2012

Sexual Reorientation

Elizabeth M. Glazer
Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation
Elizabeth M. Glazer, Sexual Reorientation, 100 Geo. L.J. 997 (2012)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/616

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
ARTICLES

Sexual Reorientation

ELIZABETH M. G. LAZER*

There has been a recent shift in the political and legal treatment of bisexuals. Since Ruth Colker, Naomi Mezey, and Kenji Yoshino began writing about the phenomenon of bisexual erasure and the resulting invisibility of the bisexual from sexual-orientation law and the LGBT rights movement, something strange has happened. Bisexuality is suddenly hypervisible. And not just on Glee or in The Girl with the Dragon Tattoo. Or even in the 2010 national sex survey reporting that of the seven percent of the population identifying as nonheterosexual, forty percent of the men and a large majority of the women identified as

* Associate Professor of Law, Hofstra University School of Law, 2006-Present; J.D., University of Chicago, 2004; M.A., Philosophy, University of Pennsylvania, 2001; B.A., Philosophy, University of Pennsylvania, 2001. © 2012, Elizabeth M. Glazer. This Article was one about which it was difficult not to engage in conversation, and sincere thanks are owed to those who engaged in conversation about it with me, such as Jamie Abrams, Shira Ackerman, Susan Bandes, Noa Ben Asher, Lisa Bernstein, Ori Blum, Michael Boucau, Yishai Boyarim, Adam Brenner, Bennett Capers, Dale Carpenter, Mary Anne Case, Bridget Crawford, David Cruz, Adrienne Davis, Daniel Dehrey, Liz Emens, Akilah Folami, Brian Frye, Dasi Ginnis, Toby Glazer, Vic Glazer, Julie Greenberg, Heron Greenesmith, Michael Gurary, Will Guzzardi, Carissa Hessick, Sam Jordan, Joanna Kasirer, Craig Konnoth, Andy Koppelman, Jeff Kosbie, Zak Kramer, Katy Kuh, Matt Kuiter, Holning Lau, Aníbal Rosario Lebrón, Leandra Lederman, Nancy Levit, Cynthia Malone, Serge Martínez, Naomi Mezey, Julius Nam, Jide Nzelibe, Ashira Ostrow, Rachel Peckerman, Orly Rachmilovitz, Jonathan Rauch, Caprice Roberts, Russell Robinson, Melanie Rowen, Erin Ryan, James Sample, Nadia Sawicki, Eileen Scallen, David Schraub, Lea Shaver, Judd Sneirson, Larry Solum, Ed Stein, Jake Stevens, Ann Tweedy, Spencer Waller, Kim Yuracko, the students in my Spring 2010, Spring 2011, and Fall 2011 Sexuality and the Law courses at Hofstra University Maurice A. Deane School of Law who offered helpful comments on the ideas presented in this Article, the students in my Fall 2011 Antidiscrimination Law course at Hofstra, and the students of Northwestern University School of Law’s Outlaw group. Special thanks are owed to the students in the Fall 2010 section of the Legal Scholarship Workshop at the University of Chicago Law School for making this Article a much better version of itself and to Dale Carpenter for inviting me to present a version of this paper as part of the Family Values: Law and the Modern American Family Symposium at the University of Minnesota Law School. This Article was also much improved by comments offered at workshops at William & Mary School of Law, Pace University School of Law, Loyola University Chicago School of Law, Northwestern University School of Law, Chicago-Kent College of Law, at the 40th Annual Hofstra Distinguished Faculty Lecture (for which this Article was selected for presentation), and at the Association of Law, Culture and the Humanities Conference at UNLV William S. Boyd School of Law, so thanks are due to those who attended those workshops. I am particularly indebted to Melissa Murray, Stevie Tran, Rose Villazor, and editors at The Georgetown Law Journal such as Matthew Murrell, Sean Kellem, Aaron Pennekamp, and Ray Tolentino, who provided detailed and incredibly helpful comments on earlier drafts of this Article, to Mary Anne Case not only for her characteristically sharp insights but also for calling my attention to the portion of Perry v. Schwarzenegger that provided a timely and important example of the problems about which I elaborate in this Article, and to Ruth Colker, Naomi Mezey, and Andy Koppelman for writing responses to this Article that were as incisive and illuminating as all of their prior scholarship. Lastly but perhaps most importantly, I wish to dedicate this Article to Dasi Ginnis; had I not been so puzzled by why you have chosen to love me, this theory would probably not exist.

997
bisexual. Bisexuality is now also hypervisible in the law. Recent cases have arisen where plaintiffs have alleged discrimination on the basis of their bisexual orientations and where plaintiffs have been required to prove that they are "gay enough" to merit protection from discrimination. Yet despite this hypervisibility, the law has failed to address the harms that bisexuals face. The problem stems from the law's current definition of "sexual orientation," which provides the basis for an actionable discrimination claim. This definition includes only extreme orientations like homosexuality and heterosexuality but, for all practical purposes, excludes bisexuality.

This Article offers an alternative definition by introducing the distinction between an individual's General Orientation and Specific Orientation. An individual's General Orientation is the sex toward which the individual is attracted the majority of the time. An individual's Specific Orientation is the sex of the individual's desired or actual partner(s). Whereas for many the two orientations are identical, for bisexuals the two orientations often differ. If adopted, this alternative definition would reorient the concept of sexual orientation under the law. It would offer to the LGBT rights movement, to legislatures, and to courts the opportunity to protect against discrimination on the basis of sexual orientation as it is actually lived, rather than on the basis of sexual orientation as the law has until now imagined it to be. It could also offer to antidiscrimination law a model for the protection of living identities, with respect to sexual orientation but also with respect to other identity categories.

TABLE OF CONTENTS

INTRODUCTION ........................................... 999

I. BISEXUALITY AND BISEXUALS .......................... 1004
   A. DEFINING BISEXUALITY ............................. 1005
   B. THE PRESENCE AND PROLIFERATION OF BISEXUALS .. 1008

II. A MOVEMENT ABOUT DIFFERENCE BUT DEPENDENT ON SAMENESS .......................... 1012
   A. FRAGMENTATION WITHIN THE LGBT RIGHTS MOVEMENT .... 1014
   B. THE PROTECTION OF PEOPLE WHO ARE STRAIGHT, BUT FOR THE FACT THAT THEY RE GAY .. 1016
   C. AN EARLIER DEBATE ABOUT DIFFERENCE .................. 1019

III. BISEXUALITY AND THE LAW ............................ 1023
   A. BISEXUAL ERASURE ................................. 1024
   B. A SPOTLIGHT ON BISEXUALITY ........................ 1027
      1. The Bisexual World Series .......................... 1027
INTRODUCTION

There has been a recent shift in the political and legal treatment of bisexuals. Since Ruth Colker, Naomi Mezey, and Kenji Yoshino began writing about the phenom-

2. See Naomi Mezey, Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts, 10 Berkeley Women’s L.J. 98, 100–03 (1995).
enon of bisexual erasure and the resulting invisibility of the bisexual from sexual-orientation law and the LGBT rights movement, something strange has happened. Bisexuality is suddenly hypervisible. And not just on Glee or in The Girl with the Dragon Tattoo. Or in the 2010 national sex survey conducted by Indiana University reporting that of the seven percent of the population identifying as nonheterosexual, forty percent of the men and a large majority of the women identified as bisexual. Or even in the Bi Social Network's—the first interactive bisexual network—viral-video series entitled I Am Visible, which began in November 2010 in an effort "to showcase bis as having a place to be themselves.

In addition to its hypervisibility in the public sphere, bisexuality is now also hypervisible in the law. Recent cases have arisen where plaintiffs have alleged discrimination on the basis of their bisexual orientations and where plaintiffs have been required to prove that they are "gay enough" to merit protection from discrimination. Consider Apilado v. North American Gay Amateur Athletic Alliance, a sexual-orientation-discrimination suit filed in April 2010 against a

---

4. At this point, it behooves me to drop the obligatory footnote on naming that often accompanies articles of this genre. At times in this Article I refer to "gays and lesbians," at other times to "sexual minorities," and at other times to the "LGBT" initialism, which indicates the collection of sexual minorities that includes gays, lesbians, bisexuals, and transgender people. Though this initialism omits groups such as intersex people and those who identify as queer, I have decided to use it in this Article because it is the term most often used in connection with the current political movement for rights related to sexual orientation and gender identity. For further information about my thoughts on the importance of naming in legal scholarship about sexual orientation and gender identity, see infra section V.C.1. See also Elizabeth M. Glazer, Essay, Naming's Necessity, 19 LAW & SEXUALITY 166 (2010) (urging scholars who write about the law as it relates to sexual orientation and gender identity to consider the words they use to refer to their constituent group).

5. Glee: Blame It on the Alcohol (Fox television broadcast Feb. 22, 2011) (episode summary available at http://www.fox.com/glee/recaps/season-2/episode-14/). However, the bisexual story line on Glee can be understood as a story line about bisexuality as a path to homosexuality. See Lesley Goldberg, "Glee" Writers: "Santana Is a Lesbian," AFTERELLEN (Mar. 17, 2011), http://www.afterellen.com/TV/2011/03/ryan-murphy-says-santana-is-a-lesbian (reporting that writers for the television show had said about the show's character Santana that "Santana is a lesbian. She might not be ready to come out yet, but she is," and added that Santana's lesbian sexual orientation was a fact about her character independent of "[w]hether her [sic] and Brittany will work out").


9. 792 F. Supp. 2d 1151 (W.D. Wash. 2011); see also Apilado v. N. Am. Gay Amateur Athletic Alliance, No. C10-0682 (W.D. Wash. May 27, 2011) (granting the NAGAAA's motion for partial summary judgment on injunctive relief on the basis of plaintiffs' (Stephen Apilado, LaRon Charles, and John Russ) failure to demonstrate a pattern of conduct by the NAGAAA that could establish a sufficient likelihood of future injury, and denying plaintiffs' motion for partial summary judgment on the basis of plaintiffs' failure to demonstrate that a compelling state interest in allowing heterosexuals to play
national gay softball league that disqualified a San Francisco team from the league’s world series because, according to the league, the team’s three bisexual members exceeded the league’s rule against having more than two heterosexual members on a team. Or Perry v. Schwarzenegger, the federal same-sex marriage case where attorney Ted Olson questioned Sandy Stier, his own client who had been previously married to a man, on direct examination about how convinced she was about her gay identity. Olson highlighted a challenge likely to be leveled against Stier: “Some people might say, ‘Well, it’s this and then it’s that and it could be this again.’ Answer that.”

Despite this hypervisibility, the law has failed to address the harms that bisexuals face. And those harms are both real and distinct from the harms faced by gays and lesbians. For example, self-identified bisexuals in the United Kingdom have reported that they endure more scrutiny about their relationships from their colleagues at work than do homosexuals, and that this additional scrutiny has fueled “the perception that bisexuals are . . . unstable, unreliable, and [even] un-promotable.” Moreover, under U.S. immigration law, refugees seeking asylum have been increasingly required to prove that they are “gay enough” to deserve it.

---

softball on a team within the NAGAAA’s league outweighed the interest of the NAGAAA, which the court classified as an expressive association, to exclude prospective softball players on the basis of their sexual orientation; see also Apilado v. N. Am. Gay Amateur Athletic Alliance, No. C10-0682, 2011 WL 5563206 (W.D. Wash. Nov. 10, 2011) (granting the NAGAAA’s motion for partial summary judgment on the basis of plaintiffs’ failure to show that the state’s interest in eliminating the NAGAAA’s exclusionary policies outweighed the NAGAAA’s associational rights to maintain a policy excluding people who choose not to identify as predominantly interested in partnering with members of the same sex, and denying the NAGAAA’s motion to strike the testimony of Russell Robinson, an expert who offered testimony indicating that the NAGAAA’s policy had a disproportionate impact on men of color because they are less likely to identify as predominantly gay). Ultimately the NAGAAA settled with Apilado, Charles, and Russ, paying to them an undisclosed fee and “agree[ing] to welcome an unlimited number of bisexual” (as well as transgender) players into the league in the future. Natalie Hope McDonald, The Meaning of LGBT in Sports, PHILADELPHIA MAGAZINE’S G PHILLY (Nov. 29, 2011, 10:06 AM), http://blogs.phillymag.com/gphilly/2011/11/29/meaning-lgbt-sports/ (reporting on the settlement of the lawsuit).


The problem stems from the law's current definition of "sexual orientation," which provides the basis for an actionable discrimination claim. This definition includes only extreme orientations like homosexuality and heterosexuality but, for all practical purposes, excludes bisexuality. This Article offers an alternative definition by introducing the distinction between an individual's General Orientation and Specific Orientation. An individual's General Orientation is the sex toward which the individual is attracted the majority of the time. An individual's Specific Orientation is the sex of the individual's desired or actual partner(s). Though for many the two orientations are identical, for bisexuals the two orientations often differ. If adopted—an adoption that would be modeled on the Supreme Court's decision in Price Waterhouse v. Hopkins to treat discrimination on the basis of gender nonconformity as a form of sex

Impact on Asylum Claims Related to Sexual Orientation and Gender, 27 Yale L. & Pol'y Rev. 47, 79–88 (2008). In addition, bisexuals could face harms under immigration law's "sham marriages act" if they first married a member of the opposite sex before becoming naturalized as citizens and afterwards entered into a relationship with a member of the same sex. See 8 U.S.C. § 1325(c) (2006).

14. An actionable discrimination claim is predicated upon the individual's fitting within a class protected by the antidiscrimination statute. See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 217–18 (2d Cir. 2005) (explaining that because homosexuals do not comprise a protected class under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), a lesbian plaintiff could not "satisfy the first element of a prima facie case under Title VII," which requires that a plaintiff be a member of such a class). Though Title VII itself does not protect against discrimination on the basis of sexual orientation, many states' antidiscrimination statutes do. Statewide Employment Laws & Policies, Human Rights Campaign, http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (indicating that in twenty-one states and the District of Columbia it is illegal to discriminate against someone in employment because of his or her sexual orientation and that the same is true in sixteen of those states, as well as in D.C., because of a person's gender identity) (last updated Jan. 6, 2012).

15. To be sure, this is not the only instance in which the law understands individuals in binary terms and, as a result, fails to recognize that these individuals might be better understood along a continuum. See, e.g., Melissa Murray, The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers, 94 Va. L. Rev. 385 (2008) (arguing that family law should recognize broader networks of care rather than classifying individuals within that network as either parents or strangers).

16. There are instances in life, law, and this Article in which it is important to differentiate sex from gender. I do not intend my formulation of the definitions for General and Specific Orientations to be one such instance. I used the word "sex" because prevailing definitions of sexual orientation, as well as the literature about bisexuality with which this Article principally engages, also use the word "sex" to describe individuals' sexual orientations.

17. In this Article, I do not question the monogamy norm, not because I do not believe that the norm should be questioned, but so that I can isolate the variable of bisexuality for the purpose of analyzing it here. Moreover, the problem of bisexual invisibility can be explained in part—but not entirely—by a devotion to the norm of monogamy. But the argument presented in this Article does not depend upon the governance of a monogamy norm, and I have elsewhere argued against it. See Elizabeth M. Glazer, Response, Sodomy and Polygamy, 111 Colum. L. Rev. Sidebar 66 (2011), http://www.columbialawreview.org/assets/sidebar/volume/111/66_Glazer.pdf (arguing that the LGBT rights movement has distanced itself from polygamists for the same reason that it has distanced itself from discussions of sex); see also Susan Frelich Appleton, Parents by the Numbers, 37 Hofstra L. Rev. 11 (2008); Adrienne D. Davis, Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality, 110 Colum. L. Rev. 1955 (2010); Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. Rev. L. & Soc. Change 277 (2004).

18. 490 U.S. 228 (1989).
discrimination—this alternative definition would reorient the concept of sexual orientation under the law. This sexual reorientation would offer to the LGBT rights movement, to legislatures, and to courts the opportunity to protect against discrimination on the basis of sexual orientation as it is actually lived, rather than on the basis of sexual orientation as the law has until now imagined it to be. It could also offer to antidiscrimination law a model for the protection of living identities, with respect to sexual orientation but also with respect to other identity categories.\(^{19}\)

The kind of sexual reorientation for which this Article argues potentially offers one additional payoff. The other kind of sexual reorientation—the kind that until now was the only kind of sexual reorientation—refers to the controversial practice by some psychotherapists of converting gays and lesbians into heterosexuals.\(^{20}\) Though this practice has fallen out of favor in the professional community of psychologists,\(^{21}\) it persists in other communities.\(^{22}\) The homonymic accident in this Article’s title presents an opportunity to note that a world that embraces the new kind of sexual reorientation would be one in which the old kind of sexual reorientation would no longer exist. This Article’s sexual reorientation framework aims to reflect the dynamic nature of sexual orientation, in contrast to the static understanding of sexual orientation that operates particularly strongly for those who support the practice of sexual-reorientation therapy. The idea that sexual orientation is textured and may change depending on an individual’s specific choice of partner is one that conflicts with the idea

---

19. Scholars have urged the protection against discrimination on the basis of conduct, in addition to status, because discrimination occurs not only because of an individual’s being a member of a protected class but also because of the individual’s performance of certain traits that are constitutive of class membership. See, e.g., KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); Devon W. Carbado & Mitu Gulati, Working Identity, 85 CORNELL L. REV. 1259 (2000); Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1 (1995); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001); Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 TEX. L. REV. 167 (2004).

20. For a discussion of the debate about sexual-reorientation therapy, see David B. Cruz, Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law, 72 S. CAL. L. REV. 1297 (1999).

21. See AM. PSYCHOLOGICAL Ass’N, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 3 (2008), http://www.apa.org/topics/sexuality/orientation.pdf (“All major national mental health organizations have officially expressed concerns about therapies promoted to modify sexual orientation. To date, there has been no scientifically adequate research to show that therapy aimed at changing sexual orientation . . . is safe or effective. Furthermore, it seems likely that the promotion of change therapies reinforces stereotypes and contributes to a negative climate for lesbian, gay, and bisexual persons.”).

that sexual orientation can change entirely, as a result of a reformatory process. Of course, those who believe in the practice of sexual-reorientation therapy will likely continue to believe in it despite this Article’s argument for sexual reorientation. Their inevitable encounter with this Article in a search-engine-driven world leaves this author hoping that they will at least reconsider their kind of sexual reorientation in light of the kind of sexual reorientation introduced in this Article.

The argument for sexual reorientation proceeds in five parts. Part I explores the array of definitions for bisexuality and presents evidence of the presence and proliferation of bisexuals. Part II situates bisexuals within the LGBT rights movement, likening their treatment to the treatment of the movement’s other excluded group: transgender people. Part III examines the legal treatment of bisexuals, explaining the earlier phenomenon of bisexual erasure, current bisexual hypervisibility, and the nature of the legal harms that bisexuals face. Part IV explains that bisexuals have been excluded politically and legally because of the potential for their sexual-orientation status to differ from their sexual conduct, thereby making their identity an uncomfortable moving target. Part V introduces the concept of sexual reorientation by defining and applying it, and defends it against objections.

I. BISEXUALITY AND BISEXUALS

This Article presents a new way of understanding sexual orientation that reflects the lived experience of human sexuality. At a time when bisexuals seem to be proliferating, this is particularly important. A 2001 study profiled successful marriages between bisexual men and their wives, and a 2002 study highlighted successful heterosexual marriages between men and bisexual

23. As I have in other work, I employ throughout this Article the following broad and inclusive definition of the term “transgender,” which I borrow from Anna Kirkland:

“gender variant people who have not necessarily sought to alter their bodies but nonetheless feel a disjunction between their biologically and socially gendered selves,” . . . [which] is considered broader than, and to include within its definition, the term “transsexual,” which “refer[s] to people who identify as [transsexual] and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status.”


