Is homophobia also sexism?

This question was the focus of pioneering scholarship nearly three decades ago and has been the subject of reignited controversy because of litigation over marriage rights, employment discrimination, educational opportunities, fair housing, religious exemptions, and military service. Even though some courts, federal agencies, and state employment commissions have recognized that sexual orientation and gender identity discrimination are subsets of sex discrimination, including the landmark Title VII decisions Hively v. Ivy Tech Community College and Zarda v. Altitude Express, academics, judges, and public administrators have been unable to articulate a plain theory of sexual orientation discrimination as sexism. Without a straightforward theory to operationalize into law, some
judges are unpersuaded that sexism and homophobia are linked. Appellate judges have struggled to find consensus even when they agree that sexual orientation discrimination is sex discrimination.

This Article’s objective is to reconsider the relationship between sexism and homophobia, by reexamining prior scholarship with new historical evidence and an exploration of recent LGBTQ rights jurisprudence to provide a more complete, easily digestible analytical framework that explains how homophobia fits in the larger puzzle of American sexism. The Article argues that American law’s historical and more contemporary maltreatment of sexual minorities is a product of a particular brand of sexism—ambivalent sexism—which utilizes a carrot and stick approach to subjugate both women and sexual minorities simultaneously. Ambivalent sexism punitively targets visible gender nonconformity while patronizingly rewarding individuals compliant with traditional gender expectations.

The Article contends that the development of sex stereotypes by Progressive Era lawmakers and the early administrative state in response to the LGBTQ community’s amplified visibility in the nineteenth century and the reappropriation of paternalistic legal theories initially used to restrict women’s rights, constitute the crux of homophobia in the law. The Article proffers that ambivalent sexism and its attendant sex stereotypes animate the homophobic state, and it urges courts and administrative actors to treat LGBTQ discrimination as a kind of sex discrimination.

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INTRODUCTION

The law of sexuality is messy. For decades, courts have sloppily shaped doctrine around theories of sex equality, gender nonconformity, sex stereotypes, sexual orientation, and gender identity. Judges have long failed to show a meaningful understanding of gender as a general matter or gender’s place, more specifically, in American history. Courts have muddled through complex questions of sex, sexuality, and gender by making incremental (and sometimes nonsensical) changes in governing

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1 See, e.g., Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 705 (7th Cir.), as amended (Aug. 3, 2016), and rev’d en banc sub nom. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (“And so for the last quarter century since Price Waterhouse, courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination, which can form the basis of a legal claim under Price Waterhouse’s interpretation of Title VII, and sexual orientation discrimination, which is not cognizable under Title VII.”); see also Anthony Michael Kreis, Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination, 96 TEX. L. REV. ONLINE 1, 6 (2017) (critiquing illogical doctrinal developments in Title VII); Brian Soucek, Perceived Homosexuals: Looking Gay Enough for Title VII, 63 AM. U. L. REV. 715, 726 (2014) (“The challenge facing the lower courts since Price Waterhouse [sic] is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender.”).
principles, freely interchanging terms that are not precise synonyms, or applying opaque constitutional analyses. Though the art of law is line-drawing in a world that defies determinate categories, judges and lawyers have had a noticeably rough go at applying their craft in this space.

Sex discrimination in American law is not solely about discrimination because of a person’s sex organs or secondary sex characteristics. Instead, the doctrine is concerned broadly with the eradication of inequitable power dynamics and discrimination along the continuum of masculinity and femininity. In short, while the function of...
the law revolves around gender, the form of the law has been stuck on the term sex.

The LGBTQ community’s part in these social dynamics is relatively new. Despite the truism that gay, lesbian, and bisexual Americans were part of the young nation’s body politic, there was an absence of targeted regulation. Throughout the twentieth and early twenty-first centuries, American law steered towards the suppression of lesbian, gay, bisexual, and transgender citizens with surgical precision. The state criminalized same-sex intimacy, banned sexual minorities from federal government employment and military service, enacted cross-dressing bans, denied openly LGBTQ persons the right to adopt and raise their biological children, proscribed same-sex marriages, and denied non-heterosexuals equal access to the wheels of government.

The law, with relative swiftness, pivoted from its peak rejection of sexual minority rights as a matter of constitutional law in Bowers v. Hardwick, which blessed the criminalization of same-sex intimacy, toward embracing LGBTQ rights. It took less than two decades for the Supreme Court to reverse Bowers in 2003 and then recognize the right of same-sex couples to marry in Obergefell v. Hodges a dozen years later.

Throughout the litigation challenging same-sex marriage bans and in post-Obergefell litigation, especially in the context of employment

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5 The American Psychological Association defines sex as “the traits that distinguish between males and females. Sex refers especially to physical and biological traits, whereas gender refers especially to social or cultural traits, although the distinction between the two terms is not regularly observed.” APA Dictionary of Psychology, Am. Psychol. Ass’n, https://dictionary.apa.org/sex [https://perma.cc/7UZE-9K26].

6 See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 2 (1995) (“The word ‘gender’ has come to be used synonymously with the word ‘sex’ in the law of discrimination. In women’s studies and related disciplines, however, the two terms have long had distinct meanings, with gender being to sex what masculine and feminine are to male and female. Were that distinct meaning of gender to be recaptured in the law, great gains both in analytic clarity and in human liberty and equality might well result.”). Ruth Bader Ginsburg made a strategic decision when litigating 1970s sex discrimination cases to use “gender” in place of “sex” to strip any sexualized veneer from her arguments, which might distract members of the Supreme Court. Id. at 10.

7 LGBTQ, as used in this Article, means lesbian, gay, bisexual, transgender, and queer.

8 See infra Section III.C.2.


discrimination, courts and administrative agencies have grappled with
the question of whether sexual orientation discrimination is a form of sex
discrimination. The arguments generally fall into two camps: sexual
orientation is sex discrimination because an individual cannot
discriminate against a gay, lesbian, or bisexual person without taking
their sex into account\[11\] or sexual orientation discrimination is not sex
discrimination because sexism and homophobia are unrelated types of
bias.\[12\]

What can legal history and recent jurisprudence uncover about
what, if any, connection exists between homophobia and sexism?\[13\] This
Article assesses the areas of life where the law has had the most profound
impact on sex equality and sexual orientation equality: the family, the
workplace, and the public square. Building on earlier literature, the
Article examines the policing of sexuality in these spaces across three eras
of American law—the agrarian era, the industrialized era, and the
modern economic era—and illustrates how the socioeconomic shifts in

\[11\] See, e.g., Brief for the EEOC as Amicus Curiae Supporting Plaintiff-Appellants at 7, Zarda
v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), 2017 WL 2730281, at *7
(“[S]exual orientation discrimination requires the employer to take the employee’s sex into
account (in conjunction with the sex of that employee’s actual or desired partner.”).

\[12\] See, e.g., Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 365 (7th Cir. 2017) (Sykes, J.,
dissenting) (“Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice
that classify people in distinct ways based on different immutable characteristics. Simply put,
sexual-orientation discrimination doesn’t classify people by sex; it doesn’t draw male/female
distinctions but instead targets homosexual men and women for harsher treatment than
heterosexual men and women.”); En Banc Brief for Court-Appointed Amicus Curiae at 14,
Zarda, 883 F.3d 100 (No. 15-3775), 2017 WL 3328258, at *14 (“Adverse employment action that
results from opposition to interracial relationships is race discrimination not because of some
‘but for’ thought experiment but because it is the result of racist motives and ideology. The same
cannot be said for opposition to homosexual relationships and sexism.”); Brief for the United
States as Amicus Curiae at 22, Zarda, 883 F.3d 100 (No. 15-3775), 2017 WL 3277292, at *22
(“[A]n employer who discriminates against an employee in a same-sex relationship is not
engaged in sex-based treatment of women as inferior to similarly situated men (or vice versa),
but rather is engaged in sex-neutral treatment of homosexual men and women alike.”).

\[13\] While these questions are under an intensified spotlight because of Title VII litigation,
scholars have long engaged with these issues. See, e.g., Andrew Koppelman, Why Discrimination
Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. REV. 197 (1994); Edward Stein,
Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights, 49 UCLA L. REV. 471
(2001); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of
“Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CALIF. L. REV.
1, 26 (1995).
American life that influenced the regulation of gender reveal an inextricable link between sexism and homophobia.

The Article details how the rise of the modern homophobic state is attributable to sex stereotypes rooted in ambivalent sexism, and it proceeds in four Parts. Part I explains the theory of ambivalent sexism, which recognizes the symbiotic relationship between twin forms of sexism: misogynistic, hostile sexism and paternalistic, benevolent sexism. Part II reviews the customs of sexuality in pre-industrial America, highlighting the most prevalent forms of gender policing that reinforced male supremacy.

Part III examines the implications of industrialization and urbanization for the LGBTQ community. This Part describes the hostile sexism that manifested in laws targeting same-sex relationships and forms of policing that worked to suppress gender expressions that challenged the supremacy of masculinity. Law enforcement and administrative agencies enforced the law by creating and relying on sex stereotypes about lesbian, gay, bisexual, and transgender persons who could not neatly fit within traditional binary silos of masculine men and feminine women. Part III shows the law accomplished this by aggressive enforcement of disorderly conduct laws, proscriptions against same-sex intimacies, and the emergence of a status-conduct dichotomy in American jurisprudence, all of which emphasized gender nonconforming traits to subjugate the entire LGBTQ community and reinforced descriptive sex stereotypes that endure today. This Part demonstrates, as Margot Canaday described, that the state “did not merely implicate but constituted” what it meant to be an LGBTQ person through the “identification of certain sexual behaviors, gender traits, and emotional ties” as commonly held characteristics.

Part IV turns to the modern economic era of gender equality and posits that the state’s construction of hostile, anti-LGBTQ stereotypes
was, in turn, used in conjunction with benevolent sex stereotypes about marriage and family to again suppress LGBTQ rights. Part IV uncovers how recent developments in American law favorable to the LGBTQ community’s rights are also a rejection of patently sexist principles formed to subjugate women and later reappropriated to oppose LGBTQ rights. Thus, modern constitutional protections for LGBTQ persons should be understood as part of a broader anti-sex-stereotyping principle. Part IV concludes by analyzing recent Title VII decisions recognizing sexual orientation discrimination as sex discrimination, proffering that they recognize sub silentio the ambivalent sexist underpinnings of homophobia.

I. THE AMBIVALENT SEXISM PARADIGM

Sexism takes two forms: hostile and benevolent.16 Hostile sexism is rooted in patriarchal values and lashes out in the service of protecting male economic, political, and social domination.17 Hostile sexism grows out of an ideology that believes women are inferior to men because they cannot control their emotions, they are inherently less competent than men, and they use sexual manipulation or feminism against men to achieve equality.

Unlike hostile sexism’s misogyny, benevolent sexism is patronizing. Benevolent sexism manifests in stereotypes the discriminator subjectively views as positive.19 Benevolent forms of sexism “characteriz[e] women as pure creatures who ought to be protected, supported, and adored and whose love is necessary to make a man complete.”20 Benevolent sexism embraces the philosophy that women are naturally pure and men must

17 Id. at 492.
18 Id. at 494.
19 Id. at 491.
commit self-sacrificing acts to preserve female virtue.\textsuperscript{21} Though seemingly dichotomous at first blush, benevolent sexism and hostile sexism are complementary.

Ambivalent sexism is a structural theory of sexism that recognizes the internally inconsistent but self-reinforcing dynamic hostile and benevolent attitudes produce in individuals who often subscribe to both ideologies.\textsuperscript{22} Ambivalent sexism is the consequence of a conundrum: while men work to preserve the superiority of masculinity, heterosexual men are nevertheless dependent on women with whom they desire to curry favor.\textsuperscript{23} Ambivalent sexism explains how men can simultaneously view women with utter contempt \textit{and} dismissive fondness. These dual forms of animus are complementary because they act as a carrot and a stick, punishing women who defy gender roles and rewarding women who hew closely to tradition.

However, women are not the only ones penalized by ambivalent sexism. If individuals—especially men—test the supremacy of masculinity, or gender roles are thought fungible, the entire system of male superiority collapses. Thus, strict adherence to traditional forms of gender expression and paternalistic social institutions must be preserved to maintain male domination. A careful analysis of the law’s historical development illustrates that discrimination against non-heterosexual persons lays squarely at the intersection of hostile and benevolent sexism.

The timing of homophobia’s codification, as this Article details, resulted from the collision of broader social challenges to women’s second-class status with an increased presence of gender nonconforming communities of sexual variance. As LGBTQ people, particularly those who violated norms of gender expression, became visible in the era of industrialization and urbanization, hostile sexist forces worked to suppress those forms of transgressive gender expression. This illiberal effort by the state, in turn, spurred new hostile sex stereotypes about what constituted an LGBTQ person.

At the same time, benevolent sexist attitudes shaped an ideology of family formation that created a market-family divide wherein gendered

\textsuperscript{21} Glick & Fiske, \textit{supra} note 16, at 492 (explaining that benevolent sexism includes the notion that men must be “protector[s] and provider[s],” which affords a “positive image for men [and] subtly reinforces notions of dominance over women”).

\textsuperscript{22} \textit{Id.} at 494.

\textsuperscript{23} \textit{Id.}
divisions of labor became the hallmark of family life. These benevolent sex stereotypes about marriage and family were later used in conjunction with hostile sex stereotypes about LGBTQ persons’ expressive conduct to justify excluding same-sex intimacy and same-sex relationships from constitutional protection. For these reasons, the ambivalent sexism framework helps reveal why recent gay rights constitutional jurisprudence should be understood as not only an expansion of LGBTQ individuals’ rights, but also as a rejection of sex-stereotyping.

II. THE AGRARIAN ERA

Life in early colonial America was mostly rural and agrarian. On average, Americans lived in small communities far from bustling port cities like Boston, Charleston, New York, and Philadelphia. Indeed, in the early national era, three-quarters of the American labor force—both free and slave—worked in the agricultural industry. Family life and the regulation of families reflected the geographic and commercial realities of pre-industrial America.

Families were both the center of social life and the primary economic unit of production. During the nation’s infancy, the overwhelming majority of farming households were subsistence farmers. Very few households produced enough foodstuffs to bring to the market. Instead,

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3. Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 199 (“In colonial America, religion, custom, economics and law strongly encouraged family formation. People lived in rural communities in which the family was the central unit of economic production and social status.”).


5. See WILLARD W. COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS 7 (2d ed. 1993) (“The productivity of the hunter-farmer probably rose from near zero in 1607–08 to a subsistence level by 1640, and to a level that produced a surplus over subsistence by 1780.”); ALAN TAYLOR, AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA 311 (2002) (“Most colonists lived on farm households that produced most of their own
farms produced goods at rates sufficient to meet a family’s consumption needs with a small surplus for bartering with neighboring families. In this sense, families and their farms were two halves that formed a corporate whole.

The pre-industrial family’s form as a cohesive unit of economic production did not lend itself to the formation of gendered roles for husband and wife concerning the division of labor. Thus, the idea that there were distinct spheres for men and women—the labor market versus the home—was nonexistent. As Frances Olsen described it, the “feudal family was not perceived to be separate from the rest of economic life; there was no dichotomy between the market and the family.”

Marriage and family formation were vital for economic survival and states adopted laws to channel sexual conduct into marital relationships and reinforce patriarchal life. New England colonies, for example, outlawed individuals from “solitary living” so that every colonist was “subject to the governance of family life.” Laws in the colonial and federalist periods regulated sexual conduct, typically as general prohibitions for crimes against nature. In this same vein, state laws in the antebellum era did not target same-sex relations for proscription and punishment. Rather, “laws condemning sodomy were one piece of a highly intrusive web of social intervention enforcing patriarchal family arrangements.” The first regulations of sex in the United States were calibrated to reinforce the primacy of the family unit, as John D’Emilio and Estelle Freedman describe:

> Early Americans did indeed pay close attention to the sexual behavior of individuals. . . . They did so, however, not in order to squelch sexual expression, but rather to channel it into what they considered to be its proper setting and purpose: as a duty and joy within marriage, and for the purpose of procreation.

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30 *3 PUBLIC WOMEN, PUBLIC WORDS: A DOCUMENTARY HISTORY OF AMERICAN FEMINISM* 226 (Dawn Keetley & John Pettegrew eds., 2002).
31 Law, *supra* note 26, at 200.
Both religious beliefs and economic interests supported this family-centered sexual system.\textsuperscript{32}

Early American law embraced the common law doctrine of coverture, which mirrored the economic function of families and their “deeply patriarchal” nature.\textsuperscript{33} In the eyes of the law, the family was a single, corporate unit with power vested in the husband. Married women were civilly dead.\textsuperscript{34} Sir William Blackstone described the doctrine in his 1765 \textit{Commentaries}:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a \textit{feme-covert} . . . .\textsuperscript{35}

Allison Tait explains that:

in the era of coverture, the notion that husbands and wives were equal partners in marriage seemed outlandish and unnatural. Under coverture, a married woman had no legal persona—she could not sue or be sued, she could not form contracts, and she could not buy, sell, or own property apart from her husband.\textsuperscript{36}

Thus, “[w]ives and children did not represent themselves but looked to the male head of household to represent and support them [sic], in return for which they owed their obedience and service.”\textsuperscript{37}

The formation and regulation of the early American family reflected the economic realities of the time, but all worked to bind the family as a corporate, patriarchal unit. In this stage of the American family, society held women out as inferior to their husbands—their reproductive and

\textsuperscript{33} Law, supra note 26, at 199.
\textsuperscript{34} Id.
\textsuperscript{35} 1 WILLIAM BLACKSTONE, COMMENTARIES *442.
\textsuperscript{36} Allison Anna Tait, The Return of Coverture, 114 MICH. L. REV. FIRST IMPRESSIONS 99 (2016).
\textsuperscript{37} NANCY F. COTT, PUBLIC VOWS 7 (2000).
economic capabilities were exercised in service of the family. The advent of industrialization and urbanization, however, threatened the hostile sexist domestic agrarian model.

Anti-sodomy laws criminalizing anal sex were on the books in early America in various statutory forms outlawing crimes against nature, buggery, and sodomy. Importantly, these first sex crimes did not criminalize oral sex. They were seldom enforced, however, throughout the colonial era and the early years of the republic and generally only in cases of forcible sodomy or child predatory sodomy. More surprisingly to many contemporary Americans still is that those convicted of the infamous offense often received relatively light sentences despite that the commission of the act was a capital offense. While sex crime laws were rarely invoked in the Americas, the policing and prosecuting of sex crimes ratcheted up in urbanized pockets of Europe like Amsterdam, London, and Paris.

Later developments in urbanized American culture offer clues for early settlers' lax treatment of convicted sodomites. First, unmarried men who were engaged in hyper-masculine professions disproportionately populated colonial America. Second, the lack of a cultural LGBTQ identity that heterosexual, anti-vice crusaders would later associate with male effeminacy and female masculinity (which was linked closely to feminism) may explain why LGBTQ persons avoided the full wrath of the state's prosecutorial powers. Same-sex intimacy did not threaten the primacy of masculinity or the patriarchal order in antebellum America in the way LGBTQ persons did in the late nineteenth century and early twentieth century, as LGBTQ persons formed community bonds and a publicly visible cultural identity closely tied to gender nonconformity.

