

NOTES & COMMENTS

“SEX” IS MESSY (AND ALWAYS HAS BEEN): A TEXTUALIST ARGUMENT FOR APPLICATION OF TITLE VII TO SEXUAL ORIENTATION DISCRIMINATION

by
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Three recent cases have created a circuit split as to whether Title VII’s prohibition on discrimination “because of . . . sex” applies to sexual orientation discrimination, priming this issue for Supreme Court review. Events suggesting a textualist turn on the Supreme Court mean the advocate must consider whether a textualist argument can be made for application of Title VII to sexual orientation discrimination. Treatment of the topic of sexual orientation by the medical community, the commercial film industry, and the mainstream news media in the 1960s is examined. It is argued that treatment of the topic of sexual orientation when Title VII was enacted shows that the concept we now refer to as “sexual orientation” was implicit in the concept of “sex” as used in Title VII.

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INTRODUCTION

A textualist analysis of the meaning of “sex” at the time Title VII was enacted includes what we would now refer to as “sexual orientation.” Title VII of the Civil Rights Act of 1964 makes it unlawful for subject employers to discriminate on the basis of a person’s “race, color, religion, sex, or national origin.”¹ When interpreting the statute, courts have almost uniformly held that Title VII’s prohibition on discrimination “because of . . . sex”² does not apply to discrimination on the basis of sexual orientation.³ However, three recent cases have created a circuit split, priming this issue for review by the Supreme Court.⁴

In *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit sitting *en banc* held that sexual orientation discrimination is actionable under Title VII.⁵ The plaintiff, Kimberly Hively, is openly homosexual.⁶ Ivy Tech Community College employed Ms. Hively as a part-time adjunct

¹ 42 U.S.C. § 2000e-2(a).

² *Id.*

³ See, e.g., Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U. J. GENDER & L. 333, 335 (1998) (“Federal courts have generally been unwilling to provide protection from sexual orientation discrimination under Title VII.”).

⁴ Ariane de Vogue, *LGBT Employment Cases on Road to Supreme Court*, CNN (Sept. 26, 2017), <http://www.cnn.com/2017/09/26/politics/lgbt-employment-case/index.html>.

⁵ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (*en banc*).

⁶ *Id.*

professor.⁷ From 2009 to 2014, Ms. Hively “applied for at least six full-time positions,” but was not successful in obtaining any of them.⁸ In July 2014, Ms. Hively’s “part-time contract was not renewed.”⁹ Believing her sexual orientation was a factor in Ivy Tech’s employment decisions, Ms. Hively filed a charge with the EEOC alleging she was discriminated against because of her sexual orientation.¹⁰ Bound by that circuit’s precedent, the appellate court affirmed the district court’s dismissal of the case for failure to state a claim.¹¹ After a rehearing *en banc*, the Seventh Circuit overturned that circuit’s Title VII precedent.¹² Ivy Tech opted not to appeal the decision.¹³

Similarly, in *Zarda v. Altitude Express*, the Second Circuit sitting *en banc* held that sexual orientation discrimination is actionable under Title VII.¹⁴ Altitude Express employed Donald Zarda as a skydiving instructor.¹⁵ In 2010, a couple, Rossana Orellana and David Kengle, purchased tandem skydives in which the instructor is “strapped hip-to-hip and shoulder-to-shoulder with clients.”¹⁶ Mr. Zarda was Ms. Orellana’s instructor.¹⁷ Due to the physical contact involved in tandem skydives, Mr. Zarda had a practice of informing female clients that he was homosexual.¹⁸ Following the dive, Ms. Orellana “alleged that [Mr.] Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior.”¹⁹ Mr. Kengle reported Mr. Zarda’s alleged conduct to Altitude Express.²⁰ Mr. Zarda’s employment was terminated shortly thereafter.²¹ Believing his sexual orientation was the reason for his termination, Mr. Zarda filed a charge with the EEOC alleging he was discriminated against because of his sexual orientation.²² Bound by that circuit’s precedent, the appellate court affirmed the district court’s grant of summary judgment in favor of Altitude Express.²³ After a rehearing *en banc*, the Second Circuit over-

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 342–43; *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 830 F.3d 698, 718 (7th Cir. 2016).

¹² *Hively*, 853 F.3d at 341, 351–52.

¹³ De Vogue, *supra* note 4.

¹⁴ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (*en banc*).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 109.

²³ *Id.*

turned that circuit's Title VII precedent.²⁴

In a distinguishing case, *Evans v. Georgia Regional Hospital*, the Eleventh Circuit held that sexual orientation discrimination is not actionable under Title VII.²⁵ Georgia Regional Hospital employed Jameka Evans as a security officer.²⁶ Ms. Evans is homosexual.²⁷ Ms. Evans did not openly discuss her sexual orientation at work, but she did not present herself in a "traditional woman[ly] manner."²⁸ Ms. Evans alleged she was subjected to a hostile work environment by the security chief and senior human resources director because of her sexual orientation, failure to conform to gender stereotypes, and knowledge of the security chief's wrongdoing in the department.²⁹ The district court dismissed all of Ms. Evans's claims with prejudice and without leave to amend.³⁰ The Eleventh Circuit denied rehearing *en banc* and the Supreme Court denied *certiorari*.³¹

These cases create a circuit split as to whether Title VII's prohibition of discrimination "because of . . . sex" extends to sexual orientation discrimination. This circuit split comes at a critical moment in the history of the Supreme Court in light of Justice Anthony Kennedy's retirement.³² President Trump's first appointment to the Supreme Court, Neil Gorsuch, is an "ardent textualist" in the style of the late Justice Antonin Scalia.³³ Brett Kavanaugh, President Trump's most recent appointee, similarly ascribes to a textualist approach to the interpretation of legal texts.³⁴ Giv-

²⁴ *Id.* at 110.

²⁵ *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

²⁶ *Id.* at 1251.

²⁷ *Id.*

²⁸ *Id.* (internal quotation marks omitted).

²⁹ *Id.*

³⁰ *Id.* at 1253.

³¹ *Evans v. Georgia Reg'l Hosp.*, No. 17-370, 2017 WL 4012214, at *1 (U.S. Dec. 11, 2017).

³² Nina Totenberg, *Supreme Court to Lose Its Swing Voter: Justice Anthony Kennedy to Retire*, NPR (June 27, 2018), <https://www.npr.org/2018/06/27/533997482/supreme-court-to-lose-its-swing-voter-justice-anthony-kennedy-to-retire>.

³³ Carrie Johnson, *Who is Neil Gorsuch, Trump's First Pick for the Supreme Court?*, NPR (Jan. 31, 2017), <http://www.npr.org/2017/01/31/511850519/who-is-neil-gorsuch-trumps-first-pick-for-the-supreme-court> ("Like Justice Antonin Scalia, [Gorsuch] . . . considers himself to be an originalist He is an ardent textualist (like Scalia).").

³⁴ Domenico Montanaro, *Who Is Brett Kavanaugh, President Trump's Pick for the Supreme Court?*, NPR (July 9, 2018), <https://www.npr.org/2018/07/09/626164904/who-is-brett-kavanaugh-president-trumps-pick-for-the-supreme-court> ("Kavanaugh is considered a pragmatic but conservative judge, who believes in textualism and originalism."); *see also* Scott Horsley, *Trump Taps Brett Kavanaugh As His 2nd Supreme Court Pick*, NPR (July 9, 2018), <https://www.npr.org/2018/07/09/624727227/trump-to-name-his-second-supreme-court-pick> (quoting Kavanaugh on his judicial philosophy, "A judge must be independent and must interpret the law, not make the

en this state of affairs, and the increasing trend toward textualism in general,³⁵ it is imperative for advocates to consider a textualist argument for Title VII’s application to sexual orientation discrimination.

This Note will argue that textualist analysis of Title VII’s prohibition of discrimination “because of . . . sex” includes sexual orientation discrimination. This Note proceeds in three parts. Part I examines the textualist approach to statutory interpretation. Part II provides an overview of the major arguments for application of Title VII to sexual orientation discrimination and discusses why these are unlikely to be persuasive to a textualist. Part III argues that Title VII extends to sexual orientation discrimination because at the time it was enacted, sexual orientation was implicit in the concept “sex.”

I. INTRODUCTION TO TEXTUALISM AS A METHOD OF STATUTORY INTERPRETATION

The textualist’s aim is to understand and apply legal language consistent with the meaning that language had at the time it was enacted. The late Justice Antonin Scalia adopted and popularized textualism as a method of legal interpretation.³⁶ Textualism is characterized by “exclusive reliance on text when interpreting text.”³⁷ In the case of statutory interpretation, the textualist’s aim is to understand and apply the statutory language consistent with the meaning the language had at the time it was enacted.³⁸ The textualist specifically eschews the use of legislative history when interpreting legal texts, as well as consideration of policy argu-

law. A judge must interpret statutes as written . . .”).

³⁵ See *In Scalia Lecture, Kagan Discusses Statutory Interpretation*, HARVARD LAW TODAY (Nov. 25, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> (begin video playback at 8:29) (“[W]e’re all textualists now.”).