24. A more extensive discussion of additional objections to the framework presented in this Article appears in a colloquy about this Article, which comprises responses by Colker, Mezey, and Andrew Koppelman as well as my own surresponse. See Ruth Colker, Response: Hybrid Revisited, 100 Geo. L.J. 1069 (2012); Andrew Koppelman, Response: Sexual Disorientation, 100 Geo. L.J. 1083 (2012); Naomi Mezey, Response: The Death of the Bisexual Saboteur, 100 Geo. L.J. 1093 (2012); Elizabeth M. Glazer, Surresponse: Optimizing Orientation, 100 Geo. L.J. 1105 (2012).

women. A 2006 *New York Magazine* article spent a day at Stuyvesant High School with the “cuddle puddle,” a clique of high-school juniors whose members admit sexual attraction to, and sexual experiences with, members of both sexes. According to the updated 2009 edition of *The Ethical Slut*, the “practical guide to polyamory,” “bisexuals have recently begun developing their own forceful voice and their own communities.”

Despite the growing presence of bisexuals—whether erased or hypervisible—they have been left to experience discrimination harms without the law’s protection or the support of the political movement that includes them by name. The goal in putting forward a new definition of sexual orientation is that it be able to accommodate the continuum of sexual orientation that exists between the extremes. Before summarizing the findings of several sexuality studies in section I.B, section I.A explains the axes along which sexual orientation has been defined: desire, conduct, and self-identification.

**A. DEFINING BISEXUALITY**

When Yoshino introduced his theory about bisexual erasure, he was careful to distinguish it as a theory of bisexual *erasure* rather than a theory of bisexual nonexistence. For the purpose of his analysis, Yoshino adopted a definition of bisexuality that was predicated on desire, though he noted that bisexuality, like other sexual orientations, could be defined along three possible axes: desire, conduct, and self-identification. Of course, a particular bisexual might satisfy the definition of bisexuality along a combination of more than one of these axes (for example, the self-identifying bisexual who not only desires members of both sexes but has had sexual experiences with members of both sexes). But it is important to note that definitions of bisexuality have been offered that rely on any one of these axes, taken alone.

By using the axis of desire to construct his definition, Yoshino defined the bisexual as one whose sexual appetite for members of each sex was “more than incidental,” regardless of whether any action had been taken to actualize those desires. The reason he chose to define bisexuality along the axis of desire was based upon an analogy to how he and others would define homosexuality. He

---

30. See id. at 361 (“[B]isexual invisibility is not a reflection of the fact that there are fewer bisexuals than there are homosexuals in the population, but is rather a product of social erasure.”).
31. Id. at 373.
33. Id.
34. See id. at 373–77.
explained that the desire-based definition of homosexuality was the one used most frequently, and moreover that the exclusion of those with homosexual desires on which they have not acted from the definition of homosexual “for the purposes of demonstrating erasure [would] be ironic, as it would permit erasure to control that definition, to let erasure erase itself.”

After all, Yoshino’s “inquiry [was] whether [bisexuals were] forgoing something rather than whether they should be forgoing it,” namely their same-sex desire. And the reason he qualified in his definition that desire had to be “more than incidental” was in order to limit the number of people who could fit within his definition. His theory of bisexual erasure depended on a definition that would include, for example, men “on the ‘down low,’” but would not include, for example, someone who had experienced what 30 Rock character Frank Rossitano experienced with respect to coffee delivery boy Jamie.

Yoshino analyzed a number of conduct-based definitions of bisexuality as well. For example, a definition of bisexuality relying on conduct alone would include “defense bisexuals,” who profess cross-sex desire only to mitigate the stigma of possessing same-sex desire. So-called “ritual bisexuals” or “situational bisexuals” would also fit within a conduct-based definition of bisexuality, because these individuals engaged in same-sex conduct for reasons such as the initiation into adult status, as in the case of ritual bisexuals, or for financial

35. Id. at 373.
36. Id. at 374.
37. See Russell K. Robinson, Racing the Closet, 61 Stan. L. Rev. 1463 (2009) (profiling the media’s depiction of Black men who are said to live on the down low, meaning that they have “primary romantic relationships with women” but also engage in “secret sex with men”). To be sure, Robinson does not take a position on whether men on the down low qualify as homosexual or bisexual and writes about them as though they could qualify as either homosexual or bisexual. He noted that some men adopt the identity of being on the down low in lieu of a gay or bisexual identity in order to differentiate themselves racially (because gay and bisexual identities are often linked with Whiteness), “to assert their masculinity, and to indicate they are closeted.” Id. at 1468 n.14 (citing Keith Boykin, Beyond the Down Low: Sex, Lies, and Denial in Black America 15–16 (2005)). Robinson also noted that the account of men on the down low as men who “are thought to be posing as straight but are actually gay” is problematic because “it denies the existence of genuine bisexuality.” Id. at 1487.
38. See 30 Rock: Cougars (NBC television broadcast Nov. 29, 2007) (episode information available at http://www.nbc.com/30-rock/episode-guide/season-2/224681/cougars/episode-206/224796/). In this episode, Rossitano, a heterosexual character, announced to character Liz Lemon, upon seeing twenty-year-old coffee-delivery boy Jamie appear in the office, that he wanted to “hold [Jamie]” and “kiss him on the mouth.” Liz exclaimed to Frank, to voice her disbelief that Frank could feel sexually attracted to Jamie, “Come on, you read Boobs Magazine!” And Lemon later explained to Frank, upon his reiteration of his attraction to Jamie, “No, that’s not a thing; you can’t be gay for just one person, unless you’re a lady and you meet Ellen.” At the episode’s end, Frank appeared in a scene in a gay dance club surrounded by men whom the audience was supposed to believe were gay. After dancing with the gay men in an effort to see whether he was attracted to other men, Frank concluded, “I’m not gay gay; I’m just gay for Jamie,” to which his gay companions responded, “That’s not a thing.”
40. Id. at 372.
remuneration, as in the case of situational bisexuals.41

Self-identification is the last axis along which Yoshino explained that sexual orientation is defined. Yoshino argued that defining bisexuality along the axis of self-identification was problematic because of individuals' reluctance to self-identify as bisexual.42 For example, Yoshino noted that "'Latin bisexuals' engage in sexual conduct with both men and women but self-identify as heterosexual"43 because "the insertive role in certain 'Mediterranean cultures' is not regarded as homosexual, so that men who participate in same-sex encounters may consider themselves nonetheless heterosexual."44 Yoshino also noted that a definition of bisexuality constructed along the axis of self-identification would exclude many men "who engage in extramarital same-sex conduct, or who view their same-sex conduct as 'experimental' or 'situational'" and identify as straight rather than bisexual.45 In fact, Colker reported that in 1995 "[o]nly about 1 percent of the adult population identified as bisexual [, y]et nearly 4 percent acknowledge[d] that they [were] attracted to people of both sexes."46 Despite individuals' arguable reluctance to self-identify as bisexual, self-identification has been an important way of defining sexual orientation, not only with respect to bisexuality. For example, Pat Cain observed that "[s]elf-identified homosexuals surely have an identity apart from their sexual conduct. It is not uncommon for persons to identify themselves as gay or lesbian before they have engaged in any sexual conduct."47 And for (celibate) asexuals, sexual identity may even exclude sexual conduct altogether and, because these individuals' orientation is predicated on the absence of desire, rely entirely on self-identification.48

For the purposes of this Article, it is important to understand the array of possible definitions for bisexuality but unimportant to decide on a single definition for bisexuality. Yoshino, in his article, decided on a desire-based definition of bisexuality.49 In arguing that bisexuals had been erased in a way that monosexuals had not been, Yoshino reasonably decided on a definition for bisexuality that was similar to the most common definition of homosexuality.50 Further, Yoshino's decision to define bisexuality along the axis of desire was necessary because any other definition of bisexuality would have undermined his central thesis—to erase those with bisexual desires from the definition of bisexuality would "let erasure erase itself."51 This Article argues that bisexuals

---

41. Id.
42. See id.
43. Id.
44. Id. at 371 (quoting Garber, supra note 39, at 30).
45. Id. at 372 (citing Fritz Klein, The Bisexual Option 18 (1978)) (footnote omitted).
48. On the importance of including asexuals and asexuality in sexuality discourse, see Yoshino, supra note 3, at 357 n.8.
49. See supra note 31 and accompanying text.
50. See supra note 35 and accompanying text.
51. Yoshino, supra note 3, at 373; see also supra note 35 and accompanying text.
have experienced discrimination because of their discriminators' discomfort with general and specific orientations that do not conform to each other. As a result, this Article's central thesis depends only on that nonconformity and is therefore equally applicable to any possible definition of bisexuality (and for that matter, any possible definition of other sexual orientations).

B. THE PRESENCE AND PROLIFERATION OF BIOSEXUALS

Scholars in other disciplines began studying sexuality well before legal scholars began writing about sexual orientation and the law. As will be discussed further below, the important thing to remember about the numerous sexuality studies conducted over the past fifty years is that each of them found that the incidence of nonexclusive orientation toward members of the same sex was "greater than or comparable to the incidence of homosexuality." Moreover, each of them defined sexual orientation along some combination of the three axes conventionally used to do so. Though others besides Alfred Kinsey studied human sexuality, Kinsey's studies of male and female sexual behavior—while not without critics—are still "the most...widely cited research on


53. The first law-review article to offer a systematic account of the legal treatment of homosexuals was Rhonda R. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 HASTINGS L.J. 799 (1979).

54. See Yoshino, supra note 3, at 386; see also infra note 89 and accompanying text.

55. See Yoshino, supra note 3, at 382–85 (describing the following studies of human sexuality: ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 639–41 (1948) [hereinafter KINSEY ET AL., MALE], and ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 471–72 (1953) [hereinafter KINSEY ET AL., FEMALE] (defining sexual orientation according to a combination of desire and conduct by testing subjects for "psychosexual response" (desire) and "overt sexual experience" (conduct) and creating the "Kinsey scale," which assessed sexual orientation along a continuum from 0 to 6, where 0 denoted an orientation with exclusively heterosexual contacts, 6 denoted an orientation with exclusively homosexual contacts, and 1 through 5 denoted orientations ranging from more heterosexual to more homosexual though not exclusively one or the other); SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR 70 (1993) (reporting a slightly higher incidence of bisexuality based on self-identification only); LAUMANN ET AL., supra note 32, at 311 (asking a set of questions that addressed participants' desire, conduct, and self-identification, and finding that the bisexual incidence was greater than or comparable to the monosexual incidence); WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 8, 14–15 (1979) (studying those who would have been classified according to the Kinsey scale as Kinsey 1s through Kinsey 6s and thus defining sexual orientation according to a combination of desire and conduct, though arguably employing a definition of sexual orientation more heavily conduct-based than Kinsey because individuals who qualified as Kinsey 1s "were accepted into the study only if they could document that they were currently living in a homosexual relationship of at least three months' duration"); KAYE WELLINGS, JULIA FIELD, ANNE JOHNSON & JANE WADSWORTH, SEXUAL BEHAVIOUR IN BRITAIN: THE NATIONAL SURVEY OF SEXUAL ATTITUDES AND LIFESTYLES 181, 183 (1994) (disaggregating desire from conduct in order to define and document the incidence of bisexuality, and finding that the incidence of bisexuality was greater than or comparable to that of monosexuality whether assessed on the basis of desire (attraction, according to the study) or conduct (experience, according to the study))).

sexuality in the United States.”

Alfred Kinsey founded the modern field of human sexuality studies. His chief innovation was the “Kinsey scale,” which assessed sexual orientation along a continuum from 0 to 6, where 0 denoted an orientation with exclusively heterosexual contacts and 6 denoted an orientation with exclusively homosexual contacts, and 1 through 5 denoted shades of gray between exclusive heterosexuality to exclusive homosexuality. By assessing orientation along the scale, Kinsey and his associates found that among males, only 50% were exclusively heterosexual throughout their adult lives and 4% were exclusively homosexual, meaning that 46% of men either had sexual experiences with both men and women or desired both men and women. Among women, they found that “[b]y the age of forty, 28% of women had responded erotically to other women psychologically and 19% had had overt sexual experiences with other women.” These were startling findings in a world where sexual orientation had been grouped into the two discrete monosexual categories. Perhaps equally as startling, using the Kinsey scale—which combined elements of desire and conduct—Kinsey and his associates found that “25 percent of the male population had more than incidental homosexual experience or reactions (i.e., rated from 2-6) for at least three years between the ages of 16 and 55,” while “10 percent of the males [were] more or less exclusively homosexual (i.e., rated 5 or 6) for at least three years between the ages of 16 and 55,” thus leaving 15% of the male population between the ages of 16 and 55 that had had nonexclusive homosexual experiences compared with 10% that had had exclusive homosexual experiences. For women, Kinsey and his associates found that “an average of ten percent of unmarried females and 2.5 percent of married females rated from 2 to 6 ‘in each of the years between twenty and thirty-five years of age,” figures that contrast with the “average of four percent of unmarried females and less than one percent of married females [who] rated 5 or 6 ‘in each of the years between twenty and thirty-five years of age” and which leave “six percent of unmarried women and more than 1.5 percent of married women” that had had nonexclusive homosexual experiences compared with “four percent of unmarried women and less than one percent of married women” that had had exclusive homosexual experiences. Thus, for both men and women within these time and age restrictions, Kinsey and his associates found a higher incidence of nonexclusive

57. Mezey, supra note 2, at 104.
58. See Yoshino, supra note 3, at 380 (“Begin at the beginning, with Alfred Kinsey’s foundational studies of sexual behavior in the human male and female.” (footnotes omitted)).
60. Id. at 656.
61. Mezey, supra note 2, at 104 (citing KINSEY ET AL., FEMALE, supra note 55, at 452).
62. KINSEY ET AL., MALE, supra note 55, at 650.
63. Id. at 651.
64. See Yoshino, supra note 3, at 381.
65. Id. at 381 (quoting KINSEY ET AL., FEMALE, supra note 55, at 473).
66. Id. at 381–82 (quoting KINSEY ET AL., FEMALE, supra note 55, at 473–74).
67. Id. at 382.
homosexual behavior than exclusive homosexual behavior. Of course, Kinsey’s was not the only study of human sexuality. Yoshino summarized the findings of Kinsey’s study as well as those of four other studies that were conducted after Kinsey’s, which all included “data sufficient to permit a comparison of the relative incidences of bisexuals and homosexuals in the population.” The first of these other studies was conducted by Masters and Johnson, who in 1979 conducted a study of those whom they and their researchers deemed to fall on Kinsey’s scale as 1s through 6s, excluding from their study those deemed to fall on Kinsey’s scale as 0s as well as Kinsey 1 representatives who could not document that they were living in a homosexual relationship of at least three months’ duration. According to Kinsey, “[i]ndividuals are rated as 1’s if their psychosexual responses and/or overt experience are directed almost entirely toward individuals of the opposite sex, although they incidentally make psychosexual responses to their own sex, and/or have incidental sexual contacts with individuals of their own sex.” Masters and Johnson’s additional requirement for Kinsey 1 representatives caused Yoshino to observe that these individuals would likely not have qualified as Kinsey 1s in Kinsey’s own study and that the Masters & Johnson study likely underreported the number of bisexuals as a result. Nevertheless, Yoshino interpreted the Masters and Johnson study to have concluded that its data pool was comprised of 46.8% male bisexuals compared to 48.9% male homosexuals and 59.8% female bisexuals compared to 36.6% female homosexuals. As Yoshino observed, “the ratio of bisexual men to gay men was lower than that in the Kinsey study, [but] the study still found that bisexual men existed in comparable numbers to gay men . . . [a]nd [that] the ratio of bisexual women to lesbians was greater than that found in the Kinsey study.”

The 1993 study by Cynthia and Samuel Janus relied on individuals’ self-identification in order to classify them by their sexual orientation. Nevertheless, the study reported a roughly one-to-one ratio of bisexuals to homosexuals for both men and women, but also suggested that there may have been underreporting of bisexuality. Yoshino also reported on the findings in a 1994 study of

---

68. See id.
69. Yoshino, supra note 3, at 379. Yoshino examined these five studies (Kinsey’s plus four other studies) instead of a total of nine studies on human sexuality that had been conducted at the time that he wrote his article. Id. at 378–79 (explaining his rationale for omitting discussion of a study conducted by Playboy magazine, as well as the following studies: Shere Hite, The Hite Report: A Nationwide Study of Female Sexuality (1976); Alfred Spira, Nathalie Bajos & ACSF Group, Sexual Behaviour and AIDS (1994); Carol Tavris & Susan Sadd, The Redbook Report on Female Sexuality (1975)).
70. See Masters & Johnson, supra note 55, at 14–15.
71. Kinsey et al., Female, supra note 55, at 471.
72. See Yoshino, supra note 3, at 382.
73. Id. (citing Masters & Johnson, supra note 55, at 29, 32).
74. Id. at 382–83.
75. See Janus & Janus, supra note 55, at 70–71.
76. See Yoshino, supra note 3, at 383 (citing Janus & Janus, supra note 55, at 70).
sexual behavior in Britain. The Wellings study used a five-point scale—which Yoshino numbered from 0 to 4, where 0 denoted only heterosexual attraction and/or experience and 4 denoted only homosexual attraction and/or experience—and sought to ascertain sexual attraction as well as sexual experience. The study defined sexual experience as “any kind of contact with another person that [the subject] felt was sexual,” including ‘kissing or touching, or intercourse or any other form of sex.” The study did not define sexual attraction. The Wellings study found that bisexuals existed in numbers greater than or comparable to those of homosexuals. Lastly, Yoshino reported on the findings in a 1994 study in which subjects were asked to complete the phrase, “In general, are you sexually attracted to . . .” with one of five responses: “[1] only men, [2] mostly men, [3] both men and women, [4] mostly women, [or] [5] only women.” Here, again, Yoshino reported that “the percentages of ‘bisexuals’ [were] again greater than or comparable to those of ‘homosexuals.’”

Since Yoshino wrote his article, there have been other studies of human sexuality. For example, a 2010 national sex survey conducted by Indiana University reported that of the 7% of the population identifying as nonheterosexual, 40% of the men and a large majority of the women surveyed identified as bisexual. In addition, in 2011, researchers at Northwestern University reported that they had found evidence that at least some men who identify themselves as bisexual are, in fact, sexually aroused by both men and women, evidence contradicting a 2005 study also conducted by researchers at Northwestern reporting that “with respect to sexual arousal and attraction, it remains to be shown that male bisexuality exists.” Participants in the 2011 study (all men, as in the 2005 study) were required “to have had sexual experiences

77. See id. at 383–84 (reporting on WELLINGS ET AL., supra note 55).
78. Id.
79. Id. at 383 (quoting WELLINGS ET AL., supra note 55, at 181) (alterations in original).
80. Id. (citing WELLINGS ET AL., supra note 55, at 181).
81. Id. at 384 & n.170 (explaining in further detail the study’s methodology and results).
82. LAUMANN ET AL., supra note 32, at 658.
83. Yoshino, supra note 3, at 385 (explaining in further detail the Laumann study’s methodology and results, and referring to either sexual-orientation category in quotation marks to indicate a possible difference between how Yoshino’s own desire-based definition of these categories might have applied to the subjects, and those whom the Laumann study would have designated as either bisexual or homosexual).
85. David Tuller, No Surprise for Bisexual Men: Report Indicates They Exist, N.Y. TIMES (Aug. 22, 2011), http://www.nytimes.com/2011/08/23/health/23bisexual.html (quoting Gerulf Rieger, Meredith L. Chivers & J. Michael Bailey, Sexual Arousal Patterns of Bisexual Men, 16 PSYCHOL. SCI. 579, 582 (2005), and discussing A.M. Rosenthal, D. Sylva, A. Safron & J.M. Bailey, Sexual Arousal Patterns of Bisexual Men Revisited, 88 BIOLOGICAL PSYCHOL. 112 (2011)). It should be noted that the 2011 study was financed in part by the American Institute of Bisexuality. Id. The 2005 study had perpetuated a belief that bisexuality in men did not exist. See Robinson, supra note 37, at 1488 & n.112 (citing Benedict Carey, Straight, Gay or Lying? Bisexuality Revisited, N.Y. TIMES, July 5, 2005, at F1 (describing the findings of the 2005 study, which have been subsequently contradicted by the findings of the 2011 study)).
with at least two people of each sex and a romantic relationship of at least three months with at least one person of each sex, whereas men who had participated in the 2005 study had been “recruited through advertisements in gay-oriented and alternative publications and were identified as heterosexual, bisexual or homosexual based on responses to a standard questionnaire.” In both the 2005 and 2011 studies, “men watched videos of male and female same-sex intimacy while genital sensors monitored their erectile responses.” Whereas the 2005 study “reported that the bisexuals generally resembled homosexuals in their responses” to the videos, the 2011 study found that the “bisexual men responded to both the male and female videos” while homosexual and heterosexual men studied did not.