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39 Id.
III. The Industrialization Era

A. Sexism, Fragile Masculinity, and the Market-Family Divide

The character of the American family shifted in the latter half of the nineteenth century as the nation transformed into a more urbanized polity reliant on industry for economic survival. Law and conservative elements of society determined to protect patriarchy had to counteract the newfound economic opportunities and venues for socialization that allowed individuals to unmoor themselves from the traditional nuclear family. It was in this era—of the regulated family—where benevolent sexism gave rise to distinct, gendered spheres of influence for husbands and wives and hostile sexism yielded regulations targeting gender nonconforming individuals. The philosophical core of the regulated family is the patronizing notion that wives are not inferior to men but complement the attributes and contributions of men.

Industrialization and urbanization allowed individuals, though primarily married men, to exchange their labor for wages. The wage economy meant that now the family was no longer the central unit of economic production and the market-family dichotomy emerged as a consequence. Men occupied the rough-and-tumble world of the factory and women occupied the virtuous home to pursue domestic work. “The family and home were seen as safe repositories for the virtues and emotions that people believed were being banished from the world of commerce and industry.” 41 Social movements emerged to fortify the sanctity of the home, including the temperance movement 42 and activism

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41 Olsen, supra note 29, at 1499.
42 See ELAINE FRANTZ PARSONS, MANHOOD LOST: FALLEN DRUNKARDS AND REDEEMING WOMEN IN THE NINETEENTH-CENTURY UNITED STATES 172–73 (2003) (contending that temperance reformers “objected to abuses of the patriarchal system” but did not “attack patriarchy itself” because they concentrated their efforts on “condemning men for not fulfilling patriarchal responsibilities” rather than “questioning the patriarchal system”).
aimed at the censoring of materials deemed indecent, like information about contraception.

Gendered stereotypes about the masculine qualities of the public market and the feminine virtues of the private domicile paved the way for “a kind of middle ground between traditional hierarchy and juridical equality. Women were said to be different, not inferior.” In this sense, women and men had complementary roles that permitted dual worlds of rationality, ambition, progress, and modernization to coexist with sacred values of the home.

The Supreme Court’s 1872 decision to uphold the denial of Myra Bradwell’s application to practice law because she was a married woman in *Bradwell v. Illinois* was a tacit backing of the gendered public-private dichotomy. Justice Joseph Bradley’s infamous concurrence in *Bradwell* offered a full-throated endorsement of the dichotomy. Bradley proffered

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43 See *John E. Semonche, Censoring Sex: A Historical Journey Through American Media* 100 (2007) (explaining that pro-censorship progressive reformers “saw disruptions of the family unit” caused by urbanization and “hoped to preserve the sexual order that the family represented”).


46 For some contemporary critiques advancing this position, see *Effeminate Men in Schools: Warning*, S.F. EXAMINER, Nov. 20, 1910 (quoting a Washington, D.C., speech by the University of Washington’s president warning that “men in college are bound to become effeminate” because of an increase in female matriculation); *France’s Marriage Crisis*, N.Y. TIMES (Mar. 16, 1902), https://timesmachine.nytimes.com/timesmachine/1902/03/16/118466410.pdf [https://perma.cc/WK2G-WYAM] (describing a critique of the industrialization and urbanization on the liberation of women and the institution of marriage); *That Third Sex Again*, N.Y. TRIB., at 8 (Oct. 3, 1913), https://chroniclingamerica.loc.gov/data/batches/dlc_naismith_ver01/data/sn83030214/00206531708/1913100301/0046.pdf [https://perma.cc/BYX6-MSW3] (quoting a British author’s prediction of “a future when the material work of the world will be performed by [a] new [third] sex” of women identifiable by their common “atrophyed femininity” while “normal wom[e]n” will continue to bear “the responsibilities of maternity”); *The Third Sex*, BROOKLYN DAILY EAGLE, June 21, 1902, at 12 (noting a French author’s concern that education for women caused delays in marriage and disinterest in men); *The Third Sex in Industry*, N.Y. TIMES (Mar. 30, 1919), https://timesmachine.nytimes.com/timesmachine/1919/03/30/109332187.pdf [https://perma.cc/4D9A-SF9D] (describing the impact of working women in England).

that legal rules should be crafted to reflect that the “paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.” In Justice Bradley’s estimation, this baseline principle justified Illinois’s exclusion of women from the legal profession:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

When Lavinia Goodell asked the Wisconsin Supreme Court to admit her to the state bar three years later, the Wisconsin Supreme Court’s opinion echoed the Bradley concurrence:

The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours.... The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.

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48 Id. at 141 (Bradley, J., concurring).
49 Id.
50 In re Goodell, 39 Wis. 232, 245 (1875).
While the law resisted it, urbanization helped women like Myra Bradwell and Lavinia Goodell who held aspirations to join the ranks of educated professionals. The growth of cities reduced the family’s role as an economic engine and the primary locus of socialization. Urban life and the ability to earn a wage permitted individuals to have greater autonomy over whether and when they wanted to form a traditional nuclear family. For women, professional opportunities were possible because of declining birth rates, the democratization of education, the erosion of coverture, and the increased prominence of women’s rights groups.

It also provided conditions ripe for the formation of a homosexual identity because persons with same-sex attractions could now be economically self-sufficient and independent of heteronormative family formation. “Many trends made homosexual liaisons more threatening: as the economic basis of family cohesion attenuated, emotional expectations increased; with smaller families, each child bore greater responsibility for carrying on the family line; women’s claims for emancipation and participation in wage labor challenged traditional division of functions.”

The liberating effect of America’s changing demographics accordingly inspired a push to double down on laws regulating sexual conduct as well as sexual expression to preserve the primacy of the family and fortify gender norms.

B. Perils of the Dive: Sexual Orientation and Sex Stereotype Construction

Urbanization provided a ready set of conditions for gender variant, sexual minority Americans to form social networks, develop a community, and form a social identity. It would be misleading, however, to call this phenomenon the rise of a “homosexual” or “gay” identity because the concept of sexual orientation—that there are discrete categories of heterosexuals, homosexuals, and bisexuals—was not yet a conceived social construct. Individuals outside that growing community underwrote that task. That third-party heterosexual

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51 Law, supra note 26, at 202.

52 At the risk of simplifying a complex dynamic, I use the term “gay men” as an umbrella term to capture gender variant men who expressed same-sex attractions or engaged in same-sex intimacy.
observers formulated these categories for people with same-sex attractions was consequential for sexual minorities and gender variants. That historical moment continues to inform our social and legal vernacular today. As Andrew Koppelman observed, “[t]he modern stigmatization of homosexuals as violators of gender norms—gay men as effeminate, lesbians as ‘mannish’—developed simultaneously with widespread anxieties about gender identity in the face of an emerging ideology of gender equality.”

During the late nineteenth and early twentieth centuries, social boundaries that emerged within the growing community of gender variants divided into gender lines. Among gay men, these markers represented where individuals fell on a spectrum of gender expression ranging from effeminate to the hyper-masculine. “Fairies” was the term used to describe men who exhibited feminine characteristics and typically adopted a passive sexual role. Fairies were conspicuous in working-class communities and often congregated in slum-ridden neighborhood

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53 Koppelman, supra note 13, at 240.

54 The earliest publication of the term “fairy” dates back to 1895. In the American Journal of Psychology, Professor Colin Scott described the communities that gender inverts formed in Europe and the United States:

[T]he peculiar societies of inverts. Coffee-clatches, where the members dress themselves with aprons, etc., and knit, gossip and crochet; balls, where men adopt the ladies’ evening dress, are well known in Europe. “The Fairies” of New York are said to be a similar secret organization. The avocations which inverts follow are frequently feminine in their nature. They are fond of the actor’s life, and particularly that of the comedian requiring the dressing in female attire, and the singing in imitation of a female voice, in which they often excel.

Colin A. Scott, Sex and Art, 7 AM. J. PSYCHOL. 153, 216 (1896).

55 Illustrative of the connection made between assuming a passive sexual role and the recipient of penetrative sex acts with femininity, are the notes of a sociologist from the late 1930s:

The Feminine role. (1) Being fucked (2) Necking, kissing (3) Passive role. He felt he was not doing any of the work, but on the receiving end. (4) Taking over sex behavior of women to please the man. “wiggling his ass.” “manipulating his rectal muscles.” “quivering and shivering like a woman.” (5) Associating the sexual imagery ordinarily used by a woman in order to connect the sexual function with the role he was playing. (6) Placing the man between his legs and rolling him from side to side in order to get him “hot.”

Ernest Watson Burgess, Homosexuality Interviews 2 (unpublished research notes) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Box 98, Folder 2).
dramshops called “fairy resorts.” One observer present at The Slide,\textsuperscript{56} a notorious late nineteenth-century fairy resort in Manhattan,\textsuperscript{57} recounted that among the patrons, “[t]he boys have powder on their faces like girls and talk to you like disorderly girls talk to men.”\textsuperscript{58} Another observer recalled:

[The Slide is] one of the most vile, vulgar resorts in the city, where no man of decent inclinations would remain for five minutes without being nauseated. Here men of degenerate type were the waiters, some of them going to the extent of rouging their necks. In falsetto voices they sang filthy ditties, and when

\textsuperscript{56} New York City Police Superintendent William Murray instructed precinct captains to investigate the Excise Exchange, a notorious “fairy resort,” in January 1892. The precinct reports used evidence of patrons’ “addict[ion] to unnatural practice” which “their actions and conversations would tend to confirm” to recommend state authorities revoke the Excise Exchange’s license. \textit{Murray Acts}, \textit{EVENING WORLD (N.Y.)}, Jan. 9, 1892, at 1. Importantly, though investigative journalism stressed visible forms of gender nonconforming expression at some of the beleaguered dives, these establishments were not targeted by law enforcement on the sole basis of entertaining gender nonconforming persons. The scorned businesses were part of a larger dragnet of boisterous public accommodations that violated excise laws by serving customers after midnight on Sundays. \textit{See Three Licenses Revoked}, \textit{N.Y. TIMES}, Jan. 15, 1892, at 8 (reporting the unanimous revocation of the Excise Exchange’s liquor license by state authorities because of the “bad character of visitors” and “violation of the [Sunday] excise law”). In the wake of public scrutiny, liquor license revocations, and criminal indictments, bar keepers closely adhered to liquor laws and closed on Sunday. \textit{See A Dive Auction}, \textit{EVENING WORLD (N.Y.)}, Jan. 25, 1892, at 2 (reporting that the bar keepers under indictment “kept their dive annexes closed on Saturday night, and at midnight closed their saloons also, not to reopen until this morning at the hour fixed by law”). Alarms about the lawlessness of disorderly bars were not limited to Manhattan’s Bowery and Tenderloin districts. Concerned citizens formed the Brooklyn Excise League in 1882 to provide evidence of Sunday liquor law violations and the unlawful sale of alcohol to minors, helping secure 166 liquor license revocations in the early 1890s. \textit{Want No Machine Democrats}, \textit{N.Y. TIMES}, Jan. 31, 1894, at 1 (“The excise law was violated openly and frequently, and liquor was sold to minors. The Board of Excise demanded that the evidence must be such as could be sworn to regarding the kind of liquor sold, and as to our seeing it sold.”).

\textsuperscript{57} New York journalists made hay reporting on the queer haunts in the Bowery and emphasized the male patrons’ effeminate qualities. \textit{See Outlaws to Go}, \textit{EVENING WORLD (N.Y.)}, Jan. 4, 1892, at 1 (“The den [at The Slide] swarmed with dissolute creatures. Their talk was shocking. Many of the men had painted faces and they called each other by female names.”); \textit{Dives Closing Up}, \textit{EVENING WORLD (N.Y.)}, Jan. 7, 1892, at 1 (“The ‘attractions’ at the Excise Exchange are not the women, but the class of men who frequent it. They imitate the dress and manners of women—paint their faces and eye-brows, bleach their hair, wear bracelets and address each other by female names.”).

\textsuperscript{58} \textbf{GEORGE CHAUNCY, GAY NEW YORK} 42 (1994).
not otherwise busy would drop into a chair at the table of any visitor who would brook their awful presence.\textsuperscript{59}

In part, because they were acutely gender nonconforming, fairies were the most easily noticed subgroup of gay men to urban society and were a visible part of working-class, urban life contrary to modern assumptions. While the term “fairy” was used within the gay community to describe these men, heterosexual observers used terms that emphasized their feminine characteristics including, “she-man,” “nance,” “sissy,” “pansies,” “daisy,” and “buttercup.”\textsuperscript{60}

The focus on fairies’ non-masculine constitution reflected in the written observations of anti-vice crusaders who stumbled upon gay-friendly establishments. One such witness wrote that patrons embodied “the carriage, mannerisms, and speech of women [and] . . . are fond of many articles dear to the feminine heart.”\textsuperscript{61} Another took note that in one house of disrepute, men “dressed as women, [with] low neck dresses, short skirts, [and] blond wigs.”\textsuperscript{62}

A sociology student at the University of Chicago, Conrad Bitzen, observed a racially integrated,\textsuperscript{63} queer-friendly club on Chicago’s South Side and similarly honed in on displays of male effeminacy. The master of ceremonies put on a show that Bitzen described as a “remarkable collection of sexual indeterminates.”\textsuperscript{64} Bitzen went on to explain that the male clientele at the cabaret “all act far more feminine than a normal girl, carrying flimsy handkerchiefs which they draw out of their sleeves and flutter around.”\textsuperscript{65} He took care to emphasize in his report that the dancers had painted fingernails and could avail themselves of cosmetic products provided in the men’s restroom.\textsuperscript{66}

\textsuperscript{59} Id. at 39.
\textsuperscript{60} Id. at 15. LGBTQ persons also had slang terms for heterosexuals. In Chicago, for example, the preferred slang term was “jam.” See infra note 64.
\textsuperscript{61} D’EMILIO & FREEDMAN, supra note 32, at 228.
\textsuperscript{62} CHAUNCEY, supra note 58, at 42.
\textsuperscript{63} These establishments were known as “black-and-tan cabarets.” CHAD HEAP, SLUMMING: SEXUAL AND RACIAL ENCOUNTERS IN AMERICAN NIGHTLIFE, 1885–1940, at 123, 190 (2009).
\textsuperscript{64} Conrad Bitzen, Notes on the Homosexual in Chicago (unpublished research notes, University of Chicago) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Box 145, Folder 10) (transcribed by the author).
\textsuperscript{65} Id.
\textsuperscript{66} Id.
At one lower Manhattan bar, the Golden Rule Pleasure Club, a spectator described the scene and stressed patrons’ gender nonconformity in 1892, writing:

The basement was fitted up into little rooms, by means of cheap partitions, which ran to the top of the ceiling from the floor. Each room contained a table and a couple of chairs, for the use of customers of the vile den. In each room sat a youth, whose face was painted, eye-brows blackened, and whose airs were those of a young girl. Each person talked in a high falsetto voice, and called the others by women’s names.67

One onlooker, Joel Harris, testified about gender-bending carouses to a special New York State legislative commission of Republican officials, the Mazet Committee, which was investigating allegations of political corruption and the city’s Democratic machine.68 Harris offered evidence to the committee about the goings-on at Paresis Hall, a gay bar and brothel, that operated in New York City’s Bowery during the 1890s. He testified that “most of [the patrons] are painted and powdered; they are called Princess this and Lady So and So and the Duchess of Marlboro, and get up and sing as women, and dance; ape the female character, call each other sisters and take people out for immoral purposes.”69 George Hammond followed Harris and told the Committee that the “fairies or male degenerates” “have a piano” and they “sing some songs.”70

68 N.Y. STATE ASSEMB., REPORT OF THE SPECIAL COMMITTEE OF THE ASSEMBLY APPOINTED TO INVESTIGATE THE PUBLIC OFFICES AND DEPARTMENTS OF THE CITY OF NEW YORK AND THE COUNTIES THEREIN INCLUDED, NOS. 26–27, at 1429 (1900) [hereinafter MAZET COMMITTEE REPORT]; Tammany to be Probed, N.Y. TIMES, Mar. 30, 1899, at 1.
69 MAZET COMMITTEE REPORT, supra note 68, at 1431. This kind of impression was left on social reformers in other cities, as well. In 1899, Chicago social reformer L.O. Curon described the “annual balls held by the ‘fruits’ and the ‘cabmen’” as places where gay men “ap[ed] everything feminine” in their “speech, walk, dress and adornment” with such precision that it was “impossible to distinguish them from the sex they are imitating.” L.O. CURON, CHICAGO, SATAN’S SANCTUM 89 (The Floating Press 2013) (1899). Like the members of the Mazet Committee, Curon believed the gender transgressive behavior festered because of municipal corruption, writing, “[n]o reason, except that the police are paid for non-interference with these vice pitted revels, can be given for their toleration.” Id. at 90.
70 MAZET COMMITTEE REPORT, supra note 68, at 1431.
Paresis Hall was also a haven for transgender people. George Hammond pointed this out to the Mazet Committee, testifying that “one woman who goes [to Paresis Hall] they call a hermaphrodite.” Jennie June, a transgender woman, sought refuge among the gay clientele at Paresis. She recalled an interaction with a fellow patron in January 1895, who told Jennie:

A score of us have formed a little club, the CERCLE HERMAPHRODITOS. For we need to unite for defense against the world’s bitter persecution of bisexuals. We care to admit only extreme types—such as like to doll themselves up in feminine finery. We sympathize with, but do not care to be intimate with, the mild types, some of whom you see here tonight even wearing a disgusting beard! Of course they do not wear it out of liking. They merely consider it a lesser evil than the horrible razor or excruciating wax-mask.

We ourselves are in the detested trousers because having only just arrived. We keep our feminine wardrobe in lockers upstairs so that our every-day circles can not suspect us of female-impersonation. For they have such an irrational horror of it!

