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Bisexual Erasure, Marjorie Rowland, and the Evolution of LGBTQ Rights

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ABSTRACT

Rowland v. Mad River Local School District*, a Sixth Circuit LGBTQ employment discrimination case from 1984, has not received the attention it deserves. Justice Brennan's dissent from the denial of certiorari has advanced LGBTQ rights significantly, while, at the same time, his dissent, along with the dissent from the Sixth Circuit majority opinion and the district court opinion, serve as a lens to see the work in the area that remains to be done. Bisexuals, despite being the largest segment of the LGBTQ community, are systematically erased, as scholars such as Kenji Yoshino have documented, both generally and from legal history specifically. The case has been mentioned in law review articles and discussed briefly in some sexuality and law textbooks but warrants a much more in-depth examination. Moreover, the sacrifices Ms. Rowland endured to bring the case are completely unknown in the legal arena. Indeed, it appears from the electronic research tools like Westlaw and Lexis that the case has never even been the subject of a case note.*

Based on an in-person interview with the plaintiff and original archival research, this Article recounts the many compelling aspects of Ms. Rowland's story, elucidates the contributions of the case to LGBTQ history, and explains what we can learn and implement from the district court opinion,

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[1] Professor of Law, University of South Dakota (USD) Knudson School of Law. Deepest gratitude to Marjorie Rowland for her willingness to share her story. The author would also like to heartily thank both Professor Naomi Mezey for her extremely helpful suggestions in commenting on a draft of this article for a panel on Emerging Voices in Feminist Theory hosted by the Women in Legal Education Section of the American Association of Law Schools (AALS) and Professor Janet Halley for her insightful comments for the University of Chicago Law School's Regulation of Family, Sex, and Gender Workshop. She is also very grateful to Professors Danielle Jefferis, Michael Boucai, Steven Macias, and Courtney Segota for reviewing and commenting on drafts and to audience members and co-panelists at the Women in Legal Education Section AALS panel, ClassCrits, and the Law and Society Association, to whom she presented drafts of this article. She is additionally indebted to Professor Mary Anne Case and to the participants in, and attendees of, the May 3, 2023 Regulation of Family, Sex, and Gender Workshop for their comments and questions and to the USD Knudson School of Law faculty for their comments during the Faculty Workshop where she presented a draft of this article. Many thanks also go to Professors Jasmine Gonzales Rose, Marc Spindelman, and Kyle Velte for helping her brainstorm. She would also like to thank her research assistants, Damian Vacin and Emily Greco, for their invaluable help, and the editors at the *Harvard Journal of Law and Gender* for their excellent suggestions and careful attention to this piece. Finally, librarians at the Chicago branch of the National Archives, especially Leo Belleville, were also very helpful.

the dissent in the Sixth Circuit, and Justice Brennan's dissent from the denial of certiorari. It shines a light on an important missing piece of the LGBTQ rights puzzle.

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Introduction

> "[T]he logical result of bisexuality and homosexuality is injury to the institution of marriage and family relationships. Indeed, if bisexuality and its homosexual tendencies were to become the norm, not only would marriage and family cease to exist, but mankind as well."
>
> —Mad River Local School District[2]

Rowland v. Mad River Local School District[3] was a groundbreaking LGBTQ rights case when it was decided—at the district court level in 1981,[4] at the Sixth Circuit in 1984,[5] and at the certiorari stage in 1985.[6] However, largely due to the societal practice of bisexual erasure,[7] *Rowland* has not received the attention it deserves in LGBTQ history nor in the LGBTQ rights canon. Bisexual erasure is arguably at its most virulent in the legal realm, where concerns abound that bisexual people muddy the waters of immutability arguments and that they do not make palatable plaintiffs for impact litigation.[8]

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[2] Mad River Loc. Sch. Dist.'s Motion to Set Aside the Verdicts and Judgment at 5, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 84, 1981 U.S. Dist. LEXIS 15583.

[3] Rowland v. Mad River Loc. Sch. Dist., 730 F.2d 444, 446 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

[4] Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125, 1981 U.S. Dist. LEXIS 15583, at *1 (S.D. Ohio Oct. 22, 1981).

[5] *Rowland*, 730 F.2d at 446.

[6] Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1009 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

[7] For an in-depth discussion of bisexual erasure and a theory as to why it occurs, see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 Stan. L. Rev. 353 (2000) (arguing that self-identified heterosexuals and self-identified homosexuals have overlapping interests in bisexual erasure and explaining the phenomenon of such erasure). A pamphlet from the Canadian Centre for Gender and Sexual Diversity explains:

> Bisexual erasure is the dismissal of a bi person's experiences with their identity because of certain normative expectations around sexuality. Erasure can occur explicitly [or] implicitly in our day-to-day dialogue, or systemically in our communities . . . Bisexual erasure can come from what is known as "monosexism," the idea that one can only be attracted to one gender. Bisexual folks may face erasure in both seemingly "straight" and queer relationships.

Bisexual Erasure Brochure, Can. Ctr. for Gender & Sexual Diversity (Sept. 2020), https://ccgsd-ccdgs.org/wp-content/uploads/2020/09/Bisexual-Erasure-Brochure.pdf [https://perma.cc/Q6J6-3FWU].

[8] *See, e.g.*, Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 Mich. J. Gender & L. 291, 305–06 (2015) (discussing Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415, 419–20, 460–72 (2012)); Nancy Marcus et al., *Bridging the Gap in LGBTQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law*, 34 Hastings J. Gender & L. 69, 74 (2023) ("The perception is that bi+ people do not require or deserve particular legal protection. These views are perpetuated by . . . the LGBTQ+ political movement's decisions to solely center monosexual identities. The courts' failure to recognize bisexual+ people . . . perpetuates a cycle in which advocates

Based on original archival research, an in-person interview with the plaintiff, and secondary sources, this Article articulates the many compelling qualities of Ms. Rowland's story, and it demonstrates the significance of the district court opinion and the dissents—from both the Sixth Circuit majority opinion and the Supreme Court's denial of certiorari—to LGBTQ rights arguments and jurisprudence. This Article aims to convince attorneys, scholars, and law professors of the centrality of the case to the LGBTQ rights legal canon and to stake out a respected place for Ms. Rowland in the history of the struggle for LGBTQ rights.

In December 1974, Ms. Marjorie Rowland was suspended from her job as a guidance counselor at Walter E. Stebbins High School in Riverside, Ohio after she disclosed to her secretary that she was bisexual and in love with a woman.[9] Ms. Rowland had previously made various other disclosures of her bisexuality at Stebbins, but the disclosure to her secretary appears to be the one that set off the negative chain of events.[10] Ms. Rowland was subsequently transferred to a job with no student contact and, later that year, her contract with the school district was not renewed.[11]

In May 1975, she sued, bringing equal protection, due process, Ninth Amendment, First Amendment, and 42 U.S.C. § 1983 claims.[12] Ms. Rowland alleged that the school district and other defendants took various adverse actions against her, in that they transferred her to a job with no student contact without hearing and notice, harassed her and treated her more harshly than other employees, violated her employment agreement, declined to renew her contract, and made false and defamatory statements about her because of her "bisexual[ality], because she informed others of her bisexuality and because she sued defendants."[13]

Ms. Rowland's suit initially faced formidable setbacks, such as dismissal of her due process claim on summary judgment and, later, a sua sponte

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are cautious about bringing bisexual+ plaintiffs and narratives to the forefront of impact litigation and other advocacy, especially in the Supreme Court.") (footnotes omitted).

[9] *Rowland*, 470 U.S. at 1010 (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari); *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *1; Interview with Marjorie Rowland, in Tucson, Ariz. (Apr. 8, 2017), at 5 [hereinafter Interview]; Complaint ¶ 4, *Rowland*, ECF No. 1, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[10] Interview, *supra* note 9, at 5. For information on other disclosures of her bisexuality at Stebbins, see *infra* notes 108–110 and accompanying text (describing Ms. Rowland's disclosure of her bisexuality to the assistant principal and additional disclosures to friends and acquaintances at Stebbins) and *infra* note 375 (describing her disclosure to gay students who asked her directly). There also appear to have been post-suspension disclosures made in the hopes of gaining support from her colleagues in the face of negative actions by school administrators. *See* Transcript of Record, Vol. II at 144, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (testimony of Ohio Education Association representative Peggy Titus describing a meeting at which such disclosures were referenced by Ms. Rowland's attorney).

[11] *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *1.

[12] *Id.* at *1–2; Complaint ¶ 1, *Rowland*, ECF No. 1, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[13] Complaint ¶ 9, *Rowland*, ECF No. 1, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

dismissal of her entire case, which was ultimately reversed on appeal.[14] However, in October 1981, after a two-week trial, a jury found in her favor on her equal protection and First Amendment claims, awarding her $40,447 against Mad River School District, including $13,500 for personal humiliation, mental anguish, and suffering caused by her suspension and $26,947 in lost earnings due to the non-renewal of her employment contract.[15]

In the six and a half years between filing suit and receiving the jury verdict, Ms. Rowland was blacklisted and unable to secure another job as a guidance counselor.[16] As a single mother with three children, Ms. Rowland worked a variety of other jobs before ultimately going to law school, graduating in two years, and starting to practice law—all while her case was still pending.[17] During the pendency of her case, Ms. Rowland was an object of harassment, including being targeted by numerous hostile phone calls from strangers and being trailed by the media.[18] Worst of all, a local prosecutor charged Ms. Rowland with welfare fraud, evidently in retaliation for bringing her suit, immediately after the verdict in her favor was returned, threatening her ability to continue to practice law.[19]

Ms. Rowland's suit was brought and ultimately tried during a tumultuous time in LGBTQ history. While her suit was pending, conservative activist, singer, and former beauty queen Anita Bryant began a highly injurious campaign to foment fears that LGBTQ persons would harm children, insist-

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[14] Order at 1, *Rowland*, ECF No. 15, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing earlier dismissal of due process claims and the affirmation of that dismissal on appeal); *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *2 n.1 (same); *see also* Order, *Rowland*, ECF No. 11, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (setting briefing schedule for cross motions on summary judgment). The due process claims were dismissed on the basis that Ms. Rowland's "limited contract did not give her a continuing expectancy of employment constituting a property interest." *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *1, *2 n.1; Rowland v. Mad River Loc. Sch. Dist., 615 F.2d 1362 (6th Cir. 1980) (table); *see also* Margaret A. Nash & Karen L. Graves, Mad River, Marjorie Rowland and the Quest for LGBTQ Teachers' Rights 19–20 (2022) (describing dismissal on summary judgment of the due process claim and the later dismissal of the remainder of her case as well as the overturning of the later dismissal on appeal).

[15] Jury Verdict I–III, *Rowland*, ECF No. 75, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *see* Libby Gregory, *Bisexual Teacher Awarded Damages After Dismissal*, Columbus Free Press, Nov. 4, 1981, at 1, 11.

[16] Interview, *supra* note 9, at 8; Nash & Graves, *supra* note 14, at 20; Transcript of Record, Vol. II at 387–88, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[17] Interview, *supra* note 9, at 8; Post-Trial Memorandum on Inj. Relief & Interest, Ex. A, *Rowland*, ECF No. 76, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (noting Ms. Rowland finished law school in two years); Nash & Graves, *supra* note 14, at 21; Gregory, *supra* note 15, at 11; Transcript of Record, Vol. II at 388–89, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[18] Interview, *supra* note 9, at 18, 23.

[19] Nash & Graves, *supra* note 14, at 29–32; Interview, *supra* note 9, at 30; John Zeh, *Fired Bisexual Still Faced with Problems*, Gay Cmty. News, Feb. 20, 1982 (detailing the charge of welfare fraud against Ms. Rowland); *Lesbian Lawyer Charged with Welfare Fraud*, Atalanta, June 1982, at 8; Gregory, *supra* note 15, at 11.

ing that children needed protection from them.[20] Bryant successfully achieved the immediate object of her campaign—the repeal of a Dade County, Florida ordinance protecting LGBTQ persons from discrimination—and her fear-mongering tactics continue to be deployed against LGBTQ persons today.[21] The Dade County ordinance was repealed in response to Bryant's activism in June 1977, and in October, Ms. Rowland's entire case was dismissed sua sponte by the district court.[22] Although the dismissal was later reversed, the timing raises the possibility that Bryant's arguments affected the viability of Ms. Rowland's case.[23] At times, defendants also deployed Bryant-style fear-mongering tactics in their arguments against Ms. Rowland in court.[24]

Other notable historical developments close in proximity to Ms. Rowland's case include Ohio's repeal of its sodomy statute in 1972[25] and the

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[20] NASH & GRAVES, *supra* note 14, at 21–22; *Anti-Gay Organizing on the Right*, PBS, https://www.pbs.org/outofthepast/past/p5/1977.html [https://perma.cc/3P7H-A9BS]; *see also* Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 645 (2013) ("The twin pillars of Bryant's campaign were her repeated claims of 'homosexual recruitment' and her specific focus on the vulnerability of children to the influence of openly gay teachers.").

[21] *See* NASH & GRAVES, *supra* note 14, at 22; *Anti-Gay Organizing on the Right*, *supra* note 20; Rosky, *supra* note 20, at 609–10 (explaining these fear-based tactics, including fear of queer role-modeling, and their continued use).

[22] NASH & GRAVES, *supra* note 14, at 22; Order at 2, *Rowland*, ECF No. 15, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[23] *See* NASH & GRAVES, *supra* note 14, at 22. Adding further to this possibility was the fact that Ms. Rowland had been interviewed for a news article about the anti-discrimination ordinance in Yellow Springs, Ohio, which also protected LGBTQ people, in July 1977. *Id.*

[24] This fact is evident from the epigraph to this Article. Mad River Loc. Sch. Dist.'s Motion to Set Aside the Verdicts and Judgment at 5, *Rowland*, ECF No. 84, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). It is also apparent from defendants' statements in the closing argument (1) that it was a conflict of interest for Ms. Rowland to be counseling gay students given that she was a bisexual and (2) implying that it was shocking that Ms. Rowland was counseling four gay students at Stebbins. *See* Transcript of Record, Vol. IV at 267, 272, 277–78, 280, 282, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). Both statements contain echoes of Anita Bryant's spurious claims relating especially to children that "[h]omosexuals cannot reproduce, so they must recruit." *Anti-Gay Organizing on the Right*, *supra* note 20. The same can be said of the school district attorney's statement to union representative Peggy Titus that Ms. Rowland had been suspended for "advertising herself as a homosexual," given that purported advertising could be seen as a tool of recruitment. Transcript of Record, Vol. II at 143, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *see also* Mad River Loc. Sch. Dist.'s Motion to Set Aside the Verdicts and Judgment at 4, *Rowland*, ECF No. 84, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (containing allegations that Ms. Rowland "promot[ed], advertis[ed] and flaunt[ed] her bisexuality"). Moreover, the statements referenced above that were made in closing arguments support Professor Janet Halley's conception of the school district as excluding Ms. Rowland in an attempt to express itself as a solely heterosexual institution. *See* Janet E. Halley, *The Construction of Heterosexuality*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82, 85–86 (Michael Warner ed., 1993).

[25] *See, e.g.*, md spicer-sitzes, *50 Years After Stonewall, Where is Ohio?*, EQUAL. OHIO (June 13, 2019), https://equalityohio.org/50-years-after-stonewall-where-is-ohio/ [https://perma.cc/M972-SEE5]. However, despite repeal of the Ohio sodomy statute, same-sex soliciting remained on the books as a misdemeanor in various configurations until the

removal of homosexuality from the Diagnostic and Statistical Manual, an important step toward de-pathologizing homosexuality that occurred just slightly before Ms. Rowland's disclosure of her bisexuality to Mrs. Monell.[26]

Part I of this Article first provides an in-depth account of Ms. Rowland's life story and the *Rowland* case's factual background. This information is drawn primarily from an interview the author conducted with Ms. Rowland in April 2017 at her law office in Tucson, Arizona, in addition to trial court testimony, trial court pleadings, and secondary sources.[27] Part I then summarizes the district court decision, the Sixth Circuit's decision vacating the jury verdict in Ms. Rowland's favor, and Justice Brennan's dissent from the denial of certiorari, which Justice Marshall joined.[28] As the first statement in favor of LGBTQ rights by a Supreme Court Justice,[29] Justice Brennan's dissent has been cited in important LGBTQ rights cases in the lower courts and thus has significantly advanced the cause of LGBTQ rights.[30] However, the case has not received the attention it deserves in LGBTQ rights scholarship and textbooks.[31] This lack of attention to the case can be understood as part of a widespread pattern of erasure of bisexual contributions to LGBTQ history. While many assume that bisexuals have simply not been major contributors to LGBTQ history, this perception is largely the result of bisexual erasure. For example, a bisexual man founded the first university-sanctioned LGBTQ student group, and, further, Brenda Howard,

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early 2000s. *Id.* Other states continued to have sodomy statutes on the books well after the *Rowland* case. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 569–571 (2003); *id.* at 596 (Scalia, J., dissenting).

[26] Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 571 (2015). Ms. Rowland disclosed her own bisexuality to Mrs. Monell in November 1974, just before Thanksgiving recess. Transcript of Record, Vol. II at 320, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (reflecting Ms. Rowland's testimony to that effect).

[27] Ms. Rowland has since retired from the practice of law. *See Ms. Marjorie H. Rowland, Member Directory*, STATE BAR OF ARIZ., https://www.azbar.org/for-lawyers/practice-tools-management/member-directory/ [https://perma.cc/L7SW-RFAK].

[28] Rowland v. Mad River Loc. Sch. Dist., 730 F.2d 444, 452 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1009 (1985); Rowland v. Mad River Loc. Sch. Dist., 471 U.S. 1009, 1009–18 (1985) (Brennan, J., dissenting from denial of certiorari).

[29] WILLIAM N. ESKRIDGE JR. ET AL., SEXUALITY, GENDER, AND THE LAW 537 (5th ed. 2022).

[30] NASH & GRAVES, *supra* note 14, at 42–43; Deb Price, *The High Court's William J. Brennan Jr. Leaves a Legacy of Justice for Gay Rights*, DETROIT NEWS (Aug. 8, 1997); *see also* Watkins v. U.S. Army, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment); Windsor v. United States, 699 F.3d 169, 183 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013).

[31] *See, e.g.*, Karen Graves & Margaret A. Nash, *Staking A Claim in* Mad River*: Advancing Civil Rights for Queer America*, *in* DORIS A. SANTORO ET AL., PRINCIPLED RESISTANCE: HOW TEACHERS RESOLVE ETHICAL DILEMMAS 183 (2018); David S. Cohen, *Silence of the Liberals: When Supreme Court Justices Fail to Speak Up for LGBT Rights*, 53 U. RICH. L. REV. 1085, 1087 (2019) (stating that Justice Brennan's "somewhat obscure denial of certiorari from 1985 [in *Rowland*] has been mostly forgotten"); *see also infra* notes 187–227 (discussing content relating to bisexuality in Sexuality and Law casebooks).

a bisexual woman, started the tradition of LGBTQ Pride Parades after the Stonewall riots.[32]

Part II of the Article explains how the case advanced LGBTQ rights and yet remains an example of bisexual erasure, both in terms of the inadequate recognition it has received and in terms of Ms. Rowland's inaccurate representation as a lesbian in many press accounts. Part II next describes the personal sacrifices Ms. Rowland made in disclosing her bisexuality and in bringing the case, situating the case among her other important contributions to social justice.

Finally, Part III describes the flaws in the Sixth Circuit's opinion and explores the extent to which LGBTQ rights have progressed since that decision, while shining a light into the corners in which progress has stalled and into the possibility of regression, given the current make-up of the Supreme Court. Part IV provides some concluding thoughts.

This Article is rooted in the critical feminist tradition of storytelling, in that it "attend[s] to . . . personal experiences, histories, and narratives"[33] as a means of "social transformation."[34] As critical race theorist Richard Delgado has explained, "stories can shatter complacency and challenge the status quo" and "show us the way out of the trap of unjustified exclusion."[35] Thus, this Article is, in part, a counter-narrative to the impoverished and sometimes misleading version of Ms. Rowland's story that is recounted in the Sixth Circuit opinion.

Scholars have recognized that often "[a]ppellate opinions hide, rather than display, how 'facts' are constructed and how more than one narrative can be consistent with 'raw data,'"[36] and they further that "[t]he judicial opinion is the judge's story justifying the judgment" and that its deployment of facts is therefore likely to be "inherently selective."[37] Because little legal scholarship has addressed Ms. Rowland's case in depth, much less sought to

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[32] *See, e.g.*, Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 699–703 (2015); Julia Shaw, *What People Get Wrong About the History of Bisexuality*, TIME (June 23, 2022), https://time.com/6189773/bisexuality-history-researchers/ [https://perma.cc/9EHQ-RVE5]; Miranda Rosenblum, *The U.S. Bisexual+ Movement: A #BiWeek History Lesson*, GLAAD (Sept. 22, 2017), https://www.glaad.org/blog/us-bisexual-movement-biweek-history-lesson [https://perma.cc/P9MZ-QWV4].

[33] Wendy S. Hesford, *Storytelling and the Dynamics of Feminist Teaching*, 5 FEMINIST TCHR. 20, 20 (1990).

[34] Judith Flores Carmona & Kristen V. Luschen, *Introduction: Weaving Together Pedagogies and Methodologies of Collaboration, Inclusion, and Voice*, *in* CRAFTING CRITICAL STORIES: TOWARD PEDAGOGIES AND METHODOLOGIES OF COLLABORATION, INCLUSION, AND VOICE 2 (2014).

[35] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414–15 (1989).

[36] L. Danielle Tully, *The Cultural (Re)turn: the Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. C.R. & C.L. 201, 242 (2020) (citing Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007)).

[37] Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 559 (2001).

flesh out her account,[38] the Sixth Circuit opinion remains the dominant story of her case. This Article seeks to replace that narrative with a fuller, more complete, and respectful story of Ms. Rowland's life, case, and contributions to LGBTQ rights and social justice.