³⁶ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (Amy Gutmann ed., 1997) [hereinafter *INTERPRETATION*]; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxvii (2012) [hereinafter *READING LAW*]. It should be noted that textualism is only one of two dominant theories of originalism. The other, advocated by Justice Breyer, relies upon and emphasizes the importance of legislative history in statutory interpretation. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845–46 (1992). However, due to the particular state of affairs noted in the introduction, as well as the ascendancy of textualism in general, this Note will focus exclusively on making a textualist argument. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990) (Explaining that the Supreme Court recently “has been much more willing to ignore legislative history, has been slightly more reluctant to deviate from the apparent meaning of the statutory text, and has relied more heavily than before on structural arguments and canons of statutory interpretation.”).

³⁷ *READING LAW*, *supra* note 36, at 16.

³⁸ *Id.*

ments as to what the law “should” be.³⁹

Justice Scalia viewed textualism as a solution to judicial overreach⁴⁰ and as the method of interpretation most appropriate to the new statutory law regime. Justice Scalia concedes that in a common law system, it is the prerogative of judges to make, as well as apply law.⁴¹ However, “[w]e live in an age of legislation, and most new law is statutory law.”⁴² In this new regime, it is Congress’s prerogative to make statutory law, and the court’s role is to apply that law. “In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge’s principal function is to give those texts their fair meaning.”⁴³ The court’s role in a statutory law regime is limited to applying the law because the separation of powers under the Constitution assigned to Congress, and not the judiciary, the power of drafting and revising legislation.⁴⁴ Thus, the textualist believes that when a court imposes a meaning on a statutory text different from what the text itself says, that court has gone beyond its constitutional authority. Such action by “unelected judges” is “simply not compatible with democratic theory.”⁴⁵

Ultimately, the textualist’s aim is to determine the “common” or “ordinary” meaning of the words of the statute at issue as of the time the statute was enacted.⁴⁶ The textualist’s exclusive reliance on the text limits the “permissible meanings” of the statute to a finite number of possibilities.⁴⁷ Justice Scalia referred to the method of determining the correct meaning of the text as the “fair reading” method.⁴⁸ The central principle

³⁹ *Id.* at xxvii.

⁴⁰ *Id.* at xxviii; *see also*, King v. Burwell, 135 S. Ct. 2480, 2503 (2015) (Scalia, J., dissenting) (“Only by concentrating on the law’s terms can a judge hope to uncover the scheme *of the statute*, rather than some other scheme that the judge thinks desirable.”) (emphasis in original).

⁴¹ INTERPRETATION, *supra* note 36, at 6.

⁴² *Id.* at 13.

⁴³ READING LAW, *supra* note 36, at 3.

⁴⁴ *Id.* at 24 (“[O]ur system of separated powers never gave courts a part in either the drafting or the revision of legislation.”).

⁴⁵ INTERPRETATION, *supra* note 36, at 22; *see also* READING LAW, *supra* note 36, at 3 (“It is unsurprising that the judges who used to be the lawgivers took some liberties with the statutes that began to supplant their handiwork—adopting, for example, a rule that statutes in derogation of the common law (judge-made law) were to be narrowly construed and rules for filling judicially perceived ‘gaps’ in statutes that had less to do with perceived meaning than with the judges’ notions of public policy. Such distortion of texts that have been adopted by the people’s elected representatives is undemocratic.”).

⁴⁶ READING LAW, *supra* note 36, at 37, 69.

⁴⁷ *Id.* at 31–33; *see also* INTERPRETATION, *supra* note 36, at 24 (“Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”).

⁴⁸ READING LAW, *supra* note 36, at 33.

of the fair reading method is that “the application of a governing text [i.e., statute] to given facts [is to be determined] on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.”⁴⁹

In order to determine the meaning of the words of a statute at the time the statute was enacted, Justice Scalia encouraged consultation of “near-contemporaneous,” “scholarly” dictionaries.⁵⁰ The lexicographers who compile dictionaries study “actual English usage” in determining the “core meaning” of words.⁵¹ For this reason, contemporaneous scholarly dictionaries can be a useful shortcut for determining the meaning of a word at a particular point in time.

The correct meaning of a statute is to be identified by considering the context of the law and of the word itself.⁵² Justice Scalia recognized that words often have multiple meanings.⁵³ However, he believed that a “thoroughly fluent reader” can usually determine which of several meanings is the correct one from context.⁵⁴ The context of the law includes the statute’s purpose, which is to be gathered from the text itself.⁵⁵ The context of the word includes its “historical associations acquired from recurrent patterns of past usage” and its “immediate syntactic setting.”⁵⁶

Determining the meaning a word “conveyed to reasonable people at the time [it was] written”⁵⁷ cannot always be achieved by simply consulting a dictionary. Indeed, Justice Scalia suggests that even when confronted with a relatively unremarkable word, a judge will ultimately not rely upon a dictionary definition.⁵⁸ Dictionaries are only a tool to be used by the knowledgeable legal practitioner.⁵⁹ To assist the legal practitioner in the use of dictionaries, Justice Scalia outlined several “primary principles.”⁶⁰ These include:

A dictionary definition states the core meanings of a term. It cannot

⁴⁹ *Id.*

⁵⁰ *Id.* at 36, 72, 415. For lists of dictionaries Justice Scalia found most authoritative for certain periods of time *see id.* at 415–24.

⁵¹ *Id.* at 36–37.

⁵² *Id.* at 33. Justice Scalia believed that “most interpretive questions have *a* right answer.” *Id.* at 6 (emphasis added).

⁵³ *Id.* at 70.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 33.

⁵⁷ *Id.* at 16.

⁵⁸ *Id.* at 36–37 (considering the meaning of “vehicle” in an example ordinance that states: “[n]o person may bring a vehicle into the park” and ultimately constructing his own definition because the dictionary definitions do not “seem right”).

⁵⁹ *Id.* at 418.

⁶⁰ *Id.* at 418–19.

delineate the periphery.

Because common words typically have more than one meaning, [the legal practitioner] must use the context in which a given word appears to determine its aptest, most likely sense.

[The legal practitioner] must consult the prefatory material to understand the principles on which the dictionary has been assembled. . . . [For example,] [a]lthough many people assume that the first sense listed in a dictionary is the “main” sense, that is often quite untrue

Dictionaries tend to lag behind linguistic realities⁶¹

Thus, determining the ordinary meaning of a word can require a more sophisticated “semantic analysis” of the word and its “historical associations acquired from recurrent patterns of past usage.”⁶²

In sum, the textualist’s aim is to interpret and apply statutory text according to the common meaning it had at the time the law was enacted.⁶³ That is, the textualist attempts to identify the meaning words “conveyed to reasonable people at the time they were written.”⁶⁴ Scholarly, near-contemporaneous dictionaries can be helpful. However, words often have multiple meanings. In determining which meaning is the correct one, a legal practitioner must rely upon the statute’s purpose, and the word’s historical and semantic context. Thus, while dictionaries can be a helpful shortcut, their usefulness is limited, and further linguistic study may be necessary to determine the meaning the words conveyed to reasonable people at the time they were written.

To return to the question at hand, adherents to the textualist method typically take the position that Title VII’s prohibition on discrimination “because . . . of sex” does not extend to sexual orientation discrimination. This position is exemplified in Judge Sykes’ dissent in *Hively*. Citing several dictionaries, Judge Sykes wrote:

In common, ordinary usage in 1964—and now, for that matter—the word “sex” means biologically *male* or *female*; it does not also refer to sexual orientation. To a fluent speaker of the English language—then and now—the ordinary meaning of the word “sex” does not fairly include the concept of “sexual orientation.” The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning.⁶⁵

The challenge textualism poses, then, is whether advocates can ac-

⁶¹ *Id.*

⁶² *Id.* at 33, 418.

⁶³ *Id.* at 16.

⁶⁴ *Id.*

⁶⁵ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (emphasis in original; citations omitted).

cept the textualist’s position that “sex” in 1964 meant “biologically male or female” and also persuade the textualist that in 1964 “sex” fairly included the concept we now refer to as “sexual orientation.”

II. MAJOR ARGUMENTS FOR APPLICATION OF TITLE VII TO SEXUAL ORIENTATION DISCRIMINATION

The major arguments for application of Title VII’s prohibition on discrimination “because of . . . sex” to sexual orientation discrimination reject the textualist method and, for that reason, do not attempt to meet the textualist challenge. Each, implicitly or explicitly, begins with the premise that even if “sex” meant “biologically male or female” in 1964, Title VII should apply to sexual orientation discrimination because we understand now that sexual orientation discrimination and sex discrimination are importantly related. However, this line of reasoning is simply not persuasive to a textualist.⁶⁶

The major arguments can be grouped into four categories, including the “comparable evils” argument, the comparative argument, the associational argument, and the feminist argument. The “comparable evils” argument focuses on statutory interpretation, whereas the other arguments are substantive in nature. Each of these arguments was employed in the majority’s opinion in *Hively*.⁶⁷ This section will review each of these in turn and demonstrate that these arguments are unlikely to be persuasive to a textualist.