While some, like Jennie June, wore clothing to hew to their gender identity, others dressed in drag for entertainment—an indicia of a growing LGBTQ culture. Drag balls were particularly notorious affairs in some American cities. An investigator for the New York Anti-Saloon League’s Committee of Fourteen reported in 1918 on the increasing presence of drag balls in Greenwich Village. The investigator informed the Committee that a “prominent feature of these dances is the number of male perverts who attend them. These phenomenal men... wear

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Footnotes:

71 Id. A newspaper report described Paresis Hall as a place demonstrative of the “depths human beings, men and women, can sink” and detailed the non-conforming qualities of the male patrons: “Most of the male frequenters of the place have effeminate voices, paint their faces, black their eyebrows and lashes, and in loud clothes parade the streets during the earlier part of the evening leering at every person from whom they get a casual glance in passing.” Foul Dive on the Bowery, EVENING WORLD (N.Y.), June 9, 1894, at 1.

expensive gowns, employ rouge[,] use wigs[,] and in short make up an appearance which looks for everything like a young lady.”73

In 1893, a Washington, D.C., resident recorded that local working-class black men had a penchant for throwing drag dances and “dressed in womanly attire, short sleeves, low-necked dresses, and the usual ballroom decorations and ornaments of women, feathered and ribboned head-dresses, garters, fills, flowers, ruffles, etc., and deport themselves as women.”74 Dr. Charles Hughes, the editor of the psychological journal, *The Alienist and Neurologist*, took particular offense to a 1907 St. Louis drag ball because it was a racially integrated affair attended by men flaunting feminine gender expressions:

Male negroes masquerading in woman’s garb and carousing and dancing with white men is the latest St. Louis record of neurotic and sexual perversion. . . . They were all arrested, taken before Judge Tracy and gave bond to appear for trial, at three hundred dollars each, signed by a white man.75

Similarly, in Chicago, the Ballyhoo Café in the Lincoln Park neighborhood enticed a diverse crowd for drag balls that included drag queens and tuxedo-wearing women.76

Fairies had a complicated relationship with other men who shared a common sexual interest in men but who did not identify with the fairies’ feminine gender role. This group of men, who referred to themselves as “queers,” had mixed reactions to fairies—some held fairies in contempt, while others sought fairies out for romantic or sexual relationships.

However, masculine men who had sexual relationships with fairies did not generally consider themselves “queer” if they assumed the role of the “man” and avoided submitting to penetrative sex.77 Men who were called “husbands,” “wolves,” and “jockers” typically “abided by the conventions of masculinity” but had a clear preference, near exclusive or

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73 Chauncey, supra note 58, at 236 (alteration in original).
74 Gardner, supra note 67, at 42–43.
76 Ernest Watson Burgess, Homosexuality Interviews (1938) (unpublished research notes) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Box 98, Folder 3).
77 Chauncey, supra note 58, at 66.
exclusive, for sexual relationships with other men by seeking out marriage or loving relationships with fairies. These men did not regard themselves as “queer” but saw themselves akin to “normal” men. George Chauncey astutely concluded that “the fact that neither they nor their peers regarded them as queer, even if they sometimes regarded themselves as different from other ‘normal’ men, highlights the degree to which gender status superseded homosexual interest as the basis of sexual classification in working-class culture.”

Illustrating the scorn that some queer-identified men had for fairies is a Washington, D.C., queer, Jeb Alexander, who wrote, “effeminacy repels me. . . . Homosexuality may be curse enough (though it has its wonderful compensations and noble joys) but it is a double curse when one has effeminate ways of walking, talking, or acting.” Queers used the terms “fairy,” “faggot,” and “queen” to describe effeminate, flamboyant men. Notably, these terms are used more broadly today as generic slurs for all gay men, indicating a collapse of gender roles. This kind of animosity was directed at fairies by queers because of their conspicuous gender-bending, which “provoke[ed] public censure and [gave] rise to negative stereotypes.”

The tension-riddled dynamic between queers and fairies highlights how effeminacy was the primary heuristic for self-identification within the community and that gay men understood the prominent role gender expression played in heterosexual society’s creation of sexual orientation as a social construct and society’s understanding of homosexuality. In fact, masculine men who rejected the pejorative term “queer” initially embraced the term “gay” and intended to use it as a code word. Eventually, the term was used to collapse the multi-faceted gender variant terms and roles into one community with the rise of a homosexual identity and community.

On the opposite end of the feminine-masculine gender spectrum of fairies were men known as “trade.” Trade were non-effeminate men.
often engaged in a profession that exuded masculine norms like military service, who willingly (and sometimes for payment) engaged in same-sex intimacies. These men did not consider themselves or identify as gay men, nor were they inclined to form relationships with men of the same sex. Because these men were both masculine and sexually dominant, they did not risk being categorized as fairies or queers despite their penchant for sex with other men.

Gay men in the early years of urbanization and industrialization faced a gender conundrum. On the one hand, men seeking out same-sex intimacy who publicly expressed a gender role veering toward the feminine were viewed as a spectacle by onlookers and targeted for ridicule by other gay men. On the other hand, gay men could use gender nonconformity as a vehicle for communicating their romantic or sexual interest in other men. For these men, effeminacy was a communicative tool and a cultural marker that empowered their agency.

Gay men “could avoid being identified [as gay men] by avoiding any sign of effeminacy, but . . . [some] chose to be effeminate precisely because [they] wanted to . . . identify [themselves] to other men.” Thus, “[f]or many n.”

Gay men could use non-masculine cues to telegraph their sexual orientation. For example, one gay Chicago man told University of Chicago sociologists in the late 1930s that he could “spot a queen” by their “flashy clothes,” “use [of] cosmetics,” “effeminate type” walk, “high-pitched” voices, plucked eyebrows, and cosmetically touched-up eye lashes and eye lids. Beyond style, many gay men in Chicago pursued employment opportunities where effeminacy was tolerated or openly permissible. In the 1930s-era University of Chicago survey of gay men,

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* Id. at 16.
* Id. at 56.
* Id.
* Conrad Bitzen, Notes on the Homosexual in Chicago (1938) (unpublished research notes) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Box 98, Folder 4).
* In the 1930s, University of Chicago sociology professors Robert Park and Ernest Burgess were pioneering urban ecologists, studying the dynamic evolution of city life. Park and Burgess’s research, along with their students, explored Chicago’s bustling population and often encountered LGBTQ persons. One graduate student under their tutelage, Earle Bruce, conducted the most expansive research on gay men throughout the 1930s for a master thesis about the
a substantial number of the interviewed subjects were store clerks, stenographers, or employed in service industries. One man offered his working assumption that in Chicago “bus boys were either queer or big sissies.”88 Another man said of his gay friend, Harold, that when he “gets a job the first thing he looks for is to see if there are any gay people there, so that he can camp and cavort, and carry on the way he wants to,” make “feminine gestures,” and wear mascara.89 Another gay male clerk at Chicago’s Marshall Fields department store explained that “at work practically all the people are gay or wise [sympathetic to gays]. I prefer the department store or entertainment business because you find gay people there.”90

The Chicago Vice Commission took notice of the clustering of gay men with effeminate characteristics and similar chosen occupations as early as 1911. The Commission reported the “rooming houses” in the Near North Side of the city “were occupied by young men, mostly of the counter jumper variety (dry goods people, sales people), and that after work half of the considerable number of inmates of this house would don women’s clothes for the night.”91 The commissioners’ observations about the young men’s occupations corroborate the accounts provided in the University of Chicago interviews. Perhaps unsurprisingly, the sectors of employment these gay men saw as a safe haven were typecast as the few jobs suitable for women.92

personality traits of gay men. Bruce recorded almost forty interviews with gay men living in Chicago and more than fifty personality tests. See Earle W. Bruce, Observations & Homosexuality Materials, Cases, Notes, Etc. (1933) (unpublished research notes, University of Chicago) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Boxes 98, 127, 128, 174).

88 Earle W. Bruce, Observations (1933) (unpublished research notes, University of Chicago) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Box 128, Folder 7).
89 Earle W. Bruce, Homosexuality Materials, Cases, Notes, Etc. (undated) (unpublished research notes, University of Chicago) (on file with the Special Collections Research Center, University of Chicago Library, Ernest Watson Burgess Papers, Box 128, Folder 8).
91 Id.
The phenomenon of gender-bending—whether because of innate characteristics or a conscious strategy employed for intragroup identification—grabbed the attention and focus of heterosexuals. For some, events like drag balls were a spectacle of entertainment and intrigue. For others, like vice reformers, gender nonconformity was an easily discerned trait to identify sexual minorities. The surge in their public visibility engendered disgust because the breakdown of gender norms threatened the patriarchal order that existed before urbanization and industrialization. The effeminacy of the conspicuous fairy was jarring to “normal” men against the backdrop of the shifting milieu, as George Chauncey ably described:

But the fairy also provoked a high degree of anxiety and scorn among middle-class men because he embodied the very things middle-class men most feared about their gender status. His effeminacy represented in extreme form the loss of manhood middle-class men most feared in themselves, and his style seemed to undermine their efforts to shore up their manly status. His womanlike manner challenged the supposed immutability of gender differences by demonstrating that anatomical males did not inevitably become men and were not inevitably different from women.93

As a consequence, for men who engaged in same-sex intimacies, effeminacy became the hallmark of homosexuality.94 Society collapsed the

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93 Chauncey, supra note 58, at 115.
94 One University of Chicago Sociology Department student’s framing of gay male personality traits in the late 1930s speaks to this point with particular clarity:

Thus, the passive roles becomes [sic] a nucleus for a more complex role, which might be as follows: (1) attraction in relation to men. (2) feminine behavior, such as liking for women’s clothing, makeup. (3) Impersonating a woman in practically all her aspects in accordance with the individual’s conception of the role. The impersonating of this role, in its overt aspects, is limited by the conception of self, (what he thinks others think of him) and which takes the form of a role for comparison, and personality traits. However, as may be inferred, there is variation in the manifestation of these roles, some presenting decided feminine behavior, others impersonating the role of man. Here we may add that in relation to their own sex, some homosexuals play the active role and passive role. In sexual intercourse, we associate passivity with the role of a woman. Passivity in a man does not imply the role of a homosexual, but passivity together with attitudes toward the same sex and attraction do imply a feminine role.
spectrum of gender roles within which gay men understood their community, sexuality, and identity and substituted it for the heterosexual outsiders’ perspective, a compartmentalized sexual orientation. The animus directed toward non-heterosexual orientations is thus directly tied to this fortuitous development in American life. The medicalization of sexuality in this period fueled these new understandings, breathing life into newly invented classifications like “gender invert” and “the third sex.”95 In collapsing the multiple culturally developed gender roles into categories of sexual orientation, American law and society walled off gay, lesbian, bisexual, and transgender persons from gender-based rights, benefits, and privileges of citizenship which belonged to “real” or “normal” men and women to the exclusion of all LGBTQ people. The fundamental essence of the battles over the law’s treatment of the LGBTQ community was then, as it is now, about the necessity and permissibility of targeting LGBTQ people for their gender expression.

Lesbian and bisexual women escaped the kind of intense scrutiny that befell same-sex attracted men. While urbanization and industrialization offered more opportunities for women to become self-reliant and consequently able to break from the economic necessity of family formation vis-à-vis heterosexual marriage, educational and employment opportunities were still limited such that lesbian relationships remained difficult to sustain practically.96 This is not to

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96 Nicholas C. Edsall, Toward Stonewall: Homosexuality and Society in the Modern Western World 250 (2003) (describing the limited visibility of a lesbian subculture as a consequence of the fact that female same-sex relationships, or Boston Marriages, were “an elite institution available in practice only to women of independent means and high social status”); Heather Elliott & Gerald Lunn, Civility and the Politics of Sexuality, in Civility, Legality, and Justice in America 132, 143 (Austin Sarat ed., 2014) (“There were no public lesbian spaces at this time, though a modest number of women with sufficient financial independence were able to maintain, not without difficulty, ‘romantic friendships’ or ‘Boston Marriages.’”).
suggest that during the years between the Civil War and the First World War that lesbian and bisexual women avoided greater societal inspection from increased visibility. To the contrary, as discussed in the next Section, feminism and the suffragette movement agitated traditionalists and were thought to have a strong correlation with lesbian desires.97 The prevailing view of the time was that women had fairer constitutions than men, which could be exploited in collegiate or political environments, leaving them susceptible to the advances of female inverts.98

C. Policing Gender and the Regulation of Homosexuality

1. Sex-Based Codifications of Fashion

The types of laws that initially placed sexual minorities in the crosshairs of the criminal justice system focused on the suppression of gender nonconformity and predated understandings of homosexuals as a class. Indeed, the first legal mechanisms used to specifically criminalize queer culture did not target intimate sexual conduct but regulated gender expression. Throughout the mid-to-late nineteenth century, urban centers adopted ordinances banning individuals from dressing in drag. Municipalities adopted ordinances as a gay culture (namely fairies) increasingly came into public view. An 1880 exposé published in the Kansas City Evening Star on the “little world” of “female impersonators” encapsulates the anxiety these drag performers and transgender women agitated:

[O]ff the stage there are many men who are so effeminate that they dress constantly as women, act like women and become as womanly as possible. In all large cities, and to a greater or less extent in Kansas City, these men are to be found. In Chicago they are so numerous as to form a class by themselves, and it is no uncommon thing for a score of them to be seen at a

97 See infra note 122 and accompanying text.
masquerade ball, acting their parts so well that they make any amount of conquests.\textsuperscript{99}

At the same time during this period, there were a few notorious incidents of women taking on male identities to sell their labor for wages and enter same-sex marriages.\textsuperscript{100} The effeminate cross-dressing man and the woman passing for a working-class man both challenged the supremacy of masculinity. The fairy and the butch lesbian in gender nonconforming garb undermined the assumptions that gender roles are innate and called into question the prevailing patriarchal ideology that justified creating separate spheres of the home and the market that preserved political and social power for men.\textsuperscript{101}

In 1848, Columbus, Ohio, adopted an ordinance prohibiting residents from being in “any public street or other public place in a state of nudity or in a dress not belonging to his or her sex.”\textsuperscript{102} Columbus was the first of forty-five jurisdictions that adopted laws targeting gender nonconforming dress before the First World War.\textsuperscript{103} Other cities imposing criminal liability on gender-bending clothing included Atlanta, Chicago, New Orleans, St. Louis, and San Francisco.\textsuperscript{104}

While many cross-dressing ordinances cropped up in the latter half of the 1800s, some local officials continued to adopt or amend sex-based

\textsuperscript{99} Strange Men, KAN. CITY EVENING STAR, Nov. 26, 1880.
\textsuperscript{100} D’E Milio & Freedman, supra note 32, at 124–25.
\textsuperscript{101} See Clare Sears, Arresting Dress: Cross Dressing, Law, and Fascination in Nineteenth-Century San Francisco 65 (2015) (“[C]ross-dressing law was not concerned with clothing per se but with the ability of clothing to mobilize and symbolize specific social threats. These included threats to male dominance posed by dress reform feminists who defined women’s confinement in the private sphere, threats to sexual morality posed by cross-dressing ‘degenerates’ who caroused in bars along the Barbary Coast, and threats to the cultural imperative of gender legibility posed by people with a gender identity that diverged from their legal sex. . . . [T]hey were real disruptions to an unequal power structure that positioned the respectable family as the basis of social order and systematically reserved economic, political, and social resources for white normatively gendered men.”); see also I. Bennett Capers, Cross Dressing and the Criminal, 20 YALE J.L. & HUMAN. 1, 8 (2008) (describing the national movement between 1850 and 1870 in support of legislation to “explicitly prohibit[] cross dressing”).
\textsuperscript{102} Ruthann Robson, Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes 60–61 (2013).
\textsuperscript{103} Sears, supra note 101, at 3.
fashion ordinances into the 1950s. Denver’s anti-drag ordinance was initially adopted in 1886 and followed the boilerplate language adopted in most cities prohibiting any person from appearing in public in a “dress not belonging to his or her own sex.” After hotly contested debates about the wisdom of criminalizing same-sex intimacy in Colorado and intensifying opposition to the LGBTQ community’s visibility in Denver, Denver’s city council amended the municipal code to specifically criminalize all female impersonators except for “entertainment” in 1954. Miami adopted identical regulations in the early 1950s as Denver in reverse order. In a similar move targeting gender variant males, Detroit’s 1944 cross-dressing ban proscribed men from wearing women’s clothing in public or private but did not regulate women.

2. State Control of Same-Sex Intimacy

Along with the social changes ushered in with urbanization and industrialization, courts and legislatures worked to expand the prosecutorial arm of the state by doubling down on the state’s use of criminal laws to channel sex into heterosexual marriages. Notably, these laws lagged behind local ordinances targeting visible signs of gender nonconformity. Beginning with Pennsylvania, seventeen states

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107 DETROIT, MICH. CODE § 39-1-35 (1944) (prohibiting “any member of the male sex to appear in or upon any street . . . or other public way or place or in, upon or about any private premises frequented by or open to the public in the dress of the opposite sex.”).

108 The Pennsylvania Legislature may have been provoked to act by the Pennsylvania Supreme Court. In November 1877, the court ordered bail for J. R. Mills and Christian Beck during the pendency of their appeal of sodomy convictions. While the records are scant, it appears prosecutors brought charges against the pair for fellatio under the sodomy statute, which did not traditionally include oral sex acts. No decision was reported out of the Pennsylvania Supreme Court, however. See _The Supreme Court, PITTSBURGH DAILY POST_, Nov. 13, 1877, at 4 (“It is the opinion of the prisoners and many other lawyers that the crime for which Beck and Mills were convicted could not be called ‘sodomy,’ and therefore the case was appealed to the Supreme Court. The Supreme Court decision as to whether this is a new crime to the law, or whether it can go under the name given to it in the present case, will be looked for with interest.”).
amended sodomy statutes to target oral sex between 1879 and 1931, including New York, Wyoming, Louisiana, Wisconsin, Iowa, Washington, Missouri, Oregon, Nebraska, North Dakota, Alaska, Virginia, Minnesota, Utah, and West Virginia. In the early-to-mid 1890s, Iowa, Ohio, and Washington adopted sodomy laws. Eight states between 1887 and 1917 enacted stand-alone oral sex bans: Massachusetts (1887), New Hampshire (1899), Michigan (1903), New Jersey (1906), Maryland (1916), Arizona (1917), Florida (1917), and California (1915, 1921). California’s 1915 statute was the first to specifically use the terms “fellatio” and “cunnilingus” to describe the illegal acts.