In addition to rendering visible aspects of her story that have been suppressed or elided,[39] this Article seeks to bring to light the importance of the case in the struggle for LGBTQ rights, as well as to highlight the extent to which Ms. Rowland's status as a bisexual was erased in much of the discussion about the case, which has often described her as lesbian rather than bisexual. This Article also illuminates the personal sacrifices Ms. Rowland endured to bring the case and portrays the many other contributions to social justice that Ms. Rowland has made throughout her life. In a sense, then, this Article serves as a counter-narrative more broadly to the societal stories that bisexuality and bisexuals do not exist, that bisexuality as an orientation is illegitimate, and that bisexuals' issues relating to society's treatment of bisexuality, if they exist at all, are subsumed within lesbian and gay legal and social issues.[40]

Finally, this Article explains the serious flaws in the Sixth Circuit's decision and then elucidates how far we have come in LGBTQ rights jurisprudence since that decision, while recognizing that there is much work yet to be done. One concrete indication that much more work needs to be done in this area is the fact that a remarkably similar case involving a bisexual teacher in Kentucky was dismissed at the district court level in 2019[41] before the Supreme Court's decision in *Bostock v. Clayton County*.[42] This case was then reinstated by the Sixth Circuit in light of *Bostock* and remains pending as of this writing, nearly fifty years after Ms. Rowland was suspended for disclosing her bisexuality.[43] Until *Bostock* was decided in 2020, the plaintiff in that case, Mr. Nicholas Breiner, had no legal recourse in the Sixth Circuit when his teaching contract was not renewed as a result of his disclosure of

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[38] *See infra* note 174 and sources cited therein.

[39] *See* Carmona & Luschen, *supra* note 34, at 2 (describing the role of "critical (hi)storytelling" in illuminating such stories).

[40] *See* Delgado, *supra* note 35, at 2414–15 (discussing stories and counterstories); Kristin S. Scherrer et al., *Getting "Bi" in the Family: Bisexual People's Disclosure Experiences*, 77 J. MARRIAGE & FAM. 680, 682–83 (2015) (discussing common stereotypes of bisexuals); Tweedy & Yescavage, *supra* note 32, at 703 n.22 (describing the view that bisexuality is an illegitimate sexual orientation and other stereotypes); MOVEMENT ADVANCEMENT PROJECT, INVISIBLE MAJORITY: THE DISPARITIES FACING BISEXUAL PEOPLE AND HOW TO REMEDY THEM 5 (Sept. 2016) (discussing the perception among fourteen percent of Americans, according to one survey, that "bisexuality was not a legitimate sexual orientation" and other manifestations of bias against bisexuals).

[41] Breiner v. Bd. of Educ., Montgomery Cnty., No. 5:18-cv-00351-KKC (E.D. Ky. Jan. 25, 2019), ECF No. 10.

[42] 140 S. Ct. 1731 (2020).

[43] Breiner v. Bd. of Educ., Montgomery Cnty., No. 19-5123, 2020 U.S. App. LEXIS 33103 (6th Cir. Oct. 20, 2020); Amended Sched. Ord., *Breiner*, ECF No. 46 (No. 5:18-cv-00351-KKC) (reflecting discovery deadlines spanning from August 2023 through January 2024).

his bisexuality,[44] just as the Sixth Circuit held that Ms. Rowland had no recourse so many years before. In addition to demonstrating the recency of the progress in this area of law, Mr. Breiner's case demonstrates that the societal prejudice that resulted in the adverse actions against Ms. Rowland unfortunately continues today.

I. Ms. Rowland's Life Story, the Events Leading Up to her Case, and the Decisions in the District Court and the Sixth Circuit

A. Ms. Rowland's Life Before Stebbins High School

Marjorie ("Marj") Rowland grew up in Toledo, Ohio and had a difficult childhood. Her parents were of Pentecostal background,[45] and her father drank a lot and was abusive. When she was fifteen, she was driving a car that she had borrowed from her boyfriend and got into a terrible car accident in which her friend, a passenger, was killed. Marj suffered a head injury that required her to spend a week in the hospital. After her mother brought her home from the hospital, her father slapped her and called her a murderer.

Marj's mother was not supportive of her, and eventually Marj went to live with a family she knew from church for a time. Marj became close to the mother, and the mother began to molest her (although Marj perceived the relationship as nurturing at the time). The mother also began to get very jealous of Marj's friendships with other girls. Meanwhile, Marj was bullied at school after the accident due to her friend's death, and even her chemistry teacher, who was the father of her boyfriend, participated in the bullying.[46]

Because of her extremely difficult experience in high school, Ms. Rowland went to summer school in order to finish high school early.[47] She then enrolled at Mary Manse College in Toledo, Ohio in 1957. After a year, she transferred to Wittenberg University, a Lutheran college in Springfield, Ohio, and she later graduated from Wittenberg with a bachelor of science degree in Christian Education.[48] Ms. Rowland then briefly worked for

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[44] *See generally Breiner*, 2020 U.S. App. LEXIS 33103; *Breiner*, No. 5:18-cv-00351-KKC.

[45] Interview, *supra* note 9, at 24; *see also* Joyce Murdoch & Deb Price, Courting Justice: Gay Men & Lesbians v. the Supreme Court 237 (2001) (describing Ms. Rowland's parents as "austere fundamentalist Christians" and "sin-obsessed people who ranked dancing, card playing, makeup and jewelry as forbidden vices").

[46] Interview, *supra* note 9, at 24–26; Transcript of Record, Vol. II at 387–88, Rowland v. Mad River Loc. Sch. Dist., ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (S.D. Ohio Oct. 22, 1981) (No. C-3-75-125).

[47] Interview, *supra* note 9, at 25.

[48] Transcript of Record, Vol. II at 278, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *see also Campus Ministries*, Wittenberg Univ., https://www.wittenberg.edu/administration/chapel#:~:text=the%20fourth%2Doldest%20Lutheran%20college,and%20service%20to%20the%20world [https://perma.cc/XF4A-P9P9] (describing Wittenberg as "[t]he fourth-oldest Lutheran college in the country").

churches in Savannah, Georgia and then Dallas, Texas, where she directed their education programs.[49] Ms. Rowland held these successive positions for a short time and then returned to school at Wittenberg to obtain a teaching certificate in English.[50] During this period, she taught at a high school in Springfield, Ohio for a year and, during that year, married another teacher.[51] By the end of the year, she was pregnant with her first child, and she decided to take a year off to stay home with her daughter.[52] She later returned to teaching, taking breaks for additional maternity leaves and working in related positions, including teaching in the Upward Bound Program[53] and tutoring disabled students.[54]

While Ms. Rowland was married to her husband, they became close to another family at church, and Ms. Rowland developed an intimate relationship with the woman in the couple.[55] This relationship led to conflict with her husband. As a result of the intimacy with the woman from church and her husband's unhappiness, Ms. Rowland questioned whether something was wrong with her and even voluntarily spent some time in a mental hospital.[56] Fortunately, she was able to find an empathetic psychiatrist who helped her realize that there was nothing wrong with her.[57]

She and her husband eventually divorced in 1971. Her husband had threatened to use her involvement with another woman against her in the divorce proceedings in order to gain custody of the children, but he did not end up doing so.[58] After her divorce, she moved with her three young children to Yellow Springs, Ohio for a teaching job, and she became involved

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[49] Transcript of Record, Vol. II at 278–80, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[50] *Id.* at 280–81; *see also* Complaint ¶ 2, *Rowland*, ECF No. 1, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (listing her teacher certification as being in English). Ms. Rowland left the first position in Savannah, because of the church's reluctance to admit Black parishioners, and the second position was a short-term position. Transcript of Record, Vol. II at 279–80, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[51] Transcript of Record, Vol. II at 280–81, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[52] *Id.* at 281.

[53] The Upward Bound Program is a federal program that supports high school students from low-income families as well as those from families where neither parent holds a bachelor's degree with the goal of preparing them for secondary education. *See Upward Bound Program*, U.S. Dept. of Educ. (Mar. 23, 2023), https://www2.ed.gov/programs/trioupbound/index.html#:~:text=the%20program%20provides%20opportunities%20for,parent%20holds%20a%20bachelor's%20degree [https://perma.cc/89C2-RVLW].

[54] Transcript of Record, Vol. II at 282–85, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[55] Interview, *supra* note 9, at 25–26.

[56] *Id.* at 26 (Ms. Rowland noting that she "spen[t] some time in a mental hospital voluntarily" as a result of the fact that her husband and the other woman's husband were threatened by the two women's relationship); Murdoch & Price, *supra* note 45, at 237 (2001) (stating that "the stress of living 'this double life' landed Rowland in a mental hospital briefly").

[57] Murdoch & Price, *supra* note 45, at 237; Interview, *supra* note 9, at 26.

[58] Interview, *supra* note 9, at 23.

with the LGBTQ community in Yellow Springs.[59] Yellow Springs was originally founded as a utopian community, and it has been described as having a "counterculture ethos."[60]

Ms. Rowland has never been enamored with labels, but she believes that it was during this period in Yellow Springs that she began to think of herself as bisexual.[61] As she explains: "The first time I actually labeled myself was when I got fired."[62] But that is jumping ahead.

Ms. Rowland was teaching at the middle and high schools in Yellow Springs and became involved in a peer counseling practice called Re-evaluation Counseling, in which pairs of participants engage in lay counseling with each other through active listening.[63] In practicing Re-evaluation Counseling, "people listen to each other, usually in pairs, and take turns telling their full stories," which allows the participants "to be respectfully heard and [to] share . . . triumphs, hopes, and struggles, including how they have been hurt."[64]

Before Ms. Rowland applied to the master's program in Counseling at Wright State University, she attracted attention, due to her counseling skills, from an education and counseling professor at the university. The professor had participated in a Re-evaluation Counseling workshop that Ms. Rowland led at their church and was struck by her "ability to honestly and openly express parts of herself and to help other people take a look at their communication skills and help them be able to express themselves better."[65] As a result of what he perceived to be "her tremendous skills," he encouraged

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[59] *Id.* at 26.

[60] NASH & GRAVES, *supra* note 14, at 16.

[61] Interview, *supra* note 9, at 26–27; *see also* Transcript of Record, Vol. II at 319, Rowland v. Mad River Loc. Sch. Dist., ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (S.D. Ohio Oct. 22, 1981) (No. C-3-75-125) (describing the date as earlier, namely 1968).

[62] Interview, *supra* note 9, at 27. As was the case for Ms. Rowland, it is fairly common for bisexuals to come out or disclose their sexual orientation as bisexual at times when they are partnered with someone of the same sex. *See, e.g.*, Emiel Maliepaard, *Disclosing Bisexuality or Coming Out? Two Different Realities for Bisexual People in the Netherlands*, 18 J. BISEXUALITY 142, 158 (2018) ("Disclosure because of having a partner is another critical theme in the stories of bisexual people."); Rachael L. Wandrey, et al., *Coming Out to Family and Friends as Bisexually Identified Young Adult Women: A Discussion of Homophobia, Biphobia, and Heteronormativity*, 15 J. BISEXUALITY 204, 216 (2015) (explaining that respondents, who were young bisexual women, "talked about being in a relationship with a woman as a right time to come out to others because they saw high cost and little benefit to coming out otherwise"); Kirsten McClean, *Hiding in the Closet?: Bisexuals, Coming Out and the Disclosure Imperative*, 42 J. SOCIO. 151, 162 (2016) (providing examples of respondents who noted that they would let others know of the fact of the relationship or their bisexuality if they were in a same-sex relationship).

[63] Interview, *supra* note 9, at 2; Transcript of Record, Vol. II at 285–88, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *What is Re-Evaluation Counseling? Frequently Asked Questions*, RE-EVALUATION COUNS., https://listeningwell.info/faq/ [https://perma.cc/ZL6M-375H].

[64] *What is Re-Evaluation Counseling?*, *supra* note 63.

[65] Transcript of Record, Vol. II at 30, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

Ms. Rowland to pursue a master's degree in Counseling at Wright State.[66] Ms. Rowland followed his advice, ultimately enrolling in 1973.[67]

While she was studying at Wright State, a representative from the school district in Mad River Township asked for the program to send over "their best candidate."[68] Ms. Rowland was asked to apply and interview for a vocational counselor position at Stebbins High School, located in what is now the city of Riverside, Ohio.[69] She got the job.[70] Despite the job title, Ms. Rowland was told that the job would involve not only vocational counseling but also more comprehensive counseling of students, and, thus, the job was ideal for her, at least in the short term.[71]

B. Ms. Rowland and Stebbins High School

Ms. Rowland started at Stebbins High School in the fall of the 1974–75 school year. Initially, everything went well. Students, and even some teachers, came in for counseling sessions, and Ms. Rowland got along well with the principal, Alex DiNino.[72] But everything changed when, on a day just before the Thanksgiving recess, Ms. Rowland's secretary, Elaine Monell, asked her why she was smiling so much. At first, Ms. Rowland said that she'd had a good evening the night before, or something to that effect. Eventually, after Mrs. Monell's persistent-but-friendly questioning, Ms. Rowland announced that she was in love and that the object of her love was a woman.[73] Mrs. Monell's initial response was simply to ask "a number of questions," in a manner that seemed "interested" and "curious."[74]

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[66] *Id.* at 31.

[67] Interview, *supra* note 9, at 2–3; Transcript of Record, Vol. II at 288–89, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[68] Interview, *supra* note 9, at 3.

[69] *See Riverside, Ohio*, CityTownInfo.com, https://www.citytowninfo.com/places/ohio/riverside [https://perma.cc/8R6E-A4VE] (noting that Riverside was incorporated as a city in 1995 and that is located in the Dayton-Springfield metropolitan area).

[70] Interview, *supra* note 9, at 3–4.

[71] Transcript of Record, Vol. II at 290–92, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[72] Interview, *supra* note 9, at 4–5; *see also* Transcript of Record, Vol. II at 305–06, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *id.* at 67 (trial testimony of Alex DiNino relating to his deposition testimony).

[73] Transcript of Record, Vol. II at 320–21, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). It is possible that Ms. Rowland's willingness to disclose that she was in love with someone of the same sex resulted from a level of naïveté that was due to her lacking, as a bisexual, longstanding experience with homophobia. *See, e.g.*, Jennifer Baumgardner, Look Both Ways: Bisexual Politics 216–17 (2008) (arguing that bisexual actress Anne Heche had a similar level of naïveté regarding homophobia when she urged her then-girlfriend Ellen DeGeneres to come out as gay in 1997); *cf.* Paul Monette: Becoming a Man: Half a Life Story 271–72 (2014) (describing the author's experience as a closeted gay school teacher in the late sixties and early seventies and his imagined miserable future if he had continued in that type of position, intimating that being closeted was required to maintain that type of position).

[74] Transcript of Record, Vol. II at 321, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

After their discussion, however, Ms. Rowland's workplace became tense and hostile. Mrs. Monell first shared Ms. Rowland's news with the vocational educational director, who later shared Ms. Rowland's news with the principal.[75] Ms. Rowland began to have the sense that she was being watched. A few days after Thanksgiving recess, a supervisor tipped off Ms. Rowland that Principal DiNino knew about her sexual orientation and that something was happening, and Ms. Rowland then asked to meet with Mr. DiNino.[76] During this meeting, he told her that he had heard that she was "going around telling people that [she] was bisexual," that they "couldn't have that" there, and that he would give her the opportunity to resign with no black mark on her record.[77] In the course of this conversation, Mr. DiNino indicated that he would not have a problem with Ms. Rowland's bisexuality if she were a classroom teacher.[78] Instead, he stressed that his concern was grounded in the fact that she met with students "one-to-one," hinting at false and pernicious stereotypes of LGBTQ persons as sexual predators and pedophiles.[79] He implied that he would fire her if she did not

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[75] Transcript of Record, Vol. IV at 239, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[76] *Id.* at 335–37.

[77] Interview, *supra* note 9, at 5.

[78] Transcript of Record, Vol. II at 337, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[79] *Id.*; *see* Ann Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1478 n.63 (2011) (discussing the wrongful association between LGBTQ persons and pedophilia); Wandrey et al., *supra* note 62, at 216 (describing a fear among the study's young female bisexual respondents that "they would be viewed as sexual predators by heterosexual women"); Tweedy & Yescavage, *supra* note 32, at 736 (describing a theme among the study's bisexual respondents of being stereotyped as hypersexual).

On other occasions, the school administrators tried to develop the theme of hypersexuality, likely to create a stronger reason to discharge Ms. Rowland. For example, school officials asked two students whether Ms. Rowland had ever touched them. *See US Teachers Win*, 4 GAY CMTY. NEWS 16 (1981); Interview, *supra* note 9, at 19. The school district also attempted to argue that Ms. Rowland had inappropriately brought up sexual subjects when giving a visiting lecture in an English class, but the teacher who had invited Ms. Rowland to speak disputed this characterization, and the jury, as illustrated by their special verdict answers, did not accept the school district's characterization. Transcript of Record, Vol. II at 521–22, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (testimony of Maryann Myers to the effect that the questions brought up during that class period in which Ms. Rowland guest lectured came from the students and were answered by the students); *id.* at 525 (Ms. Myers's testimony that she had received a positive evaluation from the principal, Mr. DiNino, and that she did not face criticism regarding Ms. Rowland's guest lecture); Transcript of Record, Vol. IV at 268, 286–87, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing Ms. Rowland's guest lecture during defendant's closing argument); Special Verdict V, No. 9, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (responding that the only way in which Ms. Rowland's job performance was unsatisfactory was in her having revealed the sexual orientation of two students to Mrs. Monell); *see also US Teachers Win*, *supra* (describing the testimony on the subject elicited by the school district and quoting Ms. Rowland's attorney as to the jury's disregard of it).

Mrs. Monell also apparently worried that Ms. Rowland's bare presence at the school would in some way harm her teenage child who attended the school, although the teenager did not interact with Ms. Rowland and in fact took classes in a separate wing of the

resign, noting that "he didn't want to have to dismiss" her.[80] Ms. Rowland did not immediately respond. After making this threat, Mr. DiNino noted that Mrs. Monell also had told him that Ms. Rowland had revealed the sexual orientations of two students to Mrs. Monell and that he may "use that information against [her] to show that [she] had broken confidences."[81]

On December 9, 1974, Ms. Rowland received a notice from a student messenger instructing her to attend a meeting after school at which Mr. DiNino and the superintendent would be present to "discuss [her] status . . . as a faculty member at Stebbins High School."[82] At that point, Ms. Rowland contacted a lawyer from the ACLU, who attended the meeting with her. At the outset of the meeting, the school district representatives announced that "[i]t has come to our attention that Ms. Rowland is either bisexual or lesbian," although Ms. Rowland herself had not stated that she was a lesbian.[83] Her attorney asked how this was different from being a Republican or a Rotarian.[84] In response, Ms. Rowland's resignation was demanded, but she refused to resign. She was then suspended immediately and was not even

building. Interview, *supra* note 9, at 10; Transcript of Record, Vol. III at 410–11, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[80] Transcript of Record, Vol. II at 337, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[81] *Id*. at 338. The discussions with Mrs. Monell about one of the students' orientations occurred at an earlier point in Ms. Rowland's employment, about two to three weeks before Ms. Rowland's disclosure to Mrs. Monell of her own sexual orientation, with the disclosure to Mrs. Monell regarding the second student occurring at roughly the same time as Ms. Rowland's disclosure of her own bisexuality. *See, e.g.*, *id.* at 316, 320 (reflecting Ms. Rowland's testimony regarding the timing of disclosure to Mrs. Monell of each of the two students' sexual orientations); Transcript of Record, Vol. IV at 258, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing timing of incidents during plaintiff's closing argument). Given the timing of the first disclosure, it can probably be inferred that Mrs. Monell did not outwardly react negatively to being told of the student's sexual orientation because Ms. Rowland felt comfortable later telling Mrs. Monell of her own sexual orientation, and there is also evidence that Mrs. Monell initially kept the information about the student confidential. *See* Transcript of Record, Vol. IV at 258, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) ("Mrs. Rowland on two occasions had mentioned sexual orientation of students . . . and that information Mrs. Monell had kept confidential . . . . It was only at the end of November when Mrs. Rowland mentioned her sexual orientation to Mrs. Monell that Mrs. Monell told Mr. Lane about Mrs. Rowland's sexual orientation and also the fact that she had told her that a student is gay."). Notably, Ms. Rowland argued that she had the permission of the students to reveal their sexual orientations to Mrs. Monell, and that the purpose of the disclosures was to ensure that the students would have unfettered access to her. Transcript of Record, Vol. II at 314–17, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Interview, *supra* note 9, at 3; Transcript of Record, Vol. IV at 258–59, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing students' permission during plaintiff's closing argument). Finally, it appears that Mrs. Monell ultimately also breached the students' confidentiality in reporting the matter to Mr. Lane, after she learned of Ms. Rowland's bisexuality. Transcript of Record, Vol. IV at 258–60, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing Mrs. Monell's disclosure during plaintiff's closing argument).

[82] Transcript of Record, Vol. II at 341, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[83] Interview, *supra* note 9, at 5.

[84] *Id.*

allowed to return to the building where her office was to get her belongings.[85] No one told the students why Ms. Rowland disappeared from the school, which was traumatic for those who had a counseling relationship with her.[86]

Ms. Rowland's attorney filed a suit for reinstatement, and Ms. Rowland won that suit on the basis that she had not received a hearing before being suspended.[87] However, in response to the District Court's order that she be allowed to return to work, the principal and the superintendent created a "make-shift" position for her, with no student contact, that was located in another building.[88] The sign on her new office door read "restroom," and there was, in fact, a bathroom in the corner of her office.[89] Ms. Rowland's new task was to work under the supervision of a curriculum specialist to create plans for a district-wide career education program that could then be submitted for federal funding.[90] Even under the stress of removal from her counseling position and the transfer to this make-shift position, she did an excellent job, as her supervisor for this project testified.[91] Ultimately, however, her contract was not renewed, and Ms. Rowland sued.

C. The Jury Verdict and the District Court Orders and Decision

Ms. Rowland brought claims under the First, Ninth, and Fourteenth Amendments of the United States Constitution and under 42 U.S.C. § 1983 in her July 1975 complaint.[92] The complaint does not clearly differentiate her claims, but it does refer to defendants as "discriminating" against her and states as reasons for the defendants' adverse actions the fact that Ms. Rowland "is bisexual, . . . [that she] announced her bisexuality to others, . . . [and that she] filed a lawsuit against defendants."[93]

Ms. Rowland's due process claim, which alleged that the defendants acted arbitrarily and capriciously, was dismissed on summary judgment

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[85] *Id.*

[86] *See* Transcript of Record, Vol. II at 562–63, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (testimony of student's mother); *id.* at 547 (testimony of student); *id.* at 273 (testimony of student); Interview, *supra* note 9, at 17.