Yoshino observed, with respect to the five studies that he analyzed, that “each . . . found that the incidence of bisexuality was greater than or comparable to the incidence of homosexuality.” The studies conducted since Yoshino wrote his article have continued to demonstrate such an incidence of that which Yoshino would have defined as bisexuality (and that which would qualify as nonexclusive orientation toward members of the same sex whether or not one adopts Yoshino’s definition of bisexuality) as compared with homosexuality. Moreover, the “unusual scientific about-face” that occurred between the 2005 study and the 2011 study conducted by researchers at Northwestern University provides even stronger support for the prevalence of bisexuality.

II. A MOVEMENT ABOUT DIFFERENCE BUT DEPENDENT ON SAMENESS

Much has changed since the time that Yoshino and others addressed the problem of bisexual invisibility. Sodomy laws have been held unconstitutional. The military’s “Don’t Ask, Don’t Tell” law (DADT) has been repealed. President Obama publicly renounced the constitutionality of the Defense of Marriage Act (DOMA) and refused to defend it in court. Same-sex marriage is legal in seven states and in the District of Columbia—certainly far from a majority, but an incremental victory nonetheless.

86. Tuller, supra note 85.
87. Id.
88. Id.
89. Yoshino, supra note 3, at 380.
90. Tuller, supra note 85.
91. See supra notes 1–3 and accompanying text.
94. Letter from Eric H. Holder, Jr., Att’y Gen. of the U.S., to The Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (reporting that the President had determined that Section 3 of DOMA, “as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment,” and that the Attorney General would no longer instruct Department of Justice attorneys to defend it in pending cases).
95. As this article goes to print, same-sex marriage is legally recognized in California, Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont, as well as in the District of Columbia. Perry v. Schwarzenegger, 702 F. Supp. 2d 921, 1004 (N.D. Cal. 2010) (holding Proposition 8’s ban on
Some states have adopted antidiscrimination statutes that protect against discrimination on the basis of sexual orientation in the employment contexts.

This generation's civil rights struggle has improved dramatically since Rhonda Rivera examined the legal treatment of gays and lesbians in the United States just over thirty years ago. Law libraries are different places than they were when Bill Rubenstein, as a student at Harvard Law School, spent an evening going "[u]p and down the cavernous corridors and through the labyrinth of stacks[, finding] no casebooks, no hornbooks, no treatises, no black letter guides, no practice pointers . . . about [his] life." Since then, the law has recognized the social problem of discrimination against gays and lesbians, and has offered some legal resolution to it.


69. Bill Eskridge has argued that the path to legally recognizing same-sex marriage should be "step-by-step and incremental," so perhaps an incremental victory is all that should be desired. See William N. Eskridge, Jr., Essay, Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition, 31 McGEORGE L. REV. 641, 647 (2000).


71. E.g., ME. REV. STAT. ANN. tit. 5, § 4591 (2002 & Supp. 2011) ("The opportunity for every individual to have equal access to places of public accommodation without discrimination because of . . . sexual orientation . . . is recognized as and declared to be a civil right"); NJ. STAT. ANN. § 10:5-4 (West 2002 & Supp. 2011) ("All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . affectional or sexual orientation . . .").

72. See David Vines, Our Generation's Defining Struggle, THE HUFFINGTON POST (Oct. 13, 2009, 10:40 AM), http://www.huffingtonpost.com/david-vines/our-generations-defining_b_315636.html ("Whether we like it or not, the fight for gay rights will be our struggle.").

100. Rivera, supra note 53.

But success has come at a cost. In order to achieve victories, advocates for gays and lesbians have tried to argue that but for gays’ and lesbians’ differences, they are just like everybody else.102 Their strategy is not unreasonable. The Aristotelian insight that likes should be treated alike is a powerful one and has had a profound impact not only on the efforts of LGBT rights advocates, but also for antidiscrimination efforts more broadly.103 The cause lawyer who wants to win civil rights on behalf of a group that includes her client would thus be well-advised to choose a client whose only difference is the possession of the characteristic that formed the basis of his alleged discrimination.104 Otherwise, the task of proving that her client suffered discrimination because of his possession of the characteristic in question becomes increasingly difficult.105 Thus, the successes of gays, lesbians, and other minorities have been predicated on the similarity of these individuals in comparison with the majority of the population, as opposed to the differences that have caused members of the majority to discriminate against them.

A focus on the extent to which gays and lesbians are just like everybody else helps to explain the regrettably fractured state of the current LGBT rights political movement, which is elaborated in section II.A. Section II.B explains more particularly that the movement, because of its commitment to representing only those who do not challenge the similarity between its constituents and those who discriminate against them, has become a movement that protects those who are, for all practical purposes, “straight but for the fact that they’re gay.” Finally, section II.C revisits the initial debate about litigating difference in sexual-orientation law, which arose in connection with sodomy litigation.

A. FRAGMENTATION WITHIN THE LGBT RIGHTS MOVEMENT

Scholars such as Katherine Franke, Nancy Levit, and Marc Spindelman have observed that the pragmatic strategy for lawyers litigating for LGBT rights has been to use the “‘homo kinship’ model or ‘like straight’ logic to argue for parental rights or same-sex marriage.”106 As a result, in securing victories,

102. See Mary Anne Case, Commentary, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights, 79 VA. L. REV. 1643, 1664 (1993) (“This may be one reason why . . . the court may have felt less threatened by this couple—they were blending in, behaving ‘just like everybody else.’”).

103. See Suzanne B. Goldberg, Discrimination by Comparison, 120 YALE L.J. 728, 743 (2011) (citing ARISTOTLE, NICOMACHEAN ETHICS 1131a–b (Martin Ostwald trans., The Bobbs-Merrill Co. 1962) (c. 384 B.C.E.)).

104. For more on the theory, ethics, and practice of cause lawyering, see CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998).

105. See Glazer & Kramer, supra note 23, at 661 (“In order to articulate a discrimination claim under Title VII, plaintiffs must satisfy the statute’s causation requirement, meaning that plaintiffs must claim that the discrimination suffered was ‘because of’ their membership in a particular protected category.”).

LGBT rights advocates have “intentionally le[ft] parts of the community behind.”107 The recent exclusion of transgender people from successive drafts of the Employment Non-discrimination Act (ENDA),108 on the theory that their inclusion would prevent ENDA’s eventual passage, provides a notable example. This exclusion caused sharp division among LGBT rights advocates. In particular, the Human Rights Campaign (HRC) infamously supported a noninclusive ENDA, which prohibited discrimination on the basis of sexual orientation but not on the basis of gender identity, because HRC concluded that a more inclusive ENDA would not pass out of the House of Representatives.109 HRC received a lot of criticism for its position on ENDA,110 which it later reversed, explaining that its earlier opposition to a trans-inclusive ENDA “would [have done] more to advance inclusive legislation.”111 Public support for a trans-inclusive ENDA ultimately brought about support among LGBT rights advocates for a version of ENDA that prohibited discrimination on the basis of sexual orientation and gender identity, which describes the latest versions of the


109. See Laird, supra note 107 (“While HRC had previously gone on record as supporting only an ENDA that included both sexual orientation and gender identity protections, it abandoned that position once . . . lawmakers on Capitol Hill determined there were not enough votes for the inclusive ENDA to pass out of the House of Representatives.”).

110. See Eliza Gray, Transitions: What Will It Take for America To Accept Transgender People for Who They Really Are?, THE NEW REPUBLIC (June 23, 2011), http://www.tnr.com/article/politics/magazine/90519/transgender-civil-rights-gay-lesbian-lgbtq (describing HRC’s lack of support for ENDA’s protection against discrimination on the basis of gender identity and remarking that “there was no question that the ENDA debate had exposed a rift” between those who support rights for transgender people and those arguing for gay rights); Jeremy Hooper, HRC ‘s Up For More Peaceful ENDA Discourse, Good as You (Mar. 26, 2009), http://www.goodasyou.org/good_as_you/2009/03/hrc-ts-up-for-more-peace-endadiscourse.html (“Remember in 2007, when their failure to oppose a non-inclusive ENDA led many LGBT activists to Harangue/Ridicule [sic]/Challenge HRC? Well happily, the future seems more Hopeful Regarding Cooperation on passing an inclusive measure . . . .”).

bill as they were introduced last spring: if enacted into law, the most recent version of ENDA would prohibit the states, as well as other employers, from discriminating against their employees on the basis of sexual orientation and gender identity.\(^{112}\)

Agreement among key players in the LGBT rights movement on the need to include transgender protection in ENDA has not meant that the interests of transgender people have been fully integrated into the LGBT rights movement’s goals. But litigation\(^{114}\) and some scholarly attention (including my own),\(^{115}\) as well as the political attention that the ENDA debate attracted, have heightened the collective sensitivity to the harms that transgender people face. The exclusion of bisexuals has received far less attention.

B. THE PROTECTION OF PEOPLE WHO ARE STRAIGHT, BUT FOR THE FACT THAT THEY’RE GAY

Transgender and bisexual people have been excluded from the movement’s efforts and, therefore, have not benefited from its recent victories.\(^{116}\) Operating on the homo-kinship model, advocates who have fought for rights on behalf of gays and lesbians have tried their best to make gays and lesbians appear as “normal” as possible.\(^{117}\) Neither transgender nor bisexual people appear normal,
if appearance as normal depends upon the extent to which an individual is similar to a heterosexual. Transgender people challenge the pervasive gender binary, adherence to which is necessary for an individual’s normalcy. Bisexual people challenge the pervasive sexual-orientation binary that “contemporary American society . . . insist[s] on.” Individuals, thus, seem to qualify as normal to the extent they adhere strictly to a binary, which neither transgender people nor bisexuals do.

Transgender and bisexual people are minorities among minorities. Their identities overlap to a certain extent with those of gays and lesbians but at times diverge. The debate over a trans-inclusive ENDA provided an opportunity for the LGBT rights movement to clarify its commitment to civil rights for people who are transgender. But bisexuals continue to be left behind. Bisexuals are, at least in name, a part of the LGBT rights movement—arguably, however, in name only. In addition to their exclusion from the legal definition of “sexual orientation,” bisexuals have been excluded from the movement’s efforts to protect individuals from discrimination on the basis of sexual orientation.

Part of the reason for bisexual exclusion may relate to persistent myths about bisexuals, which seem to be popular amongst both heterosexuals and homosexuals. Yoshino mentioned “the stereotype of bisexuals as ‘greedy’ or ‘promiscuous’” and explained that the implication of such a stereotype was that “bisexuals [ask] for more than their due,” because an individual’s “due” is to be attracted to only one sex, and really (because of the prominence of the norm of monogamy) only one person. He also mentioned that heterosexuals and homosexuals, in some cases, believed different stereotypes about bisexuals. For example, he observed that “[c]ommon straight stereotypes of bisexuals portray[ed] them as promiscuous, as duplicitous, as closeted, and especially as bridges for HIV infection from the ‘high risk’ gay population to the ‘low risk’

“would have been useless to [the] goals” of the earlier movement for gay rights, goals such as sexual freedom and gay liberation as opposed to the “more conservative concept of ‘gay rights’”

118. See infra notes 130–31 and accompanying text (discussing the homo-kinship model that has dictated the strategy of litigating on behalf of LGBT rights).
119. See, e.g., Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265 (1999) (discussing the law’s commitment to the sex and gender binaries in exploring the legal treatment of intersex individuals).
120. Yoshino, supra note 3, at 356 (footnotes omitted).
121. See supra notes 108–13 and accompanying text.
122. Yoshino, supra note 3, at 374.
This particular stereotype has become increasingly popular with the uncovering of men—and in particular, Black men—"who are said to live on the 'down low' . . . in that they have primary romantic relationships with women while engaging in secret sex with men."

Yoshino observed that homosexuals, too, attach to bisexuals a stigma "by characterizing individuals who self-describe as bisexual as going through a ‘phase’ that will end in monosexuality,” leading homosexuals “to be suspicious of those who claim bisexuality as a stable identity.”

Sean Cahill, director of the National Gay and Lesbian Task Force Policy Institute, acknowledged these misconceptions about bisexuals when he wrote that, “[c]ontrary to common misconceptions, bisexuality is not the equivalent of sexual promiscuity,” and “[a]lso contrary to misconceptions, bisexuality is not a transitional phase between heterosexuality and homosexuality.”

But these myths seem to prevail, and seem to have prompted the “cute blonde girl” who “saved” bisexual author Maria Burnham from exclusion at the “very first all-lesbian shindig” that she attended during the summer of 2009 to advise Burnham to “[c]laim gay” if Burnham “like[d] a dyke” because “most lesbians are not . . . cool with bi girls” because, according to the blonde, lesbians “think they can’t trust [bisexuals], that [bisexuals will] turn on them if the right guy comes along, that [bisexuals are] not serious.”

The prevalence of myths about bisexuality can explain not only the prescription to shy away from identifying as bisexual at a lesbian party but also the fact that lawyers have not, until very recently, brought suit on behalf of bisexual plaintiffs.

Transgender people have certainly been excluded, too. The exclusion of bisexuals is both similar to and different from the exclusion of transgender people from the LGBT rights movement. Including the interests of transgender people is different from including the interests of bisexuals because transgender discrimination does not constitute discrimination on the basis of sexual orientation but instead discrimination on the basis of gender identity. Sexual orientation and gender identity are certainly related. But the exclusion of bisexuals

123. Id. at 396 (citing Robin Ochs, Biphobia: It Goes More than Two Ways, in BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY 217, 227 (Beth A. Firestein ed., 1996)).
124. Robinson, supra note 37, at 1464.
125. Yoshino, supra note 3, at 398.
128. See supra note 9 and accompanying text.
129. See Francisco Valdes, Queers, Sissies, Dykes, and Tomboyos: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CALIF. L. REV. 1 (1995) (deconstructing and critiquing the conflation of sex, gender, and sexual orientation over time and across borders); see also Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 196 (arguing that “the censure of homosexuality cannot be animated merely by a condemnation of sexual behavior,” and that “[i]nstead, homosexuality is censured because it violates the prescriptions of gender role expectations”).
from the LGBT rights movement stems from a desire on the part of LGBT rights advocates to protect individuals whose sexual orientation adheres to the sexual-orientation binary as much as possible, whereas bisexuality challenges the very existence of this binary.

The homo-kinship model has dictated, for example, that LGBT rights lawyers should litigate cases in states where residents are more likely to agree that gays and lesbians should have the right to marry. It has also dictated that lawyers arguing for LGBT rights should treat their cases like controlled experiments; only one factor—their clients’ sexual preference for members of the same sex—differentiates their clients from everybody else. This way, it is more likely that the lawyer will be able to demonstrate that an individual was discriminated against because of her sexual orientation, and that the individual would not have been discriminated against but for her sexual orientation.\textsuperscript{130}

This strategy is predicated on the required elements for an actionable discrimination claim. Under what Suzanne Goldberg has recently identified as the comparator model of discrimination law, courts will only rule that discrimination has occurred if, for example, “an employer has two employees who are similar but for $X$ characteristic, and the employer treats Employee $X$ worse than Employee Not-$X$,” because “we are generally comfortable inferring that $X$ is the basis, or cause, for the different treatment.”\textsuperscript{131} In order for the comparator model to work—not only in the operation of statutes like Title VII but in other contexts in which discrimination is alleged—someone must exist against whom to compare the person who experienced discrimination. That person must be just like the person who experienced discrimination, but for the characteristic that supposedly caused the discrimination.

In light of the comparator aspect to antidiscrimination law, the homo-kinship model is a strategy reasonably employed. What is objectionable, however, is that this strategy has dictated the exclusion of individuals who should be included in the movement’s efforts, because their inclusion is not strategic. Bisexuals are not straight enough to be gay. In order that LGBT advocates can demonstrate that protected individuals experienced discrimination because of their homosexuality, they tend to protect only those who are straight, but for the fact that they are gay.

\textbf{C. AN EARLIER DEBATE ABOUT DIFFERENCE}

The issue of whether to include bisexuals or transgender people within the LGBT rights movement is related to an issue that was the subject of earlier debate among scholars of sexual-orientation law. In 1993, Mary Anne Case engaged Janet Halley and Pat Cain in a debate about the extent to which lawyers arguing against the constitutionality of sodomy statutes should emphasize the details of gay and lesbian sex. Case argued that doing so would lessen

\textsuperscript{130} See supra note 105 and accompanying text.

\textsuperscript{131} Goldberg, supra note 103, at 744.
the opportunity for success in the arena of gay and lesbian rights. Halley and Cain argued that doing so would promote the purpose of the gay and lesbian rights movement.

Halley and Cain both argued that gay rights advocates should focus on the details of individuals’ sexual activity. Halley’s goal was to create “alliances along the register of acts” instead of along the register of identities. She argued that an act-based alliance among individuals would highlight that sodomy, prohibitions against which had not yet been held unconstitutional at the time she wrote, was an activity in which not only homosexuals but also heterosexuals engaged. By creating an “alliance of sodomites,” Halley hoped to “undermine[] [heterosexual identity] from within,” which would—in her estimation—end the metonymy of sodomy and homosexuality.

Cain reconstructed the history of litigating for lesbian and gay rights, telling a story that demonstrated that it was the “hostility toward ’difference’ [that] prevented the formation of any widespread gay or lesbian movement against anti-gay discrimination.” Cain lamented a “general shift in the movement away from the original concept of ‘gay liberation,’ towards a more conservative concept of ‘gay rights.’” By “gay liberation,” Cain meant “a commitment to the deconstruction of the categories homosexual and heterosexual as those categories ha[d] been constructed by dominant forces in society.”

