, MSW leader, Jack Nichols,<sup>154</sup> maintained that “homosexuality per se is not a sickness, but is an orientation not different in kind from heterosexuality.”<sup>155</sup> Nichols reminded readers of the importance of convincing Americans that homosexuality was nothing more than a sexual orientation: “[S]ickness equals inferior status . . . . It is on the issue [sic] of homosexuality as a sickness that the homophile movement will . . . fight its most crucial and repeated battles.”<sup>156</sup> At a gathering with religious leaders, Kameny reiterated that homosexuality “per se is neither a sickness, disturbance, or other pathology, but is rather . . . [an] orientation . . . fully on par with, and not different in kind from, heterosexuality.”<sup>157</sup>

Over the course of the 1960s, MSW, DOB, and their allies worked to rebrand their cause as a fight to to outlaw sexual orientation discrimination and informed the media that the homosexual movement was open to members of any sexual orientation.<sup>158</sup> In 1964, DOB attacked public health authorities in New York for continuing to label homosexuality as a disease.<sup>159</sup> Leaders of the group contended, how . . . we conduct our sex life is an important moral problem for all of us, whether we are heterosexual or homosexual.”<sup>160</sup> In 1962, with expanding interest in gay rights, DOB, MSW, and other organizations formed the East Coast Homophile Organization (ECHO), a loose umbrella group that would coordinate the work of homophile groups.<sup>161</sup> The message that emerged from ECHO conferences centered on orientation.<sup>162</sup> In 1968, when a variety of homophile groups adopted a bill of rights for gays and lesbians, Rev. Robert Warren Cromey explained, “To subject [homosexuals] to legal harassment and exclude them from

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<sup>153</sup> Warren D. Adkins, *Homosexuals Confer with Clergy*, E. MATTACHINE MAG., June 1965, <https://rainbowhistory.omeka.net/items/show/4938348> (follow “Files” hyperlink) [<https://perma.cc/XTP9-JCTB>] [hereinafter *Homosexuals Confer with Clergy*].

<sup>154</sup> SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 152 & n. 6.

<sup>155</sup> Warren D. Adkins, *What Is Bieberism?*, HOMOSEXUAL CITIZEN, Dec. 1966, at 3, 7, <https://rainbowhistory.omeka.net/items/show/4938598> (follow “Files”) [<https://perma.cc/3VHV-QXZQ>].

<sup>156</sup> *Id.*

<sup>157</sup> See *Homosexuals Confer with Clergy*, *supra* note 153.

<sup>158</sup> See Philip Gerard, *Symptom of the Times*, LADDER, Dec. 1964, at 9, 9–12.

<sup>159</sup> *Id.*

<sup>160</sup> See Iris Murdoch, *The Moral Decision About Homosexuality*, Ladder, Dec. 1964, at 19, 20.

<sup>161</sup> On the formation of ECHO, see, for example, DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* 230, 247 (2004); EAKLOR, *supra* note 5, at 102; FADERMAN, *supra* note 5, at 142–43.

<sup>162</sup> See, e.g., *Homosexuals Ask Candidates’ Ideas: Seek Views on Penalties—‘Bill of Rights’ Urged*, N.Y. TIMES, Aug. 19, 1968, at 29 (discussing the “North American Conference of Homophile Organizations” adoption of a “Homosexual Bill of Rights” with numerous provisions prohibiting exclusion on the basis of sexual orientation).

employment solely because of their sexual orientation is a violation of their constitutional rights.<sup>163</sup>

Arguments involving sexual orientation offered several important strategic advantages. First, as Kameny tried to compare his movement to the quest for civil rights, the rhetoric of sexual orientation bolstered MSW's reasoning from race. As MSW defined it, sexual orientation, like race, was immutable but largely unrelated to individual character, personality, or adjustment.<sup>164</sup> Moreover, in the same way that all Americans had a race, MSW argued that every American had a sexual orientation, none superior to or more natural than any other.<sup>165</sup> Reasoning from race allowed MSW to combat key justifications for anti-gay discrimination. If homosexuality could be cured, gays and lesbians could logically respond to discrimination by changing their behavior. And if homosexuality was pathological, then gays and lesbians were not similarly situated to their heterosexual counterparts and could not logically demand equal treatment.

Just as important, the idea of sexual orientation allowed MSW to argue that the case against sexual orientation discrimination was even stronger than the one against racial bias. Whereas race was visible, MSW leaders argued in the context of federal employment that sexual orientation was private, unrelated to workplace conduct, and therefore made no difference to the co-workers or employers of gays and lesbians.<sup>166</sup> MSW leaders testified before the United States Civil Service Commission that “[p]rivate, consensual sexual acts . . . [between] adults . . . [a]re not, under any circumstances, the proper concern of an employer, public or private.”<sup>167</sup> Not only was sexual orientation immutable and unrelated to character; Mattachine leaders also framed sexual orientation as a harmless difference to which no reasonable employer could logically object.

By the late 1960s, homophile attorneys and their allies in organizations like the ACLU used the idea of sexual orientation to challenge discriminatory immigration and employment laws.<sup>168</sup> Litigation had unintended consequences, however, as the courts used a different idea of sexual orientation to uphold discriminatory practices and policies.

In the immigration context, movement members initially stayed away from the idea of an immutable sexual orientation. Even so, the Supreme Court used the idea of sexual orientation to forge what Kenji Yoshino has called a “one drop rule”—a

<sup>163</sup> *Id.*

<sup>164</sup> See *supra* notes 123–31 and accompanying text.

<sup>165</sup> See *supra* notes 124–25 and accompanying text.

<sup>166</sup> See, e.g., THE MATTACHINE SOC'Y OF WASH., FEDERAL EMPLOYMENT OF HOMOSEXUAL AMERICAN CITIZENS 3, 16 (Nov. 15, 1965), <http://rainbowhistory.omeka.net/items/show/4937932> (follow “Files” hyperlink) [<https://perma.cc/HVE5-99ZQ>] [hereinafter FEDERAL EMPLOYMENT OF HOMOSEXUAL AMERICAN CITIZENS].

<sup>167</sup> *Id.* at 3.

<sup>168</sup> See, e.g., SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 155–57 (discussing enhanced collaboration efforts between homosexual organizations and the ACLU).

conclusion that any same-sex sexual act signals homosexuality.<sup>169</sup> Borrowing from the idea that homosexuality was a matter of inborn, immutable preference, the courts expanded federal authority to deport anyone proven to have had homosexual sex.<sup>170</sup>

Later, after the movement popularized the idea of homosexuality as an immutable sexual orientation, courts used the distinction between conduct and status to limit antidiscrimination protections. By distinguishing orientation from conduct and identity, certain judges and administrative officials sustained discrimination against employees who “flaunted” their status.<sup>171</sup> Immutability became a limiting principle for demands for protection against discrimination.<sup>172</sup>

By the 1970s, when activists first challenged bans on same-sex marriage, the courts turned immutability arguments against the movement in a different way. Movement members analogized sexual orientation to race and sex, arguing that all three were immutable.<sup>173</sup> Drawing on this logic, courts sometimes concluded that same-sex couples were not similarly situated to heterosexual couples with respect to either marriage or reproduction.<sup>174</sup> The idea of real, biological differences that the Supreme Court used to sever the connection between sex equality and reproduction stood at the heart of decisions limiting access to marriage.

#### *E. In Boutilier, Activists Separate Status and Conduct*

In the context of immigration, movement members temporarily moved away from framing sexual orientation as an immutable orientation in *Boutilier v. Immigration and Naturalization Service*, a case that found its way to the Supreme Court.<sup>175</sup> Clive Michael Boutilier, a Canadian immigrant, had moved to the United States to pursue better employment opportunities.<sup>176</sup> In 1963, he applied for citizenship, and during his interview, he admitted that he had been arrested on a sodomy charge.<sup>177</sup> After further questioning, Boutilier acknowledged that he had previously engaged in both homosexual and heterosexual acts.<sup>178</sup> Indeed, at the time he sought naturalization, Boutilier was in a long-term,

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<sup>169</sup> Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 375 & n.99 (2000) (“A single same-sex sexual experience was sufficient to brand an individual as a homosexual.”); *id.* at 392–393 & n.211 (analogizing between the “one drop rule” in identifying race to the “one act rule in the orientation context”).

<sup>170</sup> See *Boutilier v. INS*, 387 U.S. 118, 122–25 (1967).

<sup>171</sup> See *infra* pp. 25–29.

<sup>172</sup> See *infra* pp. 29–30.

<sup>173</sup> See *infra* pp. 29–30.

<sup>174</sup> See *infra* pp. 29–30.

<sup>175</sup> *Boutilier*, 387 U.S. 118.

<sup>176</sup> *Id.* at 119; see also ESKRIDGE, *supra* note 6, at 156.

<sup>177</sup> *Boutilier*, 387 U.S. 118.

<sup>178</sup> *Id.* at 119–20; ESKRIDGE, *supra* note 6, at 156.

committed relationship with another man.<sup>179</sup> On the basis of these admissions, immigration officials submitted Boutilier’s case to the Public Health Service, which certified that Boutilier was “afflicted with . . . a psychopathic personality” under the McCarren-Walter Act and therefore subject to deportation.<sup>180</sup>

When Boutilier appealed, his case won the support of the ACLU and a homophile group, the Homosexual Law Reform Society, a group headed by Clark Polak, a veteran activist and the head of the Janus Society,<sup>181</sup> a prominent homophile organization.<sup>182</sup> As Marc Stein has written, both organizations made the decision not to describe Boutilier as openly gay, instead emphasizing that he had been sexually involved with both men and women.<sup>183</sup> To be sure, as Stein argues, this tactical conservatism contributed to Boutilier’s struggles in court, especially when the justices noted that Boutilier himself had at times described his orientation as a status.<sup>184</sup> However, in *Boutilier*, the idea of an immutable sexual orientation, so successfully championed by homophile activists, served as a core reason for his deportation.