A. The “comparable evils” argument regarding statutory interpretation

The “comparable evils” argument concerns statutory interpretation and rejects the textualist premise that the words of a statute constrain its meaning and application. Instead, advocates who employ the “comparable evils” argument argue that Title VII should be applied to sexual orientation discrimination because statutory interpretation is not con-

⁶⁶ This Note will not focus on arguments regarding Title VII’s legislative history because of this Note’s exclusive focus on textualism. However, there is some interesting and well-done scholarship dealing with this topic. See CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN’S ISSUES, 1945–1968 (1989) (examining the legislative history surrounding the inclusion of “sex” in Title VII); Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1313–14 (2012) (examining the legislative history of Title VII, and the progression of sex discrimination jurisprudence, arguing that the understanding of sex discrimination as resting on biological sex was a later development); see generally Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409 (2008) (examining the legislative history surrounding the inclusion of “sex” in Title VII, as well as the development and implications of the claim that it was added to sabotage the bill).

⁶⁷ *Hively*, 853 F.3d at 345, 347, 354–55, 356.

strained by the primary “evil” that motivated it.⁶⁸ Rather, a statute may be extended to “comparable evils,” as determined by the court. Thus, because sexual orientation discrimination is importantly related to sex discrimination, Title VII’s prohibition of discrimination “because of . . . sex” should apply to sexual orientation discrimination.

The “comparable evils” argument overlooks the role of textualism in the case in which the phrase “comparable evils” originated. The phrase originated in Justice Scalia’s opinion in *Oncale v. Sundowner Offshore Services, Inc.*⁶⁹ In *Oncale*, the Supreme Court held that Title VII’s prohibition of discrimination “because . . . of sex” extended to sexual harassment “when the harasser and the harassed employee are of the same sex.”⁷⁰ Mr. Oncale worked as part of an all-male crew for Sundowner Offshore Services on an oil platform in the Gulf of Mexico.⁷¹ During his employment, Mr. Oncale was “forcibly subjected to sex-related, humiliating actions” including physical assault “in a sexual manner” and threat of rape.⁷² Writing for a unanimous Court, Justice Scalia famously wrote:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because . . . of sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.⁷³

The *Oncale* Court reasoned that “nothing in Title VII necessarily bars a claim of [sex] discrimination . . . merely because the plaintiff and the defendant . . . are of the same sex” and, thus, that Mr. Oncale had stated a claim for sex discrimination under Title VII.⁷⁴

The *Hively* majority quoted this language favorably, construing it to stand for the proposition that application of Title VII’s prohibition on sex discrimination is not constrained by the principal evil that motivated

⁶⁸ *Id.* at 356.

⁶⁹ *Oncale v. Sundowner Offshore Servs, Inc., et al.*, 523 U.S. 75, 79 (1998).

⁷⁰ *Id.* at 76.

⁷¹ *Id.* at 77.

⁷² *Id.*

⁷³ *Id.* at 79–80.

⁷⁴ *Id.* at 79.

Congress in enacting the statute.⁷⁵ The *Hively* majority continued by noting that courts have determined that sex discrimination includes, among other things, sexual harassment, discrimination based on actuarial assumptions, failure to conform to gender stereotypes, and—now—sexual orientation discrimination.⁷⁶ Thus, concludes the *Hively* majority, because sexual orientation discrimination is a form of sex discrimination,⁷⁷ it is a “comparable evil” and, thereby, is prohibited by Title VII’s prohibition on discrimination “because . . . of sex.”⁷⁸ Unfortunately, this argument suffers from what I will refer to as “*Oncale* optimism,” by which I mean the tendency to interpret the “comparable evils” comment to loosen the bounds on statutory interpretation more than it does.⁷⁹

The *Oncale* Court’s conclusion that Title VII extended to male-on-male sexual harassment did not turn on the concept of “sex discrimination,” but rather on application of textualist principles. Justice Scalia discusses the *Oncale* opinion in the chapter of *Reading Law* concerning general terms, or category words. “Without some indication to the contrary, general words . . . are to be accorded their full and fair scope.”⁸⁰ That is, general terms should not be given a narrow reading in the absence of limiting language. Expanding on this idea, Justice Scalia says, quoting *Oncale*, that the “conclusive response” to one who argues for giving general terms a narrow reading despite the absence of limiting language is

⁷⁵ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 356 (7th Cir. 2017) (en banc); see also *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *9 (July 16, 2015) (“Congress may not have envisioned the application of Title VII to these situations. But . . . ‘statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.’”).

⁷⁶ *Hively*, 853 F.3d at 345.

⁷⁷ This proposition, of course, requires a substantive argument for the premise that sexual orientation is a form of sex discrimination. Such arguments will be addressed in the next subsection *infra*.

⁷⁸ *Hively*, 853 F.3d at 344.

⁷⁹ For other examples of “*Oncale* optimism” see Matthew W. Green, Jr., *Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. GENDER, RACE & JUST. 1, 33 (2017) (“*Oncale* established that sexual orientation discrimination could also be actionable under Title VII regardless of what Congress may have envisioned in the 1960s as long as such discrimination is discrimination because of sex.”); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMPLE POL. & C.R. L. REV. 573, 642 (2008) (“[T]he best evidence indicating that Justice[] Scalia . . . would read Title VII[’s] [’]sex[’] to include both biological attributes and gender attributes [as opposed to just biological attributes] is *Oncale*. . . [which] explicitly recognize[d] the idea that [’]sex[’] in Title VII goes beyond the ideas that legislators had in 1964.”).

⁸⁰ READING LAW, *supra* note 36, at 101.

that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁸¹ Justice Scalia goes on to discuss the *Oncale* opinion:

And just as there is no textual basis for limiting its protections to women, the Court found “no justification in the statutory language or [its] precedent for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.” The Court acknowledged that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.” But *the statutory prohibition was broadly worded.*⁸²

That is, the *Oncale* opinion did not turn on the similarity between male-on-male sexual harassment and sex discrimination. Rather, the *Oncale* opinion turned on the language of the statute.

The *Oncale* Court held that Title VII’s prohibition on sex discrimination extends to male-on-male sexual harassment because the text of the statute requires this broader reading. The argument encapsulated in the “comparable evils” comment, then, is as follows: “Sex” is a general term that refers to men and women.⁸³ Because there is no language in the statute limiting the scope of “sex,” “Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women.”⁸⁴ Since the statutory language does not bar claims where the harasser and the harassed are of the same sex, Title VII also applies to male-on-male sexual harassment.

The “comparable evils” comment is part of the *Oncale* Court’s application of textualist principles to the text of Title VII. As such, the advocate cannot meet the textualist challenge by invoking the “comparable evils” comment in the *Oncale* opinion because it is itself an application of the textualist approach to statutory interpretation. Furthermore, the “comparable evils” argument is inapposite as a reply to the textualist challenge because it does not amount to an argument that in 1964 “sex” fairly included the concept of sexual orientation.

B. Substantive arguments that sexual orientation discrimination is sex discrimination

Advocates have developed several arguments for the substantive proposition that sexual orientation discrimination is a form of sex discrimination. Whereas the “comparable evils” argument concerns the extent to which statutory interpretation is constrained by the principal evil

⁸¹ *Id.* at 103–04.

⁸² *Id.* at 104 (emphasis added).

⁸³ *Id.*; *Oncale v. Sundowner Offshore Servs, Inc., et al.*, 523 U.S. 75, 78 (1998).

⁸⁴ *Oncale*, 523 U.S. at 78.

that motivated the statute, these arguments consider the nature of sex discrimination. Advocates, like the *Hively* majority, employ these arguments to the effect that Title VII prohibits sex discrimination, sexual orientation discrimination is a form of sex discrimination and, thus, Title VII prohibits sexual orientation discrimination. This section presents each of these arguments in turn and concludes by showing that these arguments are unlikely to be persuasive to a textualist.

1. *The comparative argument*

The comparative argument⁸⁵ compares two individuals who differ only as to their sex and, if one individual is treated adversely and the other individual is not, concludes that the differential treatment is due to sex discrimination.⁸⁶ Applied to sexual orientation and Title VII, the idea is that if an employer takes an adverse employment action against a female employee for having sexual or romantic relations with a woman, but the employer would not take that same adverse action against a male employee for having sexual or romantic relations with a woman, then the employer has discriminated against the female employee on the basis of her sex.⁸⁷

In its treatment of the comparative argument, the *Hively* majority employed the sex stereotyping theory of sex discrimination first recognized in *Price Waterhouse v. Hopkins*.⁸⁸ Ann Hopkins was famously not offered partnership at the accounting firm Price Waterhouse despite her outstanding professional performance.⁸⁹ Written performance evaluations revealed that the accounting firm withheld an offer of partnership from Ms. Hopkins, at least in part, due to her failure to conform to sex stereotypes.⁹⁰ Indeed, Ms. Hopkins was advised that her chances of becoming a partner would be improved if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁹¹ The *Hopkins* plurality held that sex stereotyping is a form of sex discrimination.⁹² In terms of the comparative argument, Price Waterhouse discriminated against Ms. Hopkins by with-

⁸⁵ The *Hively* majority uses the term “comparative,” but the argument is substantively the same as “formal” arguments that sexual orientation discrimination is sex discrimination. *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc).