[87] *See* NASH & GRAVES, *supra* note 14, at 18; *see also* Complaint ¶ 8, *Rowland*, ECF No. 1, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (reciting that "Judge Rubin issued an order enjoining defendants 'from discharging, suspending, or otherwise disciplining plaintiff without granting a hearing' and from 'employing plaintiff in any capacity other than that for which she holds appropriate certifications' ").

[88] *See Rowland*, No. C-3-75-125, 1981 U.S. Dist. LEXIS 15583, at *18; *Sexuality No Grounds for Firing*, GAY CMTY. NEWS, Nov. 7, 1981 (quoting Ms. Rowland describing the new position as "make-shift").

[89] Transcript of Record, Vol. II at 191, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[90] *Id.* at 185–86.

[91] *Id.* at 188–89.

[92] Complaint ¶ 1, *Rowland*, ECF No. 1, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[93] *Id.* at ¶¶ 9, 12.

early on, and that dismissal was affirmed on appeal.[94] In August 1977, Ms. Rowland's remaining claims for violation of her rights to equal protection and free speech were dismissed sua sponte by the District Court for failure to state a claim on the basis of non-binding court decisions that had rejected similar claims.[95] In so holding, the District Court quoted the statement in *Matlovich v. Secretary of the Air Force*[96] that "[i]t is now clear . . . that there is no constitutional right to engage in homosexual activity" and then concluded that "the defendants were entitled to take plaintiff's sexual preference into consideration in declining to renew her contract."[97] This dismissal was vacated on appeal in an unreported decision, with the goal of the vacatur being to allow for "development of any of the circumstances surrounding the decision of the Defendants."[98] Ms. Rowland remembers that one of the appellate judges stated at the end of the oral argument that "this woman deserves her day in court."[99]

After the Sixth Circuit remanded the case, the parties consented to have it heard by Magistrate Judge Robert Steinberg, who had been Ms. Rowland's law school professor (a fact that she disclosed to the school district and the individual defendants).[100] Ms. Rowland was represented by an attorney provided by the National Education Association (NEA), of which she was a member.[101] Notably, the NEA had voted only the very year that Ms. Rowland was suspended to protect LGBTQ educators.[102] Judge Steinberg

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[94] Order at 1, *Rowland*, ECF No. 15, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing earlier dismissal of due process claims and the affirmation of that dismissal on appeal); *Rowland*, No. C-3-75-125, 1981 U.S. Dist. LEXIS 15583, at *2 n.1 (same). The due process claims were dismissed on the basis that Ms. Rowland's "limited contract did not give her a continuing expectancy of employment constituting a property interest." *Id.*; *see also* NASH & GRAVES, *supra* note 14, at 19 (describing dismissal of due process claim on summary judgment).

[95] Order at 2, *Rowland*, ECF No. 15, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[96] No. 75-1750, 1976 WL 649 (D.D.C. Aug. 25, 1976), *vacated sub nom.* Matlovich v. Sec'y of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

[97] Order at 2, *Rowland*, ECF No. 15, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (internal quotation marks omitted) (quoting *Matlovich*, No. 75-1750, 1976 WL 649, at *1).

[98] Rowland v. Mad River Loc. Sch. Dist., 615 F.2d 1362 (6th Cir. 1980) (table); *see also Rowland*, 1981 U.S. Dist. LEXIS 15583, at *1.

[99] Interview, *supra* note 9, at 8; *see also* NASH & GRAVES, *supra* note 14, at 20.

[100] Interview, *supra* note 9, at 8. Ms. Rowland entered law school in 1978, about three years after her contract was not renewed, and she graduated in 1981. NASH & GRAVES, *supra* note 14, at 21. She began law school at the University of Toledo and later transferred to the University of Dayton. *See* Interview, *supra* note 9, at 8.

[101] Interview, *supra* note 9, at 7; NASH & GRAVES, *supra* note 14, at 18. The case was so significant to the NEA attorney, Alexander Spater, that it was mentioned prominently in his 2013 obituary. *See* Jeb Phillips, *Alexander 'Sandy' Spater, 1943-2013: Lawyer Championed Civil Rights*, COLUMBUS DISPATCH (Sept. 10, 2013), https://www.dispatch.com/story/news/crime/2013/09/10/alexander-sandy-spater-1943-2013/23929999007/ [https://perma.cc/Z7S9-L8XB].

[102] NASH & GRAVES, *supra* note 14, at 18.

presented the jury, which consisted of eight women and four men,[103] with eight special verdicts, each involving multiple questions.[104] In all, the jury answered fifty-three individual questions.[105]

Overall, the special verdicts were a resounding victory for Ms. Rowland. For instance, the jury determined in Special Verdict I that Ms. Rowland's statements to her secretary regarding her bisexuality did not interfere with either person's duties or with the operation of the school.[106] The jury further determined in Special Verdict I that Ms. Rowland's suspension, the transfer to a position with no student contact, and the eventual non-renewal of her contract were all motivated at least in part by her statements to Elaine Monell regarding her own bisexuality.[107]

The special verdicts also directed the jury to examine the impact of most of Ms. Rowland's additional disclosures of her bisexuality. The jury determined that Ms. Rowland's statement of her bisexuality in confidence to an assistant principal did not interfere with her job and that it at least partially motivated the adverse actions against her.[108] This statement to the assistant principal was made because a gay student's mother had yelled at Ms. Rowland for being accepting of her son and accused Ms. Rowland of being homosexual too. As this outburst was a cause of concern for Ms. Rowland, she decided to discuss the matter in confidence with an assistant principal, Mr. Goheen, who was—and remained—supportive of her, although, at the time, he apparently did not understand the meaning of the term "bisexual."[109] The jury further concluded that Ms. Rowland's mention of her bisexuality to other teachers who were friends or acquaintances did not interfere with her job duties and that these statements were part of the motivation for the adverse employment actions taken against her.[110]

In Special Verdict V, the jury found that Ms. Rowland had been treated "differently than similarly situated employees, because she was homosexual/bisexual" by the principal and superintendent, and, in Special Verdict VIII, the jury determined that Ms. Rowland would not have been suspended, transferred to a position with no student contact, nor faced non-renewal of

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[103] *Court Backs Teacher Fired for Gay Lover*, CAMPAIGN, Jan. 1982, at 10 (describing the gender make-up of the jury).

[104] Special Verdicts, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 68, 1981 U.S. Dist. LEXIS 15583.

[105] *Id.*; Interview, *supra* note 9, at 8.

[106] Special Verdict I, No. 1, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[107] Special Verdict I, Nos. 3–8, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[108] Special Verdict II, Nos. 1, 3–8, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[109] Transcript of Record, Vol. II at 329–31, 335–36, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[110] Special Verdict III, Nos. 1, 3–8, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Transcript of Record, Vol. II at 322, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (Ms. Rowland's testimony naming the other teachers she had told of her bisexuality as friends and acquaintances).

her contract if she "had not been bisexual" and had not told other teachers and Mrs. Monell of her sexual preference.[111] Although there was no special verdict question inquiring about it, the jury also implicitly rejected the school district's claim that Ms. Rowland improperly brought up sexual subjects while serving as a visiting facilitator for a discussion in a literature class.[112]

Portions of the special verdicts that did not go in Ms. Rowland's favor included: (1) a determination that Ms. Rowland had not been retaliated against for filing a lawsuit; (2) a finding that the individual defendants acted in good faith—thus entitling them to qualified immunity under the partially-subjective standard then in place; (3) a finding that the Board of Education had not treated Ms. Rowland differently than similarly situated employees because of her sexual orientation (presumably because it relied on the superintendent's recommendation); and (4) a determination that she was not performing her job satisfactorily because she had revealed two of her students' sexual orientations to her secretary—although Ms. Rowland believed that she had the students' permission to make these two disclosures to her secretary, and she did so to ensure that Mrs. Monell would prioritize the students' requests when they needed to reach her.[113] The school district attempted to refute the claim that the students involved had given Ms. Rowland permission to make the disclosure, relying on Principal Alex DiNino's surmise in a prepared statement that LGBTQ students would be unlikely to give such permission due to the societal shame attendant upon professing a non-normative sexual orientation.[114]

After the special verdicts were issued and the damages verdicts were entered—awarding Ms. Rowland just over $40,000 for emotional pain caused by her suspension and lost earnings due to the non-renewal of her

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[111] Special Verdict V, Nos. 1–6, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Special Verdict VIII, Nos. 1, 3, 5, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[112] *See supra* note 79 and sources cited therein (discussing Ms. Rowland's visit to Maryann Myers's literature class).

[113] Special Verdict IV, Nos. 1–5, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Special Verdict VI, Nos. 1–6, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Special Verdict V, Nos. 7–9, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Transcript of Record, Vol. II at 314–17, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Interview, *supra* note 9, at 4. For a discussion of the standard for qualified immunity that was in place at the time, including the good faith element, see generally Wood v. Strickland, 420 U.S. 308 (1975). In 1982, the Court replaced the subjective standard in *Wood* with the objective one in place today. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[114] Transcript of Record, Vol. IV at 276, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing prepared statement of Alex DiNino during defendant's closing argument).

contract—the trial court issued a written opinion.[115] The court also later issued an order denying reinstatement, awarding prejudgment interest on her lost earnings, and granting Ms. Rowland expungement of records relating to her suspension, transfer to a job with no student contact, and the non-renewal of her contract.[116]

Judge Steinberg's opinion summarized the special verdicts and resolved some of the remaining issues (such as whether the school district could be held liable for the decisions of the superintendent and the principal).[117] Judge Steinberg's eloquent opinion explained that, while one has no constitutional right to be homosexual or bisexual, defendants were still subject to an equal protection obligation not to "treat Plaintiff any differently than employees in positions of similar responsibility and with comparable work records solely because she was homosexual or bisexual."[118] The court further upheld Ms. Rowland's First Amendment claim.[119] In its opinion, issued before *Connick v. Myers*[120] cemented the rule that public employees' speech will only be protected if it is on a matter of public concern,[121] the district court described the requirement of balancing Ms. Rowland's interest in speaking in this instance against the interests of the defendants "as employers, in having their employees properly perform their duties and in having the school operate in a normal fashion."[122] The district court then explained that the special verdicts resolved many of the issues in the case and stated that the jury had concluded: (1) that adverse actions would not have been taken against Ms. Rowland absent her revelations of her own bisexuality and (2) that those revelations impeded neither her own job performance nor that of other employees.[123]

In balancing Ms. Rowland's interests against those of the defendants in the First Amendment context, the district court noted that "the fact that Plaintiff did not speak out in a public forum does not strip her speech of protection, nor does the fact that the statements may have contained information which the listener either did not wish to hear or felt was repugnant to

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[115] *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *6; *see* Gregory, *supra* note 15, at 1, 11 (noting that Ms. Rowland was reportedly pleased with the jury verdict, although she wished it had been more).

[116] Order re: Plaintiff's Request for Pre-Judgment Int., Reinstatement & Expungement at 6–7 *Rowland*, ECF No. 82, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[117] *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *8.

[118] *Id* at *3; *see also id.* at *7–8.

[119] *Id.* at *9–25.

[120] 461 U.S. 138, 139, 147 (1983).

[121] *Id.* at 145–46. In addition to increasing the focus in the *Pickering* balancing test on whether the public employee's speech pertained to a matter of public concern, the Court in *Connick* has also been described as "exaggerat[ing]" the role of the employer's discretion to deem the employee's speech disruptive and therefore outside the realm of First Amendment protection. Andrew C. Alter, *Public Employees' Free Speech Rights:* Connick v. Myers *Upsets the Delicate* Pickering *Balance*, 13 NYU Rev. L. & Soc. Change 173, 173–74 (1984).

[122] *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *3.

[123] *Id.* at *7.

him."[124] The court further explained that the salient "question is whether the school district had a legitimate, overriding governmental interest in penalizing [Ms. Rowland] for making the statements in question,"[125] and it concluded that the jury's determination that the speech did not interfere with the functioning of the school or with Ms. Rowland's or others' job duties meant that the balancing test tipped in Ms. Rowland's favor.[126]

The court held, in accord with *Monell v. Social Services*,[127] that the school board was liable for Ms. Rowland's suspension and transfer in violation of her equal protection and First Amendment rights.[128] *Monell* had held that municipalities may only be held liable under 42 U.S.C. § 1983 for policies that violate the Constitution or other federal law.[129] In this case, because the school board acted on the superintendent's recommendation, which was formed in consultation with the school district's attorney, and because the superintendent had policymaking authority, the school district could be held liable for its actions against Ms. Rowland, which were thus properly understood to be rooted in a constitutionally impermissible policy.[130] Finally, the court interpreted the special verdicts as indicating that the school board did not violate equal protection in failing to renew Ms. Rowland's contract. The district court then examined the question of whether the board violated Ms. Rowland's First Amendment rights in failing to renew her contract. It held that the school violated her right to free speech because the board knew the reason that the superintendent wanted her removed from her position and chose to act on that reason.[131]

The district court ended its opinion with the following affirmation, which seems just as relevant a sentiment now as it likely did to many in 1981:

> Apparently the jury felt, as does the Court, that in our public educational system, which should have as one of its highest values the free expression of thoughts and ideas, there is room for the "free spirit," the unconventional person who marches to the beat of "a different drummer."
>
> Although no court has yet ruled on the specific issues set forth in this opinion, we believe that such a person has the constitutional

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[124] *Id.* at *12.
[125] *Id.* at *13.
[126] *Id.*
[127] 436 U.S. 658 (1978).
[128] *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *16–21.
[129] *Monell*, 436 U.S. at 691.
[130] *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *24 ("Therefore, the Board's action in voting not to renew was based upon the same constitutionally impermissible reason as Dr. Hopper's recommendation: Plaintiff's exercise of her rights under the First Amendment.").
[131] *Id.* at *22–25 (citing Hickman v. Valley Loc. Sch. Dist. Bd. of Educ., 619 F.2d 606, 610 (6th Cir. 1980)).

> right to be different; to express her innermost personal thoughts, her doubts, her fears, her insecurities, her likes, and her loves to fellow workers and friends so long as she does not impede the performance of the public school function.[132]

D. The Sixth Circuit's Decision

A divided Sixth Circuit reversed the jury's verdict in Ms. Rowland's favor.[133] The Sixth Circuit opinion will be addressed in more depth in Part IV. To briefly summarize, the majority rejected the district court's determination that the school district violated Ms. Rowland's free speech rights by failing to renew her one-year contract on the basis that Ms. Rowland's statements regarding her sexual orientation did not pertain to a matter of public concern under the *Connick v. Myers* test.[134] It relied in part on the fact that Ms. Rowland had requested confidentiality when she made some of the statements to demonstrate that her sexual orientation was not a matter of public concern.[135]

The Sixth Circuit's reasoning for reversing the equal protection verdict was more complicated. It zeroed in on the jury's finding that Ms. Rowland had improperly revealed the sexual orientations of two of her counselees to her secretary and held that this finding alone was a sufficient basis for the school district's decision to suspend and reassign her, despite the jury's findings that Ms. Rowland's bisexuality and disclosures of her bisexuality were at least partial bases of the adverse actions taken against her.[136] The Sixth Circuit then stated that, where there are permissible and arguably impermissible reasons for discipline of a public employee, the court must engage in an analysis under *Mount Healthy City Board of Education v. Doyle*[137] to determine whether the defendant "would have reached the same decision . . . even in the absence of the protected conduct."[138] The Sixth Circuit acknowledged that the district court had attempted to make the determination required under *Mount Healthy*, but it found fault with the special verdict designed to do so, noting that the special verdict asked both whether Ms. Rowland would have faced adverse employment actions if she was not bisexual and whether she would have faced such actions if she had not stated that she was bisexual.[139] The court understood there to be nothing wrong with disciplining someone because of a statement about their sexual orienta-

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[132] *Id.* at *26–27 (footnotes omitted).
[133] Rowland v. Mad River Loc. Sch. Dist., 720 F.2d 444 (6th Cir. 1984).
[134] *Id.* at 449 (citing Connick v. Myers, 461 U.S. 138 (1983)).
[135] *Id.*
[136] *Id.*; *see* Special Verdicts I–III, *Rowland*, ECF No. 68, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).
[137] 429 U.S. 274 (1977).
[138] 720 F.2d at 450 (quoting Mt. Healthy City Bd. of Educ., 429 U.S. at 287).
[139] *Id.*

tion, and it therefore held that, even if there were something wrong with disciplining someone because of their sexual orientation, the special verdict was irretrievably ambiguous as to whether the statements or the status were the basis of the adverse action.[140] The court then emphasized the jury's conclusion that Ms. Rowland had improperly revealed two students' sexual orientations to her secretary, apparently to diminish the weight of her equal protection claim.[141]

The Sixth Circuit next turned to the "other errors" it saw as "requir[ing] reversal and dismissal."[142] It stated that there was no evidence that Ms. Rowland had been treated differently than other, similarly situated employees and then found fault with the district court's decision to hold the school district liable for actions of its superintendent.[143] Specifically, contrary to its own precedent, the Sixth Circuit construed the district court's decision as relying on respondeat superior liability, which is improper under 42 U.S.C. § 1983 jurisprudence, to hold the school district liable, insisting that there was no policy or custom in place that was used as a basis for Ms. Rowland's suspension and transfer.[144]

A strong dissent by Judge George Clifton Edwards pushed back against the majority's conclusions. Judge Edwards emphasized that, contrary to the majority's insinuations, homosexuals are not excluded from constitutional protections. He further argued that, while Ms. Rowland may have intended her initial statement regarding her sexual orientation to be confidential—and therefore not a matter of public concern—it clearly shifted into the sphere of public concern after being relayed to school administrators: "Long before her nonrenewal/discharge, plaintiff became a center of public controversy in the Mad River School community involving the same issue of homosexual rights which has swirled nationwide for many years."[145] The dissent also pointed to the role of some irate parents in the nonrenewal and discharge as evidence that the adverse actions against Ms. Rowland implicated an important public issue.[146]

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 450–51.
[144] *Id.* at 451. As noted above, *Monell v. Department of Social Services* requires the presence of an impermissible municipal policy to support § 1983 liability for a municipality, rather than simply basing liability on an individual municipal employee's impermissible action. 436 U.S. 658, 690–91 (1978). Sixth Circuit precedent in place both then and now construed a school board's knowing acceptance of a school administrator's recommendation for adverse action *and* the unconstitutional basis thereof to be municipal policy that is actionable under § 1983. Hickman v. Valley Loc. Sch. Dist. Bd. of Educ., 619 F.2d 606, 610 (6th Cir. 1980); *see also infra* notes 304–307 and associated text (discussing *Hickman*, 619 F.2d, as well as later cases).
[145] Rowland v. Mad River Loc. Sch. Dist., 720 F.2d 444, 452–53 (6th Cir. 1984) (Edwards, J., dissenting).
[146] *Id.* at 453.

As to the equal protection verdict, Judge Edwards's dissent analogized Ms. Rowland's dismissal to a racially charged dismissal to argue that it was clear that there was a policy at play in her non-renewal, further suggesting that the dichotomy drawn by the majority between bisexual status and statements acknowledging bisexual status was a false one.[147] The dissent also rejected the idea that Ms. Rowland provided inadequate evidence that similarly situated employees were treated differently, stating that this question was really one of "credibility and logical inference which the jury was uniquely positioned to resolve."[148] Additionally, the dissent emphasized that, "[l]ike all citizens, homosexuals are protected in these great rights [of free speech and equal protection], certainly to the extent of being homosexual and stating their sexual preference in a factual manner where there is no invasion of any other person's rights."[149] Finally, the dissent chided the majority for treating the case "as if it involved only a single person and a sick one at that," explaining that homosexuality is not a mental disease and that studies like Kinsey's revealed that homosexual experience was quite common.[150] Rebuking the majority's intimations of mental illness and its apparent construction of bisexuality as a rare, freakish condition, the dissent powerfully stated: "To the contrary, this record does not disclose that [Ms. Rowland] is subject to mental illness; nor is she alone."[151]

E. Justice Brennan's Dissent from the Supreme Court's Denial of Certiorari

The U.S. Supreme Court denied review of the Sixth Circuit ruling, and Justice Brennan, joined by Justice Marshall, dissented. Justice Brennan highlighted the logical flaws in the Sixth Circuit majority opinion, emphasizing that the jury had found that Ms. Rowland's mention of her bisexuality had not interfered with the regular operation of the school, yet the majority of the Sixth Circuit panel had held that it was constitutional to dismiss her for talking about it. He also criticized the Sixth Circuit's rejection of the equal protection claim on the basis that Ms. Rowland had not provided evidence that similarly situated heterosexual employees were treated differently.[152]

Justice Brennan referenced the Sixth Circuit's "crabbed reading" of Supreme Court precedent and "unexplained disregard of the jury and judge's factual findings" as evidence of the Circuit's "desire to evade the central

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[147] *Id.* at 453–54.
[148] *Id.* at 454.
[149] *Id.* at 452.
[150] *Id.* at 454–55. As noted in the Introduction, the American Psychiatric Association had voted to remove homosexuality from the Diagnostic Statistical Manual not even a full year before Ms. Rowland disclosed her bisexuality to Mrs. Monell. Drescher, *supra* note 26, at 571.
[151] *Rowland*, 720 F.2d at 454 (Edwards, J., dissenting).
[152] *Rowland*, 470 U.S. 1009, 1010.

question" of whether a state "may dismiss a public employee based on her bisexual status alone."[153]

Citing Judge Edwards's dissent, Justice Brennan characterized speech relating to sexual orientation as "inherently of public concern," thus rendering it protected speech under *Connick*; he further suggested that—beyond the issue of public concern—the speech's non-disruptive character should render it protected speech under the First Amendment.[154]

As to equal protection, Justice Brennan suggested that the discrimination against Ms. Rowland was likely presumptively invidious given that it targeted a suspect class and impinged on the exercise of a fundamental right.[155] He further characterized Ms. Rowland's speech as a natural outgrowth of her sexual orientation, stating that it was impossible to separate her speech from her status, thus rejecting the Sixth Circuit majority's view that the special verdicts should have evaluated causation with respect to speech and status separately.[156] Justice Brennan closed by noting that the "case raises serious and unsettled constitutional questions relating to this issue of national importance, an issue that cannot any longer be ignored" and emphasizing that certiorari should have been granted.[157]

II. *Rowland*'s Advancement of LGBTQ Rights and the Phenomenon of Bisexual Erasure

Retired education professors Margaret A. Nash and Karen L. Graves document the critical impact of Justice Brennan's dissent in *Rowland* in their 2022 book on the case's advancement of LGBTQ teachers' rights.[158] Specifi-

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[153] *Id.* at 1011.