Boutilier raised a number of procedural arguments.<sup>185</sup> Primarily, though, Boutilier argued that the McCarren-Walter Act did not apply to homosexuals or give adequate notice that his conduct would subject him to deportation.<sup>186</sup> This argument failed in the Second Circuit, but the Supreme Court soon granted certiorari to resolve a circuit split.<sup>187</sup> In the Ninth Circuit, in *Fleuti v. Rosenberg*, the court had accepted the “void for vagueness” argument and reaffirmed that argument in 1966.<sup>188</sup>

At the Supreme Court, both Boutilier’s counsel and the Homosexual Law Reform Association transformed the definition of homosexuality developed by homophile organizations. While Boutilier’s counsel echoed arguments that homosexuality was not a mental illness,<sup>189</sup> because Boutilier could plausibly claim to have a more fluid sexual identity, his attorney described homosexuality, at least in

<sup>179</sup> See *id.* at 120 (noting that Mr. Boutilier “had shared an apartment with a man with whom he had had homosexual relations” since 1959).

<sup>180</sup> *Id.*

<sup>181</sup> See *id.* at 120–23; see also Brief for ACLU and N.Y. Civil Liberties Union as Amici Curiae Supporting Petitioner, *Boutilier v. INS*, 387 U.S. 118 (1967); Brief for the Homosexual Law Reform Society of America as Amicus Curiae Supporting Petitioner, *Boutilier v. INS*, 387 U.S. 118 (1967).

<sup>182</sup> ENCYCLOPEDIA OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HISTORY IN AMERICA 388–89 (Marc Stein ed. in chief) (2004) (discussing Clark Polak’s background and involvement with Janus Society and Homosexual Law Reform Society).

<sup>183</sup> STEIN, *supra* note 6, at 195–96; see also ESKRIDGE, *supra* note 6, at 156; STEIN, *supra* note 85 at 75.

<sup>184</sup> Stein, SEXUAL INJUSTICE, *supra* note 6, at 195–96.

<sup>185</sup> See, e.g., *id.* at 171–203.

<sup>186</sup> See Brief for Petitioner, at 8–20, *Boutilier v. INS*, 387 U.S. 118 (1967) (No. 440).

<sup>187</sup> For the Second Circuit’s decision, see *Boutilier v. INS*, 363 F.2d 488, 492–96 (2d Cir. 1966).

<sup>188</sup> *Fleuti v. Rosenberg*, 302 F.2d 652, 654–56, 658 (9th Cir. 1962); see also *Lavoie v. INS*, 360 F.2d 27, 28 (9th Cir. 1966) (affirming *Fleuti* holding that the statute as applied to homosexuals was “void for vagueness”).

<sup>189</sup> See Brief for Petitioner, *supra* note 186, at 19–20, 21–28; Brief for Homosexual Law Reform Society, *supra* note 182, at 7–19.

his case, as a matter of conduct, not orientation.<sup>190</sup> “By and large,” Boutilier explained, “homosexuality is a kind of behavior, evidently very wide-spread, and not the manifestation of a particular kind of person.”<sup>191</sup>

Recognizing that the category of psychopathic personality under the McCarren-Walter Act most clearly covered a condition, Boutilier disconnected sexual orientation and sexual conduct.<sup>192</sup> In the political arena, groups like MSW played up the connection between behavior and status, describing sexual orientation as an immutable, naturally occurring trait.<sup>193</sup> At least for those like Boutilier, his attorney insisted that sexual relationships were voluntarily chosen and distinguishable from any more lasting identity.<sup>194</sup> “[T]here is nothing in the record to establish or even suggest that those experiences were compulsive in character and not merely a matter of choice,” Boutilier argued.<sup>195</sup> The distinction between freely chosen conduct and immutable identity meant both that Boutilier did not count as a psychopathic personality under the statute and did not have notice that immigration authorities would regard him as such.<sup>196</sup>

Polak’s Homosexual Law Reform Society of America similarly refined the idea of sexual orientation on which MSW had frequently relied. The organization’s brief reasoned, “That homosexuality and heterosexuality represent anything other than ‘differences among human beings in their sources of pleasure’ has not been established.”<sup>197</sup> The brief canvassed psychological evidence indicating that homosexuality was not a mental illness, but stopped short of offering the definition of sexual orientation promoted by MSW.<sup>198</sup>

Quoting psychiatrists who testified on behalf of the Petitioner, attorneys for the Immigration and Naturalization Service (INS) responded that homosexuality was an immutable orientation.<sup>199</sup> Pointing to the legislative history of the McCarren-Walter Act, the INS argued that Congress had always intended to treat homosexuals as being afflicted with a psychopathic personality.<sup>200</sup> When discussing whether the statute excluded Boutilier, the INS used the idea of orientation in Boutilier’s case to suggest that virtually any homosexual conduct was irrefutable evidence of status:

This evidence, coupled with the Public Health Service's certificate based upon it, compelled a finding that petitioner was homosexual when he entered. It is true that petitioner, by his own account, had had occasional

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<sup>190</sup> See Brief for Petitioner, *supra* note 186, at 10–11.

<sup>191</sup> *Id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *supra* notes 146–147, 153–157 and accompanying text.

<sup>194</sup> See Brief for Petitioner, *supra* note 186, at 10–20.

<sup>195</sup> *Id.* at 16.

<sup>196</sup> See *id.* at 15–20.

<sup>197</sup> Brief for Homosexual Law Reform Society, *supra* note 182, at 19.

<sup>198</sup> See *id.* at 8–19.

<sup>199</sup> See Brief for Respondent at 42–52, *Boutilier v. INS*, 387 U.S. 118 (1967) (No. 440).

<sup>200</sup> See *id.* at 20–27.

heterosexual experiences prior to his entry. But they were far fewer than his homosexual experiences, and hardly detract from his clearly—and concededly—dominant homosexual orientation.<sup>201</sup>

Superficially, the INS's argument read as an assertion that homosexuality was a mathematical question, and Boutilier had too many same-sex relationships to qualify as a heterosexual.<sup>202</sup> Read more carefully, however, the INS's argument leveraged the idea of an immutable orientation that homophile groups had crafted.<sup>203</sup> In this analysis, it no longer mattered whether or not psychiatrists treated homosexuality as a mental illness.<sup>204</sup> Whatever homosexuality was, it was unchangeable, and sexual behavior signaled a more fixed identity or condition.<sup>205</sup> It was this status, the INS argued, that Congress had targeted in the McCarran-Walter Act.<sup>206</sup>

The INS also turned the testimony of Boutilier's expert witnesses on its head.<sup>207</sup> Boutilier had presented the opinions of two psychiatric experts, both of whom emphasized Boutilier's experimentation with heterosexual sex and his "fluid" sexual identity.<sup>208</sup> The witnesses also asserted that homosexuality was not a mental illness.<sup>209</sup> Even accepting this proposition as true, the INS argued that Boutilier's immutable status made him excludable.<sup>210</sup> The INS brief emphasized that Boutilier's expert had "referred to his 'homosexual orientation.'"<sup>211</sup>

This admission, for the INS, was tantamount to acknowledging that Boutilier was targeted because of who and what he was, not because he had made particular choices.<sup>212</sup> At most, by referring to orientation, Boutilier's expert could "show that petitioner, while homosexual, was not dangerous or psychopathic."<sup>213</sup> Because Boutilier knew he was homosexual, the INS argued that he was clearly excludable under the act and had ample notice of the possibility that he would be deported.<sup>214</sup>

The Court's opinion in *Boutilier* similarly applied the lens of an immutable orientation to Boutilier's case. Writing for a majority of six, Justice Clark first emphasized that Boutilier admitted to acts that necessarily confirmed his status as a

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<sup>201</sup> *Id.* at 51.

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See id.* at 19 ("Whatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts.").

<sup>205</sup> *See id.* at 51.

<sup>206</sup> *See id.* at 46, 48–51.

<sup>207</sup> *See id.* at 51–52.

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* at 52.

<sup>212</sup> *See id.* 51–52.

<sup>213</sup> *Id.* at 51.

<sup>214</sup> *See id.* at 46–52.

homosexual.<sup>215</sup> The basis for his deportation, in the majority's view, lay not with Boutilier's post-entry sexual conduct but in the status he had claimed for himself.<sup>216</sup>

The Court rejected Boutilier's void-for-vagueness claim on similar grounds.<sup>217</sup> Boutilier had argued that he had no notice that post-entry conduct, such as the sexual contact and an ongoing relationship to which he had admitted, could give rise to a deportation order.<sup>218</sup> The Supreme Court responded that Boutilier was being deported because of his condition, not his conduct.<sup>219</sup> "The petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed *at the time of his entry*," Clark wrote.<sup>220</sup> "Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality."<sup>221</sup>

*Boutilier* did not squarely address whether a majority of psychiatrists would view homosexuality as a mental illness.<sup>222</sup> Indeed, the Court treated the category of "psychopathic personality" as a legal question, rather than a scientific one.<sup>223</sup> Nevertheless, the Court assumed that homosexuality was a condition, an unchangeable characteristic.<sup>224</sup> Even if there was no psychiatric consensus about homosexuality, the *Boutilier* Court reasoned that sexual orientation was an immutable trait that Congress could legitimately make grounds for deportation.<sup>225</sup>

#### *F. Courts Treat the Distinction Between Status and Conduct as a Rational Basis for Discrimination*

In the context of employment discrimination, in the 1960s and 1970s, workers seeking a job in the federal civil service or in public school teaching began questioning the legitimacy of sexual-orientation discrimination. Bureaucrats and courts skeptical of these claims argued that while employers could not target anyone on the basis of an immutable status, the "flaunting" of orientation was fair game.

The conduct-status distinction first frustrated the movement in its effort to eliminate discrimination in the civil service. John Macy, the head of the United States Civil Service Commission in the 1960s, was a committed liberal who had

<sup>215</sup> *Boutilier v. INS*, 387 U.S. 118, 122 (1967).

<sup>216</sup> *See id.* at 124.

<sup>217</sup> *See id.* at 123–25.

<sup>218</sup> *See id.* at 124.

<sup>219</sup> *See id.* at 123–25.

<sup>220</sup> *Id.* at 123 (emphasis in original).

<sup>221</sup> *Id.*

<sup>222</sup> *See generally id.* at 123–25 ("[T]he test here is what the Congress intended, not what differing psychiatrists may think.").