⁸⁶ Schroeder, *supra* note 3, at 346 (“If conduct by an employee is the basis for adverse action taken by an employer, and the same conduct if engaged in by a member of the opposite sex would not result in a similar adverse employment action, then the employer is discriminating based on sex.”).

⁸⁷ *Id.*; see also *Hively*, 853 F.3d at 345.

⁸⁸ See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁸⁹ *Id.* at 231.

⁹⁰ *Id.* at 234–35.

⁹¹ *Id.* at 235 (internal quotation marks omitted).

⁹² *Id.* at 250.

holding an offer of partnership because she did not conform to female stereotypes, but they would not have done the same to a male employee.

Invoking *Hopkins* in its discussion of the comparative argument, the *Hively* majority asserted “Hively represents the ultimate case of failure to conform to the female stereotype [because] . . . she is not heterosexual.”⁹³ That is, discrimination on the basis of sexual orientation is sex discrimination because, as in *Hopkins*, sexual orientation discrimination is discrimination for failure to adhere to sex stereotypes.

2. *The associational argument*

The associational argument reasons that discrimination on the basis of the sex of a person with whom an employee associates is discrimination against the employee “because of . . . sex.” This argument takes its cue from the miscegenation cases beginning with *Loving v. Virginia*.⁹⁴ In *Loving*, the Supreme Court held that anti-miscegenation statutes that criminalized interracial marriages were unconstitutional.⁹⁵ Richard Loving, a Caucasian man, and Milred Jeter, an African-American woman, were sentenced to one year in jail for violating Virginia’s anti-miscegenation statute.⁹⁶ The Supreme Court overturned their convictions holding, in part, that anti-miscegenation statutes violated the Equal Protection Clause.⁹⁷ In so holding, the Court rejected the argument that the statutes do not discriminate on the basis of race because both parties to the marriage—African-American and Caucasian—are punished equally.⁹⁸ Rather, the Court found that the statutes “rest[ed] solely upon distinctions drawn according to race.”⁹⁹

The associational argument that Title VII should apply to sexual orientation discrimination rests on an analogy between race and sexual orientation. As the *Hively* majority noted, “to the extent [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 . . . sex of the associate.”¹⁰⁰ That is, if an employer discriminates against a female employee because the employee’s spouse is also a woman, then the employer has discriminated against the employee on the basis of sex.¹⁰¹

⁹³ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

⁹⁴ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

⁹⁵ *Id.* at 2, 12.

⁹⁶ *Id.* at 2–3.

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 8–9.

⁹⁹ *Id.* at 11.

¹⁰⁰ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 349 (7th Cir. 2017) (en banc).

¹⁰¹ Compare Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 203, 215–19 (1994) (examining associational argument in constitutional context); and Schroeder, *supra* note 3, at

Thus, sexual orientation discrimination is sex discrimination.

3. *The feminist argument*

The feminist argument posits that sexual orientation discrimination is sex discrimination because homophobia is part of “a larger system of social control based on gender” that serves to subordinate women.¹⁰² This argument was initially offered in the constitutional context,¹⁰³ but scholars have applied it to the statutory context as well.¹⁰⁴ The idea is that homophobia is actually a reaction to the homosexual individual’s failure to conform to traditional gender roles.¹⁰⁵ According to traditional gender norms, men and women have separate roles within the family, broader society and the economy, and in sexual intercourse.¹⁰⁶ Men are supposed to be dominate, breadwinners, and active penetrators.¹⁰⁷ Women, on the other hand, are supposed to be submissive, homemakers, and passive recipients.¹⁰⁸ Thus, traditional gender roles provide a rationale for male domination and female subordination.

Homosexual individuals challenge traditional gender roles by their very existence. “[H]omosexuality is threatening because it calls into question the distinctive and superior status of being male.”¹⁰⁹ Or to put it more graphically, “[t]he central outrage of male sodomy is that a man is reduced to the status of a woman” by taking on the role as passive recipient in sexual intercourse.¹¹⁰ This undermines traditional gender roles, and hence male dominance, because men cannot both be passive recipients and powerful.¹¹¹ Laws that discriminate on the basis of sexual orientation, then, serve to reinforce traditional gender roles by punishing those who stray too far beyond their prescribed role.¹¹² Finally, because

346–49 (examining miscegenation analogy argument for application of Title VII to sexual orientation discrimination).

¹⁰² Koppelman, *supra* note 101, at 202–03.

¹⁰³ Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187 (1988).

¹⁰⁴ See, e.g., Shawn Clancy, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 J. LEGIS. 119, 129 (2011) (“Discrimination based on sexual orientation is intrinsically intertwined with gender and sex, and separating the topics is impossible.”); Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J. FORUM 115, 123 (2017) (“[H]omophobia serves more broadly to police men’s and women’s respective spheres.”).

¹⁰⁵ Soucek, *supra* note 104, at 118.

¹⁰⁶ Schroeder, *supra* note 3, at 345.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Koppelman, *supra* note 101, at 235–36.

¹¹⁰ *Id.* at 235. The reader may note that this relies on a fairly limited, and even inaccurate, conception of heterosexual sexual activity.

¹¹¹ *Id.* at 236.

¹¹² Schroeder, *supra* note 3, at 345.

traditional gender roles serve to subordinate women, such laws ultimately operate to ensure the continued subordination of women.¹¹³ Thus, sexual orientation discrimination is sex discrimination.

The *Hively* majority alluded to the feminist argument when it asserted that it is “impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.”¹¹⁴

These substantive arguments will not help the advocate meet the textualist challenge.¹¹⁵ Each implicitly rejects the textualist’s position that “sex” meant “biologically male or female” in 1964 as irrelevant or unimportant. For this reason, none of them amounts to an argument that at the time Title VII was enacted, the word “sex” fairly included the concept we would now refer to as “sexual orientation.” Advocates, then, must consider whether a textualist argument can be made for the proposition that at the time Title VII was enacted, the word “sex” fairly encompassed sexual orientation.¹¹⁶ The next section offers such an argument.

III. EXAMINATION OF THE MEANING OF “SEX” AT THE TIME TITLE VII WAS ENACTED

At the time that Title VII was enacted the concept we now refer to as “sexual orientation” was implicit in the meaning of the word “sex.”¹¹⁷ This

¹¹³ Koppelman, *supra* note 101, at 249.

¹¹⁴ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc). For a critique of the feminist argument see Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397, 409 (2001) (“To many people, including many feminists, the [feminist] sex discrimination argument in gay rights cases seems too clever by half. For some, that is because it seems to be a dodge around what they sense is really going on, which is the subordination of homosexual[] [individuals].”).

¹¹⁵ It is not the point of this Note to offer criticisms of arguments that sexual orientation is a form of sex discrimination. However, for an interesting critique of these arguments see Schroeder, *supra* note 3, at 356–66 (arguing that “none presents a theory by which *all* homosexuals and bisexuals are protected against employment discrimination” but rather each only provides “partial coverage”).

¹¹⁶ At least one author has forwarded a textualist argument to the effect that Title VII extends to discrimination on the basis of transgender identity. See Weiss, *supra* note 79, 574–76. Unfortunately, Professor Weiss mischaracterizes textualism, supposing that textualists are concerned with the current meanings of words rather than the meanings of words at the time the relevant statute was enacted. *Id.* at 574–76, 641–42. This error renders her argument of limited value in this area.

¹¹⁷ Compare with Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 3 (1995). Valdes argues that our society conflates sex, gender, and sexual orientation and that this conflation “regulates the social and sexual lives of everyone.” *Id.* at 7. Valdes further argues that our laws “are antithetical to sex/gender egalitarianism” insofar as they embody or employ this conflation. *Id.* at 9. Valdes then parlays this into a plea to incorporate sexual orientation discrimination into Title VII. *Id.* at 17. (“[T]he nation’s formal commitment to end

section will take as its starting point the textualist’s position that “sex” in 1964 meant “biologically male or female.” However, accepting Justice Scalia’s admonishments that dictionary definitions can only get us so far, this section will go beyond dictionaries to attempt to get a better sense of how reasonable people understood the word “sex” in 1964. Specifically, this Part will use evidence from the medical community, popular culture in the form of film, and the mainstream news media to show that when Title VII was enacted what we now refer to as “sexual orientation” was implicit in the meaning of the word “sex.”

A. *A brief detour into dictionaries*

Contemporaneous scholarly dictionaries almost uniformly include as a definition of “sex” a definition closely related to what we would now refer to as “sexual orientation”. This fact is often elided in textualist arguments. As Judge Sykes demonstrated well, when rejecting the claim that Title VII’s prohibition on discrimination “because of . . . sex” extends to sexual orientation, the textualist often asserts that the concepts “sex” and “sexual orientation” are wholly distinct. The reader will recall Judge Sykes’ dissent in *Hively*:

In common, ordinary usage in 1964—and now, for that matter—the word “sex” means biologically *male* or *female*; it does not also refer to sexual orientation To a fluent speaker of the English language—then and now—the ordinary meaning of the word “sex” does not fairly include the concept of “sexual orientation.” The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning.¹¹⁸

The unwary reader might take from this that if they were to look up the definition of “sex” in a contemporaneous scholarly dictionary they would find just one definition: “biologically male or female.”