Some legislatures, however, were slow to act and prosecutors worked to bootstrap oral sex into existing sodomy statutes. The lagging states tended to be rural. Accordingly, legislative idleness in these jurisdictions is consistent with the thesis that increased policing of sexual minorities is deeply rooted in a sense of urgency to combat the vices of urbanization, industrialization, and an emerging LGBTQ subculture associated by outsiders with patriarchal-undermining, ostentatious gender nonconformity. Parting with an 1893 decision by the high court in Texas that oral sex did not fall within the ambit of conduct prohibited by the state’s anti-sodomy law, the Illinois Supreme Court ruled in *Honselman v. People* that oral sex could be prosecuted:

The existence of such an offense is a disgrace to human nature. The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled

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110 ESKRIDGE, DISHONORABLE PASSIONS, supra note 38, at 50.
111 Id. at 49.
112 Id. at 388–498.
113 Id. at 53. California’s first law was invalidated under the state constitution as void for vagueness (the first case to do so as a matter of constitutional due process) because it used the Latin term “fellatio,” which did not clearly indicate whether the active role, the passive role, or both roles, were criminalized. *In re Lockett*, 178 P. 134, 137 (Cal. 1919) ("Unexplained, the word ‘fellatio’ would, to a man of common understanding (indeed, we think also to one of uncommon understanding), be as cabalistic as if written in Egyptian or Mexican hieroglyphics or in Japanese or Chinese characters."). The California Legislature adopted a new statute in 1921 prohibiting “[a]ny person participating in the act of copulating the mouth of one person with the sexual organ of another,” which was upheld against a vagueness challenge. *People v. Parsons*, 255 P. 212, 213 (Cal. Ct. App. 1927).
with the details of different acts which may go to constitute it. A statement of the offense in the language of the statute, or so plainly that its nature may be easily understood by the jury, is all that is required. . . . [A male performing fellatio] is as much against nature, in the sense of being unnatural and against the order of nature, as sodomy or any bestial or unnatural copulation that can be conceived. It is within the statute.115

The highest courts in sixteen states subsequently adopted the Illinois Supreme Court’s logic.116 Nine state courts expressly rejected Honselman in favor of the Texas rule,117 and in all but one instance legislators filled the gap.118 The relative speed with which legislatures and courts acted to crack down on the performance of oral sex on men did not translate to cunnilingus, which was not expressly proscribed until the mid-1910s. More telling is that by 1921, six states—some of them quite urban—never criminalized oral sex performed on women despite imposing criminal

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115 Honselman v. People, 48 N.E. 304, 305 (Ill. 1897).
117 Weaver v. Territory, 127 P. 724 (Ariz. 1912); People v. Boyle, 48 P. 800 (Cal. 1897); Koontz v. People, 263 P. 19, 22 (Colo. 1927); Commonwealth v. Poindexter, 118 S.W. 943, 944 (Ky. 1909); State v. De Wolfe, 93 N.W. 746 (Neb. 1903); State v. Morrison, 96 A.2d 723, 727 (N.J. Super. 1953); Bennett v. Abram, 253 P.2d 316, 317 (N.M. 1953); State v. Johnson, 137 P. 632, 634 (Utah 1913); Wise v. Commonwealth, 115 S.E. 508, 509 (Va. 1923).
liability on oral sex acts received by men. In all, by 1921, oral sex performed on men was criminalized in thirty-four states, but only five states expressly outlawed oral sex performed on a woman.

The developmental pattern suggests that visible cultural displays of gender nonconformity that were more publicly noticeable among fairies, and men generally, and the idea of men performing subservient sex acts were alarming to the powers that be. Indeed, the Chicago Vice Commission was unsatisfied with the State of Illinois law despite Honselman in light of evidence that queer men had formed a vast underground social network:

It appears that in this community there is a large number of men who are thoroughly gregarious in habit; who mostly affect the carriage, mannerisms, and speech of women; who are fond of many articles ordinarily dear to the feminine heart; who are often people of a good deal of talent; who lean to the fantastic in dress and other modes of expression, and who have a definite cult with regard to sexual life. They preach the value of non-association with women from various standpoints and yet with one another have practices which are nauseous and repulsive. Many of them speak of themselves or each other with the adoption of feminine terms, and go by girls’ names or fantastic application of women’s titles. They have a vocabulary and signs of recognition of their own, which serve as an introduction into their own society.

Female-centered oral sex was off regulators’ radar in many jurisdictions but was specifically targeted at the height of the suffragette movement and intensified calls for social equality in the workforce. Indeed, the shift in legal posture highlights the link men made between feminism, the belief that feminism was related to the masculinization of

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119 Eskridge, Dishonorable Passions, supra note 38, at 53 (listing Illinois, Michigan, Missouri, Nevada, Pennsylvania, and Wisconsin as states that criminalized oral sex performed on men but not oral sex performed on women).

120 Chi. Vice Comm’n, The Social Evil in Chicago 298 (1911) (“It should be so altered and made specific, under the guidance of scientific men who understand these practices, as to make it clearly understood that society regards these abhorrent deeds as crimes. Better definition would probably make it more possible to readily obtain conviction when desirable.”).

121 Id. at 297.
women, and the belief that the eroding passivity displayed by women in
the public square was a cause of same-sex desires among women. This
was particularly true of women demanding political rights in the
suffragette movement.

It was against this backdrop that Dr. James Weir propounded in
1895 that he was “perfectly safe in asserting that every woman who has
been at all prominent in advancing the cause of equal rights in its entirety,
has either given evidences of masculo-feminity (viraginity), or has shown,
conclusively, that she was the victim of psycho-sexual aberrancy.” 122 A
little over twenty years later, American sexologist James G. Kiernan
echoed the same thinking, writing that the prevailing wisdom at the time
was not that “every suffragette [was] an invert” but “the very fact that
women in general of today are more and more deeply invading man’s
sphere is indicative of a certain impelling force within them.” 123

Anti-women’s suffrage iconography at the turn of the century also
reflected Weir’s hypothesis linking political rights for women with
masculine women, gender inverts, and the emasculation of men. 124 In
1909, New York–based lithograph company Dunston-Weiler produced a
series of twelve color postcards opposing women’s suffrage. The images
depicted the “consequences” of granting women equal rights: men
completing domestic chores, 125 husbands caring for children, 126

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122 James Weir, Jr., The Effect of Female Suffrage on Posterity, 29 AM. NATURALIST 815, 819 (1895).
123 James G. Keirnan, Sexology, 18 UROLOGIC & CUTANEOUS REV. 372, 375 (1914).
124 For example, a sketch accompanying a 1915 Chicago newspaper book review of a book
that derided pro-equality women who “dabble amateurishly in art and science” depicted a
confident woman smoking a cigarette. The dispassionate, cool woman was noticeably indifferent
to the smiling gaze of a man doing needlepoint. Nixola Greeley-Smith, Must Woman Make Her
Living out of Her Love?—"The Third Sex" Says "No!", DAY BOOK (Chi.), Jan. 6, 1915, at 14.
125 Dunston-Weiler Lithograph Co., I Want to Vote, but My Wife Won’t Let Me, Suffragette
Series No. 11 (1909).
126 Dunston-Weiler Lithograph Co., Suffragette Madonna, Suffragette Series No. 1 (1909);
Dunston-Weiler Lithograph Co., Election Day, Suffragette Series No. 7 (1909); Dunston-Weiler
Lithograph Co., I Don’t Care if She Never Comes Back, Suffragette Series No. 8 (1909); Dunston-
Weiler Lithograph Co., Where, Oh Where Is My Wandering Wife Tonight?, Suffragette Series No.
10 (1909).
masculine female law enforcement officers policing emasculated men,\textsuperscript{127} gender inversion,\textsuperscript{128} and happily independent women,\textsuperscript{129}

3. Nonconformity and Criminalized Association

The criminalization of all LGBTQ persons, whether it be by greater enforcement of anti-sodomy statutes, expanding sodomy laws to prohibit oral sex, or legislating against gender-bending garb, is all inextricably bound to heterosexual animus against alternative forms of gender expression spotlighted by a growing cultural identity. Similarly, the policing of public accommodations through vagrancy laws, degeneracy crimes, and liquor license regulations reveals how the state discriminated against the LGBTQ community by suppressing gender expression and using LGBTQ nonconformity as an indicator of criminality. The legislative history of public order offenses in New York is instructive in demonstrating how the regulation of homosexuality is a byproduct of gender policing to reaffirm the supremacy of male masculinity.

In 1882, the New York Legislature enacted a law criminalizing disorderly conduct, defined as any action that “tends to a breach of the peace who shall in any thoroughfare or public place . . . [including the] use [of] any threatening, abusive, or insulting behavior with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned.”\textsuperscript{130} In April 1900, after the Mazet Committee concluded its investigation into vice and political corruption in New York City, the state legislature enacted a vagrancy statute aimed to crack down on prostitution. The state’s Criminal Procedure Code now criminalized


\textsuperscript{128} Dunston-Weiler Lithograph Co., \textit{Pantalette Suffragette in the Sweet Bye and Bye}, Suffragette Series No. 3 (1909); Dunston-Weiler Lithograph Co., \textit{Uncle Sam Suffragee}, Suffragette Series No. 6 (1909).

\textsuperscript{129} Dunston-Weiler Lithograph Co., \textit{Suffragette Vote-Getting the Easiest Way}, Suffragette Series No. 4 (1909); Dunston-Weiler Lithograph Co., \textit{Queen of the Poll}, Suffragette Series No. 9 (1909); Dunston-Weiler Lithograph Co., \textit{I Love My Husband, But—Oh You Vote}, Suffragette Series No. 12 (1909).

\textsuperscript{130} New York Consolidation Act, ch. 410, § 1458, 1882 N.Y. Laws 504.
“[e]very male person who lives wholly or in part on the earnings of prostitution, or who in any public place solicits for immoral purposes.”

The rise of prostitution and gender nonconforming behaviors that accompanied urban growth and massive troop mobilization for the First World War motivated moral crusaders to lobby for broadening New York’s vagrancy law. These subsequent amendments to the disorderly conduct law at the behest of the city’s anti-vice commission green-lighted aggressive law enforcement action against nonconforming behaviors, particularly among effeminate men. Crucially, the 1900 vagrancy law was later retooled to empower law enforcement to crack down on degeneracy in both public and private spaces. The first amendment criminalizing any person “who loiters in or near any thoroughfare or public or private place for the purpose of inducing, enticing or procuring another to commit lewdness, fornication, unlawful sexual intercourse or another indecent act” or “procura a person who is in any thoroughfare or public or private place, to commit any such act” was adopted in 1915. Another provision was added banning face painting and disguises, which was used to target cross-dressing.

The disorderly conduct law was an attractive tool for vice squads to stamp out public displays of gender-bending. Unlike felonious sodomy, disorderly conduct was a misdemeanor that could be tried without a jury and more easily prosecuted on evidence of gender nonconformity alone. Most individuals targeted for homosexuality were charged under the disorderly conduct statute. These tactics were deliberate. For example, the 1912 New York City handbook for police recruits directed young beat cops to use nonconforming behaviors to

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134 Id.

135 A New York City Police handbook was brutally honest about the use of public order offenses, explaining that there was a long-standing practice of charging persons with disorderly conduct “whenever a policeman did not know exactly what to charge.” JAMES J. SKEHAN & JAMES P. CONWAY, PRACTICAL POLICE WORK: WHAT TO DO AND HOW TO DO IT 24 (1919), https://archive.org/stream/practicalpolicew00skehrich#page/24/search/disorderly+conduct [https://perma.cc/5M6D-VCTD].

136 CHAUNCY, supra note 58, at 185.
detect sex criminals: “This class of persons whom the police have to do with, are usually found around parks, comfort stations or places where persons go for the purpose of urinating. Those creatures are effeminate [sic] in their appearance, particularly in their speech and dress.”

The notorious raid on the Hotel Koenig in 1920 illustrates how the disorderly conduct law was used to target citizens gathered at places of entertainment where deviation from sex stereotypes was tolerated. In July 1920, thirty patrons, the hotel manager, and a waitress were arrested and charged with disorderly conduct. The arrested patrons appear to have been gay men, tried en masse without individual indictment. Their only crime was publicly associating with one another.

The Koenig raid exemplifies how the criminal code was weaponized to stymie a flourishing gender-variant subculture. Indeed, it did not matter if the individual defendant-customers demonstrated effeminate or masculine traits, solicited or engaged in illegal sexual conduct, or identified themselves as homosexual persons—they were all lumped into one degenerate class. While the joint indictment and mass trial evidences the formation of sexual orientation as a class of persons deserving of regulation and criminalization, gender nonconformity remained the touchstone for designating an establishment as a disorderly house, thus supporting the sweeping crackdown. The pre-Prohibition tactics, employed against the Koenig patrons, using gender markers as evidence to combat homosexual congregation, were employed by state liquor agencies in the decades after Prohibition’s end.

In 1921, social reformer Lawrence Veiller presented to a gathering of New York magistrate judges on behalf of the Charity Organization Society of New York City. Veiller asked the magistrates to support strengthening the disorderly conduct law. Among the many proposed revisions, Veiller offered language to criminalize men and women from gathering and associating with gay men. Veiller admitted to the conference that the authority to police gender deviance was “probably . . . [already] taken care of in the Code,” but it did “no harm”

137 CORNELIUS J. CAHALANE ET AL., POLICE DUTY: A COURSE OF STUDY FOR POLICEMEN EVERYWHERE 110 (1912).
138 CHAUNCEY, supra note 58, at 170–71.
Enacted in 1923, Veiller's proposal forbade "[a]ny person who, with the intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . . [f]requents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness." The 1923 law exemplifies the outsider's use of gender expression—not sexual conduct—to create a new class of persons to target for discrimination.

4. Transgressive Sexuality and the Modern Administrative State

Though the Mazet Committee discussed "restrictions in the excise department [to] not to license" gender transgressive places like Paresis Hall as early as 1899, state-backed reform fell short. However, the New York Committee of Fourteen coordinated with brewers and surety companies to place a check on licensees that allowed unseemly behavior between 1905 and 1920 with some success. After Prohibition ended, the state took the Committee of Fourteen's place. The Alcoholic Beverage Control Law of 1934, which set the parameters for issuing liquor licenses after Prohibition, reinforced the practice of targeting LGBTQ hangouts. License holders, under threat of revocation, were required to ensure their establishments did not "suffer or permit such premises to become disorderly." The New York State Liquor Authority (SLA) breathed new life into the longstanding practice of

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139 N.Y. STATE PROB. COMM’N, PROCEEDINGS OF THE FOURTEENTH ANNUAL CONFERENCE OF THE NEW YORK STATE ASSOCIATION OF MAGISTRATES 43 (1923).
140 Act of May 22, 1923, ch. 642, § 722(8), 1923 N.Y. Laws 961 (emphasis added).
141 MAzet COMMITTEE REPORT, supra note 68, at 1432.
142 Mara L. Keire, The Committee of Fourteen and Saloon Reform in New York City, 1905–1920, 26 BUS. & ECON. HIST. 573, 575 (1997) (describing the difficulty of amending the state liquor license law and ineffective police raids stymied by judges unsympathetic to the Committee of Fourteen’s cause).
143 See Brooklyn’s Evil Resorts Are to Be Wiped Out, BROOKLYN DAILY EAGLE, Sept. 9, 1911, at 2 (describing the Committee of Fourteen’s fundraising and campaign of coordination to close disreputable bars and cafes).
144 Keire, supra note 142, at 581 (noting that “New York was a ‘cleaner’ city in 1920 than it was in 1905” after the Committee of Fourteen’s coordinated efforts to pressure liquor license holders).
surveilling genderqueer-friendly businesses and penalizing business owners that allowed sexual minorities to congregate. As before, the state interpreted male expressions of effeminacy as the hallmark of a disorderly house that entertained gay men. Investigators for the SLA targeted one Manhattan bar, Gloria’s, in 1939 after it was reported that male customers “gabbed around in feminine voices” and “impersonated females.”

As a consequence of the inspector’s report, the SLA threatened to revoke Gloria’s license because it had “become disorderly in permitting homosexuals, degenerates, and undesirable people to congregate,” as evidenced by male patrons exhibiting feminine behaviors and male-on-male fondling. After the bar failed to keep out the disorderly elements, the SLA voided Gloria’s liquor license. The bar challenged the SLA’s justifications for pulling its liquor license, including the allegation that at one point investigators witnessed “over 100 fags” on the premises as indicated by their “feminine voices,” “facial expressions, gait, attitude, gestures and actions.” SLA Chief Investigator McIlhargy summarized why Gloria Bar came into investigators’ crosshairs at the bar’s administrative license renewal hearing: “The bar was quite crowded with men who had the appearance of what we generally know as ‘fags’; very effeminate in their appearance and actions. In some instances they rouge their faces and lips. They have effeminate gestures and manner of speech.”

The defense strategy focused on impeaching investigators’ qualifications to identify homosexuality, which required a significant amount of inference on the part of SLA agents since they did not witness overt same-sex sexual conduct. The bar’s attorney probed SLA Investigator William E. Wickes’s professional background, noting he did not possess any training in psychology that would allow him to detect
homosexuals with accuracy. The state defended the investigation and the liquor agents’ focus on gender-bending to conclude the bar was disorderly. The state’s attorney objected to the line of questioning and argued, “You don’t have to be an expert to be able to see a homosexual.”

Though the objection was sustained, Investigator Wickes boasted that he “could tell a degenerate” and a “homosexual when [he] saw one.”

Believing that Wickes’s excessively sweeping statement may have cracked the door to undermining his credibility, Gloria’s attorney asked Wilkes, “But you admit that it is sometimes difficult to tell the difference between a homosexual and a normal man?” Wilkes curtly responded, “Hardly.” Wilkes’s position that the key to identifying a crowd of homosexuals was gender nonconformity illustrates how government agents (and society at large) failed to appreciate the spectrum of gender on which gay men fell, and how heterosexual men substituted that gender continuum for their own judgment that male homosexuality was fundamentally about effeminacy. The policing of homosexuality relied on dividing “men” and “degenerate men,” thus creating a sex stereotype that gender nonconforming males were most likely homosexuals.

The emphasis on gender role deviation to shut down queer spaces continued throughout the 1950s and 1960s. In 1954, the SLA attempted to rescind a liquor license after an officer “observed about fifteen males who acted in a ‘female way’ gathered in groups of three or four along the

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150 Record on Review, supra note 146, at 113–15.
151 Id.
152 Id. at 312.
153 Id. at 321.
154 Id.
155 Police stake-outs at the Times Square Garden & Grill in 1939 reveal a similar effeminacy-based heuristic approach to determining whether a business served a predominately homosexual clientele. See Record on Review at 24–25, 32, Times Square Bar & Grill, Inc. v. Bruckman, 256 A.D. 1062 (N.Y. App. Div. 1939) (no docket number in original) (on file with the New York Supreme Court Records, Civil Branch, New York County, New York) (transcribed by the author) (recording testimony by Patrolman Daniel Linkers that “fags” could be identified by “their feminine actions”); id. at 35 (recording testimony by Patrolman Joseph Fleming that males who wore cosmetics were likely homosexuals); id. at 73 (“From my experience in the Police Department and coming in contact with the people, and from their mannerisms and conversation, I would term [the bar patrons as] homosexuals.” (quoting Captain Frank Fristensky)).
bar” and occasional touching. The SLA was ordered to restore the license by a state appellate court, however, reasoning that the one time incident of degenerate disorderly conduct was insufficient evidence that the establishment itself was a house of disorder.

Similar patterns unfolded in California. In San Francisco, for example, “patrolmen focused most of their attention on gay bars rather than lesbian drinking establishments, but lesbian nightspots increased their chances for persecution if they allowed cross-dressing.” However, the California Supreme Court issued a number of rulings to obstruct police efforts to close LGBTQ spaces. In 1951, the State Supreme Court in Stoumen v. Reilly held that the liquor control agency, the State Board of Equalization, was not empowered to initiate liquor license revocation proceedings solely because sexual minorities frequented a licensed establishment. The Stoumen decision was a nominal victory for sexual minorities in that it recognized homosexuals as a class entitled to a modicum of rights under the Unruh Civil Rights Act, but acknowledged that a distinction might exist between homosexual status and disorderly homosexual conduct.