<sup>223</sup> *See id.* (noting that Congress "was not laying down a clinical test, but an exclusionary standard . . .").

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

spoken favorably of antidiscrimination mandates.<sup>226</sup> When Frank Kameny requested a meeting with Macy, however, Macy turned him down flat.<sup>227</sup> Macy continued refusing similar requests until 1965, when Kameny and a group of twenty-five activists picketed the United States Civil Service Commission.<sup>228</sup> Following the picket, Kameny and a small group of colleagues received a meeting with some of Macy's colleagues and were later instructed to submit a written statement of their views.<sup>229</sup> In the written statement, Kameny and Mattachine elaborated on the claim that sexual orientation was an immutable trait that subjected gays and lesbians to unjustifiable discrimination.<sup>230</sup> The Mattachine statement asserted that gays and lesbians possessed every relevant trait of a sociological minority.<sup>231</sup> In addition to sharing a common trait and facing discrimination, gays and lesbians were rarely judged on individual merit. "Minority group members are judged not as individuals," the statement explained, "but as members of a group, every member bearing the consequences and stigma of the faults, the weaknesses, and the sins of particular individuals."<sup>232</sup> The statement also reiterated that homosexuality was neither changeable nor pathological.<sup>233</sup> As the statement reasoned, "[w]e do not grant, conceptually, that rehabilitation applies to homosexuality and its practice."<sup>234</sup>

Macy's response borrowed from the idea of sexual orientation to limit any demand for protection against discrimination.<sup>235</sup> In rejecting Mattachine's position, Macy agreed that discriminating on the basis of sexual orientation would be wrong.<sup>236</sup> Rather than targeting anyone on the basis of status, Macy argued that the Civil Service Commission acted upon the basis of "overt conduct . . . not upon spurious classification of individuals."<sup>237</sup> By acting on the basis of conduct alone,

<sup>226</sup> FADERMAN, *supra* note 5, at 151; SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 155.

<sup>227</sup> FADERMAN, *supra* note 5, at 151–53; SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 155.

<sup>228</sup> FADERMAN, *supra* note 5, at 152–54; *see also* SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 164–65 (discussing various Mattachine picketing efforts).

<sup>229</sup> FADERMAN, *supra* note 5, at 152–53; SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 5, at 165.

<sup>230</sup> *See generally* FEDERAL EMPLOYMENT OF HOMOSEXUAL AMERICAN CITIZENS: A STATEMENT FOR THE U.S. CIVIL SERV. COMM'N, *supra* note 166, 4–17 (drawing analogies to discrimination against minorities to challenge the unjustified exclusion of homosexuals from employment positions).

<sup>231</sup> *Id.* at 4–6.

<sup>232</sup> *Id.* at 4–5.

<sup>233</sup> *Id.* at 5–6 & n.8.

<sup>234</sup> *Id.* at 6.

<sup>235</sup> *See generally* Letter from John W. Macy, Jr., Chairman, U.S. Civil Serv. Comm'n, to The Mattachine Society of Washington (Feb. 25, 1966), 1–4, *in* The Frank Kameny Papers, Box 41 (on file with The Library of Congress) (focusing on homosexual conduct as a rational bar to employment).

<sup>236</sup> *See id.* at 3–4.

<sup>237</sup> *Id.* at 3.

Macy claimed a right to terminate anyone who admitted to being homosexual or expressed pride in her identity.<sup>238</sup> Macy explained:

To be sure[,] if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences, as some members of the Mattachine Society openly avow, the Commission would be required to find such an individual unsuitable for Federal employment.<sup>239</sup>

In early employment discrimination cases, skeptical courts used the distinction between conduct and a private status, sexual orientation, to reject demands for equal treatment. Consider the case of Joseph Acanfora, a Maryland school teacher.<sup>240</sup> As a college student at Penn State, he became involved in a homophile group that sought official recognition from the university.<sup>241</sup> When the university refused, the group brought suit, and Acanfora agreed to be one of the named plaintiffs.<sup>242</sup> While the litigation was pending, Acanfora began pursuing a career in education and eventually gained a position teaching in the Maryland schools.<sup>243</sup> When the *Acanfora* case again reached the courts, Joseph spoke to the media.<sup>244</sup> The school district almost immediately transferred Acanfora to a non-teaching position.<sup>245</sup> Because of his access to the media, Acanfora criticized the school's stance on television and in print, and the school ultimately dismissed him.<sup>246</sup>

In federal district court, Acanfora argued that his firing violated the First Amendment, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>247</sup> Acanfora contended that he had been a victim of sexual orientation discrimination, notwithstanding the fact that his behavior and preferences had no bearing on what happened in public.<sup>248</sup> In dicta, the district court acknowledged that the right to privacy might cover Acanfora's claim,<sup>249</sup> but the court focused on the claim that Acanfora's transfer violated his right to free speech under the First Amendment.<sup>250</sup> Because Acanfora had taken his case to the

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<sup>238</sup> See *id.* at 3–4.

<sup>239</sup> *Id.* at 4.

<sup>240</sup> See *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974); *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843 (D. Md. 1973).

<sup>241</sup> *Acanfora*, 359 F. Supp. at 844–45.

<sup>242</sup> *Id.* at 845.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 845–46.

<sup>247</sup> See *id.* at 849–57.

<sup>248</sup> See *id.*

<sup>249</sup> *Id.* at 851 (“In this context, the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty.”); see also *id.* at 855.

<sup>250</sup> *Id.* at 854–57.

public, the court viewed his comments as the kind of non-speech covered by the court's incitement doctrine.<sup>251</sup> Acanfora's gay pride would be "likely to incite or produce imminent effects deleterious to the educational process."<sup>252</sup> "There exists then not only a right of privacy, so strongly urged by the plaintiff, but also a duty of privacy," the court explained.<sup>253</sup>

The Ninth Circuit Court of Appeals viewed sexual orientation in similar terms. In *Singer v. United States Civil Service Commission*, a probationary employee, John Singer, started work as a typist at the Seattle office of the Equal Employment Opportunity Commission (EEOC).<sup>254</sup> At work, Singer identified as a gay man.<sup>255</sup> He served on the board of directors of the Seattle Gay Alliance and as an act of protest, had requested a marriage license for himself and his life partner.<sup>256</sup> Because of Singer's activism, the EEOC terminated him, citing his "immoral and notoriously disgraceful conduct, [in] openly and publicly flaunting his homosexual way of life."<sup>257</sup>

In court, Singer argued that his firing violated the First Amendment's free speech and free association guarantees, and because there was no rational connection between his sexual orientation and his ability to perform his job, he argued that his termination violated the Due Process Clause of the Fifth Amendment.<sup>258</sup> Because of Singer's "open and public flaunting [of] his homosexual way of life," the Ninth Circuit rejected his First Amendment and Due Process claims.<sup>259</sup> From the standpoint of Due Process, the court identified a rational basis for the firing.<sup>260</sup> Singer was victimized not on the basis of his sexual orientation but because his "notorious conduct and open flaunting and careless display of unorthodox sexual conduct in public might be relevant to the efficiency of the service."<sup>261</sup> Open conduct also doomed Singer's First Amendment claim. As the court reasoned, the Commission could have properly concluded that "the interest of the Government as an employer 'in promoting the efficiency of the public service' outweighed the interest of its employee in exercising his First Amendment Rights through publicly flaunting and broadcasting his homosexual activities."<sup>262</sup>

Cases like *Acanfora* and *Singer* showed how the idea of sexual orientation could be used to justify discrimination against employees who openly challenged anti-gay

<sup>251</sup> See *id.* at 856–57.

<sup>252</sup> *Id.* at 857.

<sup>253</sup> *Id.* at 855. The Fourth Circuit ultimately affirmed the lower court's decision on other grounds, reasoning that the school district could justifiably transfer Acanfora for misrepresenting his relationship to the gay rights movement on his employment application. *Acanfora v. Bd. of Educ.*, 491 F.2d 498, 503–04 (4th Cir. 1974).

<sup>254</sup> *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 248 (9th Cir. 1976).

<sup>255</sup> *Id.* at 249.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 251.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 255–56.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 255 (citing *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969)).

<sup>262</sup> *Id.* at 256.

bias. As a limiting principle, sexual orientation arguments protected employees only if they remained “in the closet.” By having a public relationship or participating in advocacy, gays and lesbians, by definition, gave employers a sufficient reason for discrimination.

*G. Courts Seize on “Real” Differences Between Homosexual and Heterosexual Couples*

In the 1960s and 1970s, courts also seized on the idea of sexual orientation to defeat early demands for same-sex marriage. When Singer and his life partner were refused a marriage license, Singer brought suit, arguing that the state’s marriage law violated both the state and federal constitutions.<sup>263</sup> In particular, Singer insisted that prohibiting same-sex marriage constituted impermissible gender and sexual-orientation discrimination.<sup>264</sup> First, he contended that “to construe state law to permit a man to marry a woman but at the same time to deny him the right to marry another man is to construct an unconstitutional classification ‘on account of sex.’”<sup>265</sup> The court rejected this claim on both state and federal constitutional grounds, leveraging the biological differences between gay and straight couples.<sup>266</sup> “[I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union,” the court reasoned.<sup>267</sup> “Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination ‘on account of sex.’”<sup>268</sup>

Singer responded that the law discriminated on the basis of sexual orientation, a classification that he thought the courts should treat as suspect.<sup>269</sup> But, as the court reasoned, there was no sexual orientation discrimination because gay and lesbian couples were not similarly situated to their heterosexual counterparts:

[I]t is apparent that the state’s refusal to grant a license allowing the appellants to marry one another is not based upon appellants’ status as males, but rather it is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no

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<sup>263</sup> Singer v. Hara, 522 P.2d 1187, 1188–90 (Wash. Ct. App. 1974).

<sup>264</sup> *Id.* at 1189–90.

<sup>265</sup> *Id.* at 1190.

<sup>266</sup> *See id.* at 1195.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1196.

same-sex couple offers the possibility of the birth of children by their union.<sup>270</sup>

Defending an unchangeable, immutable status opened the door to justifications based on the supposed reproductive and biological differences between gay and straight couples. Borrowing from the Supreme Court's jurisprudence on sex discrimination, courts rejected equal protection claims on the basis that gay couples could not reproduce *in vivo* and thereby failed to serve the primary aim of marriage. Even from the standpoint of due process, the court identified reproductive differences as a rational basis for excluding gays from marriage.