Cain shared Halley’s concern that sodomy had become a metonym for homosexuality. In order to end this metonymy, Cain argued for a distinction between proven conduct and presumed conduct along with a directive to “those who litigate on behalf of gay men and lesbians to focus the court’s attention on the details of the conduct their clients have engaged in.” She urged gay rights advocates to use substantive due process arguments because they “would allow us (lesbians and gay men) to argue independently about the value of intimate association, construction of self through relationship, and the authenticity of lesbian and gay love. We could tell our stories of relationships in our own terms without forcing them to sound just like everyone else’s.” Cain argued more specifically that litigators “combine substantive due process claims that focus on conduct with equal protection claims that focus on status.” The substantive due process claim that Cain envisioned would focus on the fundamental importance of lesbian and gay conduct, whereas the equal protection claim she

---

133. See id.
134. See id. at 1722, 1771.
135. Cain, supra note 47, at 1558 (commenting on the lack of unity in the gay rights movement in the post-World War I era).
136. Id. at 1640 (footnote omitted).
137. Id.
139. Cain, supra note 47, at 1639.
140. Id. at 1619.
envisioned would “attack the irrationality of the discriminatory classification.” She called this a “nonbifurcation strategy,” and Cain advocated the use of such a strategy because it would “prevent courts from inferring ‘conduct . . . from the mere fact of status.’” But taking a safe route in order to win some (but not all) civil rights battles, rather than none (but not some), was not unreasonable, even according to Cain, who conceded that she could tolerate a “limited bifurcation” strategy—one where “litigators should not consider it necessary to bifurcate status from all conduct,” but could bifurcate it from all conduct except sodomy (because at that time sodomy was criminal).

Case noted that what was notably absent from Cain’s history of litigating for gay and lesbian rights were same-sex couples and the details of their copulation. Case observed that “[c]ourts accord the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect has perforce been removed . . . .” According to Case, gay rights advocates should not highlight the details of what was at one time referred to as “the behavior that defines the class” when litigating sodomy cases. Case argued against Cain’s suggestion that “gay rights advocates should focus more attention . . . on the specifics of one form of coupling—copulation . . . .”

Case argued against the likely effectiveness of Halley’s and Cain’s increased focus on sexual acts on the basis of its lack of precedential support. She also argued that this increased focus on sexual acts presented substantial risks. One risk was political; Case argued that Cain’s proposal could “fracture the gay community into ‘sodomites’ and ‘nonsodomites.’” Though Case argued that Halley’s proposal was less risky than Cain’s (because Halley’s proposal was not a strategy to be employed in litigation but instead a strategy to reorganize the bases for political alliances), she argued that Halley’s proposal would, like Cain’s, “divide the gay community,” but along an axis even more controversial than the axis of identity that Halley sought to avoid. Case argued that Halley’s alliance “would benefit those whose sexual activity most closely resemble[d] . . .

---

141. Id. at 1633.
142. Case, supra note 102, at 1681–82 (quoting Cain, supra note 47, at 1627).
143. Id. at 1644.
144. See Case, supra note 102 (commenting on the absence of the couple from the history of gay rights litigation, as reconstructed by Pat Cain in Cain, supra note 47).
145. Id. at 1645. Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (“If the Court [in Bowers v. Hardwick, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.”).
146. Id. at 1645. Though Case argued against both Cain’s and Halley’s suggestions that gay rights advocates focus on the details of sexual activity on the ground that “[n]either proposal w[ould] work,” she was careful to circumscribe her commentary to the provision of insights rather than affirmative litigation strategies. Id. at 1682, 1694.
147. See id. at 1688.
148. Id.
that of the majority of heterosexuals and exclude those most different from heterosexuals in their practices.”\textsuperscript{150} After all, an alliance based on acts would necessarily depend on the “identity or similarity between acts” performed by allies.\textsuperscript{151} Another risk presented by an increased focus on sexual acts was legal; Case argued that forcing the legal system to confront the details of gay sex would “provoke a worse reaction”\textsuperscript{152} from the legal system than what Cain herself had characterized as the legal system’s then-current “negative judgment against all things homosexual.”\textsuperscript{153}

This earlier debate about difference in the gay rights movement was a debate about how best to preserve qualities of a discriminated minority group that make that group different. After all, the group’s differentiating qualities were also the reasons that the group suffered discrimination and therefore the reason for the existence of the movement to advance the group’s rights. These debates, while parts of the same social movement, differ essentially from each other in two important ways. First, current debates about the LGBT rights movement lack agreement among all debate participants that the movement’s purpose is to obtain the right for its constituents to exercise their differences. Second, and related, current debates lack the earlier debate’s shared commitment among participants to avoid the movement’s fracture and division between those who seem most different from the rest of society and those who seem most similar to it.

This earlier debate exemplified agreement about the gay rights movement’s purpose to obtain the right for its constituents to exercise their differences. Case disagreed with Halley and Cain about the appropriate strategy to be employed for the purpose of obtaining the rights to form pair bonds and to copulate. These two activities are the qualities of gays and lesbians that make them different; they are “exactly what gay men and lesbians may want to do and what troubles society when they try to do [them].”\textsuperscript{154} But all three participants in this debate agreed on the purpose of strategizing within the gay rights movement: to secure the rights to form pair bonds and to copulate.

Because all three scholars agreed on the movement’s purpose to protect the right to be different, they shared a second and related commitment to avoid the movement’s fracture and division between those who seem most different from society and those who seem most similar to it. In fact, the strength of Case’s attack on Halley and Cain is in its irony. Case argued not only that Halley’s and Cain’s proposals would not achieve the gay rights movement’s purpose, about which all three scholars agreed, but that their proposals would achieve the exact opposite of that purpose, namely the movement’s fracture and division. Case demonstrated that the risk of highlighting gays’ and lesbians’ differences was

\textsuperscript{150} Id. at 1689.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. (citing Cain, supra note 47, at 1592).
\textsuperscript{154} Id. at 1643.
that doing so would likely generate benefits for gays and lesbians who were the least different from heterosexuals.\textsuperscript{155} And of course, these individuals were also those within the movement who were the least likely to experience discrimination.

This earlier debate about the gay rights movement did not prevent the movement from achieving incremental but impressive victories since its occurrence just under twenty years ago.\textsuperscript{156} Of course, this earlier debate about gay rights differs in other ways from the current debates about LGBT rights, and arguably in ways that may complicate a direct comparison between the two debates. However, the opportunity exists to compare these debates—which pertain to the future of different versions of the same civil rights movement—so as to derive insights about the arguable success that the first debate allowed and the arguable failure toward which the second set of debates may be contributing. The current LGBT rights movement is plagued by intense disagreement about the inclusion of bisexual and transgender people—those who challenge the movement’s collective commitment to preserving the right to be different—and the movement’s resulting regrettably fractured state between those who are “straight, but for the fact that they’re gay” and those whose rights are most violated.\textsuperscript{157} Meanwhile the earlier debate about the gay rights movement, despite disagreement, contained a shared commitment to preserve the right to form pair bonds and copulate—rights that have been achieved in the years since the occurrence of the debate—and a commitment to avoid the fracturing of the movement by excluding those who are most different, and most in need of its support, from it.

III. BISEXUALITY AND THE LAW

Though legal scholarship has addressed bisexuality only in rare moments,\textsuperscript{158} Yoshino’s epistemic contract of erasure answered Ruth Colker’s earlier call for a “bi jurisprudence”\textsuperscript{159} and explained why the “vast and vastly unacknowledged wall between heterosexual and homosexual identities” that Naomi Mezey identified has been so “vigilantly maintained.”\textsuperscript{160} But whereas earlier scholarship

\begin{flushleft}
\textsuperscript{155} See supra notes 148–51 and accompanying text.
\textsuperscript{156} See supra notes 91–101 and accompanying text.
\textsuperscript{157} See supra section II.B.
\textsuperscript{158} There has, however, been a recent flurry of interest among legal scholars in the topic of bisexuality. See, e.g., Heron Greenesmith, \textit{Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years After Bisexual Erasure}, 17 CARDozo J.L. & GENDER 65 (2010). In addition, Michael Boucai, the current Sears Law Teaching Fellow at The Williams Institute at UCLA School of Law, the leading think tank dedicated to the field of sexual-orientation law and public policy, is currently working on projects that relate to bisexuality. See Faculty Biography of Michael Boucai, UCLA Sch. of Law, http://www.law.ucla.edu/home/index.asp?page=3452 (last visited Dec. 8, 2011) (“His current projects deal with bisexuality’s obscured centrality to debates about gay rights . . . .”).
\textsuperscript{159} COLKER, supra note 1 (introducing a perspective that rejects conventional bipolar categories in the areas of gender, race, and disability).
\textsuperscript{160} Mezey, supra note 2, at 100.
\end{flushleft}
observed an erasure of the bisexual, this Article observes a spotlight shining on him. Section III.A describes in further detail the phenomenon of bisexual erasure and section III.B describes the shift away from erasure and towards the current era of bisexual hypervisibility. Whether bisexuals have been erased or are instead spotlighted and therefore hypervisible, they have continued to suffer distinct harms. Section III.C explains the nature of those harms.

A. BISEXUAL ERASURE

Though Colker and Mezey wrote about bisexuality and the law before Yoshino, Yoshino examined bisexuals with more of a descriptive lens than they did.161 He did not advocate any particular solution to the problem of bisexual erasure, instead offering what has served as the definitive explanation of why bisexuals have been erased. His project was not exclusively descriptive, to be sure; he argued that bisexuals should be rendered more visible in the legal realm, particularly in the realm of sexual harassment law. Yoshino argued that the reason to promote bisexual visibility was to represent accurately the fluid nature of human sexuality.

In explaining why he believed that bisexuals had been erased to the point of invisibility (a phenomenon for whose existence he argued convincingly), Yoshino wrote about the “epistemic contract of bisexual erasure,” the tacit agreement between both homosexuals and heterosexuals (collectively, “monosexuals”) to erase bisexuals.162 Yoshino defined this agreement as “a contract in the sense that a social contract is a contract,” meaning that it was “not a conscious arrangement between individuals, but rather a social norm that ar[ose] unconsciously.”163 And parties to this social or epistemic contract—heterosexuals and homosexuals—erased bisexuals by employing three strategies: class erasure, individual erasure, and deligitimation. Class erasure was the denial of the entire category of bisexuality.164 Individual erasure permitted the recognition of the category of bisexuality, but referred to the contestation that any particular individual was a bisexual, a contestation that tends to accompany a monosexual’s reference to one or more of the pervasive myths about bisexuals’ nonexistence.165 And deligitimation referred to the acknowledgement of the existence of bisexuals, as a class and also as individuals, but with the attachment to bisexuals of a stigma.166

Yoshino argued that monosexuals shared an interest in erasing bisexuals for three reasons. First, both dominant sexual-orientation groups had an interest in proving a monosexual identity:

---

161. See infra section IV.A for elaboration of Colker’s and Mezey’s positions.
162. See Yoshino, supra note 3.
163. Id. at 391–92.
164. Id. at 395.
165. Id. at 396; see also supra notes 122–28 and accompanying text.
166. Id.
[S]traights (for example) can only prove that they are straight by adducing evidence of cross-sex desire. . . . But this means that straights can never definitively prove that they are straight in a world in which bisexuals exist, as the individual who adduces cross-sex desire could be either straight or bisexual, and there is no definitive way to arbitrate between those two possibilities.\(^{167}\)

The same was true for gays: they could only prove that they were gay by offering evidence of same-sex desire, evidence that was called into question when bisexuals offered the same. The second interest that monosexuals shared was that in "retaining the importance of sex as a distinguishing trait in society . . . because to be straight or gay is to discriminate erotically on the basis of sex."\(^{168}\) And third, because "bisexuals [we]re often perceived to be ‘intrinsically’ nonmonogamous,"\(^{169}\) heterosexuals and homosexuals erased bisexuals in order to defend the norm of monogamy. Each of Yoshino's three interests was slightly different, but all of them demonstrated an anxiety that monosexuals had about preserving the stability of certain categories—monosexual identity, sex, and monogamy.

Yoshino argued that increasing bisexual visibility would effect a change in sexual-harassment doctrine, a change that he argued was necessary because of the doctrine's imposition of a particular harm on bisexuals. At the time Yoshino wrote, the most famous mention of bisexuality in case law was the then largely hypothetical example of the so-called bisexual harasser,\(^{170}\) a mostly fictional character who first appeared in the 1975 case, \textit{Corne v. Bausch & Lomb, Inc.}, where the judge dismissed allegations of sexual harassment because the alleged harasser, a male whose actions were directed toward females, was merely "satisfying a personal urge."\(^{171}\) The judge then demonstrated why such desire-based harassment should not fit within the definition of sexual harassment under Title VII of the Civil Rights Act of 1964:\(^{172}\) "to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit."\(^{173}\) The bisexual harasser appeared again in the 1977 case, \textit{Barnes v. Costle}, this time by name, when the court noted that "[i]n the case of the

\(^{167}\) Id. at 362.

\(^{168}\) Id.

\(^{169}\) Id. at 363.

\(^{170}\) This discussion tracks Yoshino's discussion of the same. See id. at 434–58.


biseXual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.”

In neither of these cases, however, was the bisexual-harasser defense actually raised—these cases merely pointed out the possibility of a hypothetical bisexual harasser.

At the time Yoshino wrote, the bisexual-harasser defense had actually been raised in only two cases and was not accepted in either case. For this reason, courts deciding cases at the margins of sexual harassment law merely included in their opinions a “boilerplate phrase in sexual harassment cases,” namely the Eleventh Circuit’s statement that “[e]xcept in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex.” Yoshino demonstrated that whether one adopted a “desire-based theory” that sexual harassment is actionable only if the harassment is sexual in nature, or instead a “because of . . . sex” theory that sexual harassment is actionable because it would not have occurred but for the victim’s sex, the bisexual-harasser exemption from sexual-harassment liability had been, for all practical purposes, closed.

An exemption from liability in sexual harassment law that had not been closed, on the other hand, was the horseplay exemption. Under this exemption, certain conduct would not be held to constitute sexual harassment, but instead would be considered nonsexual horseplay. For example, a coach’s smacking a football player on the buttocks would likely qualify as horseplay rather than sexual harassment. The logic behind the horseplay exemption was that “this is football[, and] some homosocial acts are so transparently homosocial that they cannot be read any other way.” But, Yoshino argued, closing the bisexual-harasser exemption while keeping open the horseplay exemption made clear that sexual-harassment law failed to recognize the possibility that someone could be bisexual. And the harm, according to Yoshino, that inhered in the failure to recognize bisexuality in sexual-harassment law was that liability turned on status rather than on conduct and, “more specifically, on the sexual orientation of the actors rather than on the nature of the allegedly harassing

175. See Raney v. District of Columbia, 892 F. Supp. 283, 287–88 (D.D.C. 1995); Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 (D.D.C. 1995) (declining to decide the bisexual-harasser question, but noting that the success of such a defense “would appear to produce an anomalous result” in Title VII law, and labeling this a “troubling possibility”). For a more elaborate discussion of those cases that have, have not, and might have been expected to have raised the bisexual-harasser defense, see Yoshino, supra note 3, at 443 n.486.
176. Yoshino, supra note 3, at 443.
177. Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982).
179. Id. at 440 (“As a practical matter, the bisexual harassment exemption has been closed.”).
181. Yoshino, supra note 3, at 457.
acts.”

Just after the publication of Yoshino’s article, the Seventh Circuit accepted the bisexual-harasser defense in Holman v. Indiana, a case in which married couple Steven and Karen Holman—who both worked in the maintenance department at the Indiana Department of Transportation—together filed claims of sexual harassment against Gale Ulrich, their foreman who allegedly approached each of them separately for sexual favors and retaliated against each of them for rejecting his approaches. The court of appeals affirmed the dismissal of the Holmans’ sexual-harassment claims and stated that it “d[id] not think . . . it is anomalous for a Title VII remedy to be precluded when both sexes are treated badly. Title VII is predicated on discrimination. Given this premise, requiring disparate treatment is consistent with the statute’s purpose of preventing such treatment.” It is unlikely that the reopening of the exemption from sexual-harassment liability for the bisexual harasser pleased Yoshino, on the basis of his theory. But ultimately, the exemption has continued to remain relatively closed, despite the existence of the Holman decision. Holman signified nothing if not the beginning of a new era, one in which bisexuals are no longer harmed by implication and therefore erased from existence, but are instead hypervisible. Now, those who are not monosexual are singled out on that very basis.

B. A SPOTLIGHT ON BISEXUALITY

Since Yoshino identified the phenomenon of bisexual erasure and the resulting invisibility of the bisexual from sexual-orientation law and the LGBT rights movement, bisexuality has gone from being erased to the point of invisibility to being hypervisible. More recent cases, which this section elaborates, differ in two important ways from the erasure that Yoshino described. First, while Yoshino described a tacit erasure, more recent cases seem to address bisexuality explicitly. Second, while Yoshino described bisexual erasure to have been effected equally by both heterosexuals and homosexuals, newer spotlighting efforts seem to be conducted primarily by homosexuals and their advocates.

1. The Bisexual World Series

On April 20, 2010, the National Center for Lesbian Rights (NCLR) and the law firm of K&L Gates LLP filed a lawsuit in the United States District Court for the Western District of Washington on behalf of Steven Apilado, LaRon Charles, and Jon Russ, three bisexual members of the San Francisco Gay Softball League whose team, D2, advanced to the 2008 Gay Softball World Series in Seattle, an event run by the North American Gay Amateur Athletic

182. Id. at 435–36.
183. 211 F.3d 399 (7th Cir. 2000).
184. Id. at 400–01.
185. Id. at 404.
Association (NAGAAA). The NAGAAA had a rule that no team participating in the World Series could have among its members more than two heterosexuals.\(^{186}\) Washington’s public accommodations law prohibits discrimination on the basis of sexual orientation.\(^{187}\)

During the World Series championship, another participating team challenged the eligibility of D2 to play on the basis of the NAGAAA’s heterosexual cap of two team members.\(^{188}\) Despite the NAGAAA’s stated mission of promoting “amateur sports competition, particularly softball, for all persons regardless of age, sexual orientation or preference, with special emphasis on the participation of members of the gay, lesbian, bisexual and transgender community,” five members of D2 were summoned by the NAGAAA to a room with over twenty-five people, in front of whom the players were expected to answer “whether they were ‘predominantly attracted to men’ or ‘predominantly attracted to women,’ without the option of answering that they were attracted to both.”\(^{189}\) After the players answered these questions, “a panel voted on whether [each] was ‘gay’ or ‘non-gay’... refus[ing] to entertain the idea that the players could be bisexual.”\(^{190}\) The panel ultimately decided by vote that Apilado, Charles, and Russ were not gay.\(^{191}\) The panel also “recommended disciplinary measures against [the players,] their team, and the San Francisco Gay Softball League, including forcing ... D2[] to retroactively forfeit their second-place World Series win.”\(^{192}\) Moreover, the NCLR reported that, “[i]n response to a player’s statement that he was attracted to both men and women, a NAGAAA member responded, ‘This is the Gay World Series, not the Bisexual World Series.’”\(^{193}\)

This lawsuit, which has now settled,\(^{194}\) has been called a “legal first”\(^{195}\) because it involved a lawsuit for discrimination on the basis of sexual orientation filed against a group intended for mostly gays. But the suit was a first for another reason: in claiming discrimination on the basis of plaintiffs’ bisexuality, the lawsuit highlighted the differences between bisexuality and homosexuality.

---


\(^{188}\) See Press Release, supra note 186.

\(^{189}\) Id.

\(^{190}\) Id.

\(^{191}\) Id. Incidentally, it should be noted, too—as it is in NCLR’s press release—that all three of these players were non-White. The panel questioned two other members of D2, both of whom were White, and decided by vote that these players were gay. See id.

\(^{192}\) Id.

\(^{193}\) Id.

\(^{194}\) See McDonald, supra note 9.