[154] *Id.* at 1012 and n.4. *Fricke v. Lynch*—a pre-*Rowland* district court case—arrives at the same conclusion in a somewhat different context. 491 F. Supp. 381 (D.R.I. 1980). In *Fricke*, a male high school student was prevented by his public high school from taking another young man to prom. *Id.* at 383. The court held that a male student's decision to take another male student to the prom included expressive content, ultimately deciding that such a decision was protected by the First Amendment. *Id*. at 384–85, 388. Ms. Rowland also won at the district court level, so it is perhaps unsurprising that a gay student prevailed on First Amendment grounds in a district court. Interestingly, however, some scholars have noted that LGBTQ student organizations have, at least historically, fared better than LGBTQ public employees. Patricia A. Cain, *Litigating for Lesbian & Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1610 (1993). The fact that *Fricke* involved a student's—rather than a teacher's—expressive rights may partially explain the positive result. At any rate, it is possible that Justice Brennan's analysis was inspired, at least in part, by the district court's analysis in *Fricke*.

[155] *Rowland*, 470 U.S. at 1014.

[156] *Id.* at 1016 n.11. Judge Pettine's earlier decision in *Fricke* also supports this conclusion: *Fricke* held that simply engaging in non-heteronormative behavior is protected under the First Amendment, which in turn implies that LGBTQ status cannot be separated from speech. *Fricke*, 491 F. Supp. at 384–85; *see also* William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 180 (1999) (arguing that homosexual conduct, such as same-sex handholding, should be considered speech).

[157] *Rowland*, 470 U.S. at 1018.

[158] *See* Nash & Graves, *supra* note 14, at ix, 42–43.

cally, Nash and Graves highlight the importance of Justice Brennan's dissent for free speech and equal protection claims made by LGBTQ persons.[159] Indeed, Westlaw indicates that the Supreme Court's denial of certiorari has been cited close to 500 times when examining all content types and that Justice Brennan's dissent has been cited forty-nine times in cases.[160] Notable examples of court opinions that have cited to Justice Brennan's dissent include Judge Norris's concurrence in the judgment in *Watkins v. U.S. Army*,[161] an en banc case decided by the Ninth Circuit in favor of a servicemember who had been discharged as a result of his acknowledged homosexuality. Judge Norris, concurring in the judgment that required the U.S. Army to allow Watkins to re-enlist, rejected the majority's estoppel rationale and argued that the decision should have rested on equal protection grounds instead.[162] In making his equal protection argument, Judge Norris relied significantly on Justice Brennan's dissent in *Rowland*, quoting it a total of three times.[163] Specifically, he quoted Justice Brennan's important statements that: (1) "homosexuals have historically been the object of pernicious and sustained hostility"; (2) "discrimination against homosexuals is likely . . . to reflect deep-seated prejudice rather than . . . rationality"; and (3) "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals . . . , members of this group are particularly powerless to pursue their rights openly in the political arena."[164] In fact, Judge Norris's concurrence in the judgment in *Watkins* has been quite influential, having been cited in thirty-seven electronically-available LGBTQ rights proceedings.[165]

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[159] *Id.* at 42; *see also* Price, *supra* note 30 (describing the Brennan dissent as "transmitting a powerful message to help the overall cause").

[160] *Citing References, Rowland v. Mad River Loc. Sch. Dist., Montgomery Co. Ohio,* WESTLAW PRECISION, https://1.next.westlaw.com/RelatedInformation/I72edbd219c9a11d991d0cc6b54f12d4d/kcCitingReferences.html?docSource=685dd35d1a754980a453a92a7cbad4fc&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=74d17f7614644455aa430912fa43668d&originationContext=Citingreferences&transitionType=citingReferences&contextData=%28sc.Default%29 (last visited Aug. 14, 2023).

[161] 875 F.2d 699 (9th Cir. 1989) (en banc).

[162] *Watkins*, 875 F.2d at 711 (Norris, J., concurring in the judgment). Importantly, Justice Blackmun also relied on Justice Brennan's dissent from the denial of certiorari in *Rowland* in his own dissent in *Bowers v. Hardwick*, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting).

[163] *Watkins*, 875 F.2d at 724–25, 727.

[164] *Id.* (some citations and internal quotation marks omitted; some alterations in original).

[165] Walcott v. Garland, 21 F.4th 590, 602 (9th Cir. 2021); Hassan v. City of New York, 804 F.3d 277, 301 (3d Cir. 2015); Windsor v. United States, 699 F.3d 169, 183 n.4 (2d Cir. 2012); Philips v. Perry, 106 F.3d 1420, 1439 (9th Cir. 1997); Meinhold v. U.S. Dept. of Def., 123 F.3d 1275, 1285 (9th Cir. 1997); Rylance v. Ellis, 76 F.3d 388, 1996 WL 26946, at *4 (9th Cir. 1996); Steffan v. Perry, 41 F.3d 677, 720 (D.C. Cir. 1994); Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993); Schowengerdt v. United States, 944 F.2d 483, 490 n.8 (9th Cir. 1991); High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 573 n.9 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989); Obergefell v. Wymyslo, 962 F. Supp.2d 968, 990–91 (S.D. Ohio 2013); Pedersen v. Off. of Pers. Mgmt., 881 F. Supp. 2d 294, 326 (D. Conn. 2012); Golinski v. U.S. Off. of Pers. Mgmt., 824 F.Supp.2d 968, 987 (N.D. Cal. 2012); Mullen v. City of Portland,

Other notable examples of reliance on Justice Brennan's dissent in *Rowland* include its use in the Second Circuit opinion in *United States v. Windsor*,[166] upholding Edith Windsor's right to have her same-sex marriage treated the same as a different-sex marriage under federal law, and a district court decision in *Weaver v. Nebo School District*,[167] in which a lesbian teacher sued after having her coaching duties taken away based on her sexual orientation and after being told not to discuss her sexual orientation with students, parents, or colleagues. The Second Circuit's opinion in *Windsor* was affirmed by the Supreme Court, but the Supreme Court's opinion, although also relying at least in part on equal protection, was less definitive than the Second Circuit's in terms of the standard to be applied to classifications based on sexual orientation.[168] In *Weaver*, the district court held, based on Justice Brennan's dissent in *Rowland*, that speech about one's sexual orientation is a matter of public concern.[169]

Additionally, it is quite possible that Justice Brennan's dissent in *Rowland* and even the district court opinion in the case and the Sixth Circuit dissent have had effects far beyond what can be discerned by searching for citations. For example, the district judge who upheld Ms. Weaver's First Amendment claim also ruled in her favor on the equal protection issue,[170] and he may well have been influenced by Justice Brennan's analysis in doing so. More metaphysically, scholars such as Brooke Coleman have argued that plaintiffs in civil rights cases not only advance substantive law but also publicly embody the law's potential as a vehicle for social change and that, by

2007 WL 3047224, at *2 (D. Or. 2007); Bleecher v. Manheim Tp., 2002 WL 32345700, at *1 (E.D. Pa. 2002); Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y 1997); Holmes v. California Army Nat. Guard, 920 F. Supp 1510, 1533 (N.D. Cal. 1996); Buttino v. Fed. Bureau of Investigation, 801 F. Supp. 298, 306 (N.D. Cal. 1992); Steffan v. Cheney, 780 F. Supp. 1, 5 (D.D.C. 1991); Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991); Doe v. Sparks, 733 F. Supp. 227, 231 (W.D. Pa. 1990); Puzz v. U.S. Dept. of Interior, Bureau of Indian Aff., 1989 WL 201547, at *9 (N.D. Cal. 1989); *In re* Balas, 449 B.R. 567, 577 (Bkrtcy. C.D. Cal 2011); Donaldson v. State, 292 P.3d 364, 405 (Mont. 2012); Varnum v. Brien, 763 N.W.2d 862, 889 n.16, 893 (Iowa 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 434 (Conn. 2008); Andersen v. King Cnty., 138 P.3d 963, 1032 n.78 (Wash. 2006); *In re* Marriage Cases, 49 Cal. Rptr.3d 675, 755 (Cal. App. Dist. 2006); Snetsinger v. Montana Univ. System, 104 P.3d 445, 455 (Mont. 2004); Jegley v. Picado, 80 S.W.3d 332, 350 (Ark. 2002); Lawrence v. State, 41 S.W.3d 349, 380 (Tex. Ct. App. 2001); Dean v. D.C., 653 A.2d 307, 342 (D.C. 1995); State v. Bates, 507 N.W.2d 847, 852 (Minn. App. 1993); State Dept. of Health & Rehab. Serv. v. Cox, 672 So. 2d 1210, 1225, 1229 n.9 (Fla. Dis. Ct. App. 1993); Woodard v. Gallagher, 1992 WL 252279, at 3, (Fla. Cir. Ct. 1992); Commonwealth v. Wasson, 842 S.W.2d 487, 499 (Ky. 1992).

[166] 699 F.3d 169 (2d. Cir. 2012), *aff'd* 570 U.S. 744 (2013).

[167] 29 F. Supp. 2d 1279 (D. Utah 1998).

[168] United States v. Windsor, 570 U.S. 744 (2013); Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 144 (2015) (describing the Supreme Court's rationale in *Windsor*); *cf. Windsor*, 699 F.3d at 185, *aff'd* 570 U.S. 744 (2013) (applying intermediate scrutiny).

[169] 29 F. Supp. 2d at 1284; *see also* NASH & GRAVES, *supra* note 14, at 54–56 (discussing the case and its aftermath).

[170] *Weaver*, 29 F. Supp. 2d at 1287.

engaging in private law enforcement, they serve an important regulatory function.[171] Even devastating losses like Ms. Rowland's in the Sixth Circuit help advance the cause of LGBTQ rights by vividly illustrating the importance of the issue to those who are victimized by discrimination and by generating public discussion of the rights asserted.[172] Finally, for bisexual persons, who often face discrimination in employment yet rarely sue to enforce their rights,[173] Ms. Rowland's case stands as an important and irrefutable example of our existence. The paucity of discrimination cases involving bisexual plaintiffs heightens the importance of the case and should ground its centrality in discussions about LGBTQ legal history.

Despite these important contributions, *Rowland* has not received the attention it deserves,[174] and Ms. Rowland's sacrifices in bringing the case

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[171] Brooke D. Coleman, *Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 502, 526–28 (2012).

[172] *See, e.g.*, Ann E. Tweedy, *A Bisexual Perspective on Law School Hiring*, 31 COLUM. J. GENDER & L. 82, 83 (2016) ("'People will never fight for your freedom if you have not given evidence that you are prepared to fight for it yourself.'") (quoting Baynard Rustin, *Brother to Brother: An Interview Between Bayard Rustin and Joseph Beam*, ADVOCATE.COM (Jan. 1, 2015), https://www.advocate.com/arts-entertainment/people/2015/01/01/brother-brother-interview-between-bayard-rustin-and-joseph-beam [https://perma.cc/8REK-5PQS]); BAUMGARDNER, *supra* note 73, at 210 (arguing that "even the opposition [to LGBTQ rights] is progress" and that news stories about same-sex marriage, before such marriages were held to be constitutionally protected, were beneficial because they forced people to talk about LGBTQ rights); Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 946 (2011) ("Only by understanding courts within a multilayered, dynamic framework of social change and by situating litigation within the model of multidimensional advocacy can we begin to uncover the productive and counterintuitive effects of litigation loss."); Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 75 (2015) ("[E]ven 'losing litigation can achieve limited success in stimulating . . . meaningful social change.'") (citations and some internal quotation marks omitted).

[173] *See generally* Tweedy & Yescavage, *supra* note 32 (detailing findings that bisexual persons experience significant levels of employment discrimination but overwhelmingly do not seek legal relief).

[174] *See, e.g.*, Graves & Nash, *supra* note 31, at 171–72 (arguing that, "[g]enerally, significant and fierce battles in schools are absent from popular press coverage of the struggle for gay civil rights" and discussing the *Rowland* case); MURDOCH & PRICE, *supra* note 45, at 249 (noting that it took over a decade for courts to begin to rely on the *Rowland* dissent). *But see* Bowers v. Hardwick, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting) (citing Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting from denial of certiorari)). Before the Nash and Graves book was published in 2022, *see generally* NASH & GRAVES, *supra* note 14, other notable examples of works discussing the case included a chapter in Joyce Murdoch and Deb Price's book *Courting Justice: Gay Men and Lesbians v. the Supreme Court*, *see* MURDOCH & PRICE, *supra* note 45, at 237–51, and Janet Halley's discussion of the case in a book chapter, *see* Halley, *supra* note 24, at 84–89. Eve Kosofsky Sedgwick also briefly discussed the case in her seminal book, *Epistemology of the Closet*. *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 70–72 (1990). A variety of law review articles also cite the case, including a few that devote significant attention to it. For law review articles that devote significant attention to the case, see Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits Into LGBT Legal Strategy Ten Years After Bisexual Erasure*, 17 CARDOZO J.L. & GENDER 65, 70 (2010); Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 76–77, 85–86, 92–94, 104, 117 (2006); Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating Out-*

remain largely unrecognized. One of the key reasons that the case has not received an appropriate level of attention given its importance is likely because it involves a bisexual plaintiff, rather than a gay or lesbian one. Scholars such as Ruth Colker, Naomi Mezey, Kenji Yoshino, Nancy Marcus, and myself, among others, have documented bisexual erasure,[175] a phenomenon which is undoubtedly fueled in part by the liminal space bisexuality occupies and by the fact that its very existence thwarts attempts to clearly demarcate gay and straight sexual orientations.[176] Bisexuals are also passed over as potential plaintiffs in LGBTQ rights cases because of a concern that they are less palatable than monosexual (gay or lesbian) plaintiffs,[177] who may be more able to make convincing assimilationist arguments. Finally, although immutability arguments both in the context of LGBTQ rights and more gen-

ness under the Equal Protection Clause, 47 STAN. L. REV. 269, 277, 279–82 (1995); Marsha Jones, Comment, *When Private Morality Becomes Public Concern: Homosexuality and Public Employment*, 24 HOUS. L. REV. 519, 521 n.19, 525 n.55, 526 n.60, 529 n.80, 538 n.153, 539 n.163, 541–42, 543–46 (1987); Cohen, *supra* note 31, at 1085, 1087–89, 1119, 1122, 1134. Based on Westlaw's Headnote filter search option, most of the law review articles citing the case appear to address free speech issues, such as whether communicating one's sexual orientation relates to a matter of public concern, which suggests that the equal protection component of the case is under-researched. *See, e.g.*, Jinyoung Lee, *Out-Speech: The First Amendment and Sexual Orientation*, 4 GEO. J. GENDER & L. 197, 198 n.3, 203 n.35 (2002); Kathryn Ward, *The First Amendment and Personal Expression of Sexuality*, 6 GEO. J. GENDER & L. 359, 368 n.81, 369 n.83, 370–71 (2005); Nan D. Hunter, *Identity, Speech, & Equality*, 79 VA. L. REV. 1695, 1718 n.89 (1993). A handful of articles about bisexuality and the law also discuss the case. *See* Greenesmith, *supra*, at 70; Tweedy & Yescavage, *supra* note 32, at 700 n.1, 708 n.47, 709 n.51, 710 n.52, 718; Marcus, *supra* note 8, at 300 n.19, 306 (2015); Ruth Colker, *A Bisexual Jurisprudence*, 3 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 127, 134 (1993).

[175] Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98, 98–99, 100–03, 132–33 (1995); Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 2–3, 30 (1995); Marcus, *supra* note 8, at 300–06; Tweedy & Yescavage, *supra* note 32, at 699–703, 713–14. *See generally* Yoshino, *supra* note 7 (examining why the category of bisexuality has been erased in contemporary American political and legal discourse). Besides bisexual erasure, an additional reason that the case did not receive the attention it warranted is likely its proximity to *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case regarding the constitutionality of criminal laws barring same-sex sodomy. *See, e.g.,* Cain, *supra* note 154, at 1606 (describing the proximity of the petitions for certiorari in the two cases); SEDGWICK, *supra* note 174, at 70 (noting that the opinion in *Hardwick* came only eighteen months after the Supreme Court denied certiorari in *Rowland*).

[176] *See, e.g.*, Tweedy & Yescavage, *supra* note 32, at 700–01 (discussing the work of Kenji Yoshino, *supra* note 7); Mezey, *supra* note 175, at 98 (stating that "homosexuality and heterosexuality maintain their bipolarity through the very language that constitutes them, a language that represents and reproduces mutually exclusive identities within a system that purports to account for all possible choices"); Nathan Patrick Rambukkana, *Uncomfortable Bridges: The Bisexual Politics of Outing Polyamory*, 4 J. BISEXUALITY 141, 144 (2004) (discussing bisexuality's "liminal nature," i.e., its "position between conditions that many conceive of as mutually exclusive"); Boucai, *supra* note 8, at 419 (arguing that same-sex marriage advocates engage in bisexual erasure in part because of "bisexuality's complication of the fixed and binary conception of sexual orientation on which several equality arguments for same-sex marriage currently depend").

[177] *See* Marcus et al., *supra* note 8, at 74 (2023); Tweedy & Yescavage, *supra* note 32, at 713–14.

erally have been subject to criticism,[178] concerns that the existence of bisexuality might undermine immutability arguments appear to be another reason that LGBTQ rights advocates have ignored the impact of same-sex marriage bans on bisexuals, instead electing to engage in bisexual erasure.[179]

Indeed, the Supreme Court's lack of reliance on Justice Brennan's dissent in *Rowland* in watershed LGBTQ rights cases such as *Obergefell v. Hodges*[180] and *Bostock v. Clayton County*[181] may itself be evidence of the erasure of bisexuals, who are rarely mentioned in court decisions even when their rights are directly at stake.[182] In terms of legal scholarship, the fact that no law review articles available on Westlaw, Lexis, or HeinOnline have the case name or Ms. Rowland's last name in their titles is surprising, especially given Justice Brennan's trailblazing dissent. While several law review articles contain significant discussions of the case,[183] one would expect *Rowland* to have received substantially more attention in light of its importance and the nearly four decades that have passed since the Sixth Circuit decision. The equal protection portion of the case in particular appears to be under-

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[178] *See generally* Jessica Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015) (arguing that immutability considerations detract from the aims of antidiscrimination law); Heron Greenesmith, *What If We Weren't Born That Way?*, XTRA MAG. (May 26, 2021), https://xtramagazine.com/power/sexuality-fluidity-legal-rights-201664 [https://perma.cc/L95L-J4FA] (critiquing immutability as a legal mechanism).

[179] Boucai, *supra* note 8, at 420, 468–70; *see also* Yoshino, *supra* note 7, at 362, 405–07. This concern about bisexuality undermining immutability arguments is misdirected both because notions of immutability have been shifting and becoming less rigid in recent years, *see* Boucai, *supra* note 8, at 471–72; Tweedy & Yescavage, *supra* note 32, at 716–17, and because bisexuality is no more mutable than any other sexual orientation, *see* Boucai, *supra* note 8, at 472; Tweedy & Yescavage, *supra* note 32, at 717.

[180] 576 U.S. 644 (2015).

[181] 590 U.S. 140 (2020).

[182] *See, e.g.*, Marcus, *supra* note 8, at 306–10. Significantly, Justice Blackmun cites Justice Brennan's Rowland dissent in his own dissent in *Bowers v. Hardwick. See* 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting). It is possible that the writers of the majority opinions in two of the most recent LGBTQ rights cases (Justice Kennedy in *Obergefell* and Justice Gorsuch in *Bostock*) wished to distance themselves from Justice Brennan's *Rowland* dissent, either in light of his reputation as a "liberal lion," *see, e.g.*, Michael Robert Patterson, *William J. Brennan—Colonel, United States Army*[,] *Associate Justice, United States Supreme Court*, ARLINGTON NAT'L CEMETERY (June 16, 2023), https://www.arlingtoncemetery.net/wbrennan.htm [https://perma.cc/N3D5-JNLC], or because neither *Bostock* nor *Obergefell* went so far as Justice Brennan's dissent in *Rowland*, with each stopping short of adopting strict scrutiny. Even so, Justice Brennan's dissent—as the first statement by a U.S. Supreme Court justice on equal protection issues in the sexual orientation context—was highly relevant. *See* ESKRIDGE ET AL., *supra* note 29, at 537; *accord* Cohen, *supra* note 31, at 1088–89 (emphasizing the historical importance of Justice Brennan's dissent and bemoaning the fact that, in later cases, liberal justices failed to write separately or to take a strong stance in favor of LGBTQ rights). Accordingly, the dissent could easily have been cited as an example of a position that was *not* being adopted. And even if a desire to avoid association with Justice Brennan explains the lack of citation to Brennan's *Rowland* dissent in the majority opinions in *Bostock* and *Obergefell*, one might still expect the dissents in those cases to raise Justice Brennan's dissent as a fearful specter that the majorities were alleged to be covertly working towards.

[183] *See supra* note 174 and sources cited therein (listing law review articles that devote attention to the case).

researched.[184] Indeed, the only existing article that the author found that substantially focuses on the *Rowland* case is a student-written comment from 1987 arguing that "unless . . . [a public] employee's speech works an actual disruption in the functioning of the governmental office, the state has no interest which outweighs the employee's right to speak out for equal treatment of gays under the laws and community acceptance of this alternative lifestyle."[185]

Bisexual erasure is also evident in law school casebooks addressing gender, sexuality, and law. Even though bisexuals comprise the largest group under the LGBTQ umbrella,[186] issues related to bisexual erasure and discrimination against bisexuals receive somewhat abbreviated treatment in these casebooks.[187] Moreover, as explained below, the *Rowland* case is only included in two of the four major casebooks that the author examined, and much like the other materials on bisexuality included in the casebooks, the discussions on *Rowland* are often written from a decidedly non-bisexual (in other words, monosexual) perspective.