The same idea of real differences informed the reasoning of *Baker v. Nelson*, the first case involving same-sex marriage to make it to the Supreme Court.<sup>271</sup> When Baker and his life partner were refused a marriage license, Baker argued that the state marriage law authorized same-sex marriage and violated the Constitution if interpreted in any other way.<sup>272</sup> The Minnesota Supreme Court rejected both Baker's due process and equal protection arguments, highlighting a real, biological difference between gay and straight couples.<sup>273</sup> "The institution of marriage [is] a union of man and woman, uniquely involving the procreation and rearing of children within a family," the *Baker* Court explained.<sup>274</sup> Even recognizing that some heterosexual couples did not wish to procreate, the court repeated that marriage and procreation were inextricably linked and did not logically apply to same-sex couples.<sup>275</sup>

Over the course of the 1970s, cases like *Acanfora*, *Singer*, and *Baker* convinced many in the emerging gay liberation movement that strategies based on sexual orientation were too risky. Given that certain definitions of sexual orientation had been effectively used to limit the government's duty to avoid discrimination, activists began experimenting with an alternative definition based on sexual or affectional preference.<sup>276</sup>

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<sup>270</sup> *Id.* at 1195.

<sup>271</sup> See *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissing appeal from Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589, 2591 (2015) (overruling *Baker* and noting that *Baker* was "a one-line summary decision . . . holding that the exclusion of same-sex couples from marriage did not present a substantial federal question).

<sup>272</sup> *Baker*, 191 N.W.2d at 185–86.

<sup>273</sup> *Id.* at 185–87.

<sup>274</sup> *Id.* at 186.

<sup>275</sup> See *id.* at 186–87.

<sup>276</sup> See *infra* Part II.

## II. SEXUAL PREFERENCE AND ANTIDISCRIMINATION

In the late 1960s and early 1970s, the gay rights movement changed dramatically. In 1969, in New York City, customers at the Stonewall Inn frustrated by police harassment and shakedowns fought back.<sup>277</sup> The riots came at a time when identity politics and radical social movements often made the front page.<sup>278</sup> Following the Stonewall riots, gay-rights activists formed a more radical movement of their own.<sup>279</sup> Founded in New York City, the Gay Liberation Front (GLF) described its cause as the sexual liberation of all Americans, gay and straight.<sup>280</sup> GLF members also tried to win a place in the broader New Left, and the organization partnered with black power and feminist groups impatient with the pace of social change.<sup>281</sup> By 1969, former GLF members started the Gay Activists Alliance (GAA) as a splinter group that would prioritize antidiscrimination protections for gays and lesbians over a broad New Left agenda.<sup>282</sup>

GAA focused on a civil-rights ordinance that would outlaw discrimination against gays and lesbians.<sup>283</sup> Members of the GAA rejected the sometimes cautious approach taken by other gay-rights organizations, handing out pamphlets urging voters to “vote gay” and holding confrontational “zaps” at public events and the workplaces of politicians.<sup>284</sup> As Jim Owles of GAA explained, “We do not ask for respectability or sympathy from straight people.”<sup>285</sup> GAA leaders framed the bill as part of an effort to bring gays and lesbians out of the closet. As GAA leader Bruce

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<sup>277</sup> See, e.g., CARTER, *supra* note 161, at 137–94 (discussing the Stonewall Inn raid and patrons’ responses); see also ANN BAUSUM, *STONEWALL: BREAKING OUT IN THE FIGHT FOR GAY RIGHTS* 35–45 (2015).

<sup>278</sup> See, e.g., RICHARD M. ABRAMS, *AMERICA TRANSFORMED: SIXTY YEARS OF REVOLUTIONARY CHANGE, 1941–2001*, at 175 (2006) (explaining that the “identity politics” of the 1960s set the stage for the Stonewall Riots).

<sup>279</sup> See, e.g., *SEXUAL POLITICS, SEXUAL COMMUNITIES*, *supra* note 5, at 223–50 (“The Stonewall riot . . . spark[ed] a nationwide grassroots ‘liberation’ effort among gay men and women.”); see also *RETHINKING THE GAY AND LESBIAN MOVEMENT*, *supra* note 5, at 65–77, 102–08 (discussing homophile activism in the 1960s).

<sup>280</sup> See ANDREW HARTMAN, *A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS* 32–33 (2015); Allen Young, *Out of the Closets, Into the Streets*, in *OUT OF CLOSETS: VOICES OF GAY LIBERATION* 29 (Karla Jay & Allen Young eds., 1992) (urging that in contrast to heterosexuality, homosexuality helps move society away from “male supremacy” and toward equality); Will Lissner, *New Left Groups in Session Here*, *N.Y. TIMES*, Jul. 19, 1970, at 33.

<sup>281</sup> See, e.g., Lissner, *supra* note 280 and text accompanying; see also HARTMAN, *supra* note 280 and text accompanying.

<sup>282</sup> See, e.g., STEIN, *supra* note 5, at 40.

<sup>283</sup> See, e.g., FADERMAN, *supra* note 5, at 216–17.

<sup>284</sup> See, e.g., FADERMAN, *supra* note 5, at 218–25; *id.* at 218 (“Zaps’ [were] . . . high-spirited actions in which ‘the good guys publicly embarrass the bad guys.’”); see also CARTER, *supra* note 161, at 241–51.

<sup>285</sup> Joseph Lelyveld, *Militant Homosexuals to Stage Mark on Central Park Today*, *N.Y. TIMES*, June 27, 1971, at U30.

Voeller stated, “It should be obvious that our general purpose in getting bills passed is to educate gays and the general public.”<sup>286</sup>

While rejecting the strategy adopted by organizations like MSW, GAA initially used the language of sexual orientation in the bill it promoted.<sup>287</sup> Reports stated that, “The bill is technically an amendment to the city’s Omnibus Human Rights Act, seeking to insert the words ‘sexual orientation’ among a list of actions on which discrimination is illegal.”<sup>288</sup>

The bill’s early struggles highlighted some of the problems with a sexual-orientation framing encountered by homophile activists in the 1960s. In January 1972, the bill died in committee.<sup>289</sup> GAA leaders blamed the defeat on New York Mayor, Richard Lindsey, who activists believed had done too little to support the provision.<sup>290</sup> Opposing politicians attributed the bill’s downfall to its sponsors’ focus on gay pride.<sup>291</sup> While ambivalent politicians might support a bill outlawing discrimination based on purely private sexual orientation, one opponent of the bill explained that undecided council members “found [activists’ public] behavior generally repugnant.”<sup>292</sup> In February, Lindsey issued a directive banning discrimination in the city’s department of personnel and civil service commission on the basis of “private sexual orientation.”<sup>293</sup> Lindsey’s move appeared to be a direct response to the complaints raised by the city council.<sup>294</sup> The concept of sexual orientation seemed to be a limiting principle on the drive for protection against discrimination, doing nothing to check bias supposedly based on conduct rather than status.

The use of sexual orientation as a limiting principle continued in 1973. Two committees of the Association of the Bar of the City of New York endorsed Intro 475 because it focused on private propensity.<sup>295</sup> “Much of the resistance to legislation . . . stems from the belief that all homosexuals behave in a stereotype fashion[,] which is often identified with eccentric dress and conduct,” the committees’ report explained.<sup>296</sup> “[L]egislation prohibiting discrimination based on sexual orientation would not require an employer to hire or a landlord to rent to an individual who was unacceptable for reasons other than sexual orientation.”<sup>297</sup> In

<sup>286</sup> *Id.*

<sup>287</sup> See Pamphlet, Gay Activists Alliance, *Civil Rights for Homosexuals* (1971) (on file with the Rare Book & Manuscript Library, Columbia University).

<sup>288</sup> John Darnton, *A Rights Bill for Homosexuals Rejected Again in City Council*, N.Y. TIMES, Dec. 21, 1973, at 1.

<sup>289</sup> See, e.g., Edward Ranzal, *Homosexuals Bill Protecting Rights Is Killed by Council*, N.Y. TIMES, Jan. 28, 1972, at 1.

<sup>290</sup> See, e.g., FADERMAN, *supra* note 5, at 220; see also CLENDINEN & NAGOURNEY, *supra* note 5, at 139.

<sup>291</sup> See, e.g., Ranzal, *supra* note 289, at 74.

<sup>292</sup> See *id.*

<sup>293</sup> *New City Directive Bars Hiring Bias on Homosexuals*, N.Y. TIMES, Feb. 8, 1972, at 35.

<sup>294</sup> See *id.*

<sup>295</sup> See Edward Ranzal, *Bar Groups Back Homosexual Bill*, N.Y. TIMES, Feb. 11, 1973, at 62.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

December 1973, the same problem cropped up.<sup>298</sup> When Intro 475 died again in committee, its defeat was linked to an amendment that would have exempted “public transvestites” from the bill.<sup>299</sup> When council members rejected the amendment, its supporters successfully moved for the entire bill to be set aside.<sup>300</sup>

Indeed, in 1974, when the bill finally made it out of committee, debate turned on whether it would legitimize public gay conduct. Opponents of the bill, including the Roman Catholic Church and police and firemen’s unions, contended that it would give “public license to uninhibited manifestations of sexual preference or sexual relationships” and would “propagandize deviant forms of sexuality.”<sup>301</sup> Council members in favor of the bill successfully added an amendment stating that “nothing in the definition of sexual orientation . . . ‘shall be construed to bear upon the standards of attire or dress code.’”<sup>302</sup> Even the *New York Times* endorsed the bill because of its narrow protections, demanding only “rights [for] a minority who in their private lives adopt a ‘sexual orientation’ different from the majority.”<sup>303</sup> When the bill went down in defeat, the shortcomings of the use of the term sexual orientation—at least as council members had framed it—seemed clear.<sup>304</sup>

#### A. *Sexual Preference Emerges as an Alternative Framework*

As early as 1973, activists began exploring alternative definitions to sexual orientation, and one particularly influential effort unfolded in Minneapolis-St. Paul.<sup>305</sup> Twenty activists met with sympathetic mental health professionals and attorneys to develop a model civil rights ordinance.<sup>306</sup> “Some of those present felt that words like ‘homosexual’ or ‘sexual orientation’ ought to be used” because “everybody [knew] what they mean[t].”<sup>307</sup> Others worried that an orientation-based approach would inevitably leave many without protection, particularly when it came to conduct.<sup>308</sup> As one attendee explained, “Gay people get hassled not for what they do in bed, but for publicly expressing their affection—holding hands,

<sup>298</sup> See, e.g., John Darnton, *A Rights Bill for Homosexuals Rejected Again in City Council*, N.Y. TIMES, Dec. 21, 1973, at 1.