Despite the fact that this lawsuit was brought on behalf of three bisexuals, a May 2011 order in the case noted that “th[e] Order d[id] not mention bisexuality in any sense.”196 This order held that the NAGAAA had a constitutional right because of its classification as an expressive association to exclude anybody who did not share its values, such as heterosexuals.197 In the order, Judge Coughenour concluded that though the plaintiffs had “framed th[e] case as a matter of bisexual rights,” the case involved the “intrusive and disrespectful” nature of the NAGAAA’s inquiry into plaintiffs’ sexual orientation.198

Of course, a determination of how intrusive and disrespectful were the NAGAAA’s inquiries into plaintiffs’ sexual orientations depended, as it would for any expressive association, on an analysis of the association’s expressive purpose.199 Though the Supreme Court has held that courts should “give deference to an association’s assertions regarding the nature of its expression [and] . . . what would impair its expression,” such deference is “not absolute.”200 In order for the NAGAAA to argue successfully that it had a constitutional right as an expressive association to exclude Apilado, Charles, and Russ, the organization needed to demonstrate to the court that it had an explicit message.

The NAGAAA provided to the court such an explicit message in time for its inclusion in a subsequent November 2011 order.201 The court quoted the NAGAAA’s message: “NAGAAA has chosen to send a message through the annual Gay Softball World Series that athletes can play competitive team sports ‘as openly gay, lesbian, and bisexual individuals,’ and to ‘demonstrate that there are such men and women.’”202 On the basis of this message, the court granted the NAGAAA’s motion for partial summary judgment on the basis of the plaintiffs’ failure to show that the state’s interest in eliminating the NAGAAA’s exclusionary policy outweighed the NAGAAA’s constitutional rights as an expressive association.203

2. This, That, and Then This Again: Bisexuality and Same-Sex Marriage

Until recently, bisexuals have not really factored much into the debate about legally recognizing same-sex marriage. After all, bisexuals have the right to marry in every state. Of course, this right is contingent upon bisexuals’ choosing to marry someone of the opposite sex. On this basis Yoshino argued that

---

197. See id. at 3, 15.
198. Id. at 3–4.
199. See id. at 12–15.
200. Id. at 12 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000)).
203. See id. at 5.
biseexuals experienced a harm exactly the same as the harm experienced by gays as a result of prohibitions against same-sex marriage, namely that those prohibitions “violate[] sex discrimination norms.”

Seeking to isolate a harm particular to bisexuals, Yoshino argued that a bisexual might be harmed by the failure to recognize same-sex marriage because the state “impedes [the bisexual] from seeing 'through' sex to other traits that she may find more important,” but he noted that this was a weak argument for bisexual harm.

Michael Boucai, in a forthcoming article, argues that prohibitions against same-sex marriage “substantially burden a right to choose homosexual relations and relationships” in violation of the Court’s protection of sexual liberty in *Lawrence v. Texas*.

But Boucai employs bisexuality in his article “as an illuminating perspective from which to apprehend the heterosexual coerciveness of marriage,” not to isolate harms particular to bisexuals. Because bisexuals arguably do not present any issues particular to their bisexuality with respect to the right to marry, bisexuals do not tend to play a role in the same-sex marriage debate.

Freedom to Marry, “the campaign to win marriage nationwide,” includes a page on its website entitled “Why Marriage Matters to the Bisexual Community,” which includes the following quotation from Alan Hamilton, a former president of the East Coast Bisexual Network and a co-founder of the Unitarian-Universalist Bisexual Network: Think about it: Even a bisexual married to someone of another gender knows that her/his partner could die from an accident or disease and leave her/him alone. After recovering from that loss, their next relationship might be with someone of the same gender. She/he will want the same rights as they currently have in a mixed-gender relationship. A bi person who is dating or in a committed same-gender relationship also wants the same rights as straight-identified people. For all these reasons, bi people have been active in Freedom

---

204. Yoshino, supra note 3, at 459.
205. Id.
206. See id. at 459–60.
208. Id.
209. See id. at 27 (“The channeling of bisexuals into heterosexuality is ultimately ‘a special case of a general phenomenon.’ In its legal mechanisms, the pressure brought to bear on bisexuals is essentially the same as that imposed on homosexuals and even heterosexuals . . . .” (footnote omitted) (quoting Clifford Rosky)).
To Marry and the Equal Marriage movement since its inception, and continue their strong support.\(^{212}\)

On this theory, marriage matters to the bisexual community because a bisexual person might enter into a same-sex relationship.

Bisexuality seems to have found its way into *Perry v. Schwarzenegger*,\(^{213}\) the high-profile and controversial\(^{214}\) federal same-sex marriage trial challenging the constitutionality of California's Proposition 8. A bit about the *Perry* case as it relates to the same-sex marriage debate: Proposition 8, a ballot initiative to amend the California Constitution by adding Section 7.5, which provided that “[o]nly marriage between a man and a woman is valid or recognized in California,”\(^{215}\) passed with 52.1% of Californians’ votes in the November 2008 election.\(^{216}\) Its passage effectively overturned the California Supreme Court’s decision in *In re Marriage Cases*,\(^{217}\) which had held unconstitutional California’s previous statutory bans against same-sex marriage because “statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny” under California’s equal protection clause,\(^{218}\) and the statutory bans at issue in that case failed the strict scrutiny standard of review because “the interest in retaining the traditional and well-established definition of marriage . . . [could not] properly be viewed as a compelling state interest for purposes of the equal protection clause, or as necessary to serve such an interest.”\(^{219}\)

The plaintiffs in *Perry* argued that Proposition 8 was unconstitutional because it violated the Equal Protection Clause of the 14th Amendment, an argument

---


\(^{214}\) See, e.g., Jesse McKinley, Bush v. Gore Foes Join To Fight California Gay Marriage Ban, N.Y. TIMES (May 27, 2009), http://www.nytimes.com/2009/05/28/us/28marriage.html. Not everyone in the gay rights movement, however, was thrilled by the sudden intervention of the two limelight-grabbing but otherwise untested players—lawyers David Boies and Theodore Olson—in the bruising battle over Proposition 8. Some expressed confusion at the men’s motives and outright annoyance at the possibility that a loss before the Supreme Court could spoil the chances of future lawsuits on behalf of same-sex marriage. “It’s not something that didn’t occur to us,” said Matt Coles, the director of the LGBT project at the American Civil Liberties Union, at the time the suit was filed. “Federal court? Wow. Never thought of that.” *Id.*


\(^{216}\) Tamara Audi, Justin Scheck & Christopher Lawton, California Votes for Prop 8, WALL ST. J. (Nov. 5, 2008), http://online.wsj.com/article/SB1225860567599000673.html.

\(^{217}\) 183 P.3d 384 (Cal. 2008).

\(^{218}\) *Id.* at 442.

\(^{219}\) *Id.* at 401.
which the Ninth Circuit ultimately accepted.\textsuperscript{220} In \textit{Romer v. Evans},\textsuperscript{221} the Supreme Court invalidated Colorado's Amendment 2, which would have prevented any Colorado municipality from recognizing homosexuals, lesbians, or bisexuals as a protected class,\textsuperscript{222} because it "seem[ed] inexplicable by anything but animus toward the class it affects" and therefore "lack[ed] a rational relationship to legitimate state interests."\textsuperscript{223} When Vaughn Walker, then-Chief Judge of the United States District Court for the Northern District of California,\textsuperscript{224} held Proposition 8 unconstitutional, he found that

Proposition 8 was premised on the belief that same-sex couples simply [we]re not as good as opposite sex couples . . . [w]hether . . . based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman [wa]s inherently better than a relationship between two men or two women . . . .\textsuperscript{225}

As the plaintiffs in \textit{Perry} sought to invalidate Proposition 8 because it discriminated against people on the basis of their sexual orientation, it was not surprising that on direct examination, attorneys David Boies and Ted Olson asked their clients about their sexual orientations. For example, Boies asked plaintiff Jeffrey Zarrillo, "Are you gay?" to which Zarrillo responded, "Yes, I am"; Zarrillo responded to Boies's next question, "How long have you been gay?" by saying, "As long as I can remember."\textsuperscript{226} Boies asked Zarrillo about the sexual orientation of his partner, Paul Katami, by asking, "Now, today you are in a committed relationship with another gay man, correct?" Zarrillo responded in the affirmative.\textsuperscript{227} Boies addressed Katami's sexual orientation by asking him on direct examination, "Now, you say you were a natural-born gay. Does that mean you've always been gay?" to which Katami responded, "As long as I can


\textsuperscript{221} 517 U.S. 620 (1996).

\textsuperscript{222} Id. at 623–24.

\textsuperscript{223} Id. at 632.


\textsuperscript{225} \textit{Perry}, 704 F. Supp. 2d at 1002 (citation omitted); \textit{see also} William Eskridge, Jr. \& Darren Spedale, \textit{Who Will Win the Gay Marriage Trial?}, \textit{Slate} (Jan. 29, 2010), http://www.slate.com/id/2242957 (opining, after the close of testimony in \textit{Perry}, that "[i]f Judge Walker finds that Proposition 8 reflected nothing but prejudice or animus against lesbian and gay people, he will rule it unconstitutional," based on the \textit{Romer} precedent).


\textsuperscript{227} Id. at 79.
remember, yes." When questioning Kris Perry, Olson asked her, “How would you describe your sexual orientation?” to which Perry responded, “I am a lesbian.” Olson then pursued a line of questioning with Perry, asking her to address the mutability of her sexual orientation: whether she thought that she had been born with her lesbian sexual orientation, and whether she thought that it could ever change.

But the most telling exchange was between Olson and plaintiff Sandy Stier. Stier had been married to a man. When Olson asked her on direct examination to describe her sexual orientation, Stier responded, “I’m gay.” Stier claimed to have learned that she was gay “fairly late in life, in [her] mid-thirties.” She admitted that at the time she was married to a man—from 1987 to 1999—she had no feeling that she was a lesbian. She admitted, too, that her marriage to this man “start[ed] out with the best intentions” and that she “love[d] him when [she] married him.” And though Stier met Kris Perry, a woman with whom she has now been in a relationship for over a decade, in 1996, she testified that her “sexual orientation or [her] discovery of [her] sexual orientation ha[d nothing] to do with the dissolution of [her] marriage.” When asked how convinced she was that she was gay, Stier answered: “Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris.”

Olson asked Stier: “How convinced are you that you are gay? You’ve lived with a husband. You said you loved him. Some people might say, ‘Well, it’s this and then it’s that and it could be this again.’ Answer that.” To be sure, the argument here is not that Olson’s question was unreasonable, particularly in light of the lawsuit’s allegation that Proposition 8 discriminated on the basis of sexual orientation. But his question assumed that Stier needed to identify as gay in order to have the right to marry. Olson made reference in his question to a myth about bisexuals, which “some people might” believe, namely that bisexuals are promiscuous, indecisive, and occupy a transitional sexual orientation that may change at some point. As already noted, Stier responded to Olson as follows: “Well, I’m convinced, because at 47 years old I have fallen in love one

228. Id. at 91.
229. Id. at 140.
230. Id. at 140–41 (responding in the affirmative that she felt she had been born with the tendency toward sexual attraction to women and in the negative about her “sense that [her sexual orientation] might somehow change”).
231. Id. at 161.
232. Id. at 161–63.
233. Id. at 162.
234. Id. at 165.
235. Id. at 165.
236. Id. at 164.
237. Id.
238. Id. at 167.
239. Id. at 166–67.
240. See supra note 126 and accompanying text.
time and it’s with Kris.”

A couple of things are notable about Olson’s exchange with Stier. First, Olson wanted Stier to demonstrate that she was very convinced she was gay, undoubtedly because her sexual history suggested that she could switch the sex of her sexual partner unpredictably at any time. Second, in demonstrating that she was very convinced that she was gay, Stier presented the following argument:

I have been in love only once.
I have been in love with a woman.

Therefore, I am capable of falling in love with women only.

Both Olson’s question and Stier’s answer demonstrate separate but related assumptions that have operated silently as a part of the fight for gay rights. Olson’s purpose in his examination of Stier, and in the context of the Perry lawsuit as a general matter, was to secure marriage rights for Stier, Perry, and the other plaintiffs who are parties to the lawsuit. And while same-sex marriage is a gay rights issue, it is worth noting that Olson has suggested through this line of questioning that Stier should be afforded marriage rights if and only if her gay identity is stable.

Stier’s answer to Olson presents an additional opportunity to unearth an assumption that has animated same-sex-marriage litigation. That is the assumption that an individual’s attraction to one specific person demonstrates the individual’s attraction to other people who possess the person’s sex characteristic. For illustrative purpose, consider for a moment if Olson had asked Stier not how convinced she was that she was gay but instead how convinced she was that she would always be attracted to people with green eyes. In order to demonstrate to Olson that she was very convinced of this fact about herself, Stier’s answer would take the following logical form if she employed the same logic when answering Olson’s question about her sexual orientation:

I have been in love only once.
I have been in love with a person with green eyes.

Therefore, I am capable of falling in love with people with green eyes only.

When framed this way, Stier’s response seems strange. After all, it is very common to hear that an individual has partnered with someone who is not her “type.” Moreover, if an individual partners with someone who is not her type, she is not expected to change her type but can comfortably articulate that while she is typically attracted to people with blue eyes and continues to be, she has

chosen to partner with someone with green eyes. When the characteristic is eye color, or even race, an individual can talk about the difference between her general “type” and the characteristics of her partner to explain a difference between the two, if one exists.

But the rationale that Stier offered to substantiate her lesbianism signifies an assumption that rests at the core of the current conception of sexual orientation. Stier testified that because she had fallen in love only once, and because she had fallen in love with a woman, she was convinced that she was gay. It may be that Stier felt a more profound love for Kris Perry than she had felt for her late husband. But the way that Stier presented evidence of her sexual orientation demonstrated that she believed something to be true not only about her own sexual orientation but about the nature of sexual orientation, and that is that being (generally) gay and being attracted to a specific, single member of the same sex are connected.

Stier may have been convinced. She may have even become convinced because she fell in love one time with another woman. But if Stier, prior to meeting Kris Perry, had been attracted to people with blue eyes only, and Perry had green eyes, Stier would probably not encounter an interlocutor asking how convinced she was that she was now attracted to people with green eyes. If ever confronted with a question about Kris’s eye color, Stier could just explain that while she was generally attracted to those with blue eyes, she happened to fall in love with someone whose eyes were green. When the characteristic is sex, for some reason an individual will have difficulty explaining the difference between her general type and the sex of her partner. One might argue that sex, unlike eye color or even race, is not a type. Sex, one might say, is the essential characteristic on the basis of which individuals choose to associate intimately. For many—and for bisexuals—this is simply not true.

C. THE ESSENCE OF BISEXUAL DISCRIMINATION

The Apilado case and the dialogue between Olson and Stier in Perry not only demonstrate a shift away from the era of bisexual erasure, but also demonstrate a growing desire on the part of LGBT rights advocates to distance themselves from perceived instability in sexual orientation. Consider the details of the settlement in Apilado as an example: the case ultimately settled in exchange for the NAGAAA’s agreement to welcome an unlimited number of bisexual (and transgender) players into the softball league in the future and payment of an undisclosed fee to Apilado, Charles, and Russ.\textsuperscript{241}

But recall the NAGAAA’s message.\textsuperscript{242} The organization announced a purpose “to send a message through the annual Gay Softball World Series that athletes can play competitive team sports ‘as openly gay, lesbian, and bisexual

\textsuperscript{241} McDonald, supra note 9.
\textsuperscript{242} See supra note 202 and accompanying text.
individuals,’ and to ‘demonstrate that there are such men and women.’ In light of that message, it seems likely that, even under the terms of the settlement agreement, any prospective bisexual players will be required to declare openly their bisexuality in order to obtain league membership from the NAGAAA. This outcome may ameliorate the negative effects of the NAGAAA’s discrimination against some bisexuals (or at the very least those who self-identify as bisexuals). But this outcome would not have helped individuals like Apilado, Charles, or Russ. These three players did not declare their bisexuality to the NAGAAA before their dismissal from the league. They only answered questions posed to them about the sex toward which they were predominantly attracted, from which conclusions were drawn about whether they were gay and, on that basis, whether they could play softball in the league’s world series. In effect, the terms of the NAGAAA’s settlement to the Apilado case, coupled with its message, form a “Tell, Because We Won’t Ask” policy under which the organization may discriminate against those who have not declared that they are gay, lesbian, or bisexual.

The terms of the NAGAAA’s settlement with these players might protect from discrimination some prospective players who would have been excluded in the absence of these terms. But the NAGAAA’s new policy to include self-identifying bisexuals does nothing to protect prospective players who experience discrimination for the very reason that Apilado, Charles, and Russ did—because they failed to conform to the organization’s expectations about individuals’ sexual orientations.

The thing that “troubles society” about bisexuals is the extent to which they do not fit neatly into established sexual-orientation categories. Though this quality certainly complicates the task of protecting bisexuality, it is the quality about bisexuals—like coupling and copulation are for gays and lesbians—that differentiates them from the rest of society. By agreeing to create a new category within its membership roster for bisexuals, the NAGAAA has agreed to dedicate a new category to bisexuals who lack the essential quality of bisexuality. The NAGAAA’s new policy has the effect of protecting bisexuals who are “gay, but for the fact that they’re bisexual” just as the gay rights movement has protected homosexuals who are “straight, but for the fact that they’re gay.” And for this reason, the NAGAAA’s policy will not effect protection against discrimination on the basis of bisexuality.

The failure to protect self-identified bisexual employees in the United Kingdom—who, according to two recent surveys, felt that they endured more scrutiny from their colleagues at work than did homosexuals, and that this additional scrutiny fueled “the perception that bisexuals are unstable, unreliable,


244. See supra notes 189–91 and accompanying text.

245. See Case, supra note 102, at 1643; see also discussion supra section II.C.
and [even] un-promotable"—may present another instance of bisexual harm. For similar reasons, the immigration context might also discriminate on the basis of bisexuality in the application of its "sham marriages act." Pursuant to 8 U.S.C. § 1325, the United States Citizenship and Immigration Services (USCIS) prohibits a noncitizen from marrying a United States citizen for the sole purpose of gaining citizenship. In fact, the statute provides that, "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than [five] years, or fined not more than $250,000, or both." What's more, there is a presumption of marriage fraud that applies to a noncitizen who obtains any admission into the United States with an immigrant visa . . . procured on the basis of a marriage entered into less than 2 years prior to such admission . . . and which, within 2 years subsequent to any admission . . . shall be judicially annulled or terminated, unless the alien establishes . . . that such marriage was not contracted for the purpose of evading . . . the immigration laws . . .

In all subsequent deportation proceedings, a noncitizen in a marriage entered into within two years prior to obtaining lawful permanent residence because of the marriage, which is judicially annulled or terminated within two years after the lawful permanent resident’s (and former noncitizen’s) entry to the United States, has the burden of rebutting the presumption that the individual attempted to evade the immigration laws. The Board of Immigration Appeals (BIA) has required individuals to rebut this presumption by a preponderance of the evidence that the marriage was not entered into for the purpose of evading those laws. Moreover, courts reviewing BIA determinations of the fraudulence of such marriages hold individuals to an even higher burden of proof, requiring that they present evidence that is "so compelling that no reasonable fact finder could fail’ to find that [the individual] had a bona fide marriage." And where a marriage of this length had been annulled by a state court on the basis of a

246. See Chamberlain, supra note 12; see also Fae, supra note 12 (reporting interim results from the U.K.'s Workplace Survey, which found that "being bisexual leads individuals to face a number of challenges and pressures that are very different from those experienced by those who identify as lesbian, gay or even straight").