But this isn’t the case. When making this assertion, Judge Sykes cited *The American Heritage Dictionary of the English Language*, *The New Oxford American Dictionary*, and *The American Heritage Desk Dictionary*.¹¹⁹ Only one of these dictionaries, *The American Heritage Dictionary of the English Language*, appears on Justice Scalia’s list of “most useful and authoritative” dictionaries for the period of 1951 to 2000.¹²⁰ That dictionary contains

sex and gender discrimination under Title VII . . . simply cannot be fulfilled until sexual orientation is incorporated into a holistic and contextual analyses [sic] of sex/gender discrimination under existing anti-discrimination laws.”). Insofar as this suggests the judiciary *should* read Title VII to apply to sexual orientation without arguing that the concept of “sex” fairly included sexual orientation in 1964, this argument will not be persuasive to a textualist.

¹¹⁸ *Hively*, 853 F.3d at 362–63 (emphasis added; citations omitted).

¹¹⁹ *Id.*

¹²⁰ *READING LAW*, *supra* note 36, at 419, 422–23. The other two appear on Justice

five definitions of the word “sex”:

1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated *male* and *female*, of this classification.
2. Males or females collectively.
3. The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female.
4. The sexual urge or instinct as it manifests itself in behavior.
5. Sexual intercourse.¹²¹

As Judge Sykes noted, the term “sexual orientation” did not exist in 1964.¹²² However, the idea of the “sexual urge or instinct” is closely related to what we would today refer to as “sexual orientation.” Moreover, of the six English language dictionaries specifically approved by Justice Scalia for determining the ordinary meaning of words for the period of 1951 to 2000, only one¹²³ fails to include a definition of “sex” relating to the “sexual urge or instinct.”¹²⁴

While our current language reflects our understanding that the concepts of “sex” and “sexual orientation” are distinct—and, thus, we have separate words for them—we did not fully understand that in 1964. Rather, in 1964, the ordinary meaning of the word “sex” included a definition closely related to what we would now refer to as “sexual orientation.” There was an overlap in meaning. Of course, the textualist method anticipates that a particular word will have multiple meanings. As we saw above, achieving the textualist’s aim to interpret and apply statutory text according to the meaning the words conveyed to reasonable people at

Scalia’s list of authoritative dictionaries for the period of 2001 to the present. *Id.* at 423–24.

¹²¹ *Sex*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (William Morris ed., 1st ed. 1969) (emphasis added).

¹²² *Hively*, 853 F.3d at 363 n.3 (“The term ‘sexual orientation’ does not appear in dictionaries at or around the time of Title VII’s enactment.”).

¹²³ THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

¹²⁴ *See Sex*, AMERICAN HERITAGE DICTIONARY, *supra* note 121 (defining “sex” as “[t]he sexual urge or instinct as it manifests itself in behavior”); *Sex*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993) (defining “sex” as “sexually motivated phenomena or behavior”); *Sex*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (defining “sex” as “the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct”); *Sex*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (3d ed. 1997) (defining “sex” as “anything connected with sexual gratification or reproduction or the urge for these; esp. the attraction of those of one sex for those of the other”); *Sex*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Philip Babcock Gove ed., 2d ed. 1961) (defining “sex” as “the phenomena of sexual instincts and their manifestations”); *Sex*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 2002) (defining “sex” as “the phenomena of sexual instincts and their manifestations”); *see also Sex*, OXFORD AMERICAN DICTIONARY (1980) (defining “sex” as “sexual feelings or impulses, attraction between members of the two sexes”).

the time they were written can require linguistic study beyond the use of dictionaries.¹²⁵ The rest of this Part will pursue that task.

B. The medical community agreed that homosexuality was a disease or psychological disorder

When Title VII was enacted, what we would now refer to as “sexual orientation” was implicit in our ordinary understanding of what it meant to be “biological male or female.” In 1964, it was the consensus of the medical community that normal, healthy men and women were heterosexual, and homosexuality was a type of psychological disorder or disease.¹²⁶ This was not an opinion held by fringe members of the medical community. The American Psychiatric Association (“APA”) published its first Diagnostic and Statistical Manual (“DSM”) in 1952 in which it characterized homosexuality as a kind of “sociopathic personality disturbance” that is “very often symptomatic of severe underlying personality disorder, neurosis, or psychosis, or [which] occur[s] as the result of organic brain injury or disease.”¹²⁷ The APA moderated its position on homosexuality in its second DSM,¹²⁸ published in 1968. In this second DSM, the APA indicated that homosexuality “by itself does not constitute a psychiatric disorder.”¹²⁹ Nonetheless, the APA continued to contrast homosexuality with “normal sexual behavior” in the second edition.¹³⁰

Despite the fact that the APA backed away from classifying homosexuality itself as a psychiatric disorder in 1968, the “disease model [of homosexuality] exercised hegemony among doctors until the 1970s.”¹³¹ Adherents to the “disease model” differed as to the exact explanation of homosexuality. Two major theories were developed by Irving Bieber and Robert Stoller.¹³²

¹²⁵ Part I, *supra*.

¹²⁶ The careful reader will note that this rests on a false binary of human sexuality (if not heterosexual, then homosexual). However, as the following discussion will illustrate, this appears to be the binary people believed to be true at this time.

¹²⁷ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38–39 (1st ed. 1952).

¹²⁸ *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II*, in DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (6th ed., 1973).

¹²⁹ *Id.* at 44. This second manual considered homosexuality a disorder only when the homosexual individual was also “disturbed by, in conflict with, or wish[ed] to change their sexual orientation.” *Id.*

¹³⁰ *Id.*

¹³¹ JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970, at 16 (1983).

¹³² In anticipation of the objection to an investigation of the meaning of the word “sex” in 1964 via investigation of the meaning of “homosexuality” in 1964 *see* Moskal v. United States, 498 U.S. 103, 119 (1990) (Scalia, J., dissenting) (concluding that the ordinary meaning of the phrase “falsely made” is “forged” by, among other things,

1. *Bieber's psychoanalytic theory of homosexuality*

Under Irving Bieber's psychoanalytic theory homosexuality is an "adaptation" adopted by the individual due to "hidden but incapacitating fears of the opposite sex" that result from dysfunctional family relations during childhood.¹³³ Bieber and his colleagues in the Society of Medical Psychoanalysts reported their conclusions after statistical analysis of the case and family histories of "106 male homosexuals and 100 male heterosexuals in psychoanalytic treatment."¹³⁴ They assumed that heterosexuality was the "biologic norm"¹³⁵ and that "adult homosexuality [was] psychopathologic."¹³⁶

Bieber and his colleagues claimed that their study revealed significant differences between the family histories of homosexual individuals and heterosexual individuals.¹³⁷ The family and sexual histories of their study participants supported the view that:

[T]he human has a capacity for homosexuality but a tendency toward heterosexuality. The capacity for responsivity to heterosexual excitation is inborn. . . . Homosexuality, on the other hand, is acquired and discovered as a circumventive adaptation for coping with fear of heterosexuality. As we evaluate the maturational processes, a homosexual phase is not an integral part of sexual development. At any age, homosexuality is a symptom of fear and inhibition of heterosexual expression.¹³⁸

They concluded that the homosexual individual was the "victim" of abnormal and unhappily married parents.¹³⁹ That is, they believed that homosexuality was a result of dysfunctional relations with and between a child's parents that interfered with the normal development of the child's sexuality.¹⁴⁰

consulting the dictionary definition of the word "forged").

¹³³ IRVING BIEBER ET AL., *HOMOSEXUALITY, A PSYCHOANALYTIC STUDY* 303 (1988) [hereinafter *PSYCHOANALYTIC STUDY* (1988)].

¹³⁴ IRVING BIEBER ET AL., *HOMOSEXUALITY, A PSYCHOANALYTICAL STUDY* vii (1965) [hereinafter *PSYCHOANALYTIC STUDY* (1965)].

¹³⁵ *PSYCHOANALYTIC STUDY* (1988), *supra* note 133, at 319 (emphasis omitted).

¹³⁶ *Id.* at 18 (emphasis omitted). *Cf.* D'EMILIO, *supra* note 131, at 16 ("Almost without exception . . . Freud's pupils and successors in psychoanalysis placed homosexuality firmly in the sphere of pathology.")

¹³⁷ *PSYCHOANALYTIC STUDY* (1965), *supra* note 134, at 310 ("*The H[omosexual]-son emerged as the interactional focal point upon whom the most profound parental psychopathology was concentrated.*") (emphasis in original).

¹³⁸ *Id.* at 305.