<sup>299</sup> See, e.g., *id.* at 23.

<sup>300</sup> *Id.*

<sup>301</sup> See Maurice Carroll, *City Council’s Bill on Homosexual Rights*, N.Y. TIMES, May 5, 1974, at L70 [hereinafter *City Council’s Bill on Homosexual Rights*]; Maurice Carroll, *Homosexual Bill Protest Draws Small Crowd Here*, N.Y. TIMES, May 1, 1974, at 1; see also Gene I. Maeroff, *Homosexuals Declare Right to Teach; Assert Sexual Orientation Is Irrelevant*, N.Y. TIMES, May 20, 1974, at 63.

<sup>302</sup> Edward Ranzal, *Homosexual Bill Gains in Council*, N.Y. TIMES, Apr. 19, 1974, at 1; see also *City Council’s Bill on Homosexual Rights*, *supra* note 301, at L70.

<sup>303</sup> *Matter of Civil Rights*, N.Y. TIMES, Apr. 19, 1974, at 36.

<sup>304</sup> See, e.g., Maurice Carroll, *Council Defeats Homosexual Bill by 22-to-19 Vote*, N.Y. TIMES, May 24, 1974, at 1, 10.

<sup>305</sup> See, e.g., Letter from Jack Baker to Bella Abzug, N.Y. Rep. 1–3 (Sept. 26, 1974) (on file with the Rare Book & Manuscript Library, Columbia University).

<sup>306</sup> See *id.* at 1.

<sup>307</sup> *Id.*

<sup>308</sup> See *id.*

dancing[,] or even for projecting an image which society does not usually associate with ‘masculine’ or ‘feminine’ roles.”<sup>309</sup>

Ultimately, the attendees settled on a definition first proposed by clinical psychologist, Gary Schoener, who favored the language of “affectional or sexual preference.”<sup>310</sup> As Schoener saw it, activists should describe bisexuality and homosexuality as neutral or even positive choices rather than as inborn traits that victimized those who were not innately heterosexual.<sup>311</sup> Schoener worried that sexual orientation as a category inaccurately suggested “that [one could] be put into one box based on [one’s] behavior.”<sup>312</sup> Attendees also approved of the language “affectional or sexual preference” because it dignified the relationships of GLBTQ couples and highlighted the non-sexual dimensions of those relationships.<sup>313</sup>

After prevailing in the Twin Cities, GLBTQ activists successfully pushed for city-level referenda in over nine other cities.<sup>314</sup> Some cities, like Detroit, developed laws focused on sexual orientation.<sup>315</sup> Other cities used sexual preference as an alternative framework.<sup>316</sup>

Ultimately, the National Gay and Lesbian Task Force (NGLTF, then the National Gay Task Force), the group working to coordinate the campaign for civil-rights ordinances at the national level, adopted a strategy based on sexual or affectional preference.<sup>317</sup> NGLTF hoped that the push for local antidiscrimination ordinances would set the stage for a federal civil rights bill.<sup>318</sup> Believing that sexuality was fixed at birth and could not be changed, most of the organization’s male leaders favored the rhetoric of orientation.<sup>319</sup> Women in NGLTF, however, argued that preference language was both broader and more affirming, legitimizing the very conduct that New York legislators had found unacceptable.<sup>320</sup> Ultimately, leaders of the group decided that preference language better served the movement’s goals for several reasons.<sup>321</sup>

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> See *id.* at 1–2 (describing Dr. Schoener’s view that words like “homosexual” and “heterosexual” were too restrictive and connoted “sexual behavior” as opposed to one’s “feelings”).

<sup>312</sup> *Id.*

<sup>313</sup> See *id.* at 1–2.

<sup>314</sup> See Judith Cummings, *Homosexual-Rights Laws Show Progress in Some Cities, but Drive Arouses Considerable Opposition*, N.Y. TIMES, May 13, 1974, at 17.

<sup>315</sup> See, e.g., *id.*

<sup>316</sup> See, e.g., *id.*

<sup>317</sup> CLENDINEN & NAGOURNEY, *supra* note 6, at 261–65.

<sup>318</sup> See Letter from Jack Baker to Bella Abzug, *supra* note 306, at 2–3 (urging Representative Abzug to consider “affectional preferences” in drafting federal bill prohibiting discrimination against homosexuals); see also *supra* notes 270–72 and accompanying text.

<sup>319</sup> See, e.g., CLENDINEN & NAGOURNEY, *supra* note 5, at 265; see also HEATHER MURRAY, NOT IN THIS FAMILY: GAYS AND THE MEANING OF KINSHIP IN POSTWAR NORTH AMERICA 64, 109, 117 (2010).

<sup>320</sup> See, e.g., CLENDINEN & NAGOURNEY, *supra* note 5, at 265; MURRAY, *supra* note 319, at 81–82.

<sup>321</sup> CLENDINEN & NAGOURNEY, *supra* note 5, at 265.

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 to the language of sexual preference to fend off attacks by some other members of the women's liberation movement.<sup>322</sup>

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.<sup>323</sup> 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.<sup>324</sup> Assistant District Attorney Edward Pear explained, "It was our feeling that it was their conduct that was unacceptable."<sup>325</sup>

Sometimes, movement leaders also hoped that sexual preference laws would protect those targeted because of gender non-conformity.<sup>326</sup> 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.<sup>327</sup>

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.<sup>328</sup> 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.<sup>329</sup> Because of the threat of conduct-based discrimination, Minnesota activists urged Abzug to change the bill to cover "sexual or affectional preference" rather than an immutable orientation.<sup>330</sup> "Please amend

<sup>322</sup> On lesbian feminists' use of the language of sexual preference, see, for example, WINIFRED BREINES, *THE TROUBLE BETWEEN US: AN UNEASY HISTORY OF WHITE AND BLACK WOMEN IN THE FEMINIST MOVEMENT* 105 (2006). For contemporary use of the language of sexual preference, see, for example, 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.

<sup>323</sup> See *supra* notes 289–304 and accompanying text.

<sup>324</sup> Cummings, *supra* note 314, at 17.

<sup>325</sup> *Id.*

<sup>326</sup> See, e.g., Madeline Janover, *Colorado Women*, OFF OUR BACKS, May 1974, at 12 (noting that many homosexuals fail to identify as such because they defy traditional gender roles).

<sup>327</sup> See *id.*

<sup>328</sup> See, e.g., Cummings, *supra* note 314, at 17.

<sup>329</sup> See, e.g., CHRISTINA B. HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE* 165 (2013); SUSAN GLUCK MEZEY, *QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY* 215 (2007); JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 319 (2002).

<sup>330</sup> See, e.g., Letter from Jack Baker & Tom Higgins to Bella Abzug (Sept. 26, 1974) (on file the Rare Book & Manuscript Library, Columbia University); Letter from Michael McConnell, Chair, Subject Headings Comm. Task Force on Gay Liberation, to Bella Abzug, N.Y. Rep. (Sept. 26, 1974) (on file with the Rare Book & Manuscript Library, Columbia University).

your bill to recognize that physical intimacy is only one[,] albeit important[,] part of human affections,” argued Michael McConnell, another Minnesota advocate.<sup>331</sup> “Holding hands and other public expressions of [a]ffection cost more jobs than private sexual [behavior].”<sup>332</sup>

NGLTF, leader Bruce Voeller travelled to Washington, DC, to ask Abzug to change the bill’s language.<sup>333</sup> Voeller “very strong[ly]” urged Abzug to frame sexuality as a matter of “affectional [or sexual] preference” instead of an immutable orientation.<sup>334</sup> In explaining his reasoning, he emphasized that sexual orientation laws left some without protection.<sup>335</sup> He cited a case from Minneapolis–St. Paul in which police officers had harassed a couple for holding hands.<sup>336</sup> Since these men were targeted because of their conduct, Voeller argued that “under the pharse [sic] ‘sexual orientation’ it would not be clear that they would be protected from harassment.”<sup>337</sup>

Although Abzug’s proposal never made it out of committee, 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 depending on the language of “affectional or sexual preference.”<sup>338</sup>

### *B. The Movement Turns Again to a Sexual-Orientation Frame*

In the late 1970s and early 1980s, movement leaders concluded that the costs of a sexual-preference frame were simply too high. At a time when public tolerance of homosexuality was limited, the recently mobilized Religious Right happily described homosexuality as a bad choice, rather than an immutable trait.<sup>339</sup> After the start of the AIDS epidemic, when anti-gay activists denounced what they described as inappropriate behavior choices,

<sup>331</sup> Letter from Michael McConnell, *supra* note 330.

<sup>332</sup> *Id.*

<sup>333</sup> See, e.g., Memorandum from Marilyn to Bella Abzug, N.Y. Rep. 1–2 (Sept. 23, 1974) (on file with the Rare Book & Manuscript Library, Columbia University).

<sup>334</sup> Memorandum from Marilyn, *supra* note 333, at 1; see also Memorandum from Jay to Bella Abzug, N.Y. Rep. (Dec. 4, 1974) (on file with the Rare Book & Manuscript Library, Columbia University).

<sup>335</sup> See Memorandum from Marilyn, *supra* note 333, at 2.

<sup>336</sup> *Id.* at 1–2.

<sup>337</sup> *Id.* at 2.

<sup>338</sup> See, e.g., Memorandum from Joe Totten to GRNL Board, (Dec. 9, 1977) (on file with Cornell University).