248. Id.

249. Id. § 1227(a)(1)(G)(i).


251. See Baliza v. INS, 709 F.2d 1231, 1233 (9th Cir. 1983) (noting that petitioner had been required at the administrative level to demonstrate "by a preponderance of the evidence that [his] marriage was not entered into in order to evade the immigration laws").

finding of fraudulent intent to evade immigration laws, an individual faced not only a presumption that the marriage was fraudulent but what was called a "presumption plus."253 In meeting these burdens of proof, individuals face an enormously difficult task, not only because the burdens are very high but also because evidence of the individual’s conduct after the marriage in question may relate to a determination of its fraudulence.254 And such determinations—when initially made by immigration officials—are "often arbitrary" and have been "based on racial prejudice and personal bias."255

In order to determine the validity of a particular marriage, "[i]mmigration officials have developed elaborate matrices of factual inquiry,"256 which are "intensely intrusive into the marital relationship."257 The goal of immigration officials in these situations is essentially to "determin[e] the level of marital intimacy that the spouses have achieved."258

Perhaps unsurprisingly, though exact numbers are unavailable, in 2005 it was reported "probable that thousands of foreign nationals ha[d] been granted asylum in the United States on . . . grounds [of sexual orientation, transgender identity, or HIV status] since 1994."259 The availability of asylum on these grounds has derived from the Immigration and Nationality Act’s provision for asylum by establishing "persecution or a well-founded fear of persecution on account of . . . membership in a particular social group,"260 membership that can be based on any noncitizen’s sexual orientation.261 Since 2006, courts have determined a noncitizen’s membership in a particular social group by determining the extent to which such membership was "visible."262 This determination of group membership on the basis of the “social visibility requirement” has been criticized because of its potential unfair application against those who are not “gay enough” to merit protection.263 Thus, while there is no reason to

---

253. See Rodriguez v. INS, 204 F.3d 25, 26–28 (1st Cir. 2000) (finding that petitioner had not sufficiently rebutted such a “presumption plus”).
254. See Bark v. INS, 511 F.2d 1200, 1202 (9th Cir. 1975).
258. Id.
261. See Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (affirming that “all alien homosexuals are members of a ‘particular social group’”).
believe that fewer noncitizens have experienced persecution on the basis of their sexual orientations, there may be reason to believe that these claims for asylum have become less likely to succeed.

Without the availability of asylum, gays and lesbians may seek other avenues through which to enter the U.S. Of course, "federal law does not allow American citizens and legal immigrants to seek United States residency for their same-sex partners." The incentive thus exists to marry a person of the opposite sex for the purpose of gaining admission to the U.S. Previous attempts by noncitizens who have identified as homosexual to gain admission to the U.S. by marrying a citizen of the opposite sex have failed because these marriages have been deemed "sham marriages."

The incentive for a bisexual to enter into such a marriage may be even more attractive than for a homosexual. The likelihood that a noncitizen who is not exclusively homosexual would meet the social-visibility requirement to make a successful asylum claim is lower than that applicable to an exclusively homosexual noncitizen. Moreover, the likelihood that any noncitizen is not exclusively homosexual is higher than the likelihood that the noncitizen is exclusively homosexual because, as studies of human sexuality have demonstrated, the likelihood that any individual—citizen or noncitizen—is exclusively homosexual is lower than the likelihood that such an individual is not exclusively homosexual. The absence of cases determining the validity for immigration purposes of marriages involving bisexual (or otherwise not exclusively homosexual) noncitizens is understandable. At this point the case of the bisexual noncitizen who married a member of the opposite sex, gained citizenship, subsequently divorced, and then coupled with a member of the same sex has not appeared in court but has been known to exist. The likelihood of success for such noncitizens is even lower than for exclusively homosexual noncitizens

---


265. Of course, such an incentive is not unique to the immigration context. Cf. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (citing In re Levenson, 560 F.3d 1145, 1150 (9th Cir. 2009)) ("[T]he court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.").

266. See, e.g., Garcia-Jaramillo v. INS, 604 F.2d 1236, 1239 (9th Cir. 1975) (finding that a marriage between a noncitizen who was "asked an inordinate number of questions concerning [his] homosexuality" and whose testimony indicated "that he was a homosexual before, during, and after his marriage" was entered into for the purpose of evading immigration laws).

267. See supra notes 260–63 and accompanying text.

268. See supra note 68 and accompanying text.

269. Telephone Interview with Ilona M. Turner, Attorney, Nat'l Ctr. for Lesbian Rights (Oct. 2009) (indicating that NCLR has received calls from bisexual individuals claiming that their marriages have been scrutinized by immigration officials).
whose marriages have been scrutinized by immigration officials. After all, the fact that such noncitizens identify as bisexual would likely cause those within the LGBT community to view them as fraudulent. The idea that the USCIS would view their marriages any differently seems even less plausible.

IV. THE PROTECTION OF LIVING IDENTITIES

Sexual-orientation law and the political LGBT rights movement prefer sameness over difference, hoping for clients who are as straight as possible, but for their homosexuality. Bisexuals differ from both heterosexuals and homosexuals for the reasons that Yoshino offered to explain their erasure. But bisexuals also differ from both heterosexuals and homosexuals because they can be defined along any combination of the axes conventionally used to define sexual orientation: desire, conduct, and self-identification. Moreover, bisexuals seem to be discriminated against because of the possibility, perhaps due to their definitional options, that they could redefine themselves at any moment. Bisexuality is, for this reason, a moving target, and moving targets cannot fit neatly into the categorical boxes that are so essential for sexual-orientation law, and for the broader enterprise of antidiscrimination law. The challenge, then, is to find a way for bisexual identity—which combines elements of identity status as well as conduct—to fit within sexual-orientation and antidiscrimination laws’ categories even though bisexual identity is predicated to some degree on conduct.

Parts IV and V aim to meet this challenge. Section IV.A reviews earlier proposals by Colker and Mezey, the former proposing a categorical solution and the latter a solution to define individuals by reference to their conduct alone. Section IV.B explains the reason that bisexuality has escaped antidiscrimination law’s protective ambit by reference to what Yoshino termed sexual orientation’s “one act rule,” which can be translated to mean that sexual orientation depends upon conformity between one’s status and one’s conduct. Section IV.C contextualizes the problem with protecting conduct within the broader landscape of antidiscrimination law, where Yoshino, in his other work, has described the law’s failure to protect conduct. Finally, section IV.D offers a model for the protection of status and conduct, which derives from the legal treatment of the LGBT rights movement’s other excluded group: transgender people. This model will serve as the basis for this Article’s ultimate proposal of sexual reorientation in Part V.

A. CATEGORIES VERSUS CONDUCT

In the legal literature, the work of three scholars—Colker, Mezey, and Yoshino—constitutes the conversation about bisexual invisibility. Colker and

270. See supra notes 125–27 and accompanying text.
271. See discussion supra section I.A.
272. Heron Greenesmith’s recent work is also notable. However, this section focuses on those scholars who have largely examined why bisexuals have been invisible, whereas Greenesmith’s work
Mezey, who wrote at roughly the same time, began the conversation about "'bi' categories," a category of categories that included bisexuality but that, for Colker, meant more generally the middle between extremes, where multiracial, bisexual, transgender, and bi-abled274 people resided. Mezey and Yoshino wrote about bisexuals only,275 in an effort to resist "the classification of persons according to a binary system of sexual orientation."276 All three scholars can be understood to have urged a revival of Alfred Kinsey's continuum, preferring it to a collection of sexual-orientation categories. Mezey and Yoshino both quoted the classic statement in which Kinsey eschewed a categorical understanding of sexual orientation:

> Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separated pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.277

In order to reach such a sound understanding, each of the three scholars offered a slightly different approach. The major difference between each of their approaches seems to be the extent to which each author embraced categories. Colker argued for the adoption of more and better categories by the law so that bisexuals could benefit from protections that were tied to membership in the monosexual categories of sexual orientation. Mezey and Yoshino, on the other hand, used bisexuality as a point of entry to critique the use of categorization to describe sexual-orientation identity at all. For them, sexual orientation was fluid and would better be described by reference to a continuum than to a collection of categories. This Article has already explained Yoshino's approach by elaborating on his theory of bisexual erasure.278 The sections that follow describe in further detail Colker's and Mezey's approaches.

1. Better Categories: Colker's Approach

Colker focused on the extent to which categories "perpetuat[ed] bipolar..." applies the theory of bisexual invisibility to specific examples in the law. See Greensmith, supra note 158.

273. Colker, supra note 1, at 1.
274. See id. at 1–2. Colker coined and defined the term “bi-abled” to mean “individuals who are neither disabled nor able-bodied.” Id. at 1 n.4.
275. See Mezey, supra note 2; Yoshino, supra note 3.
276. See Yoshino, supra note 3, at 356 n.5.
277. KINSEY ET AL., MALE, supra note 55, at 639; Mezey, supra note 2, at 103–04; Yoshino, supra note 3, at 356 n.5.
278. See supra section III.A.
injustice.”279 For Colker, categorization itself was not the enemy, but instead that categories were used inappropriately. An appropriate use for categories was, according to Colker, ameliorative. Colker argued for a “bi jurisprudence,”280 through which she advocated analyzing the experience of discrimination on the basis of hybrid traits (like bisexuality or multiracial identity), first to understand better the way we subordinate individuals and, second, to develop fair and effective ameliorative programs.281 Colker argued that grouping individuals into binaries but then forgetting to add a category for individuals who fall between those binaries has meant that we cannot ascertain the sorts of injustice that happen to those individuals.

In the sexual-orientation context, Colker warned against proposals—like that of Arthur Murphy and John Ellington282—to tie benefits to one’s identity as a “true homosexual.” This regime disadvantaged those who conducted themselves homosexually but may not have identified that way, like bisexuals.283 Colker argued for the importance of recognizing the harms that bisexuals suffered as a result of a commitment to binary categories of sexual orientation, and for this reason proposed the recognition of the bi category of bisexuality.

2. A Focus on Conduct: Mezey’s Approach

Mezey strongly opposed categories, at least as they have been applied in the context of sexual orientation. She made a two-part argument. First, she argued for the decoupling of classifications of sexual orientation based on identity from those based on acts.284 She invoked the example of Bowers v. Hardwick285 to make this point. In Hardwick, the Supreme Court concluded that the privacy right implied in the Due Process Clause did not confer a fundamental right to engage in consensual homosexual sodomy, when ruling on a facially neutral Georgia statute prohibiting sodomy. Despite the overruling of Hardwick by Lawrence286 since Mezey wrote, her example is still instructive. She examined the Court’s decision in Hardwick, noting the Court’s conflation of sexual-orientation identity and behavior. The Hardwick Court spoke of “homosexual sodomy,” despite the fact that the statute upon which its opinion was based was neutral as to the gender of participants.287 Because, as Mezey noted, heterosexu-
als perform acts of sodomy, the "[c]onduct, then," of which the Hardwick Court spoke, "only define[d] homosexual identity." 288 Thus, the conflation of acts and identities functioned to hurt only those whose identities would ordinarily be associated with the acts proscribed in the gender-neutral statute.

Mezey also argued for the elimination of sexual-orientation classifications based on identity. 289 This might seem like an argument that contradicts her first one, but it is not. Mezey made her first argument as a way to demonstrate the negative consequences that have flowed from conflating sexual-orientation identities and acts, in order to argue next that sexual orientation is really only about acts. Because Mezey argued that there was no "act that defines a class," and instead only acts in which individuals engaged no matter how they identified, she argued that "sexual identity classification based on acts could mean a more genuine and liberating correspondence between identity and acts that would dissolve gender as the locus of sexual identity." 290

She examined bisexuality in order to argue for such an alternative classification system because of bisexuality's power to demonstrate the conflation of sexual-orientation identities and acts. 291 The moment a bisexual performed a sexual act, argued Mezey, the bisexual's identity was subsumed into whatever identity that sexual act would indicate. 292 For example, a bisexual who had sex with a member of the same sex was considered homosexual and a bisexual who had sex with a member of the opposite sex was considered heterosexual. 293 Because the bisexual's acts do not track the way the bisexual identifies, classifying individuals' sexual orientations by reference to how they identify is not useful. And because sexual acts derive classification based on the identity-based classification system for sexual orientation, Mezey argued ultimately that sexual orientation really cannot be ordered into classifications. 294 After all, she argued, "the social and rhetorical categories of heterosexual and homosexual fail even

288. Id. at 123.
289. Id. at 126 (criticizing court decisions that have found sexual orientation to be a characteristic different from sexual conduct or behavior because they "essentialize[] sexual identity" and "bear[] little relation to reality" (citing Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), and Janet E. Halley, The Construction of Heterosexuality, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82, 91–97 (Michael Warner ed., 1993))).
290. Id. at 132. In this way Mezey's goal in proposing such a system of classification was different from Janet Halley's, which also proposed the differentiation of people based on acts instead of identity. See supra notes 132–34 and accompanying text.
291. See id. at 98 ("Bisexuality is one valuable way of accounting for and articulating the discrepancies between those people who call themselves heterosexual or homosexual and the sexual acts they actually perform."); see also id. at 111 ("The tremendous range of behavior that could conceivably be categorized as bisexual necessarily makes the category itself mostly theoretical; because bisexuality rarely, if ever, describes concrete behavior, it exposes the logical problem of moving too easily between rhetorics of act and identity. What, for instance, would bisexual sex as an act look like?").
292. See id. at 99 (arguing that "'bisexual practices' are absorbed into both heterosexual and homosexual identities").
293. See id. at 107 (describing this argument, which Mezey attributed to Kinsey).
294. See, e.g., id. at 122–23 (arguing that the Court in Hardwick reached its conclusion that the privacy right implicit in the Due Process Clause did not confer a fundamental right to engage in
remotely to approximate the actual range of human sexual activity, let alone human sexual desire.\textsuperscript{295}

B. SEXUAL ORIENTATION’S “ONE ACT RULE”

The reason that bisexuality has escaped the law’s protective ambit—whether as a result of bisexual erasure or a hypervisible effort to distance the LGBT rights movement from bisexuality—is that it presents an uncomfortable mix of identity and acts. Bisexual erasure had been observed when courts (a) conflated sexual-orientation status with conduct (b) so that heterosexuals who had engaged in homosexual conduct would not be considered homosexual. For example, Mezey argued that in \textit{Hardwick}, which held that Georgia’s gender-neutral antisodomy statute was constitutional and which was later overruled by \textit{Lawrence}, the Court framed the issue as one about \textit{homosexual} sodomy, thereby “wrenching heterosexual identity free of the act of sodomy while making sodomy the equivalent of homosexual identity.”\textsuperscript{296} And both Mezey and Yoshino argued that the military’s former prohibition against gays privileged sexual-orientation status over conduct with its “queen for a day” exemption,\textsuperscript{297} which permitted avowed heterosexuals who had engaged in same-sex sexual conduct to avoid dismissal by demonstrating that such conduct was unlikely to recur.\textsuperscript{298} In light of recent victories—specifically the invalidation of sodomy statutes and the repeal of DADT\textsuperscript{299}—both of these examples have been rendered moot. But the inapplicability of these early examples of bisexual harm does not mean that the more general problem that Mezey and Yoshino observed—the law’s conflation of an individual’s sexual-orientation status and conduct—has been resolved.

Consider, too, the following observation about the shift from bisexual erasure to bisexual spotlighting. Whereas earlier efforts to erase bisexuels conflated sexual-orientation status with conduct so that heterosexuals who had engaged in homosexual conduct would not be considered homosexual, current efforts to spotlight bisexuels (a) conflate sexual-orientation status with conduct (b) so that \textit{homosexuals} who have engaged in \textit{heterosexual} conduct are not considered homosexual.

Yoshino analogized the “one drop rule” of racial hypodescent to a “one act rule” of sexual-orientation hypodescent.\textsuperscript{300} The traditional rule of hypodescent

\textsuperscript{295} Id. at 101.
\textsuperscript{296} Id. at 123.
\textsuperscript{297} See id. at 129–30; Yoshino, supra note 3, at 376, 458–59.
\textsuperscript{299} See supra notes 92–93 and accompanying text.
\textsuperscript{300} Yoshino, supra note 3, at 392–93 n.211.
provided that "'one drop' of African blood categorized one as Black" and was applied by courts in the early part of the twentieth century, when almost all southern states had adopted some version of it, in order to determine an individual's slave status, responsibility to pay spousal or child support, or ability to marry in compliance with then-applicable antimiscegenation statutes.

Yoshino made the analogy between the traditional "one drop rule" and sexual orientation's "one act rule" because of a comment made by Kinsey. In connection with his discovery that human sexuality could be explained more accurately by reference to a continuum rather than to a division between two rigid categories, Kinsey observed that the group that had been classified as homosexual before his study had included anyone who had had even a single homosexual experience, which according to Kinsey meant that someone who had had even one homosexual experience would "[u]nder the law . . . receive the same penalty for a single homosexual experience that he would for a continuous record of experiences."

By focusing on the gray areas of sexual orientation, Kinsey was able to observe that the binary view of sexual orientation—namely, that sexual orientation is organized into two discrete categories: homosexual and heterosexual—did not reflect the lived experience of sexual orientation. He observed, contrary to the sexual-orientation binary, that sexual orientation was not black and white. The impact of the sexual-orientation binary, in theory at least, could have affected homosexuals and heterosexuals equally. But as Kinsey observed, its real harm was done by the imposition of legal penalties against anyone who had engaged in homosexual, not heterosexual, acts.

At the time Kinsey wrote, of course, laws banning sodomy had not yet been held to be unconstitutional, the idea that homosexuals could serve in the military was unheard of, and current antidiscrimination laws—which, despite criticisms, do in some instances protect against discrimination on the basis of sexual orientation—did not yet even exist. Yoshino expressed doubt about

---


the validity of Kinsey's comment because of the existence of a law like the “queen for a day” exemption to the prohibition against gays in the military, which “allow[ed] service members to argue that they should be retained despite homosexual acts because they [we]re really heterosexuals ... [by arguing that] the homosexual act was uncustomary behavior, unlikely to recur, consensual, and did not demonstrate a propensity to engage in other such acts.” Thus, a single “drop” of homosexual conduct would not—as it would in some states for racial-classification purposes—ruin one’s status in the dominant group and cause one to occupy status in the subordinate group. But, as Paul Finkelman has noted, not all rules of hypodescent measured literally one single drop of African blood. Perhaps Kinsey’s articulation of what Yoshino termed the “one act rule,” like the actual “one drop rule,” was not often applied in cases involving single acts.

Regardless, analogizing between the two rules helps to explain the shift from bisexual erasure to bisexual spotlighting. The purpose of the rule of hypodescent was to subordinate Blacks. Thus, whether a court counted one drop or multiple drops of blood, its purpose in counting drops was to preserve the integrity of the dominant White race. The reasons for preserving the White race, as opposed to the Black race, were not only that the former dominated the latter, but also that the rules were being administered by Whites. In the context of sexual orientation, despite recent victories, heterosexuals continue to dominate as compared to homosexuals. But though the earlier effort to erase bisexuals in the law was led by heterosexuals and anti-gay advocates, the later effort to spotlight bisexuals in order to expose and remove them from the law has been led by homosexuals and gay advocates. “[T]he rule of hypodescent worked to secure economic interests in slavery” because a rule of hypodescent assigned to “racially mixed persons . . . the status of the subordinate group.” Thus, in the same way that the “one drop rule” did not seek homogeneity neutrally as between Blacks and Whites, bisexual erasure sought homogeneity among heterosexuals and bisexual spotlighting has sought homogeneity among homosexuals.

Heterosexuals continue to be the dominant majority. Even so, the current
bisexual spotlighting effort, which aims to distance plaintiffs who identify with a homosexual status from any opposite-sex conduct in which they may have engaged, has effected a “one act rule” that operates exactly oppositely from the one Kinsey observed. In Kinsey’s time, same-sex conduct made an individual homosexual, subjecting him to all of the penalties associated with that status. Now, opposite-sex conduct seems to render an individual not worthy of homosexual status, which would prevent him from benefiting from gay-rights-movement victories.