As discussed below, each of the major casebooks on gender, sexuality, and law contains at least a few references to bisexuality, but the coverage should be substantially expanded in all four cases, both to do the topic justice and to allow bisexual students to see themselves reflected in the course materials. For its primary materials on bisexuality, one of the casebooks includes a brief excerpt of the Sixth Circuit opinion in *Rowland*,[188] an excerpt of Kenji Yoshino's trailblazing article on bisexuality, *The Epistemic Contract of Bisexual Erasure*,[189] and a discussion problem rooted in a case in which a gay softball league discriminated against bisexual players,[190] in addition to a smattering of other brief references.[191] Another well-known casebook contains an excerpt from the same Yoshino article on bisexuality[192] and some notes regarding the high percentage of bisexuals in the LGBTQ population and the stigma against bisexuals,[193] alongside several other brief mentions.[194]

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[184] *See id.*; Cohen, *supra* note 31, at 1087–88 (discussing the importance and uniqueness of Justice Brennan's equal protection argument).

[185] Jones, *supra* note 174, at 523.

[186] *See, e.g.*, Jeffrey M. Jones, *LGBT Identification in U.S. Ticks Up to 7.1%*, GALLUP (Feb. 17, 2022), https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx [https://perma.cc/76CH-CAYJ] ("More than half of LGBT Americans, 57%, indicate they are bisexual.").

[187] *See, e.g.*, ESKRIDGE ET AL., *supra* note 29; CARLOS A. BALL ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW (7th ed. 2022).

[188] ESKRIDGE ET AL., *supra* note 29, at 533–38 (excerpting *Rowland*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985), and discussing Justice Brennan's dissent from the Supreme Court's denial of certiorari).

[189] ESKRIDGE ET AL., *supra* note 29, at 539–41 (excerpting Yoshino, *supra* note 7).

[190] ESKRIDGE ET AL., *supra* note 29, at 204–05 (discussing *Apilado v. North American Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011) and *Apilado v. North American Gay Amateur Athletic Alliance*, 2011 WL 5563206 (W.D. Wash. 2011)).

[191] *See, e.g.*, ESKRIDGE ET AL., *supra* note 29, at 42, 98, 392, 507, 1057.

[192] BALL ET AL., *supra* note 187, at 29–33 (excerpting Yoshino, *supra* note 7).

[193] BALL ET AL., *supra* note 187, at 4, 23.

The third casebook includes a somewhat-longer excerpt of the *Rowland* case,[195] a brief discussion of Justice Brennan's dissent from the denial of certiorari in *Rowland*,[196] and a few isolated references to bisexuals.[197] Finally, the fourth casebook appears to have the greatest number of references to bisexuality but little in-depth treatment.[198] Like the second casebook, it does not include an excerpt of the *Rowland* case. For its primary material on bisexuality, this book includes discussions of the difficulty of defining bisexuality[199] and of the topic of bisexuality in relation to the Kinsey Scale, with references to other possible approaches to measuring sexual orientation, including one developed by bisexual psychiatrist Fritz Klein.[200]

Although it is beneficial that all four casebooks address bisexuality to some degree, the relatively scant degree of coverage is problematic, particularly in light of the longstanding practice of bisexual erasure among sexuality historians,[201] legal scholars,[202] judges, justices, and attorneys.[203] Given

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[194] *See, e.g.*, BALL ET AL., *supra* note 187, at 9–10, 12, 27, 94, 460, 677, 701.

[195] ARTHUR S. LEONARD & PATRICIA A. CAIN, SEXUALITY LAW 24–27 (3d ed. 2019).

[196] *See id.* at 260.

[197] *See, e.g.*, *id.* at 60, 491, 782.

[198] SHANNON GILREATH & LYDIA E. LAVELLE, SEXUAL ORIENTATION AND IDENTITY: POLITICAL AND LEGAL ANALYSIS 54, 61–66, 72, 207–08, 250–51, 320, 427–28, 459 (2016) [hereinafter GILREATH & LAVELLE, SEXUAL ORIENTATION AND IDENTITY]. This casebook appears to be geared more toward undergraduate students than law students. *See generally id.* The same authors wrote a law school casebook a few years before, but that book has apparently not been updated. *See* SHANNON GILREATH & LYDIA E. LAVELLE, SEXUAL IDENTITY AND THE LAW, CASES AND MATERIALS (2d ed. 2011). It similarly did not include the *Rowland* case. *See id.* at xxii.

[199] GILREATH & LAVELLE, SEXUAL ORIENTATION AND IDENTITY, *supra* note 198, at 250. Contrary to the suggestion in the casebook, bisexuality is not inherently difficult to define. Bisexuality can be defined in any of three ways: (1) based on self-identification, (2) based on behavior in terms of sexual experiences with multiple genders, or (3) based on self-reported attractions to multiple genders. *See* Tweedy & Yescavage, *supra* note 32, at 706–07. "Bisexual+" or "Bi+" is an umbrella term that, in addition to including self-identified bisexuals, also encompasses those who experience attraction to multiple genders but who use other terms like "pansexual" to describe themselves. Alex Berg, *The Evolution of the Word 'Bisexual'—and Why It's Still Misunderstood*, OUT NEWS (Sept. 23, 2020), https://www.nbcnews.com/feature/nbc-out/evolution-word-bisexual-why-it-s-still-misunderstood-n1240832 [https://perma.cc/B59U-Q46Z].

[200] GILREATH & LAVELLE, SEXUAL ORIENTATION AND IDENTITY, *supra* note 198, at 61–65; *id.* at 64 (mentioning the Klein Sexual Orientation Grid); *see also About Fritz Klein*, AM. INST. OF BISEXUALITY, https://www.bisexuality.org/fritz-klein [https://perma.cc/5MBW-93Z6].

[201] *See, e.g.*, Shaw, *supra* note 32 (noting that bisexuals have been "mislabeled or left out of" historical narratives and that "the term *bisexual* is often entirely absent from historians' writings").

[202] This problem of scholars denominating LGBTQ rights and/or LGB rights issues as simply "gay and lesbian" issues is pervasive. A few examples follow: Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U.L. REV. 467 (2012); Stewart L. Chang, *Gay Liberation in the Illiberal State*, 24 PAC. RIM L. & POL'Y J. 1 (2015); James E. Fleming, *The Unnecessary Focus on "Animus," "Bare Desire to Harm," and "Bigotry" in Analyzing Opposition to Gay and Lesbian Rights*, 99 B.U. L. REV 2671 (2019); Anthony L. McMullen, *A Brief Summary of Decisions From the Arkansas Supreme Court Affecting Gays and Lesbians*, 34 U. ARK. LITTLE ROCK L. REV. 337 (2012); *see also* Carlos A.

that self-identified bisexuals comprise the largest percentage of the LGBTQ community, the scant degree of coverage is even more surprising.[204] Additionally, bisexuals face a considerable amount of discrimination, not only from heterosexuals, but also from within the LGBTQ community itself, and this discrimination is linked to health and other disparities.[205] The fact that bisexual persons face these unique challenges is all the more reason that more in-depth treatment is needed.

Perhaps even more concerning than the relative lack of coverage of bisexuality is the fact that the coverage that does exist often appears to be from a distinctly monosexual—or non-bisexual—perspective, so that even within the existing coverage, bisexual experiences are often distorted or minimized. A few examples follow, with the caveat that, just as with legal scholars' approaches, it is unlikely that any of these problematic framings is intentional. Moreover, because of the extent to which bisexual erasure is normalized in American culture, binary thinking and speaking often take extra effort to transcend.[206]

In the casebook written by William Eskridge, Nan Hunter, and Courtney Joslin, Ms. Rowland is described as "closeted."[207] However, this characterization is inaccurate in the sense that Ms. Rowland had made several different disclosures of her bisexuality.[208] Perhaps more importantly, this

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Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345 (2005); Cain, *supra* note 154. Notably, transgender rights, although it is crucial that they be protected, may or may not be at issue in a given discussion of lesbian, gay, and bisexual rights because of the conceptual distinction between sexual orientation and gender identity. *See* Tweedy, *supra* note 79, at 1465 n.5. Given the widespread societal practice of erasing bisexuals, referred to by Professor Yoshino as the "epistemic contract of bisexual erasure," Yoshino, *supra* note 7, at 362, these sorts of elisions of bisexuality are not surprising (indeed, Professor Yoshino himself recounts his own tendency to erase bisexuals while teaching, *see* Yoshino, *supra* note 7, at 358), but, from a bisexual perspective at least, they are damaging.

[203] *See, e.g.*, Tweedy & Yescavage, *supra* note 32, at 711–15; *see* Eliot Tracz, *The Inscrutable Bisexual: An Essay on Bisexuality and Immutability*, 21 SEATTLE J. SOC. JUST. 917, 918 (2023) (noting that, "as more and more cases have come down from the United States Supreme Court, bisexuality has faded from the conversation, omitted by both litigants and the bench").

[204] Jones, *supra* note 186; Tweedy & Yescavage, *supra* note 32, at 699.

[205] *See, e.g.*, Sophie Schuyler et al., *Is It Worth It? A Grounded Theory Analysis of Navigating the Decision to Come Out as Bisexual*, 21 J. BISEXUALITY 425, 427, 435–36 (2021); *see also* Tweedy & Yescavage, *supra* note 32, at 703 n.22, 703–04, 707 (discussing health and mental health disparities that bisexuals face, intra-group discrimination, and the fact that respondents in the study reported having experienced high levels of discrimination); MOVEMENT ADVANCEMENT PROJECT, *supra* note 40, at 13–19 (describing data on health and mental health disparities).

[206] *See, e.g.*, Yoshino, *supra* note 7, at 358.

[207] ESKRIDGE ET AL., *supra* note 29, at 537. Professor Halley similarly describes Marjorie Rowland as closeted. *See* Halley, *supra* note 24, at 84.

[208] For discussion of Ms. Rowland's disclosures of her bisexuality in addition to that made to her secretary, see *supra* notes 108–110 and *infra* note 375 and accompanying text (describing Ms. Rowland's disclosure of her bisexuality to the assistant principal, additional disclosures to friends and acquaintances at Stebbins, and disclosures to gay students who specifically asked about her sexual orientation). *See also* Transcript of Re-

depiction of her fails to acknowledge both that bisexuals face many barriers to disclosing their sexuality beyond those experienced by gays and lesbians[209] and that many bisexuals do not identify with the notion of coming out.[210] With respect to Ms. Rowland herself, we know that she was not interested in labels[211] and can perhaps infer that she did not perceive herself to have been closeted irrespective of the disclosures.

Another example in the same book involves a discussion problem related to two proceedings in the U.S. District Court for the Western District of Washington involving a gay softball team's discrimination against bisexual players.[212] In the case, the judge upheld the softball league's right to discriminate against players who were insufficiently homosexual, thus instantiating a gay/straight dichotomy that left no room for bisexuals and, in effect, erased the bisexual plaintiffs from their own case.[213] The case also had a racially-charged aspect, in that the players whom the league's committee deemed insufficiently homosexual were persons of color, while the league committee members were predominantly white.[214] The book's description of the case is minimal and fails to acknowledge the feelings of stigma that bisexuals so often experience when they are discriminated against by lesbians and gay persons.[215] The discussion problem also does not mention the pernicious gay/straight dichotomy reinforced by both the court and the softball league, which rendered bisexuals invisible,[216] nor does it address the racial dynamics involved, even though people of color are more likely to identify as bisexual.[217] Providing the important context outlined above would improve the problem for all readers and be particularly helpful to bisexual readers, allowing them to feel seen and recognized, given the unique harms that they experience as members of the LGBTQ community.

A final example from this casebook appears in the notes following the Yoshino article, where the authors suggest that, because trans, intersex, and

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cord, Vol. II at 144, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 84, 1981 U.S. Dist. LEXIS 15583 (suggesting that there were likely post-suspension disclosures as well).

[209] *See, e.g.*, Maliepaard, *supra* note 62, at 147; Tangela Roberts et al., *Between A Gay and a Straight Place: Bisexual Individuals' Experiences with Monosexism*, 15 J. BISEXUALITY 554, 557 (2015).

[210] Maliepaard, *supra* note 62, at 163; *see also* BAUMGARDNER, *supra* note 73, at 209–10.

[211] Interview, *supra* note 9, at 25–27.

[212] ESKRIDGE ET AL., *supra* note 29, at 204–05 (discussing *Apilado v. North American Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011) and *Apilado v. North American Gay Amateur Athletic Alliance*, 2011 WL 5563206 (W.D. Wash. 2011)).

[213] Tweedy & Yescavage, *supra* note 32, at 711–13 (citing *Apilado*, 2011 WL 5563206, at *1–3).

[214] S.F. HUM. RTS. COMM'N, LGBT ADVISORY COMM'N, BISEXUAL INVISIBILITY: IMPACTS AND RECOMMENDATIONS 6 (2011).

[215] ESKRIDGE ET AL., *supra* note 29, at 204–05; *see, e.g.*, Roberts et al., *supra* note 209, at 566; Tweedy & Yescavage, *supra* note 32, at 731–32.

[216] Tweedy & Yescavage, *supra* note 32, at 711–13.

[217] S.F. HUM. RTS. COMM'N, LGBT ADVISORY COMM'N, *supra* note 214, at 6; MOVEMENT ADVANCEMENT PROJECT, *supra* note 40, at 2.

non-binary identities complicate the gender binary, bisexuality may be obsolete.[218] This suggestion is from a decidedly non-bisexual perspective and borders on being offensive to bisexual readers. It ignores the fact that many trans people in fact identify as bisexual[219] and that prominent definitions of bisexuality recognize the existence of numerous genders.[220]

A couple of other important examples can be found in the Gilreath and Lavelle casebook. One troubling point in the book is the apparent grouping of bisexuals with heterosexuals in the discussion of the proposed Employment Non-Discrimination Act (ENDA), followed by the suggestion that bisexuals do not have same-sex partners.[221] Regarding the ENDA, the casebook states that "ENDA would give no more rights to persons with a homosexual orientation than it would to a person with a heterosexual or bisexual orientation."[222] The sentence construction explaining the effect of ENDA implies that both heterosexuals and bisexuals already have workplace protections based on sexual orientation, whereas homosexuals (but not bisexuals) are in need of such protections. Although the conflation of bisexual persons with heterosexual persons is likely unintentional, the effect is to imply to bisexual readers that they are outside of the LGBTQ community.

In a brief discussion of domestic partnership benefits, the Gilreath and Lavelle casebook also appears to presume that bisexual people would not have same-sex partners. In that section, it states that "[n]o Fortune 500 company offered health benefits to the domestic partners of gay and lesbian employees prior to 1992."[223] By only referring to "gay and lesbian employees," the casebook elides the existence of bisexuals and the possibility that they too may have same-sex partners. Other troubling framings in this casebook include: (1) a discussion of studies on changes to one's sexual orientation over time, framed in such a way as to intimate that bisexuality may be a phase that operates as a precursor to homosexuality and (2) the use of combined data on homosexuals and bisexuals to show high rates of suicide ideation and attempts among those combined groups.[224]

Because of the harm that stems from conceptualizing bisexuality as a phase,[225] it would be best to emphasize that bisexuality is a legitimate orien-

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[218] ESKRIDGE ET AL., *supra* note 29, at 540.

[219] MOVEMENT ADVANCEMENT PROJECT, *supra* note 40, at 2. Bisexual persons have also been reported to identify transgender persons as their closest allies. Heidi Bruins Green et al., *Working Bi: Preliminary Findings from a Survey on Workplace Experiences of Bisexual People*, 11 J. OF BISEXUALITY 300, 310–11 (2011).

[220] *See, e.g.*, Berg, *supra* note 199.

[221] GILREATH & LAVELLE, SEXUAL ORIENTATION AND IDENTITY, *supra* note 198, at 250.

[222] *Id.*

[223] *Id.* at 251.

[224] *Id.* at 72.

[225] *See* Roberts et al., *supra* note 209, at 554–55. Importantly, Dr. Lisa Diamond's work does support the idea that women's sexual identities often may change over time, although she distinguishes identity from orientation. LISA M. DIAMOND, SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRE 82–85, 87 (2008).

tation in the context of this discussion about the possibility (or lack of possibility) of changing sexual orientations. Additionally, data that disaggregates bisexuals from lesbians and gays on suicide ideation and attempts and other health and mental health disparities is preferable to commingled data, and such disaggregated data often (although not exclusively) tends to show higher likelihoods of adverse outcomes among bisexuals.[226] Using disaggregated data wherever possible to show specific outcomes for bisexuals and lesbian and gay persons and explicitly taking care to avoid playing into anti-bisexual stereotypes and tropes would improve these passages.

In terms of adding material to the casebook that is specific to bisexuality, a deeper dive into the *Rowland* case and the addition of other cases brought by bisexuals is one place to start.[227] A discussion of access to justice issues, including internalized stigma, that likely prevent some bisexual persons from bringing claims[228] would be another fruitful area to pursue. Because of the relative paucity of cases involving bisexual plaintiffs, it is crucial to include stories of the experiences of bisexual people relating to discrimination, which can be found in studies and other articles.[229] Besides anti-discrimination law cases and stories, discussions of bisexuality could be added to other areas, such as immigration, given that bisexual asylum seekers have had difficulty convincing immigration officers of the legitimacy of their sexual orientations.[230] Adding a discussion of bisexuality in relation to

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[226] MOVEMENT ADVANCEMENT PROJECT, *supra* note 40, at 6, 16.

[227] The *Rowland* district court decision, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125, 1981 U.S. Dist. LEXIS 15583 (S.D. Ohio Oct. 22, 1981), the Sixth Circuit majority and dissent, Rowland v. Mad River Loc. Sch. District, 730 F.2d 444 (6th Cir. 1984), and Justice Brennan's dissent from the denial of certiorari, Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting), are all worthy of discussion. Additional discrimination cases with bisexual plaintiffs that would be worthwhile to explore include *Flood v. Bank of America Corporation*, 780 F.3d 1 (1st Cir. 2015); the aforementioned pending case regarding a bisexual teacher, *see* Breiner v. Bd. of Educ., Montgomery Cnty., No. 19-5123, 2020 U.S. App. LEXIS 33103 (6th Cir. Oct. 20, 2020); and the two proceedings involving an LGBTQ softball league's unfortunate discrimination against a team with bisexual players, *see* Apilado v. North Am. Gay Amateur Athletic All., 792 F. Supp. 2d 1151 (W.D. Wash. 2011); Apilado v. North Am. Gay Amateur Athletic All., No. C10–0682–JCC, 2011 WL 5563206 (W.D. Wash. Nov. 10, 2011). The *Apilado* cases are useful teaching tools in that they illustrate the intra-group stigma that bisexuals often face and the difficulties in educating judges about how such discrimination works. *See* Tweedy & Yescavage, *supra* note 32, at 711–13.

[228] *See, e.g.*, Tweedy & Yescavage, *supra* note 32, at 717–18, 738; BALL ET AL., *supra* note 187, at 23 (discussing invisibility and stigma experienced by bisexuals, as well as the double discrimination that they experience).

[229] *See, e.g.*, Tweedy & Yescavage, *supra* note 32, at 732 (relating story of interviewee who was fired from a religiously affiliated nonprofit after revealing her bisexuality and polyamorous relationship preference).

[230] Marcus, *supra* note 8, at 316–18; MOVEMENT ADVANCEMENT PROJECT, *supra* note 40, at 12–13. As Eskridge, Hunter, and Joslin mention, an early immigration case appears to have also involved a bisexual litigant, although the Court did not construe it that way. *See* ESKRIDGE ET AL., *supra* note 29, at 42 (citing Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118 (1967)).

family law to casebooks is another important avenue to explore.[231] Finally, in the interest of inclusivity, other identities under the bi+ umbrella, such as pansexual, should be included and explicitly discussed.[232] In light of the large and growing proportion of bisexuals in the LGBTQ community, many students in gender, sexuality, and law courses are likely to be bisexual, and ideally they should find their experiences reflected in the course materials.

Turning to erasure in the context of contemporaneous discussions of the case, Ms. Rowland's sexual orientation as a bisexual has also been erased in many discussions about and accounts of the case, as well as in the case itself. Indeed, William Eskridge, Nan Hunter, and Courtney Joslin have noted that the district court and the court of appeals both referred to her as "bisexual or homosexual,"[233] a depiction that seems to indicate bewilderment as to how to analyze a more complex sexual identity like bisexuality. Scholar Ruth Colker also described a panel discussion on the case at a law and sexuality conference during which the Director of ACLU's Gay and Lesbian Project referred to the case as a gay rights victory without mentioning Ms. Rowland's bisexuality, thus implying that Ms. Rowland was a lesbian rather than a bisexual.[234] Similar erasures were quite prevalent in contemporaneous news articles about the case, many of which were published in LGBTQ media, although some news articles do accurately recount Ms. Rowland's sexual orientation.[235] Several articles had titles obfuscating Ms. Rowland's bisexuality but then acknowledged it, or at least didn't elide it, in the body of the article.[236] Many more articles simply characterize Ms. Rowland as a "lesbian"[237] or, less commonly, "homosexual" and "gay."[238] It is worth noting

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[231] Marcus, *supra* note 8, at 318–21. Intersectionality between racially marginalized identities and bisexuality and intersectionality between disability and bisexuality also warrant attention. MOVEMENT ADVANCEMENT PROJECT, *supra* note 40, at 2.

[232] *See, e.g.,* Berg, *supra* note 199 (defining the notion of a bisexual+ identity). In lieu of the term "bisexual+," researchers sometimes use the term "plurisexual." *See, e.g.*, Lindsay Margaret Horsham, "Where Do I Fit?" An Exploration of Bisexuality as a Liminal Space, at 10 (Aug. 5, 2020) (Master's Thesis, Utrecht University), https://studenttheses.uu.nl/bitstream/handle/20.500.12932/37370/LindsayHorsham_6617727_Thesis.pdf?sequence=1 [https://perma.cc/4KLV-QPLB].

[233] ESKRIDGE ET AL., *supra* note 29, at 538.

[234] Colker, *supra* note 174, at 134.

[235] For examples of articles in which Ms. Rowland's bisexuality is referred to rather than being erased, see *Bisexual Fired*, SOJOURNER, Apr. 1985, at 5; *Sexuality No Grounds for Firing*, *supra* note 88; *The U.S. Supreme Court*, LESBIAN NEWS, Apr. 1985, at 33; *The Supreme Court*, LESBIAN NEWS, July 1985, at 29; *Gay Rights: An Ohio Victory, Some Losses*, BNA DAILY LAB. REP., WHAT SHE WANTS, Dec. 1981, at 3 (describing Ms. Rowland as bisexual in the text of the article, but not in the title).