157 In view of the excellent reputation of the licensed premises running over a period of many years, the large investment which petitioner has in the business and the other circumstances, the testimony of the one police officer concerning his observation during a twenty-five-minute visit and concerning the single incident involved, does not furnish a substantial basis for a determination that the licensee knew or, in the exercise of reasonable diligence, should have known of the disorderly activities on that one occasion. In the circumstances, a violation of subdivision 6 of section 106 of the Alcoholic Beverage Control Law was not established and petitioner’s license should not have been revoked . . . .
159 Stoumen v. Reilly, 234 P.2d 969, 971 (Cal. 1951) (“In order to establish ‘good cause’ for suspension of plaintiff’s [liquor] license, something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place.”).
160 Id.
161 Id. (“The terms of the section refer to conduct on the premises or resort thereto for improper purposes, and it is clear that it would be necessary to read something into that section before it could be construed as an attempt to regulate mere patronage by any particular class of persons without regard to their conduct on the premises.”).
In response to *Stoumen*, the California legislature clarified the Board of Equalization’s mandate. Legislators amended state law in 1955 authorizing the state liquor authority to annul a liquor license when the licensee permitted the establishment to become a “resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers, or sexual perverts” as evidenced by acts on the premises and the “general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers, or sexual perverts.”162 Once again, an LGBTQ-friendly proprietor prevailed upon the California Supreme Court to seek refuge from aggressive policing in *Vallerga v. Department of Alcoholic Beverage Control*.163

While the California Supreme Court affirmed the central principle in *Stoumen* that the congregation of homosexuals by itself could not satisfy the burden of proof required for license revocation, “[c]onduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges.”164 The court went on to explain that evidence of masculine women or effeminate men in addition to physical contact could be permissible grounds for the state to intervene.165 Thus, while the court protected the association rights of

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163 *Id.* at 909–10.
164 *Id.* at 912 (internal citation omitted).
165 The court highlighted that the collected evidence at the First and Last Chance Bar could support a finding that the bar was a business of disrepute worthy of license revocation, much of it focused on gender bending, but it was not properly submitted:

Admittedly, the licensees’ patrons were almost exclusively homosexuals and lesbians. Their sexual proclivities were displayed in that the majority of the female customers dressed in mannish attire, and patrons usually paired off, men with men, and women with women. During the period of surveillance police officers testified that they observed women dancing with other women, and women kissing other women. A policewoman testified that as she and a companion policewoman sat at a table a female patron dressed in mannish attire sat down and said to her companion, ‘You’re a cute little butch.’ Later in the evening this patron kissed the policewoman, and a waitress came by and warned the participants that if they wanted to continue such activity they should go into the restroom. On a different occasion the policewoman observed a person who appeared to be a man by her dress and makeup but who, according to the waitress, was actually a woman, make use of the women’s restroom.
LGBTQ people as a class, it did so conditionally.\textsuperscript{166} The status-conduct dichotomy was a legal fiction that, while perhaps a noble attempt from the California justices to pull back the intensity of state-sponsored discrimination against LGBTQ people,\textsuperscript{167} reinforced the state’s prerogative to interdict gender nonconformity. As a consequence, the status-conduct dichotomy undergirded a de facto rule that the LGBTQ community’s freedom to associate ceased when visible gender bending began. Equally important, the status-conduct dichotomy was a stealth reinforcement of descriptive sex stereotypes because it created a formal doctrinal mechanism that sanctioned using evidence of nonconformity as a heuristic for identifying LGBTQ people.

Like New York, the New Jersey Division of Alcoholic Beverage Control (ABC) promulgated a policy in 1934, Rule 4, that liquor license

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A police officer testified that he observed a male patron and a grey-haired man approach, embrace each other at the bar, put their foreheads together while they carried on a whispered conversation, and that the grey-haired man then kissed the other and stated to the bartender: ‘Arley and I are going steady.’ This officer also testified that he observed a person dressed and made up as a man and who appeared to be a man, but who, the witness was informed, was in fact a woman, making use of the women’s restroom. The foregoing is sufficient evidence of a display of sexual desires and urges which, when made in a public place as a continuing course of conduct, could reasonably be found by the trier of fact to be ‘contrary to public welfare or morals.’ It is apparent in the present case, however, that the foregoing evidence was not relied upon by the finder of fact in arriving at the conclusion that continuance of the license would be contrary to public welfare or morals. The only findings in the present case were that the portion of the premises where the activities permitted by the license were conducted were ‘a resort for sexual perverts, to wit, homosexuals’ and that the licensees were aware of that fact.
\end{quote}

\textit{Id.} at 912–13.

\textsuperscript{166} Citing \textit{Stoumen}, the California Supreme Court held in 1970 that the state’s civil rights law barred the arbitrary ejection of two men from a shopping mall because one of the men “wore long hair and dressed in an unconventional manner.” \textit{In re Cox}, 474 P.2d 992, 994, 997–1001 (Cal. 1970) (citing \textit{Stoumen}, 234 P.2d 969). Thus, California civil rights law afforded more protection to non-traditional, counterculture forms of grooming and fashion expression than it had eleven years earlier for gender non-conformity in Vallerga. \textit{See id.}

\textsuperscript{167} \textsc{Carlos A. Ball}, \textsc{The First Amendment and LGBT Equality: A Controversial History} 63 (2017) (arguing that the \textit{Stoumen} court found the “exercise of punitive state authority” because of “the mere presence of lesbians and gay men in a public establishment” “troubling” (emphasis in original)).
holders were not permitted to entertain “any known criminals, gangsters, racketeers, pickpockets, swindlers, confidence men, prostitutes, female impersonators, or other persons of ill repute” at their establishments.\(^\text{168}\) ABC also provided under Rule 5 that license holders could not permit “any disturbances, brawls, or unnecessary noises” or allow the place of business to be conducted “in such manner as to become a nuisance.”\(^\text{169}\) The agency amended Rule 5 in 1936 and 1950, respectively, to forbid licensees to permit “lewdness” or “immoral activities,” and “foul, filthy, indecent or obscene language or conduct.”\(^\text{170}\) Initially Rule 4 was used to shut down gay friendly bars, but ABC officials used Rule 5 to justify taking action against establishments that catered to gay men.

In 1956, ABC officials brought a Rule 5 enforcement action against Paddock Bar alleging that on five separate occasions agents recorded evidence that the bar “permitted and suffered female impersonators and persons who appeared to be homosexuals in and upon your licensed premises; allowed, permitted and suffered such persons to frequent and congregate in large numbers.”\(^\text{171}\) Paddock’s license was revoked and the bar appealed, arguing that evidence showing “persons with effeminate characteristics may have frequented the premises . . . does not constitute grounds for license suspension.”\(^\text{172}\) The court rejected the bar’s claim and cited a substantial record indicating that the bar’s clientele displayed “feminine actions and mannerisms” and “acted as though they were like a man and wife would act.”\(^\text{173}\) The court dismissed the notion that the state needed explicit proof that the men gathered at the Paddock were homosexuals—indicia of gender nonconformity was all the state needed to produce:

If the evidence here failed adequately to prove that the described patrons were in fact homosexuals, it certainly proved that they had the conspicuous guise, demeanor, carriage, and appearance


\(^{169}\) Id.

\(^{170}\) Id. (internal quotations omitted).


\(^{173}\) Id. at 2–3.
of such personalities. It is often in the plumage that we identify the bird. The psychiatrist constructs his deductive conclusions largely upon the ostensible personality behavior and unnatural mannerisms of the patient.

It cannot be logically determined that in the present proceeding there was no circumstantial or inferential evidence productive of the impression, perhaps general, that the patrons under observation were not so-called female impersonators. Logical inferences are more than mere suspicions.\(^{174}\)

The New Jersey Supreme Court, however, put an end to the practice of taking liquor licenses away from public accommodations simply for permitting homosexuals to gather without more than a showing of gender nonconformity in 1967. The New Jersey Supreme Court detailed the proffered evidence that the One Eleven Bar’s business practices ran afoul of ABC regulations:

[Patrons] were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements to each other.

One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They took short sips from their straws; took them quite a long time to finish their drinks.

They were very, very endearing to one another, very, very delicate to each other.

They looked in each other’s eyes when they conversed. They spoke in low tones like an effeminate male. When walking, getting up from the stools, they very politely excused each other,

\(^{174}\) Paddock, 134 A.2d at 780. Citing Paddock, a New Jersey appellate court affirmed a liquor license revocation under Rule 5 on the testimony of ABC agents that male customers displayed “feminine actions and mannerisms” while “speak[ing] to [other] male[s] seated with them,” and “roll[ed] their eyes at each other and simulate a kiss now and then, like you would peck a kiss at a person, and occasionally they would put their arm around each other and feel different parts of the body.” Murphy’s Tavern, 175 A.2d at 2, 5 (citing Paddock, 134 A.2d 779). The ABC agents also noted they “could definitely smell the odor of perfume on the premises.” Id.
hold on to the arm and swish and sway down to the other end of the bar and come back.

Their actions and mannerisms and demeanor appeared to me to be males impersonating females, they appeared to be homosexuals commonly known as queers, fags, fruits and other names.175

The New Jersey Supreme Court reversed the revocation order for One Eleven’s liquor license and two other similarly situated bars, holding that the mere congregation of homosexuals (as evidenced by male effeminacy) was not enough to cause ABC to act against the bars. The court reasoned:

So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like.176

A key component of the court’s decision pointed out that notwithstanding the limitation on targeting licensees solely for a gay clientele, ABC could target places tolerant of solicitation and overt acts of lewdness “effectively with the matter through lesser regulations which do not impair the rights of well behaved apparent homosexuals to patronize and meet in licensed premises.”177 The New Jersey Supreme Court approvingly cited a New York court’s decision earlier that year, which upheld a liquor license revocation where a police officer testified to effeminacy, lewdness, and other suspicious activity indicating nefarious activities were afoot.178 That ruling was subsequently overturned citing

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175 One Eleven Wines & Liquors, 235 A.2d at 15.
176 Id. at 18.
177 Id. at 19.
178 Id. at 17 (citing Kerma Rest. Corp. v. State Liquor Auth., 27 A.D.2d 918 (N.Y. App. Div. 1st Dep’t 1967)). In Kerma Restaurant Corp. v. State Liquor Authority, an officer testified that customers exhibited characteristics and mannerisms which evidenced homosexual propensities; that he heard male patrons address each other in endearing terms and saw several of
thin evidence.\footnote{On appeal, the lower court ruling and the SLA’s decision were reversed for want of evidence showing a breach of the peace. Kerma Rest. Corp. v. State Liquor Auth., 233 N.E.2d 833, 834–35 (N.Y. 1967).} The case law in New York and New Jersey, like in California, embraced a status-conduct dichotomy. Consequently, the state was entitled to oppress homosexuals as a class when gender nonconformity surfaced. The privileging of traditional gender roles and traits was the key to keeping the entire LGBTQ community at bay under the watchful eye of the state.\footnote{This was also true in the public employment context. For example, the Johns Committee in Florida, constituted by the Florida Legislature to root out subversive activity, turned its investigatory powers on homosexuality after the committee chairman’s son warned his father that "effeminate instructors had perverted the curriculum" at the University of Florida. James A. Schnur, Closet Crusaders: The Johns Committee and Homophobia, 1956–1965, in CARRYIN’ ON IN THE LESBIAN AND GAY SOUTH 132, 134 (John Howard ed., 1997). Ironically, the Committee’s infamous Purple Pamphlet documenting the more conspicuous aspects of LGBTQ culture in Florida in graphic detail, conjectured that the most visible elements of the LGBTQ community were actually unrepresentative of the community as a whole: The two homosexuals most familiar to the general public are the “Swish Queen” and the “Butch.” The Swish Queen is the ultra-effeminate male who will occasionally be dressed in women’s clothing. The Butch is the ultra-masculine female, muscular in build, with mannish haircut and tailored clothing. These are the minority in homosexual society and cannot be considered representative of homosexuals in general. FLA. LEGISLATIVE INVESTIGATION COMM., HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA (1964).} 

Over time, the repeated harassment of LGBTQ spaces bred contempt and resistance sprang up. The two most well-known instances of protest are the Sip-In at Julius’ Bar in 1967 and the Stonewall Riots in 1969, both in New York City. The protest of the SLA’s anti-gay policies at Julius’ was the first planned act of civil rights disobedience by the Mattachine Society, an early gay rights group. Three men, led by Dick...
Leitsch, invited four reporters to watch them demand service at the Ukrainian-American Village Restaurant where a prominently displayed sign demanded, “If You Are Gay, Please Go Away.” The bar was closed. After two more failed attempts to induce bartenders into denying them service, the men arrived at Julius’ and ordered liquor after announcing they were gay. The manager refused to serve the group and said, “I think it’s in the law.”

The SLA responded to the Sip-In stating the SLA would not take action against a licensee for refusing service to homosexuals. New York City Commission on Human Rights Chairman William Booth vowed to act to fight against sexual orientation discrimination under the Commission’s authority to adjudicate sex discrimination claims. “We have jurisdiction over discrimination based on sex . . . . Denial of bar service to a homosexual, solely for that reason, would come within those bounds,” Booth told the New York Times.

In the interim between the Sip-In and the Stonewall Riots in 1969, the New York courts curtailed the SLA’s revocation enforcement powers and undercut a conduct-status divide between sexual orientation as a status and attendant conduct inextricably linked to that status. In 1967, an appellate court overturned a decision to revoke Julius’ license after an officer witnessed “several males” at the bar who demonstrated the following traits: they “spoke in a high shrill voice,” had “limp wrists,” walked with a “mincing gait,” and wore tight clothes. The state failed to meet its burden, the court ruled, because “no overt acts or other conduct

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182 Id.
183 Id.
185 Id.
186 Id.
of a disorderly nature were observed on this occasion” tantamount to
disorderly conduct.188

In 1967, the New York Court of Appeals affirmed the revocation of
a liquor license for tolerating immoral conduct where same-sex couples
were seen “dancing to a slow record,” “embracing one another,” and
“feeling each other’s private parts and posteriors.”189 The New York high
court affirmed the SLA’s decision, but cautioned “there is no sound
reason to distinguish between the actions of homosexuals and that of
heterosexuals with respect to the dancing of slow dances under
circumstances such as this.”190 Thus, in the court’s view, same-sex slow
dancing alone failed to meet the necessary threshold to reprimand a
liquor license holder. The court’s admonishment that the definition of
unpalatable conduct cannot turn on the sex of the parties was an
important development, but it did not close the door on sex-stereotyping
with the same vigor that the appellate court had a few months prior in the
Julius case.

The first significant legal victories in 1967 that undercut a legal
theory that parsed sexual orientation and gender expression emerged in
the wake of a shift in strategy where the LGBTQ community would no
longer only push back when pushed against by the state but also
deliberately protest state-sponsored discrimination. The 1950s era
California rulings permitted a legal regime where signs of gender-
bending could be used as a vehicle to oppress the entire LGBTQ
community and to deny them the right to publicly associate. In contrast,
the New York decisions of the late 1960s slowed anti-gay elements in the
state and municipal governments by barring the use of variant gender
expression as a means to subjugate sexual minorities altogether. By
denying law enforcement the ability to use nonconforming behaviors as
the tell-all signal for homosexuality, the New York courts undercut state
sanctioned sex-stereotyping and noted that a person’s expressive conduct
could not be criminalized solely because of their partner’s sex.

The liquor license cases enrich our understanding of how society
coagulated gender diversity within the LGBTQ community and used

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189 Becker v. N.Y. State Liquor Auth., 234 N.E.2d 443, 444 (N.Y. 1967) (internal quotations
omitted).
190 Id.
conspicuous signals of atypical gender expression. In doing so, the state stigmatized gay men and lesbians through descriptive stereotyping: men who were not sufficiently masculine and women who were not sufficiently feminine in flouting sexual convention were altogether something different than “normal” men and “normal” women.

IV. THE ECONOMIC EMPOWERMENT ERA

History reveals that the convergence of social and political changes—industrialization, urbanization, and feminism—along with the percolation of an LGBTQ cultural identity impacted non-LGBTQ persons’ understanding of sexual minorities and the subsequent use of state power to subjugate LGBTQ persons. That outsider perspective, almost singularly obsessed with gender nonconformity, especially with respect to public displays of effeminacy by men, was key to how outsiders imposed a class-based identity on the LGBTQ community. That sexual orientation construct, which also subsumed any independent transgender identity, ignored variant gender roles within the LGBTQ community and essentially created classes of persons who heterosexuals could not easily place into the two coextensive silos of the sex-gender binary. The animus directed at LGBTQ people, then and now, must consequently be understood as a function of sex-stereotyping.

In the wake of the Stonewall Riots in 1969, LGBTQ activism spiked.191 At the same time, same-sex sexual conduct was isolated from opposite-sex non-procreative sex acts for criminalization by nine states.192 The renewed efforts to criminalize LGBTQ persons arose at the same time civil rights interest organizations plotted a litigation strategy to abrogate state sodomy laws. Two federal court rulings that upheld the constitutionality of state sodomy laws in the decade-and-a-half after

191 Michael J. Klarmann, From the Closet to the Altar, at x (2013) (describing a “burst of gay activism unleashed by the Stonewall rebellion” in the 1970s).

192 As stated in Lawrence v. Texas, these included:


A. **Challenging Sodomy Bans**

In 1975, a constitutional claim was brought questioning the validity of Virginia’s prohibition against all forms of non-procreative sex regardless of the parties’ sex. Rather than examining the Virginia law and the full breadth of conduct it prohibited, the court focused on the plaintiffs’ identity and created a status-conduct dichotomy that, like state courts had in the liquor license cases, emphasized sex stereotypes. That emphasis, in turn, placed LGBTQ men and women outside of the law’s protection because they could not contribute to the most basic of building blocks in society, which required “real” men and women. In *Doe*, the three-judge district court held that Virginia was free to criminalize same-sex sexual conduct because it “obviously” has no part “of marriage, home or family life.”

When in *Bowers* the Supreme Court considered the constitutionality of Georgia’s sodomy statute that prohibited all non-procreative sex acts like the Virginia law, the majority echoed this sentiment. The Court opined that there was no “connection between family, marriage, or procreation . . . and homosexual activity.” The combination of the *Doe* and *Bowers* courts’ parsing of same-sex sodomy from opposite-sex sodomy and creating a status-conduct dichotomy for “practicing homosexuals” allowed each court to escape the need to grapple with the associative nature of non-procreative sexual conduct. Had these courts been forced to reckon with looking beyond the same-sex aspect of the conduct, each would have been required to examine the nature of same-sex couples’ association alongside non-procreative forms of heterosexual expression. That was a dangerous prospect because it could have revealed what the Court of Appeals for the Eleventh Circuit highlighted in *Bowers*

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194 Id. at 1202.
before the Supreme Court reversed their ruling—that non-procreative sex is an expressive association between two persons that could reflect the same values shared by heterosexuals in a marital relationship:

The intimate association protected against state interference does not exist in the marriage relationship alone. In *Eisenstadt v. Baird* the Supreme Court held that prohibiting the distribution of contraceptives to unmarried persons was unconstitutional because it treated married and unmarried individuals differently. The benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage.196

The danger in recognizing that sexual intimacy between two men or two women might serve a similar purpose as a marriage exposed two problems for the supremacy of masculinity—it challenged marital-related sex stereotypes and tapped into the fears that cropped up nearly a century prior that sex and gender roles were not innate and fixed.197 Georgia all but made this argument in its brief to the Court:198

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196 Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), rev’d by Bowers, 478 U.S. 186 (internal citation omitted).