¹³⁹ *Id.* at 310. Indeed, they reported that all parents of the homosexual individuals in their study "had severe emotional problems" and the majority had "poor marital relationships." *Id.* at 310, 313.

¹⁴⁰ *Id.* at 310 ("Among the H[omosexual]-patients who lived with a set of natural parents up to adulthood—and this was so for the entire H[omosexual]-sample except for fourteen cases—neither parent had a relationship with the H[omosexual]-son

It is important to understand the model of sexual development with which Bieber and his colleagues were working. Bieber and his colleagues assumed that a child’s sexuality develops via a series of “maturational phase[s]” in which the child’s behavior “stimulates responses in the parents which, in turn, . . . determine the nature of development of that specific maturational phase.”¹⁴¹ In other words, as the child develops as a sexual being, the parents’ responses to the child’s emerging sexuality influence how the child’s sexuality develops. Bieber and his colleagues believed that parents’ ability to foster normal (i.e., heterosexual) sexual development was related to their own happiness in their sexual and romantic lives.¹⁴²

Bieber and his colleagues identified two major family dynamics they believed lead to homosexuality. One was the “over-closeness and seductiveness” of the individual’s mother.¹⁴³ In this dynamic, an unhappily married mother “attempts to fulfill [her] frustrated romantic wishes” through her son.¹⁴⁴ These mothers are “explicitly seductive” toward the son, or at the very least “the closeness of the bond with the son appear[s] to be in itself sexually provocative.”¹⁴⁵ Bieber and his colleagues posited that “the mother chooses a son whom she unconsciously identifies with her father or with a brother” whom she wishes to “possess.”¹⁴⁶ She then uses the son to “act-out her own anxiety-laden incestuous wishes” and is “especially alert to any sexual behavior her son may express to her.”¹⁴⁷ Not wanting her incestuous wishes to be discovered, the mother “suppresses” her son’s sexual behavior toward her such that he learns that “any act which includes an element of sexuality and virile masculinity is unwelcome.”¹⁴⁸ Such an unwelcoming response to the son’s heterosexual impulses towards her discourages his masculinity.¹⁴⁹ If severe enough, maternal responses may “demasculinize [the] son and will even encourage effeminate attitudes.”¹⁵⁰

The other family dynamic Bieber and his colleagues believed led to homosexuality was “hostil[ity]” and “detached[ness]” of the individual’s

one could reasonably construe as ‘normal.’”).

¹⁴¹ *Id.* at 312–13.

¹⁴² *Id.* at 313 (“Parents who are capable of sexually constructive attitudes to a child usually are individuals who are capable of a love relationship with each other and provide a stable and affectionate atmosphere in the home.”).

¹⁴³ *Id.* at 308.

¹⁴⁴ *Id.* at 313.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 314. If the Freudian pedigree of Bieber and his colleagues was not obvious to the reader previously, it will be now.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 314–15.

¹⁴⁹ *Id.* at 313, 315.

¹⁵⁰ *Id.* at 315.

father.¹⁵¹ They posited that fathers in unhappy marriages “tend to be unusually hostile to men perceived as sexual rivals.”¹⁵² This competitiveness is intensified where the son has replaced the father as the object of his wife’s affections.¹⁵³ This competitiveness, in turn, is expressed as “overt hostility,” “rejection,” or “indifference.”¹⁵⁴ The result is that “[f]ear of attack from the father coupled with the wish for his love . . . disturbs the son’s own developing masculine sexuality.”¹⁵⁵

These family dynamics serve to interfere with the child’s sexual maturation such that the child never reaches heterosexual sexual maturity.¹⁵⁶ However, Bieber and his colleagues ended their report on their findings on an optimistic note: “[h]omosexuals do not bypass heterosexual developmental phases and all remain potentially heterosexual.”¹⁵⁷ That is, with enough psychoanalytic treatment, homosexual individuals may be able to achieve sexual maturity and reclaim their normal, heterosexual selves.¹⁵⁸

2. Stoller’s “biological forces” theory of homosexuality

Under Robert Stoller’s “biological forces” theory, homosexuality is the result of an underlying physiological malfunction.¹⁵⁹ Stoller was primarily interested in sex and gender and the relationship between the two. In particular, he was interested in the development of gender identity and why a person’s sex and gender identity sometimes “each . . . go in its quite independent way.”¹⁶⁰ That is, he was interested in the phenomenon of biological men and women who do not display traditional masculine and feminine gender identity, respectively.¹⁶¹ Like Bieber and his colleagues, Stoller was part of the psychoanalytic tradition.¹⁶²

¹⁵¹ *Id.* at 310.

¹⁵² *Id.* at 315.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Bieber and his colleagues focused exclusively on homosexual men in their study. However, they suggest their theory is applicable to homosexual women, as well. *See, e.g., id.* at 315 (“These [detached and hostile] fathers, not unlike their wives, are unable to maintain a love relationship with a spouse. Some such men attempt to fulfill those emotional goals by acting-out with a daughter as their wives are acting-out with a son.”).

¹⁵⁷ *Id.* at 319.

¹⁵⁸ *Id.*

¹⁵⁹ ROBERT J. STOLLER, *SEX AND GENDER: ON THE DEVELOPMENT OF MASCULINITY AND FEMININITY* xiii (1968) [hereinafter *SEX AND GENDER*]; Robert Stoller, *A Contribution to The Study of Gender Identity*, *INT. J. PSYCHOANAL.* 220, 220 (1963); *see also* Robert Stoller, *Passing and the Continuum of Gender Identity*, in *SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY* 200 (Judd Marmor ed., 1965).

¹⁶⁰ *SEX AND GENDER*, *supra* note 159, at ix.

¹⁶¹ *Id.* at ix–x.

¹⁶² *Id.* at xi.

Stoller believed sex and gender were correlated. “[T]he normal male has a preponderance of masculinity and the normal female a preponderance of femininity.”¹⁶³ “Sex” here refers to the biological fact of being either male or female as determined by a person’s “chromosomes, external genitalia, internal genitalia (e.g., uterus, prostate), gonads, hormonal states, and secondary sex characteristics.”¹⁶⁴ “Gender” here refers to “the amount of masculinity or femininity found in a person.”¹⁶⁵ Stoller believed that gender is learned via a process that begins at birth.¹⁶⁶ Upon inspection of a newborn’s external genitalia, e.g., determination of their sex, a person is assigned a gender.¹⁶⁷ Then, through interactions with and the expectations of that person’s mother, father, siblings, friends, etc. the individual learns and internalizes their assigned gender.¹⁶⁸

Stoller’s major conclusion was that there are “biological forces,” in addition to sex and gender, which contribute to a person’s gender identity.¹⁶⁹ In the normal individual, the process of learning and internalizing one’s assigned gender continues uninterrupted.¹⁷⁰ However, the occurrence of what we would now call “gender dysphoria” in early childhood led Stoller to posit that there is a third component, which he termed “biological forces,” that influences a person’s gender identity.¹⁷¹ Stoller did not specify what these “biological forces” are other than to describe them as a “sex-linked genetic biological tendency.”¹⁷² In the normal case, these “biological forces” go unnoticed because they correlate with the individual’s sex and assigned gender.¹⁷³ In abnormal cases, however, the “biological forces” do not correlate with the individual’s sex and assigned gender.¹⁷⁴ In extreme cases, the “biological forces” can be so strong as to overwhelm the other two components leading, for example, to a biological male with a female gender identity.¹⁷⁵

Homosexuality results when a person’s “biological forces” conflict with their sex and assigned gender. “The homosexual,” Stoller explains, “regardless of the degree of his effeminacy, considers himself to be a male and a man.”¹⁷⁶ However, Stoller assumes that being “a lover of fe-

¹⁶³ *Id.* at 9–10.

¹⁶⁴ *Id.* at 9.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at xiii, 72.

¹⁶⁷ *Id.* at 72.

¹⁶⁸ *Id.* at 73.

¹⁶⁹ *Id.* at xiii.

¹⁷⁰ *Id.* at 74.

¹⁷¹ *Id.* at xiii, 73.

¹⁷² *Id.* at 74.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 75–80.

¹⁷⁶ *Id.* at 159.

males” is an essential characteristic of being male.¹⁷⁷ That is, what we would now refer to as “sexual orientation” was an aspect of gender. The suggestion, then, is that homosexuality results when the “biological forces” conflict with the individual’s sex, sexual orientation, and assigned gender identity, but are not strong enough to completely overwhelm the individual’s gender identity and cause the individual to reject their assigned gender.¹⁷⁸

When Title VII was enacted, it was accepted medical fact that normal, healthy men and women were heterosexual, and that homosexuality was due to some kind of abnormality. To put it another way, in 1964, what we would now refer to as a heterosexual “sexual orientation” was implicit in our understanding of what it meant to be “biologically male or female.” Bieber’s and Stoller’s theories typify the consensus of the medical community. Under Bieber’s psychoanalytic theory, the homosexual individual is the victim of their parents’ sexual frustration and dysfunctional marriage.¹⁷⁹ Under Stoller’s “biological forces” theory, the homosexual individual is the victim of “biological forces” that are in conflict with the individual’s biological sex and assigned gender.¹⁸⁰ Whatever the underlying explanation, the medical community subscribed to this “disease model” of homosexuality at the time Title VII was enacted.