[236] *See, e.g.*, *Lesbian Victory*, LESBIAN INCITER, 1982, at 17 (noting that the firing occurred after Ms. Rowland told other employees "that she had sexual relations with both men and women" in the body of the article); *Court Backs Teacher Fired for Gay Lover*, *supra* note 103, at 10 (noting that the firing occurred after Ms. Rowland told her "secretary and two gay students that she had a woman lover").

[237] Shane S. Que Hee, *1984: A Mix of Good and Bad for Gay Cinci*, CINCINNATI REP., GOOD TIMES!, 1985, at 7; *Legal Punishment, Hot Briefs*, BIG MAMA RAG, 1982, at 8; *Court Overturns Freedom of Speech*, *News Service Notebook*, BI-LINE, Sept. 1984, at 12; *Lesbian Counselor Fights On*, First Quarter, 1983, at 1; OPEN DOOR RURAL LESBIAN

that Ms. Rowland sometimes herself implicitly downplayed her bisexuality in talking to reporters,[239] a practice that could possibly stem from internalized biphobia or binegativity, although other explanations are possible as well.[240]

These descriptive inaccuracies in newspapers and other venues harm bisexual people in a number of ways. Bisexual persons aware of the inaccurate characterizations may come to perceive their rights as important only when used to advance the rights of gay or lesbian individuals. The mischaracterizations may also cause bisexual people to feel like their very existence is being denied. Other bisexual people may not know that Ms. Rowland was a bisexual plaintiff at all.[241] Meanwhile, parties who wish to discriminate may also take a cue from such obfuscations and may conclude that, even if they can be forced to respect the rights of gays and lesbians, those with bisexual orientations may be a legally permissible target for discrimination.[242] Additionally, Ms. Rowland herself, who initially tended to shy away from labels altogether,[243] may of course object to being mislabeled. Although she did note in an interview with the author that there were times in her life when she would not have objected to being described as a lesbian,

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NEWSL., July 1984; *Court Backs Firing of Woman who Disclosed Her Sexual Preference*, COLUMBUS FREE PRESS, May 1984, at 1; *NGRA Backs School Counselor*, GAY CMTY. NEWS, Jan. 8, 1983, at 2; *Lesbian Lawyer Charged with Welfare Fraud*, *supra* note 19.

[238] *See, e.g.*, Kathleen Wilde & Ralph Goldberg, *Time Has Come to Guarantee Rights to Homosexuals*, BWMT ATLANTA NEWSL., Apr. 1985 (describing Ms. Rowland as "homosexual" and "gay").

[239] *See, e.g.*, Jim Thomas, *Supreme Court Turns Down Gay Appeal*, GAY NEWS-TEL., Mar. 1985 ("Rowland told reporters that she was 'devastated' by the decision. 'Here is the highest court in the country not just telling me, but telling Gay people, 'If you're Gay, you can't talk about it.' It's pretty frightening."); *Constitution Doesn't Protect Gays from Reprisal, Court Finds*, SEATTLE POST-INTELLIGENCER, Feb. 26, 1985, at A2 (same).

[240] Biphobia and binegativity may be used interchangeably. *See, e.g.*, Scherrer, *supra* note 40, at 682; Schuyler et al., *supra* note 205, at 427–28.

[241] *See* Marcus, *supra* note 8, at 321 (noting that "a variety of stigmatizing harms" stem from bisexual erasure); Yoshino, *supra* note 7, at 430 ("The process of coming out as a bisexual may be retarded by the fact that no robust template of bisexual identity exists"); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 549–50 (1998) [hereinafter Yoshino, *Assimilationist Bias*] (discussing how the denial of the existence of LGBTQ persons effectuated through the military's "Don't Ask, Don't Tell" policy created the illusion that LGBTQ persons did not exist, which may have resulted in the inability of some LGBTQ persons to recognize their own identities). Bisexual plaintiffs suing for sexual orientation discrimination are a rare phenomenon, and thus, every example of such a litigant is meaningful and important. *See* Tweedy & Yescavage, *supra* note 32, at 709–10 (noting that "electronically available court decisions involving bisexual plaintiffs' claims of employment discrimination are rare compared to those involving gay, lesbian, and heterosexual plaintiffs, and [that] it seems to be virtually unheard of for a bisexual plaintiff to succeed in such a claim on the merits.") (footnotes omitted).

[242] Marcus et al., *supra* note 8, at 75 (citing Bear Creek Bible Church & Braidwood Mgmt. v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571 (N.D. Tex. 2021)).

[243] Interview, *supra* note 9, at 27.

she also stated that, at the time of the adverse actions against her, she solely identified as bisexual.[244]

As described above, Ms. Rowland endured many adverse consequences as a result of bringing the case. After finishing her master's degree, her first job was as a guidance counselor at Stebbins High School.[245] After being blacklisted by Mad River School District, she never again worked as a school counselor in the state of Ohio.[246] This was a substantial loss, not only for Ms. Rowland, but also for Stebbins High School and the other schools at which she may have served. Two of Ms. Rowland's former students and one parent testified at her trial about the superior quality of her counseling and her empathy.[247] A teacher at Stebbins testified that she referred students to Ms. Rowland specifically (rather than to other counselors at the school) because of the in-depth counseling that Ms. Rowland provided.[248] A professor who observed her lead a lay counseling session had been so impressed that he had encouraged her to enroll in a master's program in counseling at the university where he taught.[249] Ms. Rowland's departure from school counseling is a prime example of how discriminatory practices can result in the loss of skills of a highly talented professional, a phenomenon that comes with a large collective price tag.[250]

Ms. Rowland endured harassment while the case was pending, including phone calls in which strangers would bad-mouth Ms. Rowland to her young daughters and gossip among nurses when she was in the hospital after a hysterectomy.[251] Constant media attention during the trial put her romantic relationship under considerable stress.[252] Moreover, in addition to being unable to find another counseling job—or any permanent job in a public school

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[244] *Id.* at 6, 16.

[245] NASH & GRAVES, *supra* note 14, at ix, 20; Interview, *supra* note 9, at 8; Transcript of Record, Vol. II at 387–88, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 84, 1981 U.S. Dist. LEXIS 15583.

[246] NASH & GRAVES, *supra* note 14, at ix, 20; Interview, *supra* note 9, at 8; Transcript of Record, Vol. II at 387–88, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). She did briefly work as a school counselor in Arizona later on. Interview, *supra* note 9, at 12.

[247] Transcript of Record, Vol. II at 552–54, 558–60, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (testimony of student's mother); *id.* at 545–49 (testimony of student); *id.* at 272–74 (testimony of student).

[248] *Id.* at 324.

[249] *Id.* at 30–31.

[250] *See, e.g.*, Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, CTR. FOR AM. PROGRESS (Mar. 22, 2012), https://www.americanprogress.org/article/the-costly-business-of-discrimination/#:~:text=there's%20a%20price%20to%20be,due%20to%20unfairness%20and%20discrimination [https://perma.cc/SU9Q-ZEVA].

[251] Interview, *supra* note 9, at 17–18, 23.

[252] *Id.* at 23. Ms. Rowland's romantic relationship at the time appears to have been with the person whom she had mentioned to Mrs. Monell as the object of her love. *Id.* at 5, 23.

setting—Ms. Rowland went bankrupt.[253] She went on welfare and ultimately received overpayments after two of her children went to live with their father.[254] When she tried to pay back the overpayments, her offers were refused. Later, in apparent retaliation for her civil rights case, she was charged with welfare fraud as soon as her discrimination verdict came in.[255]

Ms. Rowland was a practicing lawyer when the court announced the verdict, and the felony charge could have easily permanently derailed her law career.[256] Even though her lawyers sued for selective prosecution and were eventually able to get the charge reduced to a misdemeanor,[257] the conviction (and other issues, such as her bankruptcy and her discrimination case) stalled her law career for several years when she moved to Arizona in 1986 to be close to her aging mother and applied to take the bar exam there.[258] The Character and Fitness Board initially refused her admission, but, finally, in 1992, she was admitted in Arizona after the composition of the Board changed.[259] Eventually, she got the misdemeanor welfare fraud conviction expunged.[260]

Despite these egregious injustices, Ms. Rowland's story is also one of triumph and service. She went to law school when she could not get another school counseling job and graduated within two years. Her practice in Arizona focused on bankruptcy and divorce, two areas that allowed her to make good use of her exemplary counseling skills.[261]

While still in Ohio, Ms. Rowland served on the Yellow Springs Human Rights Commission and, in 1975, was instrumental in the Village's passage of one of the first ordinances nationwide prohibiting discrimination against

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[253] MURDOCH & PRICE, *supra* note 45, at 239; *see also* Transcript of Record, Vol. II at 388–89, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 84, 1981 U.S. Dist. LEXIS 15583 (describing Ms. Rowland's work as a drug counselor and then as a teacher and counselor for Upward Bound students); Interview, *supra* note 9, at 17 (describing Ms. Rowland's teaching as a substitute in Yellow Springs after her attorney intervened on her behalf).

[254] NASH & GRAVES, *supra* note 14, at 29–32; Interview, *supra* note 9, at 30; Zeh, *supra* note 19; *Lesbian Lawyer Charged with Welfare Fraud*, *supra* note 19.

[255] NASH & GRAVES, *supra* note 14, at 32; Interview, *supra* note 9, at 30. One of the irregularities that points to the likelihood of the charge being retaliatory is the fact that others who received overpayments were allowed to repay them, whereas Ms. Rowland's attempt to repay, before the charges were filed, was refused. NASH & GRAVES, *supra* note 14, at 30–31; Interview, *supra* note 9, at 10. The prosecutor also initially uncharacteristically refused to plea bargain in her case. NASH & GRAVES, *supra* note 14, at 31. As Professors Nash and Graves note, the timing of the indictment, which coincided precisely with the jury verdict in Ms. Rowland's favor, was also highly suspicious. *Id.* at 30. Ms. Rowland noted in the interview with the author that her attorneys had identified approximately eighteen others who had received overpayments but none of them was prosecuted. Interview, *supra* note 9, at 30.

[256] NASH & GRAVES, *supra* note 14, at 31; *Lesbian Lawyer Charged with Welfare Fraud*, *supra* note 19.

[257] NASH & GRAVES, *supra* note 14, at 32; Interview, *supra* note 9, at 11.

[258] NASH & GRAVES, *supra* note 14, at 39–40; Interview, *supra* note 9, at 11–13.

[259] NASH & GRAVES, *supra* note 14, at 40; Interview, *supra* note 9, at 12–13.

[260] *See* Interview, *supra* note 9, at 11.

[261] *Id.* at 3, 22.

LGBTQ persons.[262] In 1979, she applied for the position of "(female) Co-Executive Director" of the National Gay Task Force, later renamed the Gay and Lesbian Task Force.[263] Later on, in 1984 and 1985, Ms. Rowland lobbied vigorously for passage of an ordinance to require police to arrest domestic abusers, describing her experiences as an attorney serving domestic violence victims and witnessing police refusals to arrest the abusers. While the ordinance never passed, Ms. Rowland's advocacy is an example of her commitment to social justice.[264] Indeed, her experience working with victims of domestic violence as a volunteer advocate and counselor had inspired her to go to law school because she believed that a law degree would enable her to assist these women in a more holistic way.[265] In private practice, Ms. Rowland represented lesbians seeking custody of their children, as well as same-sex couples in bankruptcy cases and in the drafting of wills and power of attorney agreements prior to the legalization of same-sex marriage.[266]

Although she has been described as an "unlikely hero,"[267] Ms. Rowland's commitment to social justice has deep and long-standing roots. She quit her first job after college in Savannah, Georgia because of a disagreement with the minister of the church at which she worked over the admission of Black parishioners.[268] Savannah, in the early 1960s—when Ms. Rowland was there—was a harsh place for civil rights supporters, with segregationists revolting and inflicting violence in response to integration attempts by ministers.[269]

Professors Nash and Graves have begun to finally bring to light Ms. Rowland's contributions to teachers' rights in the education world. It is past time for her case and personal contributions to be recognized in the legal canon as well, where she should be recognized alongside other early LGBTQ rights pioneers like Frank Kameny and John Singer (who later changed his name to Faygele benMiriam).[270] As an LGBTQ rights plaintiff

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[262] NASH & GRAVES, *supra* note 14, at 21.

[263] *Cf.* Letter from Search Comm. (Female) to Nat'l Gay Task Force Bd. of Dir. (Apr. 19, 1979) (on file with Cornell University Libraries); Cain, *supra* note 154, at 1583.

[264] *See* NASH & GRAVES, *supra* note 14, at 38–39.

[265] Interview, *supra* note 9, at 31–32.

[266] Edie Dixon, *Supreme Court Avoids Gay Rights Case*, 7 VALLEY WOMEN'S VOICE, May 1985, at 3; Interview, *supra* note 9, at 15, 16, 20.

[267] NASH & GRAVES, *supra* note 14, at 15.

[268] Transcript of Record, Vol. II at 279, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 84, 1981 U.S. Dist. LEXIS 15583.

[269] ELAINE ALLEN LECHTRECK, SOUTHERN WHITE MINISTERS AND THE CIVIL RIGHTS MOVEMENT 206–07 (2018). Among the heart-wrenching losses inflicted by white supremacists in Savannah during this period was the killing of an African American pastor in 1970, apparently because of his support for the NAACP. *Id.*

[270] *See, e.g.*, Brooke Sopelsa, *#Pride50: Frank Kameny—Father of the Gay Rights Movement*, NBC NEWS (June 3, 2019), https://www.nbcnews.com/feature/nbc-out/pride50-frank-kameny-father-gay-rights-movement-n1005216 [https://perma.cc/HJ7A-8469]; Alan J. Stein, *John Singer and Paul Barwick are Denied a Marriage License in Seattle on September 20, 1971*, HISTORYLINK.ORG (Dec. 4. 2012), https://www.historylink.org/File/10262 [https://perma.cc/KXC7-H4WJ].

turned attorney, it would seem that Ms. Rowland would have been a natural choice for speaking engagements relating to LGBTQ rights and LGBTQ legal history, but instead her contributions appeared to largely fade into obscurity.[271]

III. The Flaws of the Sixth Circuit Opinion and the Work Remaining

A. Flaws in the Sixth Circuit Opinion

While the Sixth Circuit majority attempted to strike a neutral-sounding tone in its opinion reversing Ms. Rowland's victory, as recognized by the Sixth Circuit dissent and by Justice Brennan's dissent from the denial of certiorari,[272] a careful reading shows that the Court did not seriously wrestle with many of the important questions Ms. Rowland's case raised. The law has, of course, developed in important ways since the decision, but even within the framework of the law that existed at the time, the decision has a number of flaws.

1. *Reliance on the Jury's Finding that Ms. Rowland Had Improperly Revealed the Sexual Orientation of Two Students to Her Secretary*

The Sixth Circuit majority assumed that Ms. Rowland's revelation of two students' LGBTQ sexual orientations to her secretary was a basis for the adverse actions taken against her, making the case effectively a mixed motive case.[273] But neither the evidence at trial nor the special verdicts bear out the idea that this disclosure was a motivating factor. The special verdicts do not identify this disclosure as an inciting factor; rather, the only special verdict questions addressing causation point instead to Ms. Rowland's own sexual orientation and her revelation of it.[274] In terms of the evidence at trial, both the principal, Alex DiNino, and the school district's attorney, Larry Smith, admitted that the only reasons for the suspension of Ms. Rowland

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[271] *See* Interview, *supra* note 9, at 33.

[272] Rowland v. Mad River Loc. Sch. Dist., 730 F.2d 444, 454 (6th Cir. 1984) (Edwards, J., dissenting) ("My colleague's opinion seems to me to treat the case, *sub silento*, as if it involved only a single person and a sick one at that."); *Rowland*, 470 U.S. 1009 (1985) (Brennan, J., dissenting) (The "patently erroneous . . . maneuvers [of the court below] suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone?").

[273] *Rowland*, 730 F.2d at 449–50.

[274] *See* Special Verdict V, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 68, 1981 U.S. Dist. LEXIS 15583; Special Verdict VIII, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). While the special verdicts, due to their wording, do not foreclose the possibility that this disclosure could have been a motivating factor, as discussed below, the evidence at trial did not support this idea.

were her sexual orientation and her revelations of it.[275] Similarly, Peggy Titus, the Ohio Education Association representative, testified that the district's attorney had told her that Ms. Rowland was being suspended because "she had been advertising herself as a homosexual."[276] The attorney also tried to intimidate Ms. Titus into not supporting Ms. Rowland by suggesting that, if the case went through the courts with the Ohio Education Association's support, "OEA will have gone on the record as supporting homosexualism."[277]

Ms. Rowland herself testified that she was told at the one-on-one meeting she had with Mr. DiNino, at which she was asked to resign, that the disclosure of the students' sexual orientation to her secretary might be something that he would use against her, the implication being that her own sexual orientation, rather than the disclosure of the students' sexual orientations, one of which was weeks earlier than Ms. Rowland's disclosure of her own orientation, was his true concern.[278]

Ms. Rowland made these two disclosures regarding the students to her secretary to ensure that the two students, who were in crisis and who had given her permission to make the disclosures, would have unfettered access to her.[279] One of these disclosures occurred prior to Ms. Rowland's revelation to Mrs. Monell of her own bisexuality.[280] As explained below, circumstantial

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[275] Transcript of Record, Vol. II at 76–77, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). Despite these admissions, the school district attempted to argue during its closing argument that it was not Ms. Rowland's bisexuality that caused concern for the district, but rather, more amorphously, it was the fact that she had embarked on "an uncharted course." Transcript of Record, Vol. IV at 281, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *see also id*. at 289 ("For her to come in and suggest to you that he did it because she was a bisexual, given this evidence, and that she told a few close personal friends, is just beyond my comprehension.").

[276] Transcript of Record, Vol. II at 143, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[277] *Id.* at 153.

[278] *Id.* at 338 ("And only after he had told me that [that he had heard that I was bisexual and was discussing it with others] and told me he would ask for my resignation did he also say that Mrs. Monell had also mentioned that I had mentioned to her the names of two students who were gay or bisexual and he told me that he might use that information against me to show that I had broken confidences."); *id.* at 316–20 (Ms. Rowland's testimony regarding timing of disclosures).

[279] *Id*. at 314–17; Interview, *supra* note 9, at 4.

[280] *See, e.g.*, Transcript of Record, Vol. IV at 258, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (discussing timing of incidents during plaintiff's closing argument); Transcript of Record, Vol. II at 316, 320, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (reflecting Ms. Rowland's testimony regarding the timing of disclosures to Mrs. Monell of each of the two students' sexual orientations). Professors Nash and Graves appear to view Ms. Rowland's disclosure to Mrs. Monell of her own bisexuality as occurring at the same time as the disclosure to Mrs. Monell of the two students' sexual orientations, *see* NASH & GRAVES, *supra* note 14, at 10, but this view of the timing is not supported by the trial transcript, *see* Transcript of Record, Vol. IV at 258, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); Transcript of Record, Vol. II at 316, 320, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125), which demonstrates that one of the disclosures

evidence shows that these two disclosures regarding students were not a cause for concern among her superiors.

Under Ohio law at the time of the case, when school administrators were considering terminating a teacher or counselor, they had to provide charges ahead of time and were limited to specified reasons for termination.[281] During Ms. Rowland's suspension, Ms. Titus repeatedly requested written charges under this law, which ordinarily would have come within about two weeks of a suspension, but she never received them.[282] It was in the course of one such conversation about the charges that the school district's attorney tried to deflect as well as incite fear in Ms. Titus that the Ohio Education Association's reputation would be stained by Ms. Rowland's bisexuality if the matter went to court.[283]

The failure to provide written charges in accordance with Ohio law and ordinary practice in these sorts of cases may well have reflected the district officials' sense that their reasons for taking adverse actions against Ms. Rowland did not fit easily into statutorily permissible reasons for termination. Indeed, their reasons did not. It would have been difficult to argue that Ms. Rowland was guilty of "gross inefficiency or immorality," "willful and persistent violations of reasonable regulations," or of some "other good and just cause."[284] In fact, the school district's attorney did not even know what the charges would be several months into Ms. Rowland's suspension, although he knew that her bisexuality was the reason for the suspension.[285] This departure from standard practice raised a red flag that a straightforward, clearly permissible reason for taking adverse action, such as a breach of confidentiality, was not involved.

Additionally, Mrs. Monell had access to confidential information about the students as a matter of course because she had access to the student files and provided Ms. Rowland with background information from these files "in many cases."[286] Thus, Ms. Rowland's disclosure to Mrs. Monell about

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regarding a student occurred weeks earlier than Ms. Rowland's disclosure to Mrs. Monell of her own bisexuality.

[281] 1971 Ohio Laws § 3319.16.

[282] Transcript of Record, Vol. II at 144–45, 151–53, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125); *see id.* at 347–48 (Ms. Rowland describing her stress at not receiving charges).

[283] *Id.* at 153.

[284] 1971 Ohio Laws § 3319.16.

[285] Transcript of Record, Vol. II at 153, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). The trial judge disagreed that the failure to provide charges was relevant, given that Ms. Rowland was not actually terminated, only suspended, during the course of her contract. *Id.* at 159–60, 162–64. However, as the union representative, Ms. Titus had a wealth of experience with suspensions of teachers and thought it highly unusual that the charges were not forthcoming. *Id.* at 151–53. Additionally, the suspension appears to have been intended to operate as de facto termination, with testimony at trial indicating that the superintendent "wanted Ms. Rowland 'physically gone' from the school." *Rowland*, 1981 U.S. Dist. LEXIS 15583, at *18.

[286] Transcript of Record, Vol. II at 313, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125). Mrs. Monell denied this in her testimony. Transcript of

the students' sexual orientations appears to have been in accord with the then-current practice at Stebbins High School. Although the jury found that the disclosures were improper, they would likely not have been a cause for discipline because they appear to have been in line with school practice. Indeed, the 1974 American School Counselor Association Statement on Confidentiality appeared to recognize that secretaries would be privy to confidential information; it provided that secretaries should be guaranteed "adequate working space so that students and school personnel will not come into contact with confidential information[.]"[287] Finally, a former student counselee testified that Ms. Rowland kept her confidences better than other counselors at the school.[288] Assuming this counselee's assessment to be correct, one can infer that Ms. Rowland was more fastidious about keeping confidences than other counselors at the school and thus that the sharing of information with her secretary in furtherance of her counseling relationships with the students would be an unlikely basis for disciplining Ms. Rowland.[289] Clearly, the Sixth Circuit majority did not pay careful attention to the evidence at trial nor the structure of the special verdicts, instead simply assuming that the disclosures to Mrs. Monell of two students' sexual orientations, which the jury found to be improper, were a motivating factor in the adverse actions taken against Ms. Rowland.