197 See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 308 (1995) (“Although antigay politicians often equate homosexual identity with homosexual sex—as if homosexual sex itself were clearly defined—sexual activity is not a sure guide to a person’s sexual orientation. Consider the man in prison who engages voluntarily in homosexual acts but thinks of himself as heterosexual; or the woman in a ‘Boston marriage’ who thinks of herself as lesbian but refrains from sexual activity; or the celibate priest who self-identifies as gay; or the married man who fathers children but self-identifies as gay and has a male lover. Consider, too, the people who self-identify as bisexual. Their existence challenges not only the binary system of sexual orientation categories but the very idea of ‘true’ identity categories based on sexual orientation.” (internal footnotes omitted)).

198 Virginia made a similar argument ten years earlier in *Doe*. The district court panel’s majority did not engage with the Commonwealth’s argument, but the dissenting judge rejected the Commonwealth’s suggestion that legalized homosexuality undermined heterosexual marriage:

To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response. In any event, what we know as men is not forgotten as judges—it is difficult to envision any substantial number of heterosexual
The court below has ignored the traditions and collective conscience of this nation. By concluding that homosexual sodomy, for some, serves the same purpose as the intimacy of marriage, it has lowered the estate of marriage, which has traditionally been held an institution worthy of the protection and nurture of the State, to merely another alternative for sexual gratification.\textsuperscript{199}

The brief later doubled down on this line of argumentation:

But perhaps the most profound legislative finding that can be made is that homosexual sodomy is the anathema of the basic units of our society—marriage and the family. To decriminalize or artificially withdraw the public’s expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely other alternative lifestyles.\textsuperscript{200}

In 2003, the Supreme Court overturned \textit{Bowers} in \textit{Lawrence v. Texas} after state constitutional litigation gained traction in \textit{Bowers}'s wake.\textsuperscript{201} The Kentucky Supreme Court’s invalidation of a state law prohibiting a person from engaging in “deviate sexual intercourse with another person of the same sex” in 1992 demonstrates the importance of shifting from an identity-based status-conduct analysis between \textit{Bowers} and \textit{Lawrence}.\textsuperscript{202} From the onset, the Kentucky Supreme Court in \textit{Commonwealth v. Wasson} noted that Kentucky’s anti-sodomy statute held offenders strictly liable, including individuals “involve[d] [in] a caring relationship.”\textsuperscript{203} In stark contrast to the dissent’s status-conduct framing,\textsuperscript{204} a concurring

\textsuperscript{199} Brief of Petitioner Michael J. Bowers Attorney General of Georgia at 25, \textit{Bowers}, 478 U.S. 186 (No. 85-140), 1985 WL 667939, at *25 (internal citation omitted).
\textsuperscript{200} Id. at *37–38.
\textsuperscript{201} Lawrence v. Texas, 539 U.S. 558 (2003).
\textsuperscript{202} KY. REV. STAT. ANN. § 510.100, invalidated by \textit{Commonwealth v. Wasson}, 842 S.W.2d 487 (Ky. 1992).
\textsuperscript{203} \textit{Wasson}, 842 S.W.2d at 488.
\textsuperscript{204} Id. at 516 (Wintersheinber, J., dissenting) (“[T]he statute here relates to conduct and not to persons who may choose to label themselves as ‘homosexuals.’ Nothing in this record indicates that anyone has identified the defendant as a homosexual. Much of the testimony in the trial court related to presentation by expert witnesses regarding homosexuality.”).
opinion recognized that the same-sex sodomy law was fundamentally about mandating conformity in service of preserving heteronormativity.205

When the Supreme Court struck down the remaining sodomy laws on the books in Lawrence, the Court recognized that same-sex relations were a form of expression:

The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals . . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.206

205 Justice Combs explained:

It may be asked whether a majority, believing its own happiness will be enhanced by another’s conformity, may not enforce its moral code upon all. The answer is that, first, morality is an individual, personal—one might say, private—matter of conscience, and dwells inviolate within the fortress of Section 5: “No human authority shall, in any case whatever, control or interfere with rights of conscience.” Second, the Constitution promotes no particular morality, however popular. Indeed, the New World having been sought out by those fleeing state and/or majoritarian persecution, our systems of government are predicated upon such imperatives as that recognized in Kentucky Constitution Section 2: “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” Third, morality is a matter of values. Insofar as it comprises a moral code, the Constitution embraces—yea, embodies—the immutable values of individual freedom, liberty, and equality.

Id. at 502–03 (Combs, J., concurring).

206 Lawrence, 539 U.S. at 567. Even Justice Thomas’s dissenting opinion acknowledged the expressiveness of non-procreative sexual conduct. “Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.” Id. at 605 (Thomas, J., dissenting). Lawrence, however, failed to expressly embrace sex equality despite couching the decision as protective of sexual expression. See Catharine A. MacKinnon, The Road Not Taken: Sex Equality in Lawrence v. Texas, 65 OHIO ST. L.J. 1081, 1085–86 (2004) (critiquing the Court’s
The lesson of the sodomy cases is that constitutional law’s foundational protection for LGBTQ persons eschewed calls to focus on the socially constructed identity labels imposed on those criminalized in favor of an understanding of sexuality as gender expressive conduct, which states criminalized for rationales deeply rooted in interlocking ambivalent sex stereotypes—including hostile sex stereotypes demanding gender conformity and benevolent sex stereotypes about the nature of family.

It would be no surprise to say that the anti-LGBTQ rights camp decried Lawrence and the erosion of traditional values, warning about the inevitable attack on the institution of marriage that was to come. That idea, of course, was not new, as older cases like Doe and Bowers show—litigation that predated any serious campaign for same-sex marriage rights. This begs the question: in what respect does the decriminalization of same-sex intimacy undermine heterosexual marriage? The rationale of Lawrence tapped into the historical root of the animus directed at LGBTQ persons during the period in which heterosexuals constructed a modern class to fit gender nonconforming persons. In rejecting the status-conduct dichotomy, which historically emphasized gender nonconforming behavior in effeminate men and masculine women as acceptable to police, the Court embraced same-sex intimacy as a more fluid form of expression. Lawrence and the state court decisions preceding it broke down the wall isolating LGBTQ people from heterosexual men and heterosexual women.

decision in Lawrence as not addressing whether sodomy laws “promote[d] equality or inequality on the basis of sex in a domain in which the sexes are socially unequal, specifically whether gender hierarchy and sex-based dominance, or its progressive dissolution, is promoted”); see also id. at 1082 (“While equality was undeniably promoted by Lawrence—straight or gay, the majority felt, sex is sex—significant inequalities were submerged beneath the lines. Equality was the obligato of the case. Treating gay sex like straight sex was what the decision did. But Lawrence was far from an equality decision.”).


Thus, Lawrence signaled that gender roles are in fact fluid, which could undermine traditional, sex-stereotyped constructions of the marital relationship in favor of an equality-reinforcing institution. As same-sex marriage litigation reveals, the arguments against extending the freedom to marry to same-sex couples used highly gendered sex stereotypes in defense of same-sex marriage bans’ constitutionality, and presented an image of society wherein real (masculine) men and real (feminine) women were suitable for gendered marriage, whereas a third group of non-heterosexuals, ushering in an era of “genderless” marriages, were not.

B. Marriage, Complementarity, and Same-Sex Family Formation

In 2015, the United States Supreme Court ruled in Obergefell v. Hodges that the freedom to marry—or not to marry—extended to same-sex couples. However, legal challenges by same-sex couples asserting a right to marry predated Obergefell for over four decades.

The first same-sex marriage challenge was in 1971 on the heels of the Supreme Court’s 1967 ruling in Loving v. Virginia, which struck down state laws banning interracial marriage. The case, Baker v. Nelson, arose after a Minneapolis court clerk denied a marriage license to Richard Baker and James McConnell. Minnesota law limited marriage rights to “persons of the opposite sex.” Baker and McConnell alleged Minnesota’s marriage law ran afoul of their First, Eighth, Ninth, and Fourteenth Amendment rights. The state trial court and the Minnesota Supreme Court rejected the claim. The Minnesota Supreme Court opined, “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.” The couple appealed to the

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211 Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
212 Id. at 185–86.
213 Id. at 186 & n.2.
214 Id. at 185.
215 Id. at 185–86, 186 n.2.
U.S. Supreme Court, where their petition was summarily dismissed for want of a federal question.216

In Jones v. Hallahan, the Kentucky Court of Appeals in 1973 rejected a couple’s claim that the state’s limitation of marriage to opposite-sex couples violated their due process right to marry and offended the prohibition of cruel and unusual punishment.217 The couple additionally argued Kentucky law abridged their religious free exercise and association rights.218 In a procrustean rebuke, the state court ruled, “the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”219

A 1974 case, Singer v. Hara, challenged Washington State’s marriage law, claiming the prohibition of same-sex marriage offended the state and federal constitutions.220 The Washington Court of Appeals readily dispensed with the couple’s Eighth, Ninth, and Fourteenth Amendment challenges.221 The court rejected the state constitutional claims, and concluded that “the public interest in affording a favorable environment for the growth of children” outweighed the asserted right.222

As state courts struck down sodomy laws on state constitutional grounds in the years after Bowers, same-sex marriage advocates challenged Hawaii’s same-sex marriage ban in Baehr v. Lewin.223 In Baehr, the Hawaii Supreme Court determined that Hawaii’s law limiting marriage between opposite-sex couples constituted sex-based discrimination, and thus, required the state trial court to apply strict scrutiny under the Hawaii Constitution.224 The Hawaii Supreme Court’s victory was mooted in 1998 after Hawaiians amended Hawaii’s

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217 Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973), abrogated by Obergefell, 135 S. Ct. 2584.
218 Id. at 589.
219 Id. at 590.
221 Id. at 1195 n.11, 1197 (“This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.” (citing Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971))).
222 Id. at 1194, 1197.
224 Id. at 64, 68.
Constitution to permit the legislature to restrict marriage to heterosexual couples.225

Later in 1998, a state court in Alaska followed the Hawaii courts’ lead in a same-sex marriage challenge, and ruled that “the state must . . . have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.”226 Alaska voters similarly followed Hawaii, and amended the state constitution to ban same-sex marriage, though Alaskans took the added step to remove the issue from the courts and the legislature.227

In December 1999, the Vermont Supreme Court unanimously held that denying same-sex couples marital rights was constitutionally infirm under the Vermont Constitution.228 However, the Vermont high court did not immediately mandate the state afford same-sex couples access to the institution of marriage by name.229 The majority opinion held, “We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so . . . .”230 The Vermont Legislature opted to enact a parallel institution to marriage, “a civil union,” which gave same-sex couples access to all the rights, responsibilities, and obligations of marriage, but denied them the status of marriage.231

The Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health was the first court in the United States232 to rule that the freedom to marry must apply equally to same-sex couples as

225 HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).


227 ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”).


229 Id. (permitting the “Legislature to craft an appropriate means of addressing [the] constitutional mandate” in Baker).

230 Id. at 887.


it does heterosexual couples under the Massachusetts Constitution. In the wake of Goodridge, a dozen years of intense litigation unfolded in nearly every state about the right of same-sex couples to form families and to marry. The positions advocates staked out in defense of exclusive opposite-sex marriage in this twelve-year period are deeply rooted in sexist stereotypes that have long-standing ties with understandings of marriage as a patriarchal institution as an ideal, “traditional[,] stable political unit.”

While the vast majority of litigation focused on anti-gay marriage exclusion laws as a form of sexual orientation discrimination, a number of judges acknowledged that same-sex marriage bans were a sex-based classification. Indeed, the first state courts and the first federal courts

\[\text{233 Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).} \]

\[\text{234 Insightful work in this space was undertaken in the early years of the same-sex marriage litigation campaign studying the invocation of sex stereotypes to defend anti-gay marriage laws. See Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence, 30 HARV. J.L. & GENDER 461, 461–62 (2007) (describing “patterns in how the sex discrimination argument has been used by litigants and received by courts”).} \]

\[\text{235 Bostic v. Schaefer, 760 F.3d 352, 391 (4th Cir. 2014) (Niemeyer, J., dissenting). The theory undergirding the construction of opposite-sex marriage as a stable political unit harkens the idea that complementarity brings balance and stability to a family. See Lynn D. Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL’Y 771, 792 (2001) (“Traditional marriage facilitates procreation by increasing the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation.”).} \]


\[\text{237 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (“Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex.”), aff’d sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated sub nom. Hollingsworth v. Perry, 570 U.S. 693 (2013); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206–07 (D. Utah 2013) (finding Utah’s same-sex marriage ban subject to “the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex . . . . [And the state] unable to satisfy the more rigorous standard of demonstrating an ‘exceedingly persuasive’ justification for its prohibition against same-sex marriage” (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))), aff’d, 755 F.3d 1193 (10th Cir. 2014). A later 2014 federal court held Missouri’s same-sex marriage ban was a form of} \]
to deal blows to state same-sex marriage prohibitions did so under the rationale that anti-gay-marriage laws constituted sex discrimination. Similarly, a federal court struck down the Defense of Marriage Act, which blocked federal recognition of lawfully married same-sex couples, under a sex discrimination rationale.

Throughout litigation campaigns, anti-marriage equality positions heavily relied on the argument that “genderless marriage” failed to acknowledge the complementary attributes of the sexes and the importance of “gender diversity” in households raising children. Martha Fineman poignantly explained how historical power dynamics—grounded in the market/home divide—are implicated by the complementary sex argument:

The patriarchal family is an “assumed institution” with a well-defined, socially constructed form complete with complementary roles—husband/head of household, wife/helpmate, child. The significant family tie is the sexual affiliation that, when legally sanctified, creates marriage. The assumed inevitability and primacy of this form of intimate connection reinforces patriarchy in that it defines male presence as essential and dominant within the family.

sex discrimination. Lawson v. Kelly, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014) (“The State’s permission to marry depends on the genders of the participants, so the restriction is a gender-based classification.”).


239 Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal.) (“Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski’s access to federal benefits because of her sex.”), initial hearing en banc denied, 680 F.3d 1104 (9th Cir. 2012), appeal dismissed, 724 F.3d 1048 (9th Cir. 2013).

Despite that sex-based classifications that expressly discriminated against women in family law have been chipped away during the last forty years, vestiges of sexism in marriage remain. As Deborah Widiss explains, notwithstanding the efforts of legislators and judges to shed state domestic relations laws from overt sex discrimination, “they left in place an architecture of marriage, tax, and benefits law that encourages specialization into breadwinner and caregiver roles.”241

Same-sex marriage, thus, presents a particularly salient challenge to a vision of heterosexual marriage that is not unequivocally equality-reinforcing.242 A marriage between two women challenges the patriarchal notion that a masculine man in the labor market is ideal or necessary for a successful family unit. A successful marital relationship between two men challenges the primacy of masculinity if one member of the marital union can be or is (under a complementary theory of marriage) subservient to the other.243 A same-sex marriage, whether between men or women, calls into question the innateness of gender roles and the natural disposition of masculine and feminine traits—striking at the heart of anti-LGBTQ attitudes dating back to the turn of the nineteenth century.244 So-called “genderless marriage” thus taps into deep-seated

241 Deborah A. Widiss, Changing the Marriage Equation, 89 WASH. U. L. REV. 721, 723 (2012); see also June Carbone & Naomi Cahn, Nonmarriage, 76 MD. L. REV. 55, 86 (2016) (“States have remade the relationship between parents and children to enforce more egalitarian principles of caretaking. Traditional marriage associated children’s interests with a breadwinning father and a caretaking mother who performed complementary roles.”).

242 For example, Maggie Gallagher argued in 2012 that sexual promiscuity of gay men undermined the purpose of marriage wherein a husband assumes the obligation of looking after wife or children. Gallagher stated, “A gay man does not wish to be a husband in the same sense of taking sexual responsibility for a woman and the children their sexual union produces.” JOHN CORVINO & MAGGIE GALLAGHER, DEBATING SAME-SEX MARRIAGE 230 (2012).

243 See, e.g., MATTHEW D. STAVER, SAME-SEX MARRIAGE: PUTTING EVERY HOUSEHOLD AT RISK 29 (2004) (“[T]he gender of the two sexes is important; and binary sex sets a clear, definable boundary. That boundary would be blurred, indeed obliterated, by same-sex marriage. The delicate balance of boys accepting their masculinity and girls their femininity would be clearly upset by same-sex marriage. The very notion of same-sex marriage suggests that gender is irrelevant, but gender is indeed relevant; it is essential.”).

244 Matt Staver, who led the anti-gay rights Liberty Counsel, staked out a distinctly Freudian position to oppose same-sex marriage. Staver argued that same-sex marriage bans reinforced gender norms that promoted masculine men and feminine women, which in turn discouraged the kind of “weak fathers” and “dominant mothers” that cause children to “become” homosexual adults. Id. at 26–27. Staver wrote:
fears about the balance of power between men and women, between masculinity and femininity, in the social order as argued by one amicus in the 2008 Connecticut Supreme Court case, *Kerrigan v. Commissioner of Public Health*, which recognized the right of same-sex couples to marry under the Connecticut Constitution:

> With its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage. The consequence of such deinstitutionalization must necessarily be loss of the institution’s social goods... [G]enderless marriage[s]... *do not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods.*

Two early state court defeats for same-sex couples in the Washington Supreme Court and New York Court of Appeals emphasized that the lack of so-called gender role diversity in same-sex couple households was a rational reason to deny same-sex couples marriage rights. In Washington, the State Supreme Court’s plurality opinion in *Andersen v. King County* reasoned that the “optimum mother/father setting for stable family life” was not advantageous for children because “female couple households are necessarily fatherless and male couple households are necessarily motherless.” The New York Court of Appeals in *Hernandez v. Robles* was more explicit about gender roles:

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother

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Maintaining the boundaries of gender, as traditional marriage certainly does, is important for both genders but particularly for boys. Girls can continue to develop in their feminine identification through the relationship with their mothers. On the other hand, a boy had an additional developmental task—to disidentify from his mother and identify with his father.