<sup>339</sup> See, e.g., MICHAEL STEWART FOLEY, FRONT PORCH POLITICS: THE FORGOTTEN HEYDAY OF AMERICAN ACTIVISM IN THE 1970S and 1980s, at 88 (2013); CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 127–29 (2002); DANIEL K. WILLIAMS, GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 108–09, 138–42, 147–51 (2010).

GLBTQ activists had yet another reason for relying on the language of sexual orientation.<sup>340</sup>

The downsides of a sexual preference frame first came into view in June 1977, when Miami voters decided to repeal an antidiscrimination ordinance by a 2-1 margin.<sup>341</sup> Anita Bryant, a former beauty queen and religious conservative, claimed victory in Miami as the result of a strategy centered on the idea that sexuality was freely chosen.<sup>342</sup> If homosexuality was a mere preference, Bryant asserted that the risk of gays and lesbians “converting” children was all too real.<sup>343</sup> 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 alternate way of life—that being a homosexual or lesbian is not really wrong.”<sup>344</sup> NGLTF members worried that Bryant had exposed the weaknesses of the organization’s existing strategy.<sup>345</sup> Voeller suggested that NGTF “pull away from ‘right to choose’ [arguments] in the short term.”<sup>346</sup> 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.<sup>347</sup> “‘Right of Choice’ is not a rallying point,” one board member reasoned. “People [think they] have a right to try to prevent children from being homosexual.”<sup>348</sup>

As an emerging Religious Right and New Right coalition attacked other civil rights ordinances, concern about a preference frame intensified. In St. Paul, Minnesota, Reverend Richard Angwin, a fundamentalist preacher from Kansas, headed the repeal campaign.<sup>349</sup> Angwin used the idea of sexual preference to argue for repeal.<sup>350</sup> “[B]eing a pervert is like being a thief,” Angwin explained,<sup>351</sup> “[B]oth

<sup>340</sup> See RIMMERMAN, *supra* note 340, at 132–33 (“AIDS represented divine and just retribution for immoral homosexual behavior.”).

<sup>341</sup> WILLIAMS, *supra* note 340, at 147–49.

<sup>342</sup> See RIMMERMAN, *supra* note 340, at 127; WILLIAMS, *supra* note 340, at 147–50.

<sup>343</sup> See *Anita Bryant Scores White House Talk with Homosexuals*, N.Y. TIMES, Mar. 28, 1977, at 56.

<sup>344</sup> *Anita Bryant Scores White House Talk with Homosexuals*, N.Y. TIMES, Mar. 28, 1977, at 56. For more on the work of Save Our Children, see, for example, JEFFREY D. HOWISON, *THE 1980 PRESIDENTIAL ELECTION: RONALD REAGAN AND THE SHAPING OF THE AMERICAN CONSERVATIVE MOVEMENT* 84 (2014) (discussing the background of Anita Bryant); JANICE M. IRVINE, *TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES* 143 (2002) (elaborating on the mood surrounding sexuality in the 1970s).

<sup>345</sup> See Meeting Minutes, Nat’l Gay & Lesbian Task Force Bd. of Dirs. (July 11, 1977) (on file with the Schlesinger Library, Harvard University).

<sup>346</sup> *Id.*

<sup>347</sup> See *id.*

<sup>348</sup> *Id.*

<sup>349</sup> See, e.g., CLENDINEN & NAGOURNEY, *supra* note 5, at 326; Nathaniel Sheppard, Jr., *After Repeal of Homosexual Bias Law, St. Paul Debates the Implications*, N.Y. TIMES, Apr. 27, 1978, at A20 [hereinafter *After Repeal of Homosexual Bias Law, St. Paul Debates the Implications*].

<sup>350</sup> See, e.g., *After Repeal of Homosexual Bias Law, St. Paul Debates the Implications*, *supra* note 349.

<sup>351</sup> *Id.*

are wrong and both can continue or repent.”<sup>352</sup> Angwin’s supporters carried the day. St. Paul voted to repeal its ordinance by a vote of 54,096 to 31,694.<sup>353</sup>

Religious Right groups mounted signature petition drives in Wichita, Kansas, and Eugene, Oregon.<sup>354</sup> In both cities, local pastors argued that homosexuality was an illegitimate preference.<sup>355</sup> Reverend Ron Adrian, the head of Concerned Citizens for Community Standards in Wichita, rejected the idea that the ordinance had anything to do with civil rights.<sup>356</sup> “We think it’s an effort on the part of a small group of people to ask us to approve of their immoral lifestyle,” Adrian asserted.<sup>357</sup> Rosalie Butler, a sympathizer of the Religious Right and a member of the St. Paul City Council, backed Adrian’s assessment.<sup>358</sup> “Those who choose a perverted lifestyle, whether it be as a homosexual, robber or drug pusher, can’t expect the full rights . . . that people who live in step with society get,” she explained.<sup>359</sup>

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 47,246 to 10,005.<sup>360</sup> Barely more than two weeks later, a partial tally in Eugene showed that 13,838 voters preferred repeal, with only 7,685 in opposition.<sup>361</sup>

In the wake of these defeats, NGLTF downplayed a preference frame so much that *Lesbian Tide*, a movement publication, accused NGLTF of “call[ing] for an end to choice.”<sup>362</sup> Instead of refuting this charge, NGLTF leaders sent a letter “clarifying its position . . . reiterat[ing that] ‘sexual preference’ and ‘orientation’ [are both] useful terms to different segments of the community.”<sup>363</sup>

<sup>352</sup> *Id.*

<sup>353</sup> *After Repeal of Homosexual Bias Law, St. Paul Debates the Implications*, *supra* note 349. For more on the St. Paul campaign, see Nathaniel Sheppard, Jr., *Law on Homosexuals Repealed in St. Paul*, N.Y. TIMES, Apr. 26, 1978, at A1. For more on Angwin’s campaign, see CLENDINEN & NAGOURNEY, *supra* note 5, at 323–26.

<sup>354</sup> Grace Lichtenstein, *Laws Aiding Homosexuals Face Rising Opposition Around Nation*, N.Y. TIMES, Apr. 27, 1978, at A1; *see also*, *Wichita Repeals Homosexual Law*, N.Y. TIMES, May 10, 1978, at A10.

<sup>355</sup> *See* Lichtenstein, *supra* note 355.

<sup>356</sup> *Id.* at A20.

<sup>357</sup> *Id.*

<sup>358</sup> *After Repeal of Homosexual Bias Law, St. Paul Debates the Implications*, *supra* note 349.

<sup>359</sup> *Id.*

<sup>360</sup> Tribune Wire Services, *Voters Repeal Gay Rights Law in Wichita, Kan.*, CHI. TRIB., May 10, 1978, § 1, at 7.

<sup>361</sup> Wallace Turner, *Voters in Eugene, Ore., Repeal Ordinance on Homosexual Rights*, N.Y. TIMES, May 24, 1978, at A18.

<sup>362</sup> Editorial & Political Collective, *Gay, Feminist Leaders Call for End to “Choice”*, LESBIAN TIDE, Sept.–Oct. 1977, at 21; Meeting Minutes, Bd. of Dirs., Nat’l Gay Task Force (Feb. 11–12, 1978) 14 (The Nat’l Gay and Lesbian Task Force Records, Box 3, Folder 2, Human Sexuality Collection, on file with Cornell University Library) [hereinafter Nat’l Gay Task Force Meeting Minutes February 1978].

<sup>363</sup> Nat’l Gay Task Force Meeting Minutes February 1978, *supra* note 362, at 14.

The AIDS epidemic offered another powerful reason to move away from the language of sexual preference. After 1981, when the *New York Times* first reported on the spread of AIDS,<sup>364</sup> the number of patients increased rapidly, nearly tripling between 1982 and 1983 alone.<sup>365</sup>

The federal government responded slowly, forcing local GLBTQ groups to pick up the slack.<sup>366</sup> 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.<sup>367</sup>

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.<sup>368</sup> 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.<sup>369</sup> Even cosmopolitan cities like New York and San Francisco shuttered bath houses rather than focusing on education about safe sex.<sup>370</sup>

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 genetic, glandular, or hormonal factor,” but rather “a learned

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<sup>364</sup> See Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES (July 3, 1981), <http://www.nytimes.com/1981/07/03/us/rare-cancer-seen-in-41-homosexuals.html> [<https://perma.cc/295K-FPQW>].

<sup>365</sup> *Thirty Years of HIV/AIDS: Snapshots of an Epidemic*, AMFAR, <http://www.amfar.org/thirty-years-of-hiv/aids-snapshots-of-an-epidemic/> (last visited Oct. 11, 2017) [<https://perma.cc/64GJ-SQRD>] (noting that the number of AIDS cases reported in the U.S. increased from 771 cases in 1982 to 2,807 cases in 1983).

<sup>366</sup> On the slow and incomplete federal response, see, for example, DEBORAH B. GOULD, *MOVING POLITICS: EMOTION AND ACT UP'S FIGHT AGAINST AIDS* 92–93 (2009); RIMMERMAN, *supra* note 339, at 88–89; RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC*, 324–32 (1987).

<sup>367</sup> On Reagan's veto threat, see, for example, Sue Hyde, *Task Force to Meet with Presidential Aide*, GAY COMMUNITY NEWS, June 18, 1983, at 1; Bob Nelson, *AIDS Funding Jeopardized by Veto Threat*, GAY COMMUNITY NEWS, June 25, 1983, at 3.

<sup>368</sup> William F. Buckley, Jr., *Identify All the Carriers*, N.Y. TIMES, Mar. 18, 1986, at A27.

<sup>369</sup> On Dannemeyer's proposals, see Marlene Cemons, *AIDS Workplace Guidelines Win Praise: But Dannemeyer Vows to Continue Fight to Restrict Victims' Jobs*, L.A. TIMES (Nov. 15, 1985), [http://articles.latimes.com/1985-11-15/news/mn-2456\\_1\\_aids-victims](http://articles.latimes.com/1985-11-15/news/mn-2456_1_aids-victims) [<https://perma.cc/KN63-2XLY>]; William E. Dannemeyer, *Dannemeyer Outlines His View on AIDS*, L.A. TIMES (Feb. 8, 1986), [http://articles.latimes.com/1986-02-08/local/me-5583\\_1\\_aids-patients-aids-victims-high-risk-groups](http://articles.latimes.com/1986-02-08/local/me-5583_1_aids-patients-aids-victims-high-risk-groups) [<https://perma.cc/4VG6-2RNX>]; E. R. Shipp, *Concern over Spread of AIDS Generates a Spate of New Laws Nationwide*, N.Y. TIMES, Oct. 26, 1985, at 30.