C. The commercial film industry spread the “disease model” of homosexuality to the popular culture

The ordinary understanding that normal, healthy men and women were heterosexual, and that homosexuality was a type of disease was not confined to the medical community. The commercial film industry embraced the “disease model” and spread it to the viewing public. This process started in the 1940s.¹⁸¹ Americans had their first collective experience with psychiatry due to government ordered psychiatric screening of inductees during World War II.¹⁸² Following the end of the war, Hollywood capitalized on American’s newfound fascination with psychiatry and introduced the “disease model” into popular culture.¹⁸³ “Increasingly,

¹⁷⁷ *Id.* at 156.

¹⁷⁸ Stoller suggests in passing that mal- or non-functioning sex organs may be an alternate cause of homosexuality. *See id.* at 82 (noting other studies of “cases of testicular failure . . . where the patients all appeared to be anatomically normal males at birth . . . [but] a disproportionately large number cross-dressed, were homosexuals, and/or had other sexual perversions.”). The suggestion here is that, because the sex organs are not functioning properly, the individual’s “biological forces” are able to interfere with their normal, i.e., heterosexual, sexual orientation.

¹⁷⁹ PSYCHOANALYTIC STUDY (1965), *supra* note 134, at 315.

¹⁸⁰ SEX AND GENDER, *supra* note 159, at xiii.

¹⁸¹ D’EMILIO, *supra* note 131, at 17.

¹⁸² *Id.*

¹⁸³ *Id.*

Americans came to view human sexual behavior as either healthy or sick, with homosexuality falling into the latter category.”¹⁸⁴

Explicit portrayal of homosexuality in film was prohibited by the Production Code (“Code”). The Code, a precursor to the Motion Picture Association of America’s (“MPAA”) ratings system we know today,¹⁸⁵ was originally created in 1930.¹⁸⁶ In 1934, the film industry capitulated to “tremendous pressure from the Catholic Church and other civic and religious groups” and strengthened the Code.¹⁸⁷ Among other things, the strengthened Code prohibited portrayal of homosexual characters.¹⁸⁸

Nonetheless, at least two films released in the 1950s invoked the “disease model.” The first film, called *Young Man with a Horn*, was released in 1950. The film was based on a novel in which the lead female character, Amy North, is described as “having lesbian tendencies.”¹⁸⁹ Under the restrictions of the Code, the film simply implies that Amy is a lesbian by describing her as “a neurotic young girl who’s tried everything.”¹⁹⁰ During the course of the film, Amy enters a marriage with a man that proceeds to fall apart. Ultimately, she leaves her husband and goes to Paris with a young female artist.¹⁹¹ At the end of the film her rejected husband asserts, “You’re a sick girl, Amy. You’d better see a doctor.”¹⁹²

Another film, called *Children of Loneliness*, was released in 1953.¹⁹³ The film follows the stories of two individuals with homosexual tendencies, which are “accompanied by the interpretations of . . . a psychiatrist who ‘aids the police in cases of abnormal sexuality.’”¹⁹⁴ One of the stories concerns a female office worker, Eleanor Gordon, who is being wooed by a woman.¹⁹⁵ The psychiatrist tells Eleanor that she is “particularly susceptible to lesbianism . . . because she was ‘frightened by a man in her infancy’ and cannot love in a normal way.”¹⁹⁶ Admonished by the psychiatrist not to give into her lesbian tendencies, Eleanor rejects the woman’s advances and marries a man.¹⁹⁷

Portrayals of explicitly homosexual characters increased following a

¹⁸⁴ *Id.*

¹⁸⁵ VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* 163 (rev. ed. 1987).

¹⁸⁶ *Id.* at 31.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 31; D’EMILIO, *supra* note 131, at 137.

¹⁸⁹ RUSSO, *supra* note 185, at 100.

¹⁹⁰ *Id.* (internal quotation marks omitted).

¹⁹¹ *Id.*

¹⁹² *Id.* (internal quotation marks omitted).

¹⁹³ *Id.* at 104.

¹⁹⁴ *Id.* at 104–05.

¹⁹⁵ *Id.* at 105.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

1961 revision to the Code.¹⁹⁸ The Code's grip on the film industry continued until the 1950s. "Before 1953, no film rejected by the Code had ever had a commercial release."¹⁹⁹ However, the commercial success of foreign films lacking Code approval, as well as slumping movie attendance in the 1950s, pointed to the increasing ineffectiveness of the Code.²⁰⁰ In response, the MPAA revised the Code in October 1961.²⁰¹ In its press release, the MPAA announced, "In keeping with the culture, the mores and the values of our time, homosexuality and other sexual aberrations may now be treated with care, discretion, and restraint."²⁰²

It became clear almost immediately that the MPAA would not accept all portrayals of homosexuality despite its liberalization of the Code. In November 1961, the MPAA denied approval of *Victim*, a British film depicting homosexual characters in a sympathetic light.²⁰³ "In withholding its endorsement, the film regulators rebuked *Victim* for its 'candid and clinical discussion of homosexuality' and its 'overtly-expressed plea for social acceptance of the homosexual.'²⁰⁴ Without MPAA approval under the Code, *Victim* failed to garner commercial success.²⁰⁵ Following the controversy surrounding *Victim*, the MPAA clarified its revision to the Code, explaining that "sexual aberration could be suggested but not actually spelled out."²⁰⁶ Thus, one commentator concluded, though the MPAA allowed portrayal of homosexuality following the 1961 revision to the Code, it maintained control over how homosexuality was portrayed.²⁰⁷

Between the "disease model" and the MPAA's restrictions on how homosexuality could be portrayed, the 1960s were a bleak time for homosexual characters in film. Filmmakers, hoping to avoid the same fate that befell *Victim*, created homosexual characters who were tormented, sick, and insane.²⁰⁸ One commentator observed, "Gays dropped like flies in the Sixties, and for as many reasons as there were tragedies . . . Overt, active or predatory gays . . . were killed off. The repressed, tormented types usually committed suicide, and scattered cases were "cured" by sufficient attention from the opposite sex."²⁰⁹

In all, "[i]n twenty-two of twenty-eight films dealing with gay subjects from 1962 to 1978, major gay characters onscreen ended in suicide or vi-

¹⁹⁸ D'EMILIO, *supra* note 131, at 137; RUSSO, *supra* note 185, at 33.

¹⁹⁹ RUSSO, *supra* note 185, at 118.

²⁰⁰ D'EMILIO, *supra* note 131, at 137; RUSSO, *supra* note 185, at 118.

²⁰¹ D'EMILIO, *supra* note 131, at 137.

²⁰² RUSSO, *supra* note 185, at 121–22.

²⁰³ D'EMILIO, *supra* note 131, at 137.

²⁰⁴ *Id.*; see also RUSSO, *supra* note 185, at 128.

²⁰⁵ RUSSO, *supra* note 185, at 131.

²⁰⁶ *Id.* at 129.

²⁰⁷ *Id.* at 132.

²⁰⁸ D'EMILIO, *supra* note 131, at 137–38.

²⁰⁹ RUSSO, *supra* note 185, at 156.

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olent death.”²¹⁰

When Title VII was enacted, the commercial film industry had spread to the viewing public the understanding that normal, healthy men and women were heterosexual, and that homosexuality was a medical abnormality. The film industry’s consistent portrayal of homosexual characters as psychologically ill or physiologically damaged individuals solidified this understanding in the public consciousness. To put it another way, in 1964, the commercial film industry reflected and reaffirmed the ordinary understanding that a heterosexual sexual orientation was part of what it meant to be “biologically male or female.” Thus, when Title VII was enacted “homosexuality . . . remained for Hollywood a perversion” and this understanding of homosexuality permeated the popular culture.²¹¹

D. The mainstream news media embraced and legitimized the “disease model” of homosexuality

When Title VII was enacted, the mainstream news media embraced and legitimized the ordinary understanding that normal, healthy men and women were heterosexual, and that homosexuality was a type of disease. The “disease model” ran deep in the news media’s coverage of homosexuality in the 1960s. Media outlets such as the *New York Times* and *Time* magazine adopted the term “deviates” to refer to homosexual individuals.²¹² These same media outlets often contrasted homosexual individuals with “normal persons”²¹³ and homosexual sex with “normal sex.”²¹⁴

In 1962, when the controversy surrounding the film *Victim* occurred, media outlets were in unison in criticizing the film for its sympathetic portrayal of homosexuality. A *New York Times* film reviewer found the film to be “a good bit below the British par.”²¹⁵ The reviewer dismissed the film’s appearance of substance and accomplishment; attributing it to the fact that the film was one of the first to treat the subject of homosexuality openly.²¹⁶ “The very fact that homosexuality as a condition is presented

²¹⁰ *Id.* at 52.

²¹¹ D’EMILIO, *supra* note 131, at 138.