But for two principal reasons, any rule that excludes bisexuals from protections against discrimination on the basis of sexual orientation is problematic, whether that rule preserves homogeneity amongst homosexuals or heterosexuals. First, a one-act rule that preserves homogeneity amongst homosexuals or heterosexuals effects the exclusion of bisexuals, who have experienced the social problem of discrimination, to which the law should respond. Second and related, a rule preserving the homogeneity of either monosexual category conflates sexual-orientation status with sexual-orientation conduct, thereby excluding from the definition of “sexual orientation” those groups, like bisexuals, whose status and conduct are not identical.

C. ANTIDISCRIMINATION LAW AND THE PROBLEM WITH ACTS

Yoshino observed that one of the reasons for the erasure of bisexuals by homosexuals was “a desire to retain the immutability defense . . . [which] has exonerative force because of the widely held belief that it is abhorrent to penalize individuals for matters beyond their control.” Because the bisexual chooses between the sexes when choosing a particular partner (or so the theory goes), the homosexual who does not have the same choice has an incentive to erase the bisexual because the bisexual threatens the believability of the homosexual’s claim that homosexuality is immutable. Immutability is important to homosexuals as a matter of constitutional doctrine because one of the three elements tested in determining whether a group constitutes a suspect class, therefore meriting Equal Protection analysis, is whether the group has a com-


314. See supra sections III.B–C (providing examples of discrimination harms suffered particularly by bisexuals).

315. See ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 30–31 (2008) (explaining that in order for antidiscrimination law to protect a group of individuals, that group must experience discrimination as a social problem).

316. Yoshino, supra note 3, at 405.

317. Yoshino acknowledged the possibility that individuals could be immutably bisexual but conceded that, despite this possibility, the bisexual would always be perceived to have had a choice about partnering. See id. at 405–06.
The importance of immutability has been contested widely, particularly in the sexual-orientation context. Though not identical, the debate about the importance of the immutability defense to combating discrimination on the basis of sexual orientation is closely related to the debate about whether to characterize sexual orientation on the basis of status or, instead, conduct. If one’s sexual orientation is immutable, then discrimination for being gay or lesbian (or bisexual, at least in theory) should be prohibited.

Tying protections to particular behaviors is not necessary under this theory because any discrimination against someone on the basis of their sexual-orientation status should be prohibited. Mezey argued for a classification system for sexual orientation that was based on acts as opposed to identity. Her reasons for so arguing were convincing, but as she undoubtedly knew, there is a high cost associated with moving to a sexual-orientation classification system based on acts alone. Other scholars have also argued for the importance of conduct-based classifications of sexual orientation (as well as of other protected traits, such as sex and race). In Yoshino’s other work, the highly acclaimed book Covering, he argued for the importance of protecting conduct, which I have summarized elsewhere as follows:

Civil rights lawyers and scholars no longer worry about status discrimination, often referred to as “first generation” discrimination. In the “second generation” of discrimination law, the “smoking guns—the sign on the door that ‘Irish need not apply’ or the rejection explained by the comment that ‘this is no job for a woman’—are largely things of the past.” The move from first to second generation discrimination has been characterized as “progress: individuals no longer need[] to be white, male, straight, Protestant, and able-bodied; they need[] only to act white, male, straight, Protestant, and able-bodied.”

Yoshino observed that the frontier issue for antidiscrimination law to resolve had become, in antidiscrimination law’s second generation, the protection of individuals who failed to cover the traits that were constitutive of their protected status. Stated otherwise, Yoshino observed that antidiscrimination law’s frontier issue is the protection of conduct as well as status. The impact of his proposal

---

318. See, e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986). The other elements tested are whether the group has been historically disadvantaged and whether it is politically powerless. Id.
320. See discussion supra section IV.A.2.
321. See, e.g., sources cited supra note 19.
has been enormous.\textsuperscript{323} He described the failure of antidiscrimination law to protect against the pressure to cover as its "hidden assault on our civil rights."

As Russell Robinson observed in connection with a critique of Yoshino's covering theory, Yoshino catalogued four ways that people tend to cover sexual-orientation status in particular: "(1) appearance, including gender performance or being a so-called straight-acting gay; (2) affiliation, avoiding gay social settings like Fire Island in New York, and gay culture more generally; (3) activism, eschewing the stereotype of the 'gay activist'; and (4) association, including avoiding public displays of affection."\textsuperscript{325} Yoshino also offered examples demonstrating the pressure to cover one's race\textsuperscript{326} as well as one's sex.

When discussing the example of covering sex, Yoshino focused primarily on the example of Ann Hopkins,\textsuperscript{327} the plaintiff in \textit{Price Waterhouse v. Hopkins},\textsuperscript{328} where the Supreme Court established the gender-stereotyping theory of sex discrimination. As Zak Kramer and I have summarized elsewhere,\textsuperscript{329} Hopkins was denied partnership at her consulting firm despite a strong work record.\textsuperscript{330} In rejecting Hopkins's candidacy, the partners at her firm criticized her for her lack of femininity, even offering her the following suggestion to improve her chances for partnership in the future: "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."\textsuperscript{331} Ruling in favor of Hopkins, a plurality of the Court developed a new theory of sex discrimination, which has come to be known as the gender-stereotyping theory of sex discrimination.\textsuperscript{332} According to the plurality, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."\textsuperscript{333} Under the gender-stereotyping theory, employers violate Title VII when they base employment decisions on an employee's failure to conform to stereotypical expectations of how men and women are supposed to look and behave.\textsuperscript{334}

Robinson criticized Yoshino's theory in \textit{Covering}, which Yoshino applied to

\begin{itemize}
  \item \textsuperscript{323} A LexisNexis search of law journals for "Yoshino and covering" produced 418 results on March 27, 2011.
  \item \textsuperscript{324} \textit{Yoshino}, supra note 19, at xi.
  \item \textsuperscript{326} \textit{See Yoshino}, supra note 19, at 111–41 (focusing on his own experiences as an Asian-American, as well as that of Lawrence Mungin, a Harvard-educated African-American lawyer who assimilated to White norms yet sued his law firm for racial discrimination).
  \item \textsuperscript{327} \textit{See id.} at 154–60.
  \item \textsuperscript{328} 490 U.S. 228 (1989).
  \item \textsuperscript{329} Glazer & Kramer, supra note 23, at 656.
  \item \textsuperscript{330} \textit{Price Waterhouse}, 490 U.S. at 233 (discussing work that Hopkins had done that partners had labeled "outstanding" and had remarked to be "virtually at the partner level").
  \item \textsuperscript{331} \textit{Id.} at 235.
  \item \textsuperscript{332} \textit{See generally} Zachary A. Kramer, Note, \textit{The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII}, 2004 U. ILL. L. REV. 465 (discussing the gender-stereotyping theory and applying it to cases involving lesbians and gay men).
  \item \textsuperscript{333} \textit{Price Waterhouse}, 490 U.S. at 251.
  \item \textsuperscript{334} Glazer & Kramer, supra note 23, at 656.
\end{itemize}
the categories of race, sex, and sexual orientation, on two principal grounds. First, Robinson argued that refocusing antidiscrimination law to protect against the pressure for minorities to cover the conduct that is taken to be constitutive of their group membership risks the reinforcement of stereotypes that have come to define members of that minority group. Second, Robinson criticized the covering theory for its failure to reflect the various sources of demands to cover. While Yoshino’s theory focused on the pressure to cover exerted by majority groups against minority groups (for example, straights telling gays not to dress flamboyantly, Whites telling Blacks not to wear cornrows in their hair, and men telling women to wear lipstick and skirts), Robinson uncovered two other sources of covering: the self, and minority groups. With respect to the covering demands that people tend to place on themselves, Robinson explained that “[m]ajority norms can be so ubiquitous that they structure the preferences of an individual without the person even being conscious of [their] impact.” Robinson also noted that in his account, Yoshino omitted minority-imposed covering. For example, Robinson offered the following example of race-based covering demands from within a minority group:

I have found that blacks often expect other blacks to be “less black” or “more black.” For instance, middle- and upper-class black people often turn up their noses at blacks who blast loud hip-hop music or “pimp their rides” (dress up their cars in an ostentatious manner) because these behaviors are deemed to be “ghetto.” These pressures stem at least in part from the fear that whites will see some blacks acting “ghetto” and think all blacks are “ghetto.”

Yoshino justified his focus on covering demands imposed by a majority on minorities in Covering’s final chapter. Yoshino explained:

In talking about classic civil rights groups, I have focused on the demand to conform to the mainstream because I think that for most groups (except women) these are the demands that most threaten our authenticity. But I am equally opposed to demands that individuals reverse cover, because such demands are also impingements on our autonomy, and therefore on our authenticity.

335. See Robinson, supra note 325, at 1815, 1847 (describing Richard Ford’s argument that incorporating the covering theory into the law “would require mostly white male judges to define which traits are authentically ‘black’” and would further “create a ‘regulatory effect’ on people who fail to adhere to norms of ‘authentic blackness’” (citing RICHARD T. FORD, RACIAL CuLTURe: A CRITIQUE 74–77 (2005), and Richard T. Ford, Race as Culture? Why Not?, 47 UCLA L. REv. 1803, 1810–11 (2000))).

336. Id. at 1848.

337. Id. at 1815.

338. See id. at 1819–26.

339. Id. at 1820 (footnote omitted).

340. Id. at 1824 (indicating that this excerpt could be read as a response to Robinson’s critique).

341. Yoshino, supra note 19, at 190–91.
Though Robinson accepted Yoshino’s justification for focusing on majority-imposed covering in *Covering*, he criticized Yoshino for “fail[ing] to tell us precisely why pressure to conform to the norms of a majority community are more threatening than pressure to conform to the norms of a minority community.”\(^{342}\)

Robinson’s criticisms of Yoshino were not meant to invalidate Yoshino’s covering theory, which Robinson explained turned on a metaphorical light bulb in his head, helping him to “understand the deep-seated but hard-to-articulate feelings of dissatisfaction that lingered long after [he] had come out of the closet about [his] sexual orientation.”\(^{343}\) He explained further that “[e]ven though everyone in [his] life finally knew that [he] was homosexual, some of [his] closest relationships remained stunted and repressed” because he did not feel free to share with his parents, for example, “how [he] fell in love for the first time, how [his] partner was planning to move to Los Angeles to be with [him], or how ultimately the relationship ended in sorrow.”\(^{344}\) Robinson had to cover his gay identity by hiding the “gay-related aspects of [his] life.”\(^{345}\)

For our purposes, it suffices to note that in *Covering*, Yoshino offered a powerful account of the harms that individuals face by having to silence the performance of certain conduct. Moreover, as Robinson noted in his critique of *Covering*, minority actors also demand that members of their own minority silence the performance of certain conduct.

### D. A MODEL FOR THE PROTECTION OF LIVING IDENTITIES

In *Price Waterhouse*, the Supreme Court protected conduct. Specifically, the Court held that Title VII’s protection against discrimination “because of ... sex” would apply in cases where an individual has been discriminated against on the basis of gender-nonconforming conduct.\(^{346}\) The logic in extending the application of Title VII’s prohibition on sex discrimination to cases involving gender nonconformity was that if Ann Hopkins, a woman, had been a man and had conducted herself as she had at Price Waterhouse, she would not have suffered the discrimination that she experienced.\(^{347}\) Thus, her discrimination was because of her sex because the same conduct would not have formed the basis for her discrimination claim had she been a member of the opposite sex.

---

342. Robinson, supra note 325, at 1824.

343. Id. at 1809.

344. Id. at 1810.

345. Id.

346. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”).

347. See id. at 258 (“Thus, even if we knew that Hopkins had ‘personality problems,’ this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. . . . We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.”) (emphasis added).
The gender-stereotyping theory introduced in *Price Waterhouse* has been extended to protect the other disenfranchised group within the LGBT rights movement: transgender people. In cases such as *Smith v. City of Salem* and *Barnes v. City of Cincinnati*, courts have accepted an application of the gender-stereotyping theory to protect transgender employees from discrimination. For example, Jimmie Smith was suspended from her job as a firefighter after she informed her supervisors that she intended to transition from male to female. At the time of her suspension, Smith was a lieutenant in the Salem Fire Department, in Salem, Ohio, where she had worked for over seven years without any negative incidents. By the time Smith decided to meet with her supervisors to tell them about her situation, she was already “expressing a more feminine appearance on a full-time basis,” and her coworkers had begun to ask questions and make comments about her changing appearance. Shortly after this meeting, Smith’s supervisors hatched a plan to get rid of her. Instead of terminating her directly, they planned to order Smith to undergo three separate psychological evaluations. They hoped that Smith would either refuse to follow the order or resign. If she refused to comply with the order, they planned to fire her for insubordination. After hearing about the department’s plan, Smith hired a lawyer, who contacted the department to inform it of Smith’s legal representation. Shortly thereafter, the department suspended Smith for a twenty-four hour shift.

Basing her claim on the gender-stereotyping theory that grew out of *Price Waterhouse*, Smith brought a sex-discrimination claim under Title VII. Smith alleged that she was discriminated against for failing to conform to stereotypical notions of how a man should look and act. In a break from a long line of cases concluding that transgender plaintiffs could not raise actionable sex-discrimination claims, the *Smith* court held that Smith’s transgenderism did
not prevent her from raising an actionable claim.\textsuperscript{363} According to the court, the
analysis in these older cases had been "eviscerated" by the Supreme Court's
decision in \textit{Price Waterhouse}, causing "employers who discriminate against
men because they... wear dresses and makeup, or otherwise act femininely [to be
classified as though they had] engag[ed] in sex discrimination, because the
discrimination would not [have] occur[red] but for the victim's sex."\textsuperscript{364}

In earlier work Zak Kramer and I have criticized the gender-stereotyping
model by which the employment-discrimination harms suffered by transgender
people have been redressed.\textsuperscript{365} Because some plaintiffs may be discriminated
against on the basis of their transgenderism—as distinct from their gender
nonconformity—we argued that transgender plaintiffs should be protected for
their transitional, transgender identity.\textsuperscript{366} We proposed a theory of transitional
discrimination, which would allow transgender victims of discrimination to
assert their transgender identities, rather than the sex classifications from which
they had run, in connection with their discrimination claims.\textsuperscript{367} But we made
sure to note that our introduction of a cause of action for transitional discrimina-
tion was not meant to displace, but instead to supplement, a claim based upon a
transgender employee's gender nonconformity, "to open up, not to close off,
avenues of available relief for discrimination's victims."\textsuperscript{368}

This Article's theory of sexual reorientation presents a theory of sexual-
orientation discrimination modeled on the gender-stereotyping theory of sex
discrimination. The gender-stereotyping theory has allowed Title VII's prohibi-
tion against sex discrimination to cover not only one's sex status, but also one's
conduct. For this reason, it can serve as a model—in the transgender context but
also in the traditional sex-discrimination context—for the protection of status

\begin{flushleft}
Arthur Andersen \& Co., 566 F.2d 659, 662–63 (9th Cir. 1977) (same); Voyles v. Ralph K. Davies Med.
Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) (same), aff'd, 570 F.2d 354 (9th Cir. 1978).
363. Smith, 378 F.3d at 574–75.
364. Id. at 573–74.
365. \textit{See Glazer \& Kramer, supra note 23.}
366. To be sure, Kramer and I intended for our proposed cause of action for transitional discrimina-
tion to supplement causes of action for discrimination on the basis of gender nonconformity for those
transgender individuals for whom both causes of action would apply. Because some transgender
individuals experience discrimination because of their transgenderism rather than because of their
gender nonconformity, a cause of action for transitional discrimination would capture the harms
experienced by these transgender individuals. \textit{See, e.g.,} Richard Pérez-Peña, \textit{A Lawsuit's Unusual
Devoureau, who was fired from his job as a part-time urine monitor because he refused his employer's—
who had not known Devoureau before he began presenting as a man—question about whether
Devoureau had "had any surgeries" on the basis of the employer's having heard that Devoureau was
transgender).
368. Id. at 664–65 ("[O]ur proposal that antidiscrimination law adopt an understanding of transi-
tional identity does not preclude a gender-nonconforming transgender person from claiming that she
was discriminated against as a result of her gender-nonconformity. Transitional identity is meant to
open up, not to close off, avenues of available relief for discrimination's victims.").
\end{flushleft}
and conduct.

V. SEXUAL REORIENTATION

The Cuddle Puddle was not the most popular clique at Stuyvesant High School in 2006, but they were not outcasts either. Whereas ten years prior in the same high school halls “you might have found a few goth girls kissing goth girls, kids on the fringes defiantly bucking the system,” the Cuddle Puddle was “a group of vaguely progressive but generally mainstream” seniors and juniors like Alair, who was “well known” and well-liked at school.369 In this clique, “[t]here [w]ere girls petting girls and girls petting guys and guys petting guys,” and they shunned labels. Ilia, a member of the Cuddle Puddle, explained that the orientation of the group was “not lesbian or bisexual. It’s just, whatever . . . .”370

These are the members of the “post-gay” generation.371 These are the individuals who make the law’s current definition of “sexual orientation” look stale and irrelevant. But even they cannot explain their own orientations or those of their friends. As they said, the orientation of their group was “just, whatever . . . .” But the law cannot simply ignore the dynamic nature of a category on which it relies to determine whether discrimination harms are actionable. Somewhere between the rigid categorical understanding of sexual orientation and an understanding of sexual orientation as “just, whatever,” there is an understanding of sexual orientation that reflects its dynamic, lived experience yet respects the law’s (and, arguably, humans’) need(s) for categories. This Part introduces a reconception of sexual orientation—a sexual reorientation.

A. GENERAL ORIENTATION, SPECIFIC ORIENTATION

This Article argues for the separation of sexual orientation into subcategories: it introduces and urges a distinction between an individual’s “general orientation” and an individual’s “specific orientation.” An individual’s general orientation is the sex toward which the individual is attracted as a general matter. An individual’s specific orientation is the sex of the individual’s chosen partner. In many cases the two orientations are identical, but for many bisexuals the two often differ.372

My argument, ultimately, is that the concept of sexual orientation is not as textured as it could be. Currently, sexual orientation is understood along a variety of axes—gender is of course the most obvious, but others include age,
species, fetish, power, and number. Oddly, it is to a certain extent taken for granted that individuals who possess a sexual orientation enter into relationships. But once individuals do enter into relationships, their sexual orientation becomes irrelevant because we assume that their orientation conforms to the orientation that this partnership signals. This was the phenomenon about which Mezey spoke when she observed “how often and how easily ‘bisexual practices’ are absorbed into both heterosexual and homosexual identities.” Thus, sexual orientation is currently understood by reference only to an individual’s single existence, or alternatively by reference only to an individual’s partnered existence. The current understanding falls apart, however, when applied to the obvious reality that individuals exist not only as individuals but also as partnered people.

An individual’s general orientation is the sex—or the sexes—toward which the individual is attracted as a general matter. Thus, one’s general orientation is the orientation one harbors toward the 99.9% of the world with whom one is not partnered. An individual’s specific orientation is the sex of the individual’s chosen partner. Whereas one’s general orientation may be toward those with blue eyes, or women, or both men and women, that same individual’s specific orientation—the attraction the individual possesses toward the particular person or persons with whom the individual has chosen to partner—may be toward someone with green eyes, or a man, or a woman. The distinction between one’s general “type” and the type into which one’s partner would fit—when the two differ, as they sometimes do—is an unremarkable distinction when applied to a partner’s characteristics that are not the partner’s sex. Moreover, the individual who generally likes people with green eyes does not feel pressure to then declare that the individual likes people with blue eyes after partnering with a blue-eyed someone. However, when a woman partners, for example, with a woman when she has previously partnered with a man, there seems to be pressure on her to reorient herself sexually, declaring that she is gay as opposed to either heterosexual or bisexual. Of course, the woman may argue that she is not bisexual, but only discovered her true sexuality later in life, as a result of meeting a woman with whom she desired to partner. I do not mean to argue that she is lying or that a discovery of one’s general orientation is impossible. I mean to argue only that the available vocabulary for talking about sexual orientation does not capture the experience of someone who believes that she is heterosexual or bisexual but is currently partnered with a woman.