*Id.* at 26 (internal quotation marks and citation omitted). The Staver argument rests on the idea that a “man must prove his masculinity, over and over again, and continually resist the temptation to identify with his mother.” Koppelman, *supra* note 13, at 242.


and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.247

The same sex stereotype defense of sexual orientation-based exclusionary marriage laws was raised in oral argument before the Iowa Supreme Court. The government’s attorney proposed that the Iowa justices ask themselves “how does a father teach a daughter, a girl, to be a woman? How does a woman teach a boy to be a man?”248 The government’s argument in Iowa echoed the defenses the Vermont Supreme Court deemed unconvincing nine years prior that denying relationship recognition for same-sex couples “promot[ed] child rearing in a setting that provides both male and female role models” and “bridg[ed] differences between the sexes.”249 The Iowa Supreme Court found them equally lacking in Varnum v. Brien and overturned the state’s same-sex marriage prohibition.250 Iowa’s optimal child-rearing argument, the court determined, was a veneer for the “real objectives” of the statute, motivated by “stereotype and prejudice, or some other unarticulated reason.”251

In 2008, the California Supreme Court invalidated a state law limiting marriage to opposite-sex couples.252 The voters responded and adopted a state constitutional amendment to ban same-sex marriage in November 2008, known as Proposition 8.253 Among the themes used in the campaign, Proposition 8 proponents focused on the impact same-sex

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250 Varnum, 763 N.W.2d 862.
251 Id. at 901.
252 In re Marriage Cases, 183 P.3d 384 (Cal. 2008).
marriage would have on public school educational curriculum and the ability of heterosexual parents to “instill in their children . . . the traditional gender roles and norms attendant to opposite-sex marriage.”

In a similar vein, when same-sex couples litigated Proposition 8’s constitutionality in federal court, Proposition 8 proponents fell back on the justification that the preservation of tradition for the sake of the tradition was sufficient to meet constitutional muster. Holding Proposition 8 unconstitutional under Due Process and Equal Protection Clauses, Judge Vaughn Walker repudiated the proponents’ argument as an attempt to cling to an outmoded vision of marriage:

The evidence shows that the tradition of restricting an individual’s choice of spouse based on gender does not rationally further a state interest despite its “ancient lineage.” Instead, the evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles. California has eliminated all legally-mandated gender roles except the requirement that a marriage consist of one man and one woman. Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.


255 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (internal citation omitted), aff’d sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). Judge Berzon’s concurring opinion in Latta v. Otter, which ruled same-sex marriage bans in Idaho and Nevada unconstitutional, embraced and cited Judge Walker’s observation about the connection between sex stereotypes and anti-gay marriage laws:

In short, a combination of constitutional sex-discrimination adjudication, legislative changes, and social and cultural transformation has, in a sense, already rendered contemporary marriage “genderless,” to use the phrase favored by the defendants. For, as a result of these transformative social, legislative, and doctrinal developments, “[g]ender no longer forms an essential part of marriage; marriage under law is a union of equals.” As a result, in the states that currently ban same-sex marriage, the legal norms that currently govern the institution of marriage are “genderless” in every respect except the requirement that would-be spouses be of different genders.
The popularity of these sorts of arguments did not wane over time. Indeed, the same sex-based parenting arguments were used by state defendants and the amici in their corner in post-*Windsor* litigation appealing federal court rulings that struck down same-sex marriage bans. In the Circuit Court of Appeals for the Tenth Circuit, the Alliance Defending Freedom authored a brief backing Oklahoma’s marriage law because: “[g]enderless marriage would remove the State’s ability to convey that, all things being equal, it is best for a child to be reared by her own mother and father” and “would tell the community . . . that there is nothing intrinsically valuable about fathers’ or mothers’ roles in rearing their children.” The better (and constitutional) approach, the brief argued, was a system limited to opposite-sex marriages in which the “diversity of both sexes” was central.

In a companion case before the Tenth Circuit challenging the Utah Constitution’s prohibition of same-sex marriage, Utah made a parallel argument. Utah tendered to the court that the core values in a “genderless marriage” “model” are “focused principally on the needs of adults” whereas “Utah’s marriage model . . . valorizes the role of fatherhood, motherhood, gender complementarity in child-rearing, and mutual dependence. That model is thus profoundly different from the model underlying same-sex unions and other adult relationship structures—an understanding based primarily on adult emotional bonds and commitments.” The appellate panel affirmed both lower court decisions striking marriage laws in Utah and Oklahoma over the objections of the dissenting judge’s critique that same-sex marriage

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Latta v. Otter, 771 F.3d 456, 490 (9th Cir. 2014) (Berzon, J., concurring) (internal citations omitted).

256 Appellant’s Principal Brief at 74, Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014) (Nos. 14-5003 & 14-5006), 2014 WL 897681.

257 Id. at 54.

258 Reply Brief of Appellants Gary H. Herbert and Sean D. Reyes [Corrected] at 14–16, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (No. 13-417), 2014 WL 1287029, *14–16. The argument relied on a 2004 Eleventh Circuit Court of Appeals decision upholding Florida’s exclusion of “practicing homosexuals” from adopting children. See *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004). The court did not quarrel with Florida’s position that “presence of both male and female authority figures” was the optimal environment for children because they provide “heterosexual role modeling” whereas “homosexual households . . . are necessarily motherless or fatherless and lack the stability that comes with marriage.” Id. at 806, 818–19.
erased any legal recognition of “gender complementarity, distinct from procreation.”

States’ invocation of complementarity to back discriminatory marriage laws was disproportionately focused on households with children, which ignored that many same-sex couples could raise children together notwithstanding legal impediments to marriage and that heterosexual couples could marry no matter their willingness or ability to have children. Indiana responded to this hitch that opposite-sex limitations in the marriage statute nevertheless performed a communicative function, which was rebuked, along with the state’s sexual orientation marriage restrictions, by the Seventh Circuit:

The state tells us that “non-procreating opposite-sex couples who marry model the optimal, socially expected behavior for other opposite-sex couples whose sexual intercourse may well produce children.” That’s a strange argument; fertile couples don’t learn about child-rearing from infertile couples. And why wouldn’t same-sex marriage send the same message that the state thinks marriage of infertile heterosexuals sends—that marriage is a desirable state?

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259 Bishop v. Smith, 760 F.3d 1070, 1113 (10th Cir. 2014) (Kelly, J., dissenting). Importantly, the dissent in the Oklahoma marriage case emphasized that complementarity was more than just nature procreative power or solely about household environments for raising children. This was the view adopted by judges in New Jersey and Washington. Lewis v. Harris, 875 A.2d 259, 277 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) (rejecting a same-sex marriage claim because "the binary idea of marriage arose precisely because there are two sexes"), aff’d as modified, 908 A.2d 196 (N.J. 2006); Andersen v. King Cty., 138 P.3d 963, 1002 (Wash. 2006) ("The complementary nature of the sexes and the unique procreative capacity of one man and one woman as a reproductive unit provide one obvious and nonarbitrary basis for recognizing such marriage.")., abrogated by Obergefell v. Hodges, 135 S. Ct. 2584 (2015). This logic was also expressly incorporated in state statutes. See, e.g., KY. REV. STAT. ANN. § 402.005 (LexisNexis 2019) ("As used and recognized in the law of the Commonwealth, ‘marriage’ refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." (emphasis added)).

260 Baskin v. Bogan, 766 F.3d 648, 661 (7th Cir. 2014). Like the Seventh and Tenth Circuits, the Fourth Circuit affirmed the unconstitutionality and tossed aside justifications for the Commonwealth’s same-sex marriage ban that rested on the importance of “gender-differentiated parenting” and the “distinct parenting styles” of men and women. Bostic v. Schaefer, 760 F.3d 352, 383 (4th Cir. 2014).
When the Supreme Court ruled in Obergefell that same-sex couples enjoyed the constitutional right to marry, the Court’s approach was substantive due process in flavor. This is significant because substantive due process analyses inquire into the purposes and function of the institution the rights claimants seek access to, not the identities of persons seeking to enter it. Thus, the Court’s jurisprudence from the 1970s and 1980s stripping family law of sex-based classifications that were benevolently sexist, paternalistic outgrowths of coverture and the market-family divide were exceedingly significant in reshaping the internal legal dynamics of marriage.\footnote{See Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977) (plurality opinion); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).} Citing this line of case law in Obergefell, Justice Kennedy wrote that “the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged . . . . Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage.”\footnote{Obergefell v. Hodges, 135 S. Ct. 2584, 2603–04 (2015).} The Supreme Court’s understanding of modern marriage as an equality-reinforcing institution—which relied on Reed v. Reed and its progeny more than Loving—could not square with the complementarity-centric theories advanced by same-sex marriage opponents in Obergefell and early court decisions rejecting same-sex couples’ constitutional claims.\footnote{See, e.g., Brief for Amici Curiae Organizations and Scholars of Gender-Diverse Parenting in Support of Respondents at 31, Obergefell, 135 S. Ct. 2584 (Nos. 14-566, 14-562, 14-571, 14-574), 2015 WL 1519048, at *31 (“Redefining marriage, moreover, would seriously erode the existing marital norm that encourages gender-diverse parenting. By itself, the fact that marriage is defined as the union of a man and a woman makes clear to society that marriage is really about procreation and children, and that it is expected to carry with it both a masculine and a feminine aspect.”); Brief for Robert J. Bentley, Governor of Alabama, as Amicus Curiae in Support of Respondents at 5, Obergefell, 135 S. Ct. 2584 (Nos. 14-566, 14-562, 14-571, 14-574), 2015 WL 1299737, at *5 (arguing states have a compelling governmental interest in limiting marriage to opposite-sex couples in order to “preserv[e] distinct offices for mothers and fathers”); Amicus Curiae Brief for Leaders of the 2012 Republican National Convention Committee on the Platform and Others Supporting Respondents at 38, Obergefell, 135 S. Ct. 2584 (Nos. 14-566, 14-562, 14-571, 14-574), 2015 WL 1534342, at *38 (“The diminished presence of these qualities in same-sex marriages—stability and sexual exclusivity—is likely tied to the absence of a third quality: the
Equally important, *Obergefell* rebuffed the stealth status-conduct dichotomy trap laid out by same-sex marriage opponents that, like in earlier court decisions, emphasized gender nonconforming traits.\(^{264}\) In refusing to accept complementarity-centric explanations for excluding same-sex couples from marriage, including gender diversity, the Court rebuffed the implication that same-sex couples could not by definition form relationships and households with children that possess a range of masculine and feminine qualities. As such, anti-same-sex marriage complementarity theories work only under the presumption that LGBTQ persons drift toward a particular locus on the gender spectrum, foreclosing the possibility of so-called “gender-diversity” within a same-sex coupled household.\(^{265}\) History teaches that same-sex marriage

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\(^{264}\) For instance, Kentucky, Michigan, and Ohio each argued that the three states’ respective constitutional definition of marriage did not discriminate against any person because of their sexual orientation while offering gender-centric defenses for limiting marriage to opposite-sex couples. See Brief for Respondent at 26, *Obergefell*, 135 S. Ct. 2584 (No. 14-574), 2015 WL 1384105, at *26 (“Kentucky’s marriage laws are not facially discriminatory to gays and lesbians based upon their sexual orientation.”); Brief for the Respondents at 46, *Obergefell*, 135 S. Ct. 2584 (No. 14-571), 2015 WL 1384104, at *46 (“Michigan’s marriage laws are based on biological complementarity, not sexual orientation.”); Brief for Respondent at 45, *Obergefell*, 135 S. Ct. 2584 (No. 14-566), 2015 WL 1384100, at *45 (“Ohio’s recognition framework—distinguishing void from voidable marriages—does not classify on sexual-orientation lines.”).

\(^{265}\) For another critique of the gender diversity argument, see Ian Farrell & Nancy Leong, *Gender Diversity and Same-Sex Marriage*, 114 COLUM. L. REV. SIDEBAR 97, 99 (2014) (“The gender-diversity argument against same-sex marriage hinges on the notion that a marriage of a man and a female will, in fact, be gender diverse. In so doing, the argument wrongly conflates sex—a biological classification—and gender—a construct created by society and culture. It is entirely possible that a relationship composed of two people of different sexes could include two people of the same gender. Alternatively, a relationship composed of two people of the same sex could include two people of different genders. Sex and gender are correlated, but the correlation is imperfect. A prohibition on same-sex unions is no guarantee of gender diversity in marriage.”).
opponents’ theory is built on an invidious presupposition that is traceable to decades of stereotyping gay men and lesbian women as homogenous groups possessing effeminate and masculine traits, respectively. The essence of legal arguments in opposition to same-sex couples’ freedom to marry was that marriage is for “real men” and “real women,” and not for the enjoyment of sex-stereotyped sexual minorities who were “less than” their sex. The Supreme Court’s recent gay rights jurisprudence’s rejection of these arguments to expand sexual minority rights should be understood as embracing an anti–sex-stereotyping principle.

C. Ambivalent Sexism and Employment Discrimination Law

Until the Seventh Circuit in Hively v. Ivy Tech Community College of Indiana,266 courts regularly interpreted sexual orientation discrimination to fall outside the ambit of Title VII’s sex discrimination prohibition.267 Courts dismissed sexual orientation discrimination claims brought under the theory that sexual orientation discrimination constituted unlawful sex-stereotyping as early as 1975.268 Since then, sexual orientation claims

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266 853 F.3d 339, 340–41 (7th Cir. 2017) (“For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person’s sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.”).


268 Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975) (granting summary judgment for defendant on claim alleging unlawful discrimination because of male plaintiff’s effeminacy on the grounds that Title VII does not ban “sexual preference[”] discrimination), aff’d, 569 F.2d 325 (5th Cir. 1978); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) (“Situation involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.”), aff’d, 570 F.2d 354 (9th Cir. 1978).
under Title VII doctrinally developed in a similar fashion across the circuits.

Federal courts’ treatment of sexual orientation discrimination claims has undergone a series of shifts in the four decades since LGB plaintiffs initially brought them. The courts initially approached workplace sex discrimination law as only concerning differences between men and women, ignoring other forms of bias like sexual harassment or sex-stereotyping. Because of the courts’ anti-individualist understanding of what constituted sex discrimination, early sexual orientation claims were readily disposed of by judges because homosexuals were a class of persons distinct from men and women. However, as employment discrimination doctrine changed and judges understood that sexual harassment and sex-stereotyping were corrosive forms of sex discrimination, courts’ disposition toward sexual orientation claims mutated, too. That mutation yielded a doctrinal anomaly in which

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269 *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (rejecting the theory of sexual harassment because “[t]he attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions”), rev’d, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977) (describing the sexual harassment of a worker as “nothing more than a personal proclivity, peculiarity or mannerism” that did not “deprive[] women of employment opportunities”); Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (“Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice. Its aim is to make careers open to talents irrespective of race or sex. It is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.”), rev’d, 568 F.2d 1044 (3d Cir. 1977).

270 *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 328 (5th Cir. 1978) (discriminating against effeminate men “is not forbidden by Title VII”); Devine v. Lonschein, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) (“At least until that dreadful day when unisex identity of dress and appearance arrives, judicial officers . . . are entitled to some latitude in differentiating between male and female attorneys, within the context of decorous professional behavior and appearance.”); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979) (ruling against female employee terminated for wearing a pantsuit in contravention of company dress code).

judges applied a status-conduct framework to sexual orientation employment discrimination claims while the broader gay rights jurisprudential trend disfavored such an approach.

The Second Circuit and Seventh Circuit were representative of the trend before *Hively* and *Zarda* diverged from it and held sexual orientation discrimination is an actionable subset of sex discrimination in 2017 and 2018, respectively. Decisions like *Hively* and *Zarda* are the first to apply the law of sex discrimination in a way that comprehensively addresses the genesis of sexual orientation bias. As the next Section explores, the triangulation of facial sex discrimination, gender nonconformity/sex-stereotyping theory, and associational discrimination theory under Title VII to recognize sexual orientation discrimination as sex discrimination is a kind of jurisprudential microcosm, reflective of the long-term evolution of the law’s treatment of sexual minorities.

1. Muddling Through Sex Discrimination

In 1984, the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.* ruled on the scope of Title VII’s anti-sex discrimination provision where a transgender airline pilot claimed she was unlawfully discriminated against because of her gender identity.²⁷² Without any substantial analysis, or nuance drawn between gender identity and sexual orientation,²⁷³ the panel ruled in *Ulane* that “homosexuals and transvestites do not enjoy Title VII protection.”²⁷⁴ The *Ulane* court reasoned that the ordinary meaning of sex did not also mean gender identity or sexual orientation because “[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”²⁷⁵ The *Ulane* panel further explained that the “dearth of legislative history” with respect to

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²⁷² *Ulane*, 742 F.2d at 1084.
²⁷³ This conflation of sexual orientation and gender identity is a telling hallmark of how the law connected lesbians, gays, and bisexuals with transgender persons and imposed a rudimentary one-size-fits-all classification that swept in the entire LGBTQ community.
²⁷⁴ *Ulane*, 742 F.2d at 1084.
²⁷⁵ *Id.* at 1085.
Congress’s inclusion of sex among Title VII’s protected classes “strongly reinforces the view that that section means nothing more than its plain language implies.”  

This view of Title VII’s narrow scope was reaffirmed by the Seventh Circuit in a 1997 decision where the panel emphasized “Congress had nothing more than the traditional notion of ‘sex’ in mind when it voted to outlaw sex discrimination, and that discrimination on the basis of sexual orientation and transsexualism, for example, did not fall within the purview of Title VII.”  

In two subsequent cases decided in 2000, the Seventh Circuit affirmed again that Title VII did not afford any protections to covered employees from sexual orientation discrimination. Relying on the dicta in *Ulane*, the panels in *Hamner v. St. Vincent Hospital & Health Care Center* and *Spearman v. Ford Motor Co.* ruled that “harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.” In decisions as late as 2014, the circuit precedent established in *Ulane*, *Hamner*, and *Spearman* that Title VII did not provide a remedy for sexual orientation discrimination was relied upon to block plaintiffs’ claims.  

Numerous efforts to legislatively amend Title VII to overturn decisions like *Ulane* and expressly protect lesbian, gay, bisexual, and transgender persons from employment discrimination failed.

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276 Id.
279 *Hamner*, 224 F.3d at 704; *Spearman*, 231 F.3d at 1084.
280 *Muhammad v. Caterpillar*, Inc., 767 F.3d 694, 697 (7th Cir. 2014); *Hamm v. Weyauwega Milk Prods.*, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (“The protections of Title VII have not been extended, however, to permit claims of harassment based on an individual’s sexual orientation.”), overruled by *Hively*, 853 F.3d 339; *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (“Title VII does not, however, provide for a private right of action based on sexual orientation discrimination.”).
However, in the years since \textit{Ulane}, the Supreme Court transformed Title VII’s sex discrimination doctrine. First, in \textit{Price Waterhouse v. Hopkins}, the Supreme Court ruled an employer’s use of gender expectations in employment decisions is an actionable form of employment discrimination.\footnote{Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).}

The plurality in \textit{Price Waterhouse} reasoned that under Title VII “gender must be irrelevant to employment decisions” and that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”\footnote{Id. at 240, 250.} Thus, employees who demonstrate gender nonconforming characteristics are protected under Title VII.\footnote{Id.}

As the Seventh Circuit ably summarized it, “Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.”\footnote{Doe by Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997).}

In \textit{Price Waterhouse’s} wake, effeminate gay men and masculine lesbians successfully brought sex discrimination claims as gender nonconformity claims.\footnote{See, e.g., Evans v. Georgia Reg’l Hosp., 850 F.3d 1248, 1254–55 (11th Cir. 2017) (holding a lesbian plaintiff with masculine traits could pursue a gender nonconformity claim under Title VII despite circuit precedent foreclosing sexual orientation discrimination claims under Title VII).} Courts were tasked with parsing out whether an
employee was discriminated against because of their sexual orientation or genuinely because they failed to live up to a sex stereotype—and in doing so, imported an unworkable status-conduct analysis into Title VII. One recent example from the Second Circuit shows the difficulty in this task.