2. *The Majority's Creation of a False Dichotomy Between Being Bisexual and Acknowledging Bisexuality*

The Sixth Circuit majority rejected the wording of the special verdict relating to whether, assuming there were permissible and impermissible reasons for the adverse actions against Ms. Rowland, she would have been subject to these actions if she had not been bisexual and had not disclosed her bisexuality.[290] Specifically, the majority concluded that she could be disciplined for stating the fact of her bisexuality. The only live question was thus whether she could have been disciplined based on her bisexual status alone; therefore, the majority objected to the special verdicts' approach of asking whether both the status and the verbal acknowledgement of it were the cause of the adverse actions.[291] However, as both the dissent in the Sixth Circuit

Record, Vol. III at 418–20, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[287] American School Counselor Association Statement on Confidentiality ¶ 7 (1974) (on file with Harvard Journal of Law & Gender).

[288] Transcript of Record, Vol. II at 546–47, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[289] Ms. Rowland also testified that she had not received any criticism of her work prior to her suspension, which was based on her informing Mrs. Monell that she was in love with a woman. Transcript of Record, Vol. II at 346, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[290] Rowland v. Mad River Loc. Sch. Dist., 730 F.2d 444, 450 (6th Cir. 1984).

[291] *Id.*

and Justice Brennan recognized, this is a false dichotomy.[292] If being bisexual were truly a protected status (and the majority only assumed as much for the sake of argument), then it would be illogical to allow stating the fact of that status to be a basis for adverse treatment.[293] This is the same absurd demarcation that the United States Military tried to draw with its former "Don't Ask, Don't Tell" policy; however, such a policy's premise can only be disapproval of LGBTQ status, and its effect is to erase that status in the minds of heterosexuals and perhaps LGBTQ persons as well.[294] The notion of bisexuality as a protected status is simply incompatible with the idea that it is unspeakable. Therefore, the special verdicts' inclusion of the status and disclosure of it as combined bases of the adverse actions should not have been viewed as improper.

3. *The Alleged Lack of Evidence as to Similarly Situated Employees Being Treated More Favorably*

The Sixth Circuit majority also stated that it was reversible error that there was no evidence that heterosexual employees were treated more favorably when they disclosed their heterosexuality.[295] This statement is laughable. If a school district fired all employees that disclosed their heterosexual status or the fact that they were part of different-sex marriages or different-sex romantic relationships, as well as all those that disclosed LGBTQ status, there would literally be almost no one left (presumably, only extremely pri-

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[292] *See id.* at 453–54; Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1016 n.11 (1985) (Brennan, J., dissenting).

[293] It is possible that what the Sixth Circuit majority was hinting at in creating this specious dichotomy was the idea, which was a subtext in many early LGBTQ rights opinions, that one should be ashamed of being LGBTQ and therefore that plaintiffs that "flaunted" LGBTQ status were being legitimately penalized. *See, e.g.*, Cain, *supra* note 154, at 1603–04. One of the unstated underpinnings of such a subtext is the idea that the First Amendment presumes a heterosexual speaker. *See, e.g.*, Steven J. Macias, *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in Public Schools*, 49 SAN DIEGO L. REV. 791, 808 (citing and discussing Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241 (1995)). Thus, LGBTQ speakers and actors are depicted as making political statements when they express their sexual orientations, whereas heterosexual speakers are not. Macias, *supra*, at 808–09.

While Ms. Rowland has been described as "closeted," ESKRIDGE ET AL., *supra* note 29, at 537, this is inaccurate, considering that she had disclosed her bisexuality to several other employees at Stebbins High School and that her relative openness, along with her unconventional dress, may well have been seen as a sort of flaunting by the Sixth Circuit majority. *See* Rowland, 1981 U.S. Dist. LEXIS 15583, at *26 (referring to the defendants' objections to Ms. Rowland's "mode of dress"); Interview, *supra* note 9, at 4; Mad River Loc. Sch. Dist.'s Motion to Set Aside the Verdicts and Judgment at 4, *Rowland*, ECF No. 84, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (describing Ms. Rowland as "promoting, advertising and flaunting her bisexuality to anyone who would listen"). Finally, it is worth noting that bisexuals face many barriers to disclosing their sexuality, *see, e.g.*, Maliepaard, *supra* note 62, at 147, and that many do not identify with the notion of coming out, *id.* at 163; *see also* BAUMGARDNER, *supra* note 73, at 209–10.

[294] *See* Yoshino, *Assimilationist Bias*, *supra* note 241, at 349–50.

[295] *Rowland*, 730 F.2d at 450.

vate persons and perhaps asexuals would be left, although the latter may well be discriminated against).[296] As the dissent pointed out, the jury made the determination that Ms. Rowland was treated disparately based on her sexual orientation, and that finding should have been respected.[297]

Slightly after the Sixth Circuit opinion was issued but before the U.S. Supreme Court denied certiorari, the Supreme Court clarified that there is no need to provide evidence of how similarly situated employees not in the protected class were treated if direct evidence of discrimination is present.[298] But, even without the benefit of *Trans World Airlines, Inc. v. Thurston*,[299] it should have been quite obvious that the school district would not have suspended nearly its entire workforce based on expressions of heterosexuality. Moreover, evidence adduced at trial demonstrated that many other teachers spoke freely of personal relationships with Ms. Rowland and that she had even met the husband of another female teacher, an encounter that could be considered a disclosure of sorts.[300]

4. *The Alleged Lack of a Municipal Policy Regarding Disapproval of LGBTQ Persons*

The Sixth Circuit stated that there was no official policy or custom at Mad River School District of discriminating against LGBTQ persons[301] so that the district could not be held liable under 42 U.S.C § 1983 based on *Monell v. New York City Department of Social Services*.[302] It therefore accused the district court of imposing respondeat superior liability on the school district in violation of *Monell*.[303] The majority also dismissed Ms.

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[296] For an example of a court discussing the alleged lack of evidence of a community college's treating partnered heterosexuals more favorably in a recent LGBTQ discrimination case, see *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) ("Nothing in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual relationships, or for that matter even an anti-partnership policy that is gender-neutral."). *See also* Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1145 (2017) ("It is highly unlikely that any school would fire a heterosexual woman simply for discussing her husband or disclosing that she had one."); Elizabeth Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 367 (2014) (discussing discrimination against asexuals).

[297] *Rowland*, 730 F.2d at 454.

[298] Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

[299] *Id*.

[300] Transcript of Record, Vol. II at 321–28, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 113, 1981 U.S. Dist. LEXIS 15583; *see also* NASH & GRAVES, *supra* note 14, at 37 (discussing Ms. Rowland's attorneys' arguments that "heterosexual employees routinely display[ed] evidence of their sexual orientation[s]"). For further elucidation of the idea that conduct, such as a female employee's decision to introduce a work friend to her husband, can be considered speech for First Amendment purposes, see ESKRIDGE, *supra* note 156, at 180 (arguing that homosexual conduct, such as same-sex handholding, should be considered speech).

[301] *Rowland*, 730 F.2d at 450–51.

[302] 436 U.S. 658 (1978).

[303] *Rowland*, 730 F.2d at 451.

Rowland's argument that Superintendent Hopper was a decisionmaker qualified to make policy on behalf of the district.[304] The dissent saw it as quite clear that there was an official policy and seemed to suggest that prejudice against LGBTQ persons was clouding the majority's view.[305]

The Sixth Circuit majority also ignored the case that the district court relied on to establish the school district's liability for accepting the superintendent's recommendation, *Hickman v. Valley Local School District Board of Education*.[306] *Hickman* upheld First Amendment liability of a school district after the school board failed to renew a teacher's contract as a result of the superintendent's and principal's recommendations. These recommendations were impermissibly rooted in the teacher's union activities, and the school board was held liable because it relied on these recommendations and was not insulated from the reasoning behind them.[307] *Hickman* remains good law in the Sixth Circuit to this day, and the Sixth Circuit majority in *Rowland* should have viewed it as controlling on this point.

Later cases have clarified that, in line with the dissent's understanding, municipal policies may be informal (and even that they can consist of a single decision made by a person with policymaking authority)[308] and have further enshrined the rule that a municipality may be liable under 42 U.S.C. § 1983 for ratifying an employee's decision.[309] However, the Sixth Circuit's 1980 ruling in *Hickman* was on all fours with *Rowland*. Therefore, even without these later clarifications, *Hickman* should have dispelled of any concern that to hold the district liable may have reeked of respondeat superior liability.

5. *The Question of Whether Bisexual Status is a Matter of Public Concern*

The Sixth Circuit majority stated that Ms. Rowland's sexual orientation was not a matter of public concern and therefore concluded that she could be disciplined for disclosing it.[310] The Sixth Circuit relied on the fact that some of Ms. Rowland's disclosures of her bisexuality were made in confidence to conclude that her bisexuality was not a matter of public concern,[311] even though, by the time of the Sixth Circuit decision, the Supreme Court had

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[304] *Id.*

[305] *Id.* at 453.

[306] 619 F.2d 606, 610 (6th Cir. 1980); *see also* Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125, 1981 U.S. Dist. LEXIS 15583, at *25 (S.D. Ohio Oct. 22, 1981) (citing *Hickman*, 619 F.2d at 610); Transcript of Record, Vol. III at 438, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125) (reflecting statements by Judge Steinberg regarding the import of *Hickman*, 619 F.2d).

[307] *Hickman*, 619 F.2d at 610.

[308] *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986).

[309] *See, e.g.*, Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 534 (4th Cir. 2022).

[310] Rowland v. Mad River Loc. Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984).

[311] *Id.*

already held that an employee's private communications could be entitled to First Amendment protection.[312]

Both the dissent in the Sixth Circuit and Justice Brennan's dissent from denial of certiorari contended that expressing one's minority sexual orientation is a matter of public concern because it results in one's insertion into the national debate about LGBTQ rights.[313] Justice Brennan further emphasized that the jury had found that Ms. Rowland's comments did not disrupt the functioning of the school so that, even if her statements were not on matters of public concern, her speech should not be subject to discipline (although he acknowledged that the Court had not definitively decided this latter issue).[314]

Other cases examining this issue in school and military contexts have proven to be a mixed bag, with many LGBTQ plaintiffs losing the argument that speech regarding their sexual orientations was a matter of public concern and a few prevailing on it.[315] However, the Supreme Court has now recognized that opposition to others' homosexuality is a matter of public concern,[316] so it would logically follow that expressions of one's own homosexuality or bisexuality should be viewed as such as well. Indeed, the Court's recent decision in *303 Creative v. Elenis*[317] to insulate a website designer

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[312] *See* Alter, *supra* note 121, at 177 (discussing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979)).

[313] *Rowland*, 730 F.2d at 452–53 (Edwards, J., dissenting); Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1012–13 (1985) (Brennan, J., dissenting).

[314] *Rowland*, 470 U.S. at 1013–14 (Brennan, J., dissenting).

[315] L. Camille Hébert, Employee Privacy Law § 9:9 (2d ed. 2023).

[316] Snyder v. Phelps, 562 U.S. 443, 451, 453–55, 458 (2011). The Court in *Phelps* emphasized the importance of the context of the protest at issue in determining that the public concern test was met. *Id.* at 453. While some of Ms. Rowland's disclosures were private, they were made at a public school by a faculty member at the school, a context that heightens the public concern of the disclosures, especially given the extent to which there has been longstanding fear of LGBTQ teachers. *See, e.g.*, Rosky, *supra* note 20, at 640, 645, 648–49 (describing fears and unfounded allegations of LGBTQ teachers' indoctrinating children into queerness). Indeed, Mrs. Monell's decision to report Ms. Rowland's revelation of her bisexuality to school officials and the resulting uproar would be hard to make sense of if Ms. Rowland's statement of her sexual orientation were not a matter of public concern. Finally, regarding protection for private disclosures as matters of public concern, in addition to *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court upheld First Amendment protection for a private disclosure made on the job in *Rankin v. McPherson*, 483 U.S. 378 (1987).

[317] No. 21-476 (June 30, 2023). The bare fact that the plaintiff, Lorie Smith, wanted to ensure that she could deny same-sex couples' requests that she create wedding websites for them in contravention of Colorado law, *see id.* at 2308, even when no same-sex couples had requested her services, *see, e.g.*, Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, New Republic (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/LKD5-MZHT], shows that LGBTQ rights and status remain issues of public concern.

Admirably, Colorado law defines "sexual orientation" broadly as "an individual's identity, or another individual's perception thereof, in relation to the gender or genders to which the individual is sexually or emotionally attracted and the behavior or social affiliation that may result from the attraction." Colo. Rev. Stat. Ann. § 24-34-301(24)

from state law anti-discrimination obligations to potential LGBTQ customers on free speech grounds illustrates that LGBTQ rights and status continue to be issues of public concern today, just as they were in 1983 when the Sixth Circuit heard arguments in Ms. Rowland's case.[318] Nevertheless, some scholars have cautioned that attempts to protect LGBTQ persons from discrimination based on free speech arguments are problematic in that such arguments necessarily make one's sexuality—and hence personal validity—a matter of public debate.[319]

Although the appeal of using the First Amendment to protect disclosures of LGBTQ status is clear, especially in a legal landscape that lacks other straightforward means of protection, it seems preferable to look to other bases of protection that lack the double-edged character of First Amendment protections when possible.[320]

6. *Conclusion on the Sixth Circuit Majority Opinion*

As described above, the Sixth Circuit majority in *Rowland* made several significant legal errors in its opinion. As further discussed below, other aspects of the opinion only appear erroneous in hindsight, with the benefit of recent developments protecting same-sex marriage and recognizing minority sexual orientations to be an aspect of sex, which has long been considered a quasi-suspect class.[321] Among the errors the Sixth Circuit made under then-existing law, probably the most glaring is the majority's contravention of its own recent precedent in *Hickman*,[322] which had held that a school board incurs liability for relying on a superintendent's recommendation when it is based on a constitutionally impermissible reason.[323] Its contradiction of then-recent Supreme Court precedent recognizing that a public employee's statements on the job made in confidence may still receive First Amendment protections was also highly problematic.[324] Such carelessness and apparent eagerness to resolve the case against Ms. Rowland at the expense of sound legal analysis likely was a function of prejudice against Ms. Rowland for her

(West 2023). This could prove helpful to those who use less well-known terms to define their own sexual orientations.

[318] Notably, California has adopted a similar view to the effect that expression of LGBTQ sexual orientation is inherently political in interpreting a state statute barring employment discrimination based on political activity. *See* Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 24 Cal.3d 458, 488 (Cal. 1979).

[319] *See, e.g.*, CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 94 (2000).

[320] *See* Macias, *supra* note 293, at 808.

[321] Craig v. Boren, 429 U.S. 190, 197 (1976).

[322] 619 F.2d 606, 610 (6th Cir. 1980); *see also supra* notes 306–307 and accompanying text (discussing *Hickman*, 619 F.2d).

[323] *See supra* notes 306–307 and accompanying text (discussing *Hickman*, 619 F.2d).

[324] *See supra* notes 316–317 and accompanying text; *see also* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–17 (1979) (holding that a public school teacher's complaints regarding racially discriminatory employment practices and policies in private conversations with the principal were protected under the First Amendment).

bisexuality. Whatever the cause, Ms. Rowland, who clearly poured her heart and soul into the case[325] and put her faith in the judiciary, deserved better.

B. How Far the Law Has Come Since Rowland *and the Work that Remains*

After initial setbacks, such as *Bowers v. Hardwick*,[326] there have been many important victories in LGBTQ rights since *Rowland*.[327] Yet, not only does much work remain to be done, but we may be situated at a moment of degeneration, with a Supreme Court that seems willing to go back to originalist and regressive interpretations of constitutional rights that are certain to primarily benefit straight, white, cisgender men and that has, this very term, expanded free speech protections for a Christian web designer so as to immunize her from complying with state law anti-discrimination protections for potential customers who are LGBTQ and are part of same-sex couples who plan to marry.[328]

For Ms. Rowland's case, if it were heard today, the most important victory is probably *Bostock v. Clayton County*, holding that the term "sex" in Title VII of the Civil Rights Act includes sexual orientation.[329] While Ms. Rowland did not bring a Title VII claim, presumably she would have if the facts of her case occurred today rather than in 1974. Moreover, lower courts have also applied the rationale of *Bostock* in the equal protection context, although most have done so with respect to claims of transgender plain-

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[325] As discussed above, Ms. Rowland refused the opportunity to resign quietly, experienced blacklisting from counselor and teacher jobs in Ohio, went bankrupt, experienced substantial harassment, and faced a welfare fraud felony charge and misdemeanor conviction, all in furtherance of her case and the greater cause of LGBTQ rights. *See supra* Part II. She also had to resort to seeking contributions from the public in order to continue her appeals and requests for rehearing. *See, e.g.*, VI Lavender Morning A Lesbian Newsletter for all Wimmin, Vol. VI Issue 4, Apr. 1985, at 14.

[326] 478 U.S. 186, 194–96 (1986).

[327] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Romer v. Evans, 517 U.S. 620 (1996).

[328] 303 Creative v. Elenis, No. 21-476, slip op. at 11–14 (June 30, 2023); *see id.* at 2322 (Sotomayor, J., dissenting) (noting that, "[t]oday, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class" and suggesting that the majority's decision is part of the national "backlash to the movement for liberty and equality for gender and sexual minorities"); *see also* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 3 (June 24, 2022) (Thomas, J., concurring) (arguing that, "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell* . . . [b]ecause any substantive due process decision is 'demonstrably erroneous[ ]'"); *see also* Matthew L.M. Fletcher, *Textualism's Gaze*, 25 Mich. J. Race & L. 111, 118 (2020) (arguing that "the only limiting principle in originalism, at least with constitutional texts, is to privilege the statements of elite white men exclusively").

[329] *See Bostock*, 140 S. Ct. at 1743.

tiffs.[330] Thus, although it remains the case that no federal statute explicitly protects workers from sexual orientation discrimination,[331] Title VII has been held to provide such protection and its rationale should also apply in the equal protection context, presumably requiring intermediate scrutiny in cases alleging discrimination against LGBTQ persons.[332]

Additionally, in *Obergefell v. Hodges*,[333] decided a few years before *Bostock*, the Court relied on equal protection in conjunction with due process in the context of same-sex marriage, although it was unclear about what level of scrutiny it was applying in its equal protection analysis.[334] Thus, on one level, the problems that Ms. Rowland faced in enforcing her right not to be discriminated against based on her sexual orientation appear to have been solved. On the other hand, however, the Court's willingness to dispense with precedent in favor of archaic interpretations of constitutional provisions[335] and to impinge even on its own holdings from just a year or two earlier[336] should give us pause. In the near future, the best path to stable protection for LGBTQ workers' rights would probably be passage of an explicit federal law, just as such a law has been passed to protect marriage equality.[337]

At the same time, however, a more desirable outcome from a theoretical point of view would be for the Court to adopt Justice Brennan's view that sexual orientation is a protected class under the equal protection clause and

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[330] *See, e.g.*, Monegain v. Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 141 (E.D. Va. 2020); Kadel v. Folwell, F. Supp. 3d, 2022 WL 3226731, at *32 (M.D.N.C. 2022).

[331] Tweedy & Yescavage, *supra* note 32, at 708.

[332] *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020) (applying intermediate scrutiny in the context of a transgender student's challenge regarding a discriminatory bathroom policy, but not relying on *Bostock* in the equal protection analysis). Intermediate scrutiny would presumably apply to equal protection cases involving discrimination based on LGBTQ status if *Bostock*'s reasoning is extended to the equal protection context because claims of sex-based discrimination are evaluated based on intermediate scrutiny under the equal protection clause. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ("Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification. The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'") (citations omitted).

[333] 576 U.S. 644 (2015).

[334] *Id.* at 672.

[335] *See, e.g.*, Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022) (overruling earlier cases that recognized a constitutional right to abortion).

[336] *See* Oklahoma v. Castro-Huerta, No. 21-429 (June 29, 2022); Alex Serrurier, *This Supreme Court Decision Shows How Drastically the Court Has Been Politicized*, ALL. FOR JUST. (July 21, 2022), https://www.afj.org/article/this-supreme-court-decision-shows-how-drastically-the-court-has-been-politicized/ [https://perma.cc/N6F3-NESR]; *see also* Bryce Drapeaux, *A New Entry into the Anticanon of Indian Law*: Oklahoma v. Castro-Huerta *and the Actual State of Things*, S. DAKOTA L. REV., at 32, 43 (forthcoming 2023) (discussing how the Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*, No. 21-429 (June 29, 2022), deviated from precedent).

[337] *See* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

that classifications based on it must be subject to strict scrutiny.[338] This would both provide strong protection for LGBTQ persons and would recognize their dignity under the law. While simply including the category of sexual orientation within sex discrimination (as courts are likely to do in the equal protection context after *Bostock*) does provide a significant level of protection, intermediate scrutiny is less protective than strict scrutiny. In addition, the primary justification for intermediate scrutiny in the sex discrimination context—that the law may sometimes take account of the enduring differences between the sexes[339]—does not justify treating LGBTQ persons differently than heterosexual (or cisgender) ones. Justice Brennan was clearly ahead of his time in suggesting that discrimination based on lesbian, gay, or bisexual status should be evaluated based on strict scrutiny; forty-eight years later, the Court has at least inched in that direction,[340] although it has yet to arrive.

Despite the precarious position in which women and sexual minorities find themselves given the Court's current make-up, an embrace of strict scrutiny for classifications based on sexual orientation in the equal protection context has become more conceivable in the years since the Supreme Court denied certiorari in *Rowland*. It is less clear, however, that Justice Brennan's argument that sexual orientation classifications implicate a fundamental right under the equal protection clause and that they should be subject to strict scrutiny on that basis has made significant headway.[341] Justice Brennan named privacy and freedom of expression as fundamental rights that may be implicated.[342] Although the majority opinion in *Lawrence v. Texas*[343] contains some seeds consistent with Justice Brennan's dissent in *Rowland*,[344] the emphasis on freedom and autonomy in *Lawrence* appears to be qualified by the Court's emphasis on the fact that the conduct occurred in the private sphere of the home,[345] as well as by the Court's perception of the conduct as part

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[338] Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (suggesting that discrimination based on homosexuality or bisexuality is invidious and that such discrimination should therefore be subject to "strict, or at least heightened, scrutiny").