²¹² Robert C. Doty, *Growth of Overt Homosexuality in City Provokes Wide Concern*, N.Y. TIMES, Dec. 17, 1963, at 33; *A Plea for Perversion?*, TIME, Feb. 23, 1962, at 102; *Where the Boys Are*, TIME, June 28, 1968, at 81.

²¹³ Doty, *supra* note 212, at 33; *The Homosexual in America*, TIME, Jan. 21, 1966, at 40 (Plays about same-sex romances “represent a kind of inverted romance, since homosexual situations as such can never be made romantic for normal audiences.”).

²¹⁴ *The Homosexual in America*, *supra* note 213, at 40.

²¹⁵ Bosley Crowther, *Screen: ‘Victim’ Arrives: Dirk Bogarde Stars in Drama of Blackmail*, N.Y. TIMES, Feb. 6, 1962, at 27.

²¹⁶ *Id.*

honestly and unsensationally . . . makes this an extraordinary film.”²¹⁷ But this was not enough to save the film. Rather, the reviewer opined: “How much it will be appreciated and how much its pronounced sympathy for the victimized homosexual will be shared by the viewer will depend upon the individual’s awareness and tolerance of the abnormality.”²¹⁸ Of course, by “abnormality,” the reviewer meant homosexuality.

Time magazine found *Victim* to be more of a cinematic accomplishment. The film reviewer noted the film’s “neat plot” and complimented the “eloquence and conviction” with which it treated its subject.²¹⁹ The compliments ended there. The *Time* film reviewer appears to have felt a bit tricked into watching a propaganda film they found “offensive . . . [in its] implicit approval of homosexuality as a practice.”²²⁰ Indeed, the reviewer thought the film did worse than give homosexuality implicit approval as:

[n]owhere does the film suggest that homosexuality is a serious (but often curable) neurosis that attacks the biological basis of life itself. “I can’t help the way I am,” says one of the sodomites in this movie. “Nature played me a dirty trick.” And the scriptwriters, whose psychiatric information is clearly coeval with the statute they dispute,²²¹ accept this sick-silly self-delusion as medical fact.²²²

The reader will recognize the film reviewer’s invocation of the “disease model” of homosexuality.

In addition to panning the film *Victim*, several media outlets carried long-form articles investigating the “homosexual problem” around the time Title VII was enacted.²²³ The *New York Times*, for instance, ran an article titled “Growth of Overt Homosexuality in City Provokes Wide Concern,” calling for public discussion of the growing openness of the gay community in New York.²²⁴ Despite its sensationalism, the article was optimistic:

[T]he old idea, assiduously propagated by homosexuals, that ho-

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *A Plea for Perversion?*, *supra* note 212, at 102.

²²⁰ *Id.*

²²¹ The film criticized the English law that criminalized same-sex sexual intercourse by showing that one of the consequences of the statute was that homosexual individuals made up the majority of blackmail victims. RUSSO, *supra* note 185, at 128–29.

²²² *A Plea for Perversion?*, *supra* note 212, at 102.

²²³ Doty, *supra* note 212, at 33; Ernest Havemann, *Scientists Search for the Answers to a Touchy and Puzzling Question: Why?*, LIFE, June 26, 1964, at 76 (quoting favorably Bieber’s views on the reasons for homosexuality); see also Paul Welch, *The ‘Gay’ World Takes to the City Streets*, LIFE, June 26, 1964, at 66–68 (reporting on the “sad and often sordid world” of the gay community).

²²⁴ Doty, *supra* note 212, at 1.

homosexuality is an inborn, incurable disease, has been exploded by modern psychiatry, in the opinion of many experts. It can be both prevented and cured, these experts say.²²⁵

The article explored the views of “psychiatrists, religious leaders and the police” as to the nature and cause of the “problem.”²²⁶ In particular, the article referred favorably to Bieber’s psychoanalytic theory of homosexuality at length: “[Bieber] asserts that homosexual men receive sexual stimulation from women. But, because their capacity for normal erotic expression has been crippled psychically, Dr. Bieber believes female attraction produces a reaction of fear and search for homosexual outlet.”²²⁷ The *New York Times* offers Bieber’s theory of homosexuality as a beacon of hope to those members of the public who are also concerned about the growing “problem.” The homosexual individual is not normal, but, the *New York Times* assures, homosexuality is a disease that can be cured.²²⁸

Time magazine was less optimistic.²²⁹ Prompted by the increasing visibility of homosexuality and puzzled by the fact that “most homosexuals apparently do not desire a cure,” *Time* undertook an examination of various aspects of the homosexual phenomenon.²³⁰ This included theater and art, slang and subculture, the rising homophile movement, as well as moral leaders’ views on the issue. *Time* also quoted Bieber’s theory of homosexuality favorably, explaining, “[t]he consensus is that [homosexuality] is caused psychically, through a disabling fear of the opposite sex.”²³¹ Despite its professed aim to examine the “homosexual problem” from all angles, however, *Time* was unwavering in its conclusion:

It [homosexuality] is a pathetic little second-rate substitute for reality, a pitiable flight from life. As such it deserves fairness, compassion, understanding and, when possible, treatment. But it deserves no encouragement, no glamorization, no rationalization, no fake status as minority martyrdom, no sophistry about simple differences in taste—and, above all, no pretense that is it anything but a pernicious sickness.²³²

Like the *New York Times*, *Time* offered Bieber’s theory of homosexuality to its readers as the explanation of the “problem.”

When Title VII was enacted, the mainstream news media embraced and legitimated the understanding that normal, healthy men and women

²²⁵ *Id.* at 33.

²²⁶ *Id.* at 1.

²²⁷ *Id.* at 33.

²²⁸ *Id.*

²²⁹ *The Homosexual in America*, *supra* note 213, at 41.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

were heterosexual, and that homosexuality was a medical abnormality. To put it another way, the news media reflected and reaffirmed the ordinary understanding that a heterosexual sexual orientation was part of what it meant to be “biologically male or female.” It did this through the language it used to discuss homosexuality, by consistently invoking the “disease model” in reviews of films featuring the topic of homosexuality, and when discussing the “homosexual problem.”

E. The concept of sexual orientation was implicit in the meaning of “sex” at the time Title VII was enacted

At the time that Title VII was enacted, the concept we now refer to as “sexual orientation” was implicit in the meaning of the word “sex.” This is because, as the preceding sections have shown, sexual orientation was implicit in the ordinary understanding of what it meant to be “biologically male or female.” To put the point another way, if one were to inform a reasonable speaker of English in 1964 that a person was “biologically male” or “biologically female,” this information also would have provided them an answer to the question we would now pose as: “What is that person’s sexual orientation?” They would have assumed that person was heterosexual, absent additional information. Like Stoller and Beiber, we believed that men and women were naturally heterosexual.

The fact that in 1964 heterosexual sexual orientation was part of the common, ordinary meaning of “biologically male or female” is confirmed by the prevalence of the “disease model.” It was so obvious to us that heterosexuality was the “biologic norm” that we felt we needed an explanation as to why homosexual individuals existed at all. That this concern was shared by American society writ large is reflected in the fact that the medical community, the commercial film industry, and the mainstream news media were all concerned with this topic. And all concurred—homosexuality was the result of some kind of disease that causes individuals to stray from the heterosexual norm.

Additionally, examination of dictionaries supports the conclusion that the concept we now refer to as “sexual orientation” was implicit in the meaning of the word “sex” when Title VII was enacted. Contemporaneous scholarly dictionaries consistently include among the definitions of “sex” a definition relating to “the sexual urge or instinct.” This idea is closely related to what we would now refer to as “sexual orientation.” While our current language reflects our understanding that the concepts of “sex” and “sexual orientation” are distinct—and, thus, we have separate words for them—we did not fully understand that in 1964. Rather we believed these things were linked.

This, then, provides the advocate with a response to the textualist challenge. The advocate can accept the textualist’s position that in 1964 the word “sex” meant “biologically male or female” because we did not separate the concepts of “sex” and “sexual orientation” then. Rather, the

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concept we would now refer to as “sexual orientation” was implicit in the meaning of the word “sex”; we believed that men and women were naturally heterosexual. Finally, following the reasoning of *Oncale*, because there is no language in the statute limiting its protections to heterosexual individuals, Title VII’s prohibition on discrimination “because of . . . sex” extends to discrimination on the basis of all sexual orientations.

CONCLUSION

This Note forwarded a textualist argument for application of Title VII to sexual orientation discrimination. It was shown that at the time Title VII was enacted the ordinary understanding that a heterosexual sexual orientation was part of what it meant to be “biologically male or female” was accepted, spread, and legitimized by the medical community, the commercial film industry, and the mainstream news media. The prevalence of the “disease model” of homosexuality shows that in 1964 we did not separate the concepts of “sex” and “sexual orientation.” Rather, the concept we would now refer to as “sexual orientation” was implicit in the meaning of the word “sex.” This is the advocate’s reply to the textualist challenge. Thus, Title VII’s prohibition on discrimination “because of . . . sex” extends to sexual orientation discrimination.