In 2000 and 2005, the Second Circuit held in *Simonton v. Runyon* and *Dawson v. Bumble & Bumble* that evidence of sexual orientation discrimination could not sustain a Title VII sex discrimination claim. However, the *Simonton* panel acknowledged that a *Price Waterhouse* sex-stereotyping claim was available to effeminate gay men or masculine lesbians. Thus, while some LGB persons could plausibly claim sex stereotype discrimination under Title VII, *Price Waterhouse* did not “bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” In *Dawson*, a panel affirmed summary judgment for the employer where the plaintiff failed to produce distinguishable evidence that her former employer terminated her employment because she was insufficiently feminine and not because she was a lesbian.287 Under *Simonton* and *Dawson*, LGB plaintiffs’ employment discrimination claims were scrutinized in district courts heavily as judges struggled to parse evidence of sexual orientation discrimination with evidence offered in support of sex-stereotyping.288 The Second Circuit signaled a willingness to ease the rigid compartmentalization that district court judges interpreted *Simonton* and *Dawson* as requiring in *Christiansen v. Omnicom Group, Inc.*289 In *Christiansen*, Matthew Christiansen brought a Title VII claim alleging that he was impermissibly sex-stereotyped. His claim was dismissed because the district court determined his allegations stemmed more from his supervisor’s anti-gay animus than his supervisor’s gender role expectations.


289 Christiansen, 852 F.3d 195.
In his complaint, Christiansen alleged that his supervisor called him “effeminate” around co-workers, described him as “prancing around,” and placed an image of his head on a female body with her legs in the air. Christiansen’s supervisor drew multiple lewd pictures of Christiansen, including one where Christiansen had an erect penis while holding an air pump with bubble caption that said, “I’m so pumped for marriage equality.” Christiansen also claimed that his supervisor said that because he was both gay and effeminate, he likely had AIDS. The message Christiansen’s supervisor communicated to his colleagues, as one coworker interpreted it, was that Christiansen was “a submissive sissy.”

The district court concluded that because Christiansen proffered more allegations tied to his sexual orientation than to his effeminate demeanor, his claim could not be “transform[ed] [into] a claim for discrimination that [Christiansen] plainly interpreted—and the facts support—as stemming from sexual orientation animus into one for sexual stereotyping.” The Second Circuit reversed, holding that although Christiansen might face trouble showing at summary judgment or trial that he was discriminated against because of his failure to live up to gender stereotypes and not because of his sexual orientation, the facts alleged were sufficient to withstand a motion to dismiss. This case highlights the near-impossible task that courts can face in segmenting out allegations arising from an employee’s nonconformity and an employee’s sexual orientation. The Second Circuit described courts’ undertaking as one of “lexical bean counting, comparing the relative frequency of epithets such as ‘ass wipe,’ ‘fag,’ ‘gay,’ ‘queer,’ ‘real man,’ and ‘fem’ to determine whether discrimination is based on sex or sexual orientation.” Of course, this kind of sorting is complicated by the fact that anti-LGB animus is grounded in disgust for gender nonconformity, especially in effeminate men, and that animus is central to understanding the bias against all sexual minorities, even if they individually are masculine men or feminine women. Judge Richard Posner’s concurring

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290 Id. at 198.
291 Id.
292 Id.
293 Id.
295 Christiansen, 852 F.3d at 201.
296 Zarda v. Altitude Express, Inc., 883 F.3d 100, 121 (2d Cir. 2018).
opinion in *Hamm v. Weyauwega Milk Products* criticized this doctrinal quirk as “absurd:”

[T]he law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true—effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism. To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.296

Judge Posner’s concerns were echoed in a concurring opinion authored by Chief Judge Robert Katzmann in *Christiansen*. Judge Katzmann wrote that it is an “exceptionally difficult task [to disaggregate sexual orientation and gender nonconformity claims] in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender.”297

In addition to *Price Waterhouse*, a second important decision from the Supreme Court was handed down in 1998. In *Oncale v. Sundowner Offshore Services*, the Supreme Court held that same-sex harassment was actionable under Title VII, provided the plaintiff could demonstrate that the harassing conduct was motivated “because of sex.”298

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297 *Christiansen*, 852 F.3d at 205–06 (Katzmann, J., concurring).
majority, Justice Antonin Scalia illustrated three scenarios where a plaintiff could sustain a same-sex harassment claim. A plaintiff could proffer “credible evidence that the harasser was homosexual,” evidence they were harassed with “sex-specific and derogatory terms . . . motivated by general hostility to the presence” of men or women in the workplace, or “comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”

In the aftermath of these decisions, the Equal Employment Opportunity Commission (EEOC) issued an agency interpretation of Title VII in 2015 that discrimination against a person because of their sexual orientation is a form of actionable sex discrimination. The EEOC reasoned, “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.” A handful of federal district courts relied on the EEOC’s ruling when denying motions to dismiss sexual orientation discrimination claims under Title VII.

These developments notwithstanding, the circuits were consistent and unanimous in ruling against Title VII sexual orientation discrimination claims. Until the Seventh Circuit allowed Kimberly Hively to proceed with her sexual orientation discrimination claim in 2017, no circuit deviated from the kind of analysis offered in and its progeny. Every circuit held that sexual orientation discrimination claims were not cognizable under Title VII’s existing framework.

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299 Id. at 80–81.
2. The Hively-Zarda Doctrine

In 2017 and 2018, the Seventh Circuit and Second Circuit overturned longstanding precedents foreclosing Title VII sex discrimination claims brought by gay, lesbian, and bisexual employees on the theory that sexual orientation discrimination is a subset of sex discrimination. Contrary to every appellate court to previously rule on the question, the Seventh Circuit sitting en banc in Hively held that Title VII's sex discrimination protections extended to sexual orientation discrimination and embraced three interpretations of sex discrimination to support the majority's holding: textualism, gender nonconformity theory, and associational discrimination theory. In Zarda, a majority of the Second Circuit sitting en banc adopted the associational discrimination theory, but the other two approaches persuaded only a plurality. As the remainder of this Part explains, these theories of sex discrimination gaining traction in current Title VII litigation, taken together, are the law's most comprehensive understanding yet of homophobia as a product of ambivalent sexism.

i. The Text-Based Logic of Sex Discrimination

Under a straightforward textual application of Title VII, a plaintiff's sex is changed to isolate whether an employer making an adverse employment decision took the plaintiff's protected characteristic into consideration. Thus, if an employer mistreats a female worker because she has an intimate relationship with another woman, but the employer would not mistreat the employee if she had a substantially similar relationship with a man, the causal link of that discrimination is the employee's sex. Kimberly Hively argued that if she were a man in a

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303 See cases cited supra note 302.

304 A similar application of Title VII was used in Hall v. BNSF Railway Co., No. C13–2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), where an employer denied healthcare benefits to married same-sex couples otherwise provided to married opposite-sex couples. Id. at *3. The company moved to dismiss the Title VII sex discrimination claim, arguing that the thrust of the plaintiff’s case was really about sexual orientation discrimination, which is not expressly proscribed by federal law. Id. at *2. The court denied the motion to dismiss, noting that “[p]laintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males.” Id. at *3.
relationship with a woman, she would not have been denied a promotion to a full-time position or a contract extension.\textsuperscript{305} The court held that Hively’s argument “describe[d] paradigmatic sex discrimination” because if her allegations were true, her employer “disadvantag[ed] her because she is a woman.”\textsuperscript{306} A facial application of sex discrimination is more straightforward, and less enlightening on the question of whether homophobia is sexism, than the two additional theories, gender nonconformity and associational discrimination.

ii. Hostile Sexism, Sex Stereotypes, and Gender Nonconformity Doctrine

Federal courts have long cautioned against viewing homosexuality as an all-purpose, nonconforming characteristic under \textit{Price Waterhouse} to impermissibly bootstrap sexual orientation discrimination protections into Title VII.\textsuperscript{307} However, a number of judges have recently rejected those bootstrapping concerns. For example, Chief Judge Katzmann’s concurrence in the recent Second Circuit sexual orientation Title VII case, \textit{Christiansen},\textsuperscript{308} reasoned “that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.”\textsuperscript{309} Judge Katzmann’s opinion reflects

\textsuperscript{305} Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017).
\textsuperscript{306} Id. (emphasis omitted).
\textsuperscript{307} See, e.g., Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) ("The Court in \textit{Price Waterhouse} implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."). In \textit{Evans v. Georgia Regional Hospital}, Judge William Pryor wrote a concurring opinion in which he proffered that because "[t]he doctrine of gender nonconformity is, and always has been, behavior based," not all sexual orientation discrimination claims can qualify as nonconformity claims while admitting that "[d]eviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation." Evans v. Ga. Reg’l Hosp., 850 F.3d 1248, 1258–60 (11th Cir. 2017) (Pryor, J., concurring).
\textsuperscript{308} 852 F.3d 195, 201–07 (2d Cir. 2017) (Katzmann, J., concurring).
\textsuperscript{309} Id. at 206. Other courts have echoed this idea. See Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 705 (7th Cir. 2016) ("[A]lmost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity.")
a view that sexual orientation discrimination is sex discrimination because “homosexuality is the ultimate gender nonconformity, the prototypical sex-stereotyping animus.”

The Hively court echoed this line of thinking, reasoning that social expectations that men should be sexually attracted to women and women should be sexually attracted to men inform individuals’ bias against gay, lesbian, and bisexual persons. As a consequence, sexual orientation discrimination is fundamentally indistinguishable from actionable sex discrimination arising from other gendered workplace expectations. The court explained:

Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.

Judge Sykes forcefully rejected linking sex stereotypes with non-heterosexual sexual orientations. Indeed, Sykes’s dissent criticized the majority approach as wholly detached from sex-discrimination altogether. For Sykes, “heterosexuality is not a female stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting

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311  See Zarda v. Altitude Express, Inc., 883 F.3d 100, 123 (2d Cir. 2018) (plurality) (“[A]n employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination . . . .”).
312  Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 346 (7th Cir. 2017).
that his female and male employees match a stereotype specific to their sex.” The *Hively* dissent rebuffed the broad expansion of gender nonconformity doctrine by emphasizing that anti-gay animus is projected on both men and women while overlooking how anti-LGB animus works hand-in-hand with female-specific stereotypes and male-specific stereotypes. For this reason, the theory of ambivalent sexism allays the *Hively* dissent’s exceedingly granular reproach to the majority.

Another critique of the *Hively* approach to gender nonconformity doctrine was levied by Judge William Pryor, who panned the broad application of nonconformity theory in a noteworthy concurring opinion that underscored a status-conduct dichotomy in *Evans v. Georgia Regional Hospital*. Judge Pryor argued that since “[t]he doctrine of gender nonconformity is, and always has been, behavior based,” sexual orientation discrimination claims do not necessarily qualify as nonconformity because LGB persons do not inherently violate gender norms. Thus, according to Pryor’s theory, the animus must be directed at the individual manifestation of nonconforming traits to constitute sex discrimination, which leaves no room for examining the root cause of the animus directed at the entire class of sexual minorities. Indeed, the opinion outright ignores the history of how sex-specific nonconforming traits became a heuristic for identifying members of the entire class.

In Judge Pryor’s view, the more sweeping application of gender nonconformity theory is additionally improper because there is no common social experience shared by non-heterosexuals. Pryor suggested that gay, lesbian, and bisexual persons can either adopt “the gay social identity” on the one hand or, on the other hand, choose to pursue a “celibate lifestyle” or “to enter mixed-orientation marriages” with members of the opposite sex. The *Evans* concurrence is telling in that it makes an equivalence not between heterosexual marriages and same-sex relationships, but rather heterosexual marriages and the “gay social identity.” Ironically, in rejecting the broad application of gender nonconformity theory, the concurrence lays bare the ambivalent sexist roots of anti-gay animus by juxtaposing queer cultural identities and heterosexual marriages.

313 Id. at 370 (Sykes, J., dissenting).
315 Id. at 1260.
316 Id.
In contrast, the *Hively* court’s recognition that all sexual orientation discrimination is a product of animus rooted in opposition to gender nonconformity is a stealth doctrinal acknowledgement of how hostile sexism and Progressive Era descriptive sex stereotypes underpin homophobia. In rejecting the rigid status-conduct division that allowed for some LGB workers to bring discrimination claims if they were effeminate men or masculine women, the *Hively* court adopted a theory of sex discrimination that accurately reflects the law’s evolution wherein non-heterosexuals have long been lumped together as a group by outsiders who used cues of gender nonconformity to identify and target non-heterosexuals for discrimination.317 Standing apart from those who assess forms of sex discrimination in piecemeal, the *Hively* gender nonconformity analysis is a de facto recognition of the hostile sexism that structurally polices sexuality and is the root cause of anti-LGBTQ animus.

iii. Associational Theory and the Benevolent Sexism of Exclusion

Equally insightful is the *Hively* and *Zarda* courts’ adoption of an associational discrimination theory to elucidate why sexual orientation discrimination is sex discrimination. When the *Hively* court examined whether an associational theory of discrimination could support a sexual orientation discrimination claim under Title VII’s existing framework, the court turned to associational claims in the race context, noting the Eleventh Circuit’s 1988 decision in *Parr v. Woodmen of the World Life Insurance Co.*318

Don Parr, a white man, applied for an insurance salesman position but was not hired after the company, which did not employ or sell insurance to African-Americans, became aware he was in an interracial marriage.319 The district court granted the company’s motion to dismiss, concluding Parr was not discriminated against because of his race.320 The circuit court reversed on appeal, holding that:

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317 This legal anachronism is ironic given how the law under Title VII generally protects the traits long used for nefarious purposes by state actors to discriminate against sexual minorities, while failing to appreciate that gender nonconforming behavior undergirded the animus and state-sponsored discrimination against non-heterosexual persons as a whole class.

318 791 F.2d 888 (11th Cir. 1986).

319 Id. at 889.

320 Id.
Title VII proscribes race-conscious discriminatory practices. It would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse’s race, the plaintiff would still not have been hired.321

The *Hively* Court reasoned that, like in *Parr*, if an employer discriminated against an employee because they are in an interracial relationship, the employer’s conduct would be unlawful because the employer took race into account. Extending that logic to Hively’s claim, the court reasoned, “If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.”322 As a result,

to the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the plaintiff would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.323

The *Hively* majority referenced *Obergefell* but used it as an example of broader trends in the law rather than what import, if any, it had for the associational theory of discrimination.324 The lead opinion in *Zarda* similarly failed to invoke *Obergefell* in its associational analysis. The judges did, however, gesture to “research suggesting that sexual orientation discrimination has deep misogynistic roots” but declined to explore the misogynistic foundations of institutionalized homophobia

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321 *Id.* at 892.
323 *Id.*
324 *Id.* at 342 (“Especially since the Supreme Court’s recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, bizarre results ensue from the current regime. As the panel noted, it creates a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.” (internal quotations and citations omitted)).
because “Title VII’s protection against sex discrimination is [not] limited to discrimination motivated by what would colloquially be described as sexism.”

However, the Zarda ruling, in tandem with Obergefell’s equality-reinforcing properties, works against sexist justifications for excluding same-sex couples from marriage by placing same-sex relationships on equal legal footing as opposite-sex relationships under Title VII. In this sense, the associational theory of discrimination in the sexual orientation context should be understood as a protection against the homophobic consequences that flow from ambivalent sexist ideology—it is a rejection of employment calculations stemming from hostile sexist stereotypes about LGBTQ gender nonconformity along with those interwoven benevolent sexist rationales used to justify same-sex couples’ exclusion from family recognition pre-Obergefell.

CONCLUSION

While same-sex intimacies occurred in agrarian America, institutionalized homophobia was absent. However, it materialized once a modern regulatory state seeking to curb threats to masculinity’s dominance came into being. As urbanization and industrialization made patriarchal norms vulnerable with the empowerment of women and the rise of a conspicuous LGBTQ milieu that called attention to gender fluidity, the state cracked down on the LGBTQ community with aggressive policing and new legal restrictions rooted in hostile sexism.

Acutely alarming for the defenders of male supremacy was the idea that a man could sexually submit to another man by assuming a position “reserved” for women. Had that gender role reversal gained social acceptance, it would have destabilized the hostile, sexist, patriarchal principle that women were innately weaker. The ensuing regulation of sexuality to hedge against the breakdown of strict gender roles penalized gender nonconformity by targeting effeminate men and masculine women. In doing so, the state helped impose a “homosexual classification” that ignored gender variance within the community and channeled animus toward the entire class through the lens of nonconforming stereotypes.

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325 Zarda v. Altitude Express, Inc., 883 F.3d 100, 126 (2d Cir. 2018).
Over time, this social construction of sexuality permeated into legal doctrine. Anti-LGBTQ sex stereotypes formed the basis of the status-conduct dichotomy long used by the state and anti-LGBTQ social crusaders to suppress sexual minority rights. That doctrine disproportionately emphasized a subgroup of persons exhibiting gender-nonconforming traits with the aim to deny the entire LGBTQ community rights. Thus, the law created a slipshod grouping of anomalous persons that outsiders could not easily categorize as purely masculine or feminine and employed sex stereotypes as tools of classification. The law ignored the rich diversity of gender expression and kinds of same-sex interpersonal relationships within the LGBTQ community and substituted that for a brute label to more effectively achieve discriminatory ends. This point is evident in recent litigation where the hostile sexism used to create anti-gay tropes furthered the benevolent sexist rationales to exclude same-sex couples from equal recognition in family law.

But what should courts make of all this? The triangulation of theories that have emerged in employment discrimination cases articulating why sexual orientation discrimination is a subset of sex discrimination—facial, gender nonconformity, and association—is the closest attempt the law has made to appreciate the complex socio-legal development of anti-LGBTQ animus. Taken together, the theories stand for the idea that homophobia and state-backed anti-gay bias has been the byproduct of ambivalent sexism, the simultaneous use of hostile acts to suppress gender nonconformity and paternalistic acts of exclusion to push LGBTQ people out of what represents acceptable family life.

The relationship between homophobia and sexism is multifaceted, but that they are ideologies yoked together is unmistakable. Courts should take care to not engage in the kind of ahistorical calisthenics necessary to disaggregate sex discrimination and forms of sexuality discrimination. As a matter of both historical practice and contemporary reality, LGBTQ discrimination has always been about sex-stereotyping. Courts should treat LGBTQ discrimination no differently than any other form of sex discrimination—they are the same product just marketed with different labels.