<sup>370</sup> On the bathhouse regulations, see Marilyn Chase, *Doctors' Efforts to Control AIDS Spark Battles over Civil Liberties*, WALL ST. J., Feb. 8, 1985, at 23; *N.Y. Bans Sexual Activities Tied to AIDS: Bathhouses, Other Establishments Face Closure for Violations*, L.A. TIMES (Oct. 26, 1985), [http://articles.latimes.com/1985-10-26/news/mn-13119\\_1\\_sexual-activity](http://articles.latimes.com/1985-10-26/news/mn-13119_1_sexual-activity) [<https://perma.cc/6RTH-54KF>].

behavior.<sup>371</sup> If gays and lesbians made a voluntary choice, McIlhenny argued that they could not be true victims of discrimination: “Granting special legislation to groups because of behavior—let alone immoral behavior—opens the floodgates to almost any group that wants minority status.”<sup>372</sup>

At the national level, Religious Right figures echoed this reasoning. In opposing an amendment to the Civil Rights Act, Connie Marshner, a leader of the New Right and Religious Right, contended that privacy rights militated against protections for gays and lesbians.<sup>373</sup> “What we are advocating,” she explained, “is that our right to privacy be respected: That the homosexual lifestyle not be flaunted in our neighborhood and shouted from the housetops.”<sup>374</sup> The opposition made sexual preference arguments shorthand for the selfishness of which Religious Right activists accused gay men.<sup>375</sup>

The politics of AIDS reinforced social conservatives’ efforts 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.<sup>376</sup> Framing sexuality as a mere preference, Welton argued that gay men and lesbians put their wellbeing above everyone else’s.<sup>377</sup> “What kind of compassion,” she asked, “allows a disease such as AIDS to go on, knowing the causes are selfish, immoral behavior patterns?”<sup>378</sup>

Dannemeyer, one of the most visible anti-gay leaders, happily discussed the idea of sexual preference.<sup>379</sup> 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,” Dannemeyer stated. “I speak for those who favor traditional family values.”<sup>380</sup>

<sup>371</sup> *Civil Rights Amendments Act of 1979: Hearing on H.R. 2074 Before the Subcomm. on Emp. Opportunities of the H. Comm. on Educ. & Labor*, 96th Cong. 31–32 (1980) (statement of Rev. Charles McIlhenny, Pastor, First Orthodox Presbyterian Church of San Francisco, CA).

<sup>372</sup> *Id.*

<sup>373</sup> *Civil Rights Act Amendments of 1981: Hearing on H.R. 1454 Before the Subcomm. on Emp. Opportunities of the H. Comm. on Educ. & Labor*, 97th Cong. 39–41 (1982) (statement of Connie Marshner, National Profamily Coalition).

<sup>374</sup> *Id.* at 40.

<sup>375</sup> *See id.* at 39–41.

<sup>376</sup> *See Aids Issues (Part 2): Hearing on H.R. 338, H.R. 339, H.R. 344, HR.345, H.R. 2272, H.R. 2273, H.R. 3071, and H. Con. Res. 8 Before the Subcomm. on Health & the Env’t. of the H. Comm. on Energy & Commerce*, 100th Cong. 683–87 (1987) (statement of Judy Welton, Cofounder, Parents United Because Legislators Ignore Children).

<sup>377</sup> *See id.* at 683–84.

<sup>378</sup> *Id.* at 684.

<sup>379</sup> *See* William E. Dannemeyer, *supra* note 369.

<sup>380</sup> *Id.*

Leaders of the NGLTF responded that sexual orientation discrimination, not sexual preference discrimination, was the real issue. In renewing the push for federal civil rights legislation, GRNL created a public education campaign to “analyze current 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.”<sup>381</sup> Recognizing the downsides of sexual preference arguments, members of the group planned to “counter” special-preference claims.<sup>382</sup> To do so, GRNL almost exclusively used the language of orientation. “Our goal,” the group stated, “[is] equal rights and justice under the law regardless of sexual orientation.”<sup>383</sup> 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.”<sup>384</sup>

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.”<sup>385</sup> 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.”<sup>386</sup>

### C. Orientation, Suspect Classification, and the Courts

As GLBTQ activists renewed the push for protection in the Supreme Court, activists again gravitated toward the language of sexual orientation. As the

<sup>381</sup> Press Release, Gay Rights Nat’l Lobby, Gay Rights National Lobby Creates Education and Research Foundation (Nov. 22, 1981) (Human Sexuality Collection, on file with the Cornell University Library); see also Memorandum Regarding Sharing Right to Privacy Goals and Objectives with Leaders of Other Community Organizations from Rick Davis, Educ. & Research Dir., Right to Privacy Found., to Stephen Endean, President, Right to Privacy Found., (1983) (Human Sexuality Collection, on file with Cornell University Library).

<sup>382</sup> See Memorandum from Rick Davis to Stephen Endean, *supra* note 381, at 2–3; Press Release Gay Rights National Lobby Creates Education and Research Foundation *supra* note 381, at 4.

<sup>383</sup> See, e.g., Draft Grant Proposal, Gay Rights Nat’l Lobby, Draft Grant Proposal to Playboy Foundation 3 (Feb. 17, 1983) (Human Sexuality Collection, on file with the Cornell University Library).

<sup>384</sup> *Civil Rights Act Amendments of 1981: Hearing on H.R. 1454 Before the Subcomm. on Emp. Opportunities of the H. Comm. on Educ. & Labor*, 97th Cong. 8 (1982) (statement of Jean O’Leary, Director, National Association of Business Councils). 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); CANADAY, *supra* note 5, at 262; CLENDINEN & NAGOURNEY, *supra* note 5, at 240–42, 258.

<sup>385</sup> Press Release, Nat’l Gay Task Force, Mayors’ Conference Supports Gay/Lesbian Civil Rights (Jan. 27, 1984) (Human Sexuality Collection, on file with the Cornell University Library).

<sup>386</sup> Press Release, Nat’l Gay & Lesbian Task Force, National Gay Task Force Position Statements on AIDS-Related Issues (Apr. 14, 1985) (on file with author and located in the Human Sexuality Collection, on file with the Cornell University Library).

movement explored arguments that sexual orientation was a suspect classification, it became more important to describe sexual identities and behaviors as unchangeable. In the 1986 case, *Bowers v. Hardwick*, the Supreme Court rejected an argument that the due process right to privacy extended to consensual adult intimacy.<sup>387</sup> When *Bowers* temporarily seemed to foreclose a privacy strategy,<sup>388</sup> movement attorneys began experimenting more vigorously with alternatives.<sup>388</sup> 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.<sup>389</sup>

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 a staple of social conservatism advocacy. As this history shows, sexual orientation as a legal category has had multiple, conflicting meanings, some of which have been used to limit demands for equal treatment. Part III turns to the definition of sexual orientation adopted in *Obergefell* before exploring its potential shortcomings.

### III. IMMUTABILITY, EQUALITY, AND THE LEGACY OF SEXUAL ORIENTATION

The meaning of sexual orientation—or even the proper understanding of homosexuality—is not fully addressed in either the majority or dissenting opinions in *Obergefell*. Nevertheless, the majority opinion adopts an understanding of sexual orientation reminiscent of the definitions long advanced by GLBTQ groups.

*Obergefell* first mentions sexual orientation in support of the majority’s “history of marriage” as a story “of both continuity and change.”<sup>390</sup> After describing an emerging tolerance for gay and lesbian relationships, the Court explains, “Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”<sup>391</sup> In support of this definition, *Obergefell* cited an amicus curiae brief submitted on behalf of the

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<sup>387</sup> *Bowers v. Hardwick*, 478 U.S. 186, 188, 190–93 (1986).

<sup>388</sup> See, e.g., ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 120–126 (2009); ESKRIDGE, *supra* note 5, at 329–48, 422–57.

<sup>389</sup> See, e.g., RON BECKER, GAY TV AND STRAIGHT AMERICA 65–74 (2006).

<sup>390</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

<sup>391</sup> *Id.* at 2596.

American Psychological Association (APA) and other mental health organizations.<sup>392</sup> Significantly, however, the Court's definition of sexual orientation differed substantially from the account given by the APA. In its brief, the APA described sexual orientation as "normal," "generally not chosen," and "highly resistant to change."<sup>393</sup> The *Obergefell* Court deliberately frames sexual orientation as unchangeable and never chosen, core dimensions of a definition missing from the APA's own analysis.<sup>394</sup>

On paper, at least, GLBTQ attorneys won—and not just on the issue of marriage access. By describing sexual orientation as immutable, the Court seems more likely to recognize sexual orientation as a suspect classification. Rhetorically, the Court appears to have framed the issue in a way long urged by same-sex couples. Observers could be forgiven for believing that *Obergefell* represents only the first step in the recognition of equal treatment for gays, lesbians, and other non-conforming individuals.

However, when put in the context of the history of sexual orientation as a legal category, *Obergefell's* definition of sexual orientation offers as much reason for caution as for celebration. As movement leaders realized over the course of several decades, sexual orientation as a concept had not one meaning but many, and those defending anti-gay laws successfully enlisted sexual-orientation reasoning in defending the status quo. Drawing on the history of sexual orientation arguments, this Part next considers several of the risks associated with *Obergefell's* definition of sexual orientation.

#### A. Immutability, Conduct, and Status

Much has changed since the 1970s, as the *Obergefell* opinion itself recognized. Nevertheless, immutability-based definitions carry some of the same risks recognized by activists in the 1960s and beyond. In the context of public accommodations and same-sex marriage, business owners have claimed to be discriminating on the basis of conduct rather than an immutable status.<sup>395</sup> These claims have failed so far because the courts reject a distinction based on sexual orientation "when the conduct [at issue] is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status."<sup>396</sup>

For example, in *Craig v. Masterpiece Cakeshop, Inc.*, a same-sex couple visited a Colorado baker and requested a cake for their upcoming wedding.<sup>397</sup> When the

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<sup>392</sup> *See id.*

<sup>393</sup> Brief for the American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574).