[339] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

[340] *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of sexual orientation); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment requires states to license and recognize same-sex marriage); Windsor v. United States, 570 U.S. 744 (2013) (finding one section of the Defense Against Marriage Act unconstitutional); Romer v. Evans, 517 U.S. 620 (1996) (holding that a Colorado amendment banning discrimination based on sexual orientation violated the Equal Protection Clause of the Fourteenth Amendment).

[341] *Rowland*, 470 U.S. at 1015 (Brennan, J., dissenting).

[342] *Id.*

[343] 539 U.S. 558 (2003).

[344] *Id.* at 562, 567, 574.

[345] *Id.* at 567; FRANK S. RAVITCH, RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA 42–43 (2016) (emphasizing that *Lawrence* protects private sexual conduct in the home).

and parcel of a loving relationship, even though the relationship may well have been quite casual.[346]

Thus, same-sex, private sexual conduct in the home has received protection as part of the constitutional right to privacy,[347] a protection that Justice Thomas has stated an intent to jettison,[348] but this protection has not, as of yet, been extended to anything like a fundamental right to sexual liberty, a concept whose likelihood of being adopted by the Court appears remote.[349] We do have traces of a related understanding in *Obergefell*, where Justice Kennedy's majority opinion significantly relied on liberty and personal autonomy interests under the Due Process clause in overturning statutory bans on same-sex marriage.[350] However, marriage itself is a fundamental right[351] and, moreover, has been justly critiqued on grounds of its oppressive history and connection to heteronormativity.[352] Recognition of LGBTQ individuals' right to enter a same-sex marriage thus still appears substantially distant from a more robust concept of liberty that would include a right to define oneself in terms of identity (sexual and otherwise) and a right to engage in sexual practices with consenting adults, with the sole limiting principle being that no one be harmed.[353] Similarly, as noted above, the majority in *Lawrence* seemed focused on the fact that the conduct occurred in the home and

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[346] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (focusing on the importance of loving relationships); *see also* Doron Dorfman, *Revenge Porn Laws and Gay Sex Exceptionalism*, JOTWELL (May 3, 2023), https://equality.jotwell.com/revenge-porn-laws-and-gay-sex-exceptionalism/ [https://perma.cc/6ESF-WSEA] (reviewing Andrew Gilden, *The Queer Limits of Revenge Porn*, 64 B.C. L. REV. 801 (2023)); *cf.* Marc Spindelman, *Tyrone Garner's* Lawrence v. Texas, 111 MICH. L. REV. 1111, 1114 (2013) (arguing that there was likely no sexual or romantic relationship at all between the two men whose conduct was at issue in *Lawrence*).

[347] *Lawrence*, 539 U.S. at 564, 567, 569, 572; *see also* RAVITCH, *supra* note 345, at 42–43 (emphasizing that *Lawrence* protects private sexual conduct in the home).

[348] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 3 (June 24, 2022) (Thomas, J., concurring).

[349] *Cf.* Boucai, *supra* note 172 (arguing that, in struggling for marriage equality in modern times, LGBTQ activists have distanced themselves from the sexual liberty claims employed by activists in the early 1970s and more recent marriage equality claims have an assimilationist aspect to them); *see also* Tweedy, *supra* note 79, at 1475 (contending that "sexual orientation may be such a personal, value-laden concept that society would be best-served by each person's being free to define her own" and "sexual orientation may be more analogous to religion than race in that the individual has the ultimate right to define or name that aspect of him or herself").

[350] Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015). Justice Kennedy's approach in *Obergefell* seems to echo arguments made by Professor Carlos Ball regarding same-sex marriage and autonomy. *See generally* Ball, *supra* note 202 (arguing for a version of autonomy based in state recognition of same-sex marriage).

[351] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[352] *See, e.g.*, Ball, *supra* note 202, at 371–72; Boucai, *supra* note 172, at 76 and n.619.

[353] For an exegesis of this idea, see Martha Nussbaum, *Millean Liberty & Sexual Orientation: A Discussion of Edward Stein's The Mismeasure of Desire*, 21 L. & PHIL. 317, 322–30 (2002).

on the potentially erroneous notion that the sexual conduct at issue occurred in the context of a loving relationship.[354]

Justice Brennan's dissent was relatively brief, and it is unclear whether he had such a robust notion of a fundamental right in mind when he suggested that Ms. Rowland's claim likely implicated a fundamental right. Nonetheless, such a notion, if adopted,[355] would be extremely freeing and would more fully protect plaintiffs like Ms. Rowland, whom the school district derisively termed a "free spirit" on an "uncharted course."[356] Such a concept would also have the benefit of not imprisoning individuals within restrictive concepts of identity,[357] according with the ideals of freedom Ms. Rowland evoked when she noted that she "wasn't into labeling" herself at the time that the events underlying her case occurred.[358] Given bisexuality's potential to disrupt categories of sexual identity, it may be that its protection requires a more robust notion of freedom. As poet June Jordan has asked: "What tyranny could exceed a tyranny that dictates to the human heart, and that attempts to dictate the public career of an honest human body?"[359] In the same piece, Jordan also extrapolated that: "[B]isexuality invalidates either/or formulation, either/or analysis. Bisexuality means that I am free and I am as likely to want and to love a woman as I am likely to want and to love a man . . . Isn't that what freedom implies?"[360] While all bisexuals would not endorse for themselves Jordan's notion that bisexuality translates to equal levels of attraction to men and women and—with a more modern lens—other genders,[361] Jordan's concept of bisexuality as tied to freedom resonates.

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[354] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[355] Nussbaum documents that this concept of freedom has occasionally been relied on by states adjudicating state constitutional challenges to sodomy statutes. *See* Nussbaum, *supra* note 353, at 325–27. Justice Kennedy's opinion in *Obergefell* did speak of the right to intimacy as "fundamental," language which could perhaps support a broader notion of a fundamental right to intimacy that extends beyond marriage. *Obergefell*, 576 U.S. at 671. Intimacy, of course, can have many meanings, and it is thus unclear how useful this language in the opinion would be and how the current Court would interpret the language. *Cf.* Cohen, *supra* note 31, at 1089 (describing Justice Kennedy's pronouncements about LGBTQ rights as being "notoriously flowery but somewhat vacuous").

[356] Transcript of Record, Vol. IV at 282, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 113, 1981 U.S. Dist. LEXIS 15583. The lawyer for the school district also described Ms. Rowland as a nonconformist in terms of her dress: "[T]his is the first day of school and she comes to class dressed in jeans and I think, as I recall on a motorcycle with a helmet and the jeans were dirty because she had worked on the bike." *Id.* at 281–82.

[357] *Cf.* Mezey, *supra* note 175, at 132 (arguing that exchanging current sexual orientation identity categories for categories purely based on acts could dismantle the current sexual orientation hierarchies); Tweedy, *supra* note 79, at 1469–70 (describing how sexual orientation identity categories can operate to suppress behavior and attributes that do not fit the accepted norms for those groups).

[358] Interview, *supra* note 9, at 27.

[359] June Jordan, *A New Politics of Sexuality*, *in* TRANSFORMATIONS: FEMINIST PATHWAYS TO GLOBAL CHANGE 135 (Torry D. Dickinson & Robert K. Schaeffer eds., 2008).

[360] *Id.* at 136.

[361] *See, e.g.*, Robyn Ochs, *Bisexual: A Few Quotes from Robyn Ochs*, ROBYN OCHS, https://robynochs.com/bisexual/ [https://perma.cc/NR3Y-74G2]. Notably, however,

Turning to free expression more generally in the school context, it appears that little progress has been made in the evolution of the law—or of society—on issues relating to free expression of ideas in the K–12 context and the right of teachers to be different, concepts that the district court in *Rowland* so powerfully evoked. In the legal context, public employees' free speech rights were further restricted in *Garcetti v. Ceballos*,[362] a case in which the Court rejected protections for job-related speech. In society more broadly, teachers and other public school faculty are increasingly under attack for the content of their curricula and the materials they share with students. Many states have enacted constitutionally-suspect laws that restrict a teacher's ability to teach about issues of sexuality and race,[363] and some states have actively sought to revoke teaching credentials to punish defiance of such draconian laws and policies.[364] At the same time, with respect to laws raising issues even broader than free expression,[365] a number of states continue to target transgender students and the adults who would otherwise

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Marjorie Rowland described her own bisexuality at trial similarly to June Jordan's formulation quoted above. Ms. Rowland stated at trial: "What I mean by that [stating I am bisexual] is that it's just I can—I could just as easily fall in love with a woman as with a man." Transcript of Record, Vol. II at 319, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

[362] 547 U.S. 410 (2006). The ruling in *Garcetti* would presumably mean that some of Ms. Rowland's disclosures would not be protected if her case were heard today. Her disclosure to Mr. Goheen after a parent got upset at her and her disclosure to students in the course of counseling would likely be unprotected under *Garcetti*.

[363] Laurel Wamsley, *What's in the So-Called Don't Say Gay Bill that Could Impact the Whole Country*, NPR (Oct. 21, 2022), https://www.npr.org/2022/10/21/1130297123/national-dont-say-gay-stop-children-sexualization-bill [https://perma.cc/SG3M-XYF3]; Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/8PPZ-WLKV]. For an example of a professor being fired from a private college in Florida for including content about race relations in his English composition class, see Andrew Marra, *Florida University Fires Professor After Racial Justice Lessons Prompted Parent Complaint*, USA TODAY (Mar. 17, 2023), https://www.usatoday.com/story/news/education/2023/03/17/florida-university-fires-professor/11490882002/ [https://perma.cc/7YG6-ALE4]. Another egregious example involves an Illinois middle school teacher who was forced to resign after including a young adult non-fiction book about LGBTQ identity in an assemblage of books that students could choose from for a reading project. *See* Kiara Alfonseca, *Teachers, Librarians Targeted by Angry Parents over LGBTQ Books Speak Out: One Teacher Says She was Forced to Resign Over a Police Report Made Against Her*, ABC NEWS (May 19, 2023), https://abcnews.go.com/US/teachers-librarians-targeted-angry-parents-lgbtq-books-speak/story?id=99390577 [https://perma.cc/GZ8U-5YBY]. The Illinois teacher was the target of a police report filed by a group of parents as the result of her having made the book available to students. *Id.*

[364] *See, e.g.*, Paul Blest, *Oklahoma Wants to Revoke License of Teacher Who Shared 'Books Unbanned' QR Code*, VICE NEWS (Sept. 1, 2022), https://www.vice.com/en/article/qjk3dp/oklahoma-banned-books-teacher-license [https://perma.cc/944B-9UVA] (describing how the governor of Oklahoma sought revocation of a public school teacher's license because the teacher provided her students with a Brooklyn Public Library QR code that enabled them to access banned books).

[365] *Cf.* Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. RICH. L. REV. 927, 928 (2020) (arguing that First Amendment free expression claims can be a useful tool for trans students).

protect them.[366] In addition to the devastating effects that laws banning gender-affirming care for minors will no doubt have on trans youth,[367] laws banning speech about sexuality, race, and transgenderism can be expected to have dire effects on the well-being of LGBTQ students and students of color. For example, a gag policy that was in place in a suburban Minnesota school district in 2011 was tied to extreme bullying of LGBTQ students, in which teachers felt powerless to intervene, as well as a spate of student suicides and attempted suicides.[368] Thus, laws forbidding speech about LGBTQ identity and race in schools literally put the lives of school children in grave danger.

Additionally, in the employment discrimination context generally, significant barriers remain, particularly for plaintiffs of color and poor plaintiffs. In the case of poor plaintiffs, the barriers appear to have significantly intensified.

With respect to plaintiffs of color, non-white women have been found to be the least likely of any type of plaintiff to win their employment discrimination cases, and those plaintiffs bringing intersectional claims are only half as likely to win as other plaintiffs.[369] Yet LGBTQ persons of color are, as might be expected, significantly more likely to face discrimination than white LGBTQ persons.[370]

Regarding poor plaintiffs, recent scholarship suggests that increasing procedural barriers are disparately affecting those of low economic status and those outside of mainstream cultural norms, including LGBTQ persons.[371] While Ms. Rowland had the benefit of her attorney fees being paid through the National Education Association for the trial, she had to pay the attorney fees for later petitions and appeals, forcing her to seek contributions

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[366] *See* Harper B. Keenan & Z Nicolazzo, *Trans Youth Are Under Attack. Educators Must Step Up*, EDUC. WEEK (Apr. 8, 2021), https://www.edweek.org/leadership/opinion-trans-youth-are-under-attack-educators-must-step-up/2021/04 [https://perma.cc/V76V-JHSL]; Anne Branigin & N. Kirkpatrick, *Anti-Trans Laws are on the Rise. Here's a Look at Where—And What Kind*, WASH. POST (Oct. 14, 2022), https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/ [https://perma.cc/GPT9-WSLV].

[367] *See generally* Roberto L. Avreu et al., *Impact of Gender-Affirming Care Bans on Transgender and Gender Diverse Youth: Parental Figures' Perspective*, 36 J. FAM. PSYCH. 643 (2022) (analyzing survey responses from parental figures on the impact of laws banning gender-affirming care on trans youth).

[368] *See, e.g.*, *NCLR and SPLC Demand that Anoka-Hennepin School District Repeal Discriminatory Gag Policy and Address Anti-Gay Harassment*, NCLR (May 24, 2011), https://www.nclrights.org/about-us/press-release/nclr-and-splc-demand-that-anoka-hennepin-school-district-repeal-discriminatory-gag-policy-and-address-anti-gay-harassment/ [https://perma.cc/E34X-GBUQ].

[369] ESKRIDGE ET AL., *supra* note 29, at 460 (discussing Rachel Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991 (2001)).

[370] *See, e.g.*, Schuyler et al., *supra* note 205, at 427; Tweedy & Yescavage, *supra* note 32, at 724.

[371] *See, e.g.*, Coleman, *supra* note 171, at 503.

from the public in order to fund these efforts.[372] Although blacklisted from school counseling and permanent teaching positions, she was able to use welfare benefits to support her family and was also able to enroll in law school. After the welfare reform laws emphasizing work and only very temporary benefits were passed and implemented in the 1990s, poor single mothers have become even less likely to access higher education.[373] In a sense, then, Ms. Rowland's heroic struggle to vindicate her rights may not even be possible today, because the stakes of poverty are even higher now than they were then. Plaintiffs of color, particularly women, will be even more vulnerable, facing extremely high barriers to success.

The stakes of LGBTQ rights cases in general, particularly those involving bisexual plaintiffs, also remain high. While attitudes towards LGBTQ persons generally have improved over the past several decades, significant prejudice remains; moreover, prejudice against bisexuals has not dissipated to the same extent as has prejudice against gays and lesbians.[374] Ms. Rowland revealed her own sexual orientation to student counselees who asked her directly to make them feel more comfortable about themselves,[375] and she revealed two students' orientations to her secretary to ensure that the secretary would be responsive when they came to see her.[376] According to Ms. Rowland's trial testimony, at least one of these two students was in extreme crisis about his sexual orientation—as she described it, the student would often be "very nervous and anxious, visibly shaking and pacing."[377] Ms. Rowland was a lifeline for these students and she should have remained so, despite the school district's claims at trial that it was erroneous and perhaps an unethical conflict of interest for her to provide emotional support to them given her own bisexuality.[378]

While waning and less virulent prejudice likely results in fewer teachers and counselors losing their jobs due to their LGBTQ status, and while emerging legal protections should lessen the likelihood even further, the same problems that Ms. Rowland faced nearly fifty years ago continue to

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[372] *See, e.g.*, LAVENDER MORNING A LESBIAN NEWSLETTER FOR ALL WIMMIN, *supra* note 325, at 14.

[373] *See, e.g.*, Dhaval M. Dave et al., *Effects of Welfare Reform on Education Acquisition of Adult Women*, 33 J. LAB. RES. 251, 251, 266 (2012).

[374] *See* Brian Dodge et al., *Attitudes Toward Bisexual Men and Women Among a Nationally Representative Probability Sample of Adults in the United States*, 11 PLOS ONE 1, 1–2 (2016) ("While recent population data suggest a marked shift in more positive attitudes toward gay men and lesbian women in the general population of the U.S., . . . [f]indings document the relative lack of positive attitudes toward bisexual individuals among the general population of adults in the U.S."). Additionally, prejudice against bisexual men is stronger than that against bisexual women. *Id.* at 3.

[375] *See* Transcript of Record, Vol. II at 379, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 113, 1981 U.S. Dist. LEXIS 15583.

[376] *See id.* at 314–17.

[377] *Id.* at 317.

[378] *See* Transcript of Record, Vol. IV at 272, 280, 282, *Rowland*, ECF No. 113, 1981 U.S. Dist. LEXIS 15583 (No. C-3-75-125).

exist.[379] For example, Nicholas Breiner, a choral and theater teacher, lost his job at McNabb Middle School in eastern Kentucky after he came out as a bisexual on his Instagram account in 2017.[380] Just as Ms. Rowland had at-risk LGBTQ students in 1974, Mr. Breiner had such students in 2017, including a seventh-grade girl who identified as a lesbian, was facing friction with her father, and had stated her plan to kill herself before police, and Mr. Breiner intervened.[381] His disclosure was geared toward letting such students know they were not alone.[382] Mr. Breiner's suit was dismissed at the district court level because, pre-*Bostock*, Title VII precedent in the Sixth Circuit barred his claim.[383] Like Ms. Rowland, Mr. Breiner left teaching after his job loss.[384]

For a moment in 2020, the sun broke through the clouds, and the Court decided that LGBTQ workers are protected under Title VII because, just as the Supreme Court of Hawaii concluded in 1993 with respect to its state constitution's equal protection clause,[385] a classification based on sexual orientation is in fact one based on sex.[386] We can only hope that, despite the changes on the Court since 2020, this hard-won victory holds and Mr. Breiner, whose case has now been remanded in light of *Bostock*,[387] can chart a more straightforward path to success, although, sadly, as of this writing, his case appears to be in limbo due to the Education Board's dilatory tactics. In a move reminiscent of Mad River Local School District's failure to provide charges under Ohio law to Ms. Rowland after her suspension, Montgomery County Board of Education appears to have failed to appropriately respond to discovery requests for over two years.[388]

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[379] *See, e.g.*, Breiner v. Bd. of Educ., Montgomery Cnty., No. 19-5123, 2020 U.S. App. LEXIS 33103, at *1 (6th Cir. Oct. 20, 2020); *see also* NASH & GRAVES, *supra* note 14, at 81 (describing other recent cases involving LGBTQ teachers).

[380] *See* Eli Rosenberg, *A Teacher Says He was Dismissed for His Sexuality. He Filed a Lawsuit to Protect Others Like Him*, WASH. POST (Feb. 23, 2019), https://www.washingtonpost.com/education/2019/02/23/teacher-says-he-was-dismissed-his-sexuality-he-filed-lawsuit-protect-others-like-him [https://perma.cc/79CG-S9T6].

[381] *See id.*; Valarie Honeycutt Spears, *Teacher Announces He is Bisexual, then Loses His Job. Angry Supporters Protest*, LEXINGTON HERALD LEADER (June 22, 2017), http://www.kentucky.com/news/local/education/article157539444.html (last visited June 23, 2023).

[382] *See* Rosenberg, *supra* note 380.

[383] *Breiner*, 2020 U.S. App. LEXIS 33103, at *1.

[384] Rosenberg, *supra* note 380.

[385] *See generally* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), *as clarified on reconsideration* (May 27, 1993), *and abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[386] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1746 (2020).

[387] *Breiner*, 2020 U.S. App. LEXIS 33103, at *1.

[388] *See, e.g.*, Transcript of Record, Vol. II at 144–45, 151–53, Rowland v. Mad River Loc. Sch. Dist., No. C-3-75-125 (S.D. Ohio Oct. 22, 1981), ECF No. 113, 1981 U.S. Dist. LEXIS 15583; *see id.* at 347–48 (Ms. Rowland describing her stress at not receiving charges); Motion for Pre-trial Conference and Motion to Compel at 1–2, Breiner v. Bd. of Educ., Montgomery Cnty., 5:18-cv-00351-KKC (E.D. Ky. Jan. 25, 2019), ECF No. 40 (timeline reflecting that discovery has been stalled for two years).

As more cases on LGBTQ rights reach the United States Supreme Court, it is to be hoped that the law will continue to evolve in ways that will bring more protections to particularly vulnerable segments of the LGBTQ population.

Conclusion

Even if Mr. Breiner ultimately succeeds, as one would hope given the current state of the law and the progress that has occurred to date, much work remains to be done. Economically disadvantaged plaintiffs and plaintiffs of color face formidable barriers to justice, and bisexual persons continue to face high levels of prejudice. Moreover, trans persons—and trans children in particular—have been subject to unrelenting right-wing attacks in recent years. Freedom of expression, particularly in school and even university settings, is also under virulent attack.[389]

Ms. Rowland's case, and the incredible burdens that she undertook to further equality for all LGBTQ persons, must not be forgotten. While her case is included in some Gender, Sexuality, and Law casebooks, it receives somewhat limited treatment in those texts and relatively little scholarly attention elsewhere, despite the importance of the district court opinion, the Sixth Circuit dissent, and Justice Brennan's dissent from the denial of certiorari, which Ms. Rowland has described as "the best dissent ever written."[390] Together, they can serve as a blueprint of where the law needs to go in the areas of LGBTQ equal protection rights and freedom of expression.

The insufficient attention to Ms. Rowland's case is reflective of the larger problem of bisexual erasure. This problem is one that scholars, courts, litigants, and attorneys need to address in the legal realm. More broadly, it is one that society as a whole must address.

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[389] *See supra* notes 363–364; *see also* Sahar Aziz, *The Hamline Controversy and the Real Threat to Academic Freedom*, Al Jazeera (Jan. 22, 2023), https://www.aljazeera.com/opinions/2023/1/22/the-hamline-controversy-and-the-real-threat-to-academic-freedom [https://perma.cc/CL3Y-BSV3] (arguing that overutilization of adjunct faculty suppresses academic freedom).

[390] Interview with Marjorie Rowland, *supra* note 9, at 11.