<sup>394</sup> *See* *Obergefell*, 135 S. Ct. at 2594–95.

<sup>395</sup> *See, e.g., Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 281 (Colo. App. 2015); *Elane Photography v. Willock*, 309 P.3d 53, 60–64 (N.M. 2013).

<sup>396</sup> *Craig*, 370 P.3d at 281.

<sup>397</sup> *Id.* at 276–77.

proprietor refused, the couple brought suit under a state public accommodations law outlawing sexual orientation discrimination.<sup>398</sup> The baker responded that the business acted not “because of” the couple’s sexual orientation but rather “because of [the couple’s] intended conduct—entering into marriage with a same-sex partner—and the celebratory message about same-sex marriage that baking a wedding cake would convey.”<sup>399</sup>

The court concluded that the couple’s conduct and status were too closely intertwined to be distinguishable.<sup>400</sup> Similarly, in *Elane Photography v. Willock*, a suit challenging the application of a state civil-rights statute to a photographer who refused service to a same-sex couple, the court similarly concluded that the act of marriage was “inextricably tied” to sexual orientation itself.<sup>401</sup>

Precedent offers some guidance as to when conduct and status cannot be separated. In *Christian Legal Society Chapter of the University of California, Hastings v. Martinez*, the Supreme Court considered the constitutionality of an “all comers” policy, recognizing only those student groups that opened leadership and membership to any student.<sup>402</sup> The Christian Legal Society (CLS) argued that Hastings’ policy violated the First Amendment’s guarantees of free association and free speech.<sup>403</sup> The case was governed by the Supreme Court’s limited public forum doctrine.<sup>404</sup> Under the First Amendment, the Court has held that if a governmental entity opens property under its control, any speech restriction has to be viewpoint neutral and reasonable.<sup>405</sup>

In evaluating the reasonableness of Hastings’ policy, the Court considered the relationship between Hastings’ non-discrimination rules and the all-comers policy.<sup>406</sup> CLS argued that it sought to exclude students not because of their sexual orientation but because GLBTQ students did not morally object to gay and lesbian sex.<sup>407</sup> The Court rejected this distinction.<sup>408</sup> Objecting to gay and lesbian sex—a behavior identified exclusively with gays, lesbians, and bisexuals—was the same thing as objecting to sexual orientation.<sup>409</sup>

<sup>398</sup> *Id.* at 277.

<sup>399</sup> *Id.* at 280.

<sup>400</sup> *See id.* at 280–81. The Supreme Court granted certiorari to address the free-speech and free-exercise claims raised by the owners of *Masterpiece Cakeshop*. *See* *Masterpiece Cakeshop, Ltd. v. Col. Civ. Rights Comm’n*, 137 S. Ct. 2290 (2016) (cert. granted).

<sup>401</sup> *See* *Elane Photography v. Willock*, 309 P.3d 53, 59–63 (N.M. 2013).

<sup>402</sup> *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 671–75 (2010).

<sup>403</sup> *Id.* at 672–74.

<sup>404</sup> *Id.* at 679–83, 692–97. For key articulations of public forum doctrine, see, for example, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106–08 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

<sup>405</sup> *See* *Christian Legal Soc’y*, 561 U.S. at 679–82.

<sup>406</sup> *See* *Christian Legal Soc’y*, 561 U.S. at 686–97.

<sup>407</sup> *See id.* at 668, 688–89.

<sup>408</sup> *Id.* at 669, 685–90.

<sup>409</sup> *See id.* at 688–90.

The conduct-status distinction worked much more effectively in *Bray v. Alexandria Women's Clinic*.<sup>410</sup> In that case, the respondents sought to enjoin protests by Operation Rescue, a group organizing anti-blockades, under Section 2 of the Civil Rights Act of 1871.<sup>411</sup> To establish a conspiracy under this statute, the respondents had to argue that the blockaders shared a discriminatory animus against a protected class.<sup>412</sup> By opposing abortion, a procedure performed only upon women, Operation Rescue supposedly discriminated against women because of their status.<sup>413</sup> The *Bray* Court refused to equate the conduct of opposing abortion and animus toward women as a group.<sup>414</sup> "Whatever one thinks of abortion," the Court explained, "it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations."<sup>415</sup>

The Court also rejected the conduct-status argument in the context of sex and abortion. Because only women could get pregnant and have abortions, Alexandria Women's Clinic argued that opposition to women's conduct in choosing abortion could not be separated from their status as women.<sup>416</sup> The majority was unconvinced, reasoning that the clinic could not show a discriminatory purpose unless a party "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>417</sup> Because the Court saw opposition to abortion as legitimate, it seemed unreasonable to equate sex discrimination and antiabortion activism. As the Court explained, "Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description, and for such derogatory association with racism."<sup>418</sup>

In spite of the failed use of the conduct-status distinction in a handful of cases, the history of sexual orientation as a legal category, together with the Court's case law on the subject, should give us pause. There is no obvious way to determine when conduct is so closely related to status that someone can discriminate on the basis of either one. The Supreme Court has been less willing to equate conduct and status when discriminators invoke what the courts describe as a legitimate moral or religious objection to a particular act, like abortion. In seeking to respect and dignify

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<sup>410</sup> See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

<sup>411</sup> *Id.* at 266–67; see also 42 U.S.C. § 1985(3) (2012).

<sup>412</sup> See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 101–02 (1971).

<sup>413</sup> See *Bray*, 506 U.S. at 269–70.

<sup>414</sup> *Id.* at 270–73.

<sup>415</sup> *Id.* at 270.

<sup>416</sup> See *id.* at 269–70.

<sup>417</sup> *Id.* at 271–72 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>418</sup> *Id.* at 274.

conscience-based objections to abortion, the *Bray* Court readily distinguished objections to conduct and status-based discrimination.

In describing homosexuality as a sexual orientation rather than partly as a legitimate choice, the *Obergefell* Court assumes the validity of moral objections to both same-sex marriage and homosexuality. “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here,” the majority explains.<sup>419</sup> Indeed, the *Obergefell* Court goes out of its way to reiterate that the “First Amendment ensures that religious organizations and individuals are given proper protection.”<sup>420</sup> As *Bray* instructs, the Court may more often countenance conduct-based discrimination when the justices assume the legitimacy of objections to that conduct.

Immutability-based definitions of sexual orientation do not effectively address these moral objections. Activists using these arguments argued that religious and moral opposition to homosexuality was irrelevant more than indefensible. If no one could choose a sexual orientation, moral opposition was simply beside the point. Rather than describing gay and lesbian relationships as a defensible choice to which few could legitimately object, immutability arguments can be easily squared with the belief that business owners and lawmakers have cognizable conscience-based objections.

This approach to sexual orientation is neither necessary nor unavoidable. Prior to *Obergefell*, courts often concluded that same-sex marriage bans had no rational basis, reasoning that these laws rested on pure animus toward gays and lesbians.<sup>421</sup> These decisions offered a way to talk about objections to same-sex marriage or homosexuality that does not assume the legitimacy of conscience-based objections to serving gays and lesbians or refraining from discriminating against them.

In the future, as courts face new conscience-based challenges, it is worth remembering that immutability-based definitions of sexual orientation make it much harder to explain why gays and lesbians’ interests in civil rights outweigh religious- or expression-based hostility to sexual orientation. Notwithstanding language in *Obergefell*, it is not too late to define sexual orientation in a different way.

### *B. Sexual Orientation, Biological Differences, and Reasoning from Race and Sex*

*Bray* also serves as a reminder of how immutability arguments have backfired for gays and lesbians when the issue of reproduction comes into play. In the context

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<sup>419</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

<sup>420</sup> *Id.* at 2607.

<sup>421</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014) (highlighting evidence that “suggests animus against same-sex marriage, as is further suggested by the state’s inability to make a plausible argument for its refusal to recognize same-sex marriage”); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183–92 (2014).

of sex, immutability arguments allowed the Court to justify pregnancy discrimination case law based on sex equality and reproduction. The idea of real, biological differences between the sexes was at the heart of the distinction drawn by the Court. Historically, courts hostile to equality for gays and lesbians have invoked reproduction-based, biological distinctions to justify discriminatory treatment. In the aftermath of *Obergefell*, reproductive capacity will not justify bans on same-sex marriage. Nevertheless, with *Geduldig* and *Bray* still on the books, it remains to be seen whether the Court will revive the idea of biological differences in areas more closely related to reproduction, particularly access to reproductive technologies.

Sexual orientation as a legal category has a long and complex history, serving the purposes of both opponents and proponents of civil rights for gays and lesbians. Nothing in *Obergefell* or the cases on the conduct-status distinction illuminates which of those aims the idea of sexual orientation will serve in the future. In the aftermath of the Court's decision, it will be just as important to promote a proper understanding of sexual orientation as it will be to convince the Court that sexual-orientation classifications are suspect.

#### CONCLUSION

While current scholarship explores possible constitutional approaches to sexual-orientation discrimination, the origins of sexual orientation as a legal category remain obscure. Other scholars have created a rich and impressive dialogue about the history of the law and politics of sexuality, but existing studies only touch on how and why sexual orientation emerged as a legal category. This Article contributes to the discussion by offering a more complete history, showing how even skeptical gay and lesbian activists gravitated toward arguments based on biological difference and immutability. This idea of sexual orientation provoked controversy, encouraging some movement members to reject related approaches altogether. In response to a hostile political climate, movement leaders returned to this definition. The Court's equal-protection jurisprudence also made immutability-driven approaches more strategically advantageous.

Nevertheless, there was and is nothing inevitable about the rise of this definition of sexual orientation. Other definitions—based partly on individual choice—captured the attention of the movement and even some lawmakers. *Obergefell* hints that a majority on the Court is prepared to accept a definition of sexual orientation that has made it harder to defuse conscience-based objections, refute conduct-based discrimination, and reject “real differences” arguments based on reproductive capacity. As history shows, we can do better.