B. APPLYING SEXUAL REORIENTATION

This section offers ideas about how to apply the distinction between general and specific sexual orientations to cases involving bisexual discrimination.

373. Mezey, supra note 2, at 99.
374. There should be a bar on top of the last 9 here, to indicate a recurring decimal. This is not a symbol that Microsoft Word, without an additional application, can generate.
First, this section discusses an application of the gender-stereotyping theory introduced in *Price Waterhouse* to cases involving sexual-orientation discrimination. Next, this section explains how the distinction between general and specific orientations would apply to cases involving bisexuality, as defined by desire, conduct, and self-identification.

1. A Theory of Sexual-Orientation Stereotyping

Sexual orientation is unlike sex in that not every state prohibits discrimination that is based upon it. But an opportunity exists in those states that do prohibit sexual orientation discrimination to apply the gender-stereotyping theory introduced in *Price Waterhouse* to sexual-orientation discrimination. The gender-stereotyping theory introduced by the Supreme Court in *Price Waterhouse* and applied to cases like *Smith* and *Barnes*, which involved discrimination against transgender employees, is an example of antidiscrimination law’s protection of status and conduct. After all, Ann Hopkins was protected against the discrimination that she suffered as a result of her masculine conduct.

But as has been shown, antidiscrimination law has had a difficult time protecting both status and conduct. And yet, the gender-stereotyping theory has been successful in redressing discrimination harms for gender-nonconforming individuals as well as transgender people. Thus it is worthwhile to pause and consider the qualities that differentiate gender stereotyping from other possible protections of status and conduct.

Ann Hopkins won her discrimination lawsuit against Price Waterhouse because her conduct was masculine and her sex was female. Therefore, because her sex was not male, the Court concluded that discrimination for her masculine conduct constituted discrimination on the basis of sex, within the meaning of Title VII. A transgender plaintiff such as Jimmie Smith was able to state an actionable discrimination claim against his employer because his gender expression (his conduct) was female, which did not conform to his birth sex (his status), which was male. Thus, even though as a general matter antidiscrimination law has been unable to protect both status and conduct, it has found a way to do so in cases that involve gender nonconformity. Cases that involve gender nonconformity have involved plaintiffs who have been discriminated against on the basis of that nonconformity. Bisexuals share this trait in common with plaintiffs such as Ann Hopkins or Jimmie Smith.

Whether bisexuals have been erased or spotlighted, the discomfort about them is the same—some monosexual group, whether heterosexuals or homosexuals, wishes to preserve the integrity of its group membership by failing to

375. See HUMAN RIGHTS CAMPAIGN, supra note 14.
376. See discussion supra section IV.C.
377. See discussion supra section IV.D.
378. See supra notes 327–34 and accompanying text.
379. See supra notes 349–64 and accompanying text.
recognize the possibility for bisexuality. This is further demonstrated by the applicability of the “one act rule” in the sexual-orientation context, where one or a small number of homosexual (in the case of erasure) or heterosexual (in the case of spotlighting) acts ruin an individual’s group membership in the monosexual group. Because individuals need not self-identify as bisexual in order to experience discrimination for being bisexual, bisexual discrimination could have happened to plaintiffs such as Sandy Stier, who might not identify as bisexual. In this way bisexual discrimination can be understood as discrimination on the basis of an individual’s conduct (for example, sleeping with a member of the same sex) failing to conform to an individual’s status (for example, heterosexual).

The law’s expansion of the definition of “sex” under antidiscrimination law to incorporate gender nonconformity can serve as precedent for the law’s expansion of “sexual orientation” under antidiscrimination law to understand orientation nonconformity. Orientation nonconformity, of course, entails the nonconformity of an individual’s specific orientation and an individual’s general orientation. Because the “one act rule,” whether enforced by heterosexuals or homosexuals, is predicated upon the conformity of orientation statuses and acts, this Article argues that it is fair to characterize bisexual discrimination as discrimination for such nonconformity.

2. Broadening the Definition of Sexual Orientation

The application of the gender-stereotyping theory to the sexual-orientation context breathes new life into antidiscrimination law’s definition of sexual orientation for two reasons. First, it protects against more discrimination that actually occurs on this basis. Second, it protects against discrimination on the basis of sexual-orientation status as well as sexual-orientation conduct, which is a problem not only in sexual-orientation antidiscrimination law but also in antidiscrimination law more generally.

By broadening the law’s definition of sexual orientation, Team D2 players Steven Apilado, LaRon Charles, and Jon Russ could successfully argue that the NAGAAA’s prohibition on having more than two heterosexual team members definitively did not apply to them. David Boies and Ted Olson could have skipped the portion of their direct examinations in which they inquired about the stability of their clients’ sexual orientations. Alternatively, if these attor-
neys asked their clients about their sexual orientations, these clients could answer that their specific orientations were homosexual but their general orientations, if applicable, were something else, such as heterosexual, bisexual, asexual, or something along Kinsey’s continuum. And by so admitting, plaintiffs would not risk exclusion by the LGBT rights movement.

Moreover, the prohibition of sexual-orientation nonconformity against an individual whose general and specific orientations differed would capture harms suffered under the policy instituted pursuant to the NAGAAA’s settlement agreement. A prospective league member whose general and specific orientations conflicted might argue that the NAGAAA’s policy demanded such conformity in its self-identification requirement for membership. The NAGAAA might respond that membership would depend only on a prospective member’s willingness to declare that s/he is gay, lesbian, or bisexual, and that any nonconforming conduct would not present a basis for ejection from membership. But of course, the ability to elicit such a response from the NAGAAA would demonstrate the effectiveness of this new theory of discrimination. Unlike its policy, a response such as this one from the NAGAAA would actually protect bisexuals who exhibit the characteristic about bisexuality that has caused society’s discomfort with it, namely the orientation’s failure to guarantee conformity between status and conduct. Similarly, the adoption of a theory of sexual-orientation nonconformity might provide an additional layer of protection for bisexual noncitizens accused of having entered into sham marriages for the purpose of gaining citizenship on the basis of their subsequent marriages to members of the opposite sex.

The application of the gender-stereotyping theory to the sexual-orientation context should not suggest that the only individuals whom this Article’s proposal protects are those whose status is stably heterosexual or homosexual. One might object to this aspect of the Article’s proposal because “the gender-stereotyping theory . . . has adopted a fairly rigid approach to a plaintiff’s sex and gender.” A corollary objection to the application of this theory to the sexual-orientation context would be that, in order to apply the theory, one would have to adopt a fairly rigid approach to sexual orientation. This objection is unproblematic because the fairly rigid approach to sexual orientation is the approach that the law currently uses. Thus at worst this application preserves the status quo with respect to sexual-orientation discrimination.

389. Importantly, this Article is aimed at the protection of any individual whose discrimination arises from the nonconformity between the individual’s sexual-orientation status and conduct, in light of this Article’s demonstration that discrimination has arisen against bisexuals on this basis.

390. See supra note 59 and accompanying text.

391. See discussion supra section II.B.

392. See discussion supra section V.B.1.

393. Glazer & Kramer, supra note 23, at 665 (citing Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 2–4 (1995) (criticizing sex discrimination law for assuming that male and female identities are different from masculine and feminine identities)).
C. SEXUAL REORIENTATION’S BROADER ADVANTAGES

Distinguishing between general and specific sexual orientations generates advantages for bisexuals, sexual-orientation law, the LGBT rights movement, and antidiscrimination law. This section provides three additional, broader reasons that sexual reorientation is a useful reformation of sexual-orientation discrimination law.

1. Naming’s Necessity

Though he offered substantive reasons for the erasure of the bisexual, Yoshino elaborated on the problem as one of words. He explained that at the outset of his seminar on Sexual Orientation and the Law, he led his students in a discussion about, among other things, why conversations about sexual orientation tend to focus exclusively on heterosexuality and homosexuality, to the exclusion of bisexuality. He even argued that “sexual orientation classifications that only used the two ‘monosexual’ terms ‘heterosexual’ and ‘homosexual’ were unstable and naive.” Yet as soon as the class moved on from this introductory discussion, the whole class—including Yoshino himself—continued speaking in terms of a heterosexual/homosexual binary. Yoshino said that he “found [him]self and the class falling back into the very ‘unstable’ usages [he] had worked hard to retire—specifically the usages of the words ‘heterosexual’ and ‘homosexual’ as mutually exclusive, cumulatively exhaustive terms.”

He explained further that efforts to “us[e] the word ‘queer’ instead of ‘gay,’ or [to] add[] the rider ‘or bisexual’ to ‘gay’ . . . were token and fitful.”

Perhaps because of this problem, “[m]any who would not deny that bisexuals exist when the subject of bisexuality arises can nonetheless revert to the straight/gay dichotomy when the topic shifts.” Carlos Ball has said that, “[i]n many ways, overcoming invisibility is the first step in successfully demanding basic civil rights.” And as I have argued before, the act of naming is an important step toward making visible those distinctions that even those who perceive them cannot express adequately before those distinctions are named.

---

394. See discussion supra section III.A.
396. Id. at 357–58 (citation omitted).
397. Id. at 358.
398. Id.
399. Id.
401. See Elizabeth M. Glazer, Name-Calling, 37 HOFSTRA L. REV. 1 (2008) (criticizing the practice of using gendered titles (for example, Mr. and Ms.) in the law-school classroom to refer to students who have not identified that they wish to be distinguished on the basis of their gender); Glazer, supra note 4 (urging scholars who write about the law as it relates to sexual orientation and gender identity to consider the words they use to refer to their constituent group); Elizabeth M. Glazer, Seeing It, Knowing It, 104 NW. U. L. REV. COLLOQUIY 217 (2009) (defending the need for the obscenity doctrine to make this distinction explicitly before the Supreme Court confronts a conflict between Lawrence v. Texas, 539
For this reason those who understand that bisexuals exist—and even Kenji Yoshino—"can speak at length about bisexuals at one moment and then, in the next, field a question such as 'Is X straight or gay?' without instinctively feeling as if an important possibility—the bisexual possibility—has been elided."402

This Article's chief contribution is a set of words. Words that could have helped Kenji Yoshino talk to his students about sexual orientation without having to resort to the very binary he rejected. And words that can help the LGBT rights movement, legislatures, and courts protect against discrimination on the basis of sexual orientation as it is actually lived, rather than on the basis of sexual orientation as the law has until now imagined it to be.

As a result, this Article may be perceived to offer something very small, for it simply introduces new names for subcategories of sexual orientation that describe the way that individuals already live their sexual lives. But the act of naming can be a transformative, albeit procedural, step in the process of understanding the substance of concepts that are named. Mihaly Csikszentmihalyi, regarded as one of the pioneers in the exploding field of happiness studies,403 commented on the fundamental importance of naming by invoking basic and powerful biblical examples:

The simplest ordering system is to give names to things; the words we invent transform discrete events into universal categories. The power of the word is immense. In Genesis 1, God names day, night, sky, earth, sea, and all the living things immediately after He creates them, thereby completing the process of creation. The Gospel of John begins with: "Before the World was created, the Word already existed . . ." . . . All these references suggest the importance of words in controlling experience. The building blocks of most symbol systems, words make abstract thinking possible and increase the mind's capacity to store the stimuli it has attended to. Without systems for ordering information, even the clearest memory will find consciousness in a state of chaos.404

In the sexual-orientation context, the names that authors use to identify those about whom they write diverge widely, and differ markedly from names used in

U.S. 558 (2003) and Miller v. California, 413 U.S. 15 (1973)); Glazer, supra note 306 (arguing that the obscenity doctrine should make explicit the distinction between sex and sexual orientation).


earlier writing. Rhonda Rivera wrote about “homosexuals.” Bill Eskridge has written about “gays.”

Mary Anne Case has written about “gay men and lesbians.” Chai Feldblum has written about “LGBT” people. Nancy Knauer has written about “queers,” a term she characterized as “the latest politically correct term to come from a movement that has advanced from ‘homosexual’ to ‘homophile’ to ‘gay’ to ‘lesbian and gay’ to ‘queer.’” Holning Lau has written about the “sexual minority,” and later about “SOGI minorities.”

To focus on one example, today, the word “homosexual” is one that is most often heard spoken by people who hate gay people, who think that gay people are ill, or that gay people have an “agenda.” One might argue that the name “homosexual”—as opposed to other names that authors and advocates have used—has developed a negative connotation. A recent poll conducted by CBS News and the New York Times showed that while 59% of a random sample of 1,084 adults nationwide said they supported “homosexuals” serving in the military and 34% strongly favored the same, 70% said they supported “gay men and lesbians” serving in the military and 51% strongly favored the same. In addition, the term may have particular appeal to an older generation.

405. See Rivera, supra note 53.
407. See Case, supra note 102.
408. See Chai R. Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, 72 Brook. L. Rev. 61, 63 (2006) (“I first want to make transparent the conflict that I believe exists between laws intended to protect the liberty of lesbian, gay, bisexual and transgender (‘LGBT’) people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws.”).
409. Nancy J. Knauer, Heteronormativity and Federal Tax Policy, 101 W. Va. L. Rev. 129, 142 (1998); see also Garber, supra note 39, at 62–66 (arguing that the usage of “queer” is preferable because of its inclusion of bisexuals).
413. See Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”).
415. See Todd W. Rawls, Disclosure and Depression Among Older Gay and Homosexual Men: Findings from the Urban Men’s Health Study, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 117, 129 (Gilbert Herdt & Brian de Vries eds., 2004) (finding that 21% of older gay men studied thought of themselves as homosexual rather than gay or queer or some other classification, and moreover, that 16.5% of men in their fifties, 19.8% of men in their sixties, and 51.3% of men age seventy or older thought of themselves as homosexual).
But "homosexual" is not the only name that authors and advocates in this field have abandoned. Even the abbreviation that includes lesbian, gay, bisexual, and transgender people—"LGBT"—has been criticized for not being inclusive enough.\footnote{See Lau, supra note 411.} The shift in naming trends in this area of scholarship may explain the presence in nearly every article of a qualifying footnote presenting to its reader "a note on terminology"\footnote{See, e.g., Angela Clements, Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion, 24 BERKELEY J. GENDER L. & JUST. 166, 170–71 n.19 (2009) ("A note on terminology: throughout this Article, I use ‘lesbian and gay’ instead of ‘LGBT’ intentionally in order to respond to a specific concern that sexual-orientation antidiscrimination protections may not reach some forms of discrimination against lesbian and gay workers."); Franke, supra note 393, at 32–33 n.130 (noting the author’s preference for the term “transgendered” to “transsexual”); Glazer, supra note 306, 1380 n.1 (circumscribing the essay’s focus on “‘gays and lesbians’ to the exclusion of other sexual minorities”).} in which its author sets forth definitions with which the author circumscribes the individuals whose protection the article addresses. Those qualifying footnotes become throat-clearing exercises with which scholars begin their lectures, defining the name that they will use and explaining why that name, as opposed to alternative choices, is the preferable name for the relevant constituent group. Of course, defining terms is common in many areas of academic discourse.\footnote{See Karen Gocsik, Writing: Considering Structure & Organization, DARTMOUTH WRITING PROGRAM, http://www.dartmouth.edu/writing/materials/student/ac_paper/write.shtml ("Define key terms, as you intend to make use of them in your argument. If, for example, you are writing a philosophy paper on the nature of reality, it is absolutely essential that you define the term for your reader. . . . Begin with a definition of terms, and from there work towards the declaration of your argument." (emphasis omitted)) (last modified July 12, 2005, 11:27:35 AM).} But there are some notable differences between the issue of naming in other legal or academic scholarship and in scholarship about the law as it relates to sexual orientation and gender identity.

First, there seems to be an anxiety that attends the writing of the qualifying footnote or the throat-clearing exercise in the area of LGBT rights. The hope seems to be that readers or audience members will agree with a scholar’s name choice and will not discount the substance of her article or talk on the basis of choosing a name that has fallen out of fashion. Second, the name choice in this area of scholarship is not merely stylistic but substantive. This second difference relates to the first; if choosing an unfashionable name was only a difference in style and not substance, query whether the scholar would care whether others agreed with her name choice.

The idea that naming is substantive is not new. Philosophers of language have for some time recognized and debated the importance of naming.\footnote{See SAUL A. KRIPKE, NAMING AND NECESSITY (2d ed. 1980) [hereinafter KRIPKE, NAMING AND NECESSITY]; SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., Blackwell 2d ed. 1997).} John Searle and Saul Kripke have debated the extent to which names are merely descriptions of things or are instead things in themselves.\footnote{See READINGS IN THE PHILOSOPHY OF LANGUAGE 560–61 (Peter Ludlow ed., 1997).} Searle argued that it is a
necessary truth, for example, that Aristotle has the properties commonly attributed to Aristotle such as being the teacher of Alexander the Great.421 Kripke argued in contrast that names must be “rigid designator[s],” meaning that they have the same meaning in all possible worlds.422 In this way naming was, for Kripke, necessary rather than contingent. They were contingent facts that Aristotle taught Alexander the Great, that Hitler was the man who succeeded in having more Jews killed than anyone else in history, or that a yard is the distance when the arm of King Henry I of England was outstretched from the tip of his finger to his nose. But when referring to Aristotle, Hitler, or a yard in a counterfactual sentence (for example, “[S]uppose Hitler had never been born”), the name (“Hitler”) still refers rigidly “to something that would not exist in the counterfactual situation described.”423 The name Hitler refers to something even though characteristics thought to be essential to Hitler could not be true if Hitler had never been born. Thus the name Hitler must rigidly designate the man Hitler because sentences presenting counterfactual situations continue to have meaning.

It is not my position that legal scholarship about issues that relate to these groups—whatever an author chooses to call them—needs to refer to them by only one name. It is also not my position that one particular name is better than another. But names are important. Although this Article cannot capture fully the debate amongst philosophers of language about the nature of naming, the existence of the debate suggests the importance of naming. Just because naming is basic—naming our children, our papers, and maybe even our cars424—is often the first step we take to give them life and to make them our own—does not mean that authors’ name choices do not affect the substantive nature of their claims. Of course, in some instances scholars of sexual-orientation and gender-identity law specifically delineate particular sexual minorities on which to focus their writing.425 In other instances, however, the name choice is not made because of a particular focus and is—and this is the problematic point—not discussed.

This Article, which addresses bisexuality, has proposed a name change to delineate subcategories within sexual orientation. Because naming is the first step toward making visible those who are not, and making people visible is arguably the first step in securing for them civil rights, this Article has perhaps proposed something pretty important. An open discussion about naming might

---

421. See Kripke, Naming and Necessity, supra note 419, at 74.
422. See id. at 77–78.
423. Id.
424. Bill Osinski, 4-Wheeled Love Affairs; Some Folks’ Cars Are Pampered Family Members, ATLANTA J.-CONST., Feb. 4, 2004, at IJJ (quoting popular-culture scholar Michael Marsden as saying that, “[h]istorically, it’s been true of a lot of Americans that they develop very personalized relationships with their automobiles,” and that “[i]f you do things like naming your car or decorating the dashboard like your fireplace mantel, you make it more than a piece of hardware”).
425. See, e.g., Flynn, supra note 115 (on transgender individuals); Greenberg, supra note 119 (on intersex individuals); Kramer, supra note 172 (on heterosexuals); Yoshino, supra note 3 (on bisexuals).
spur an open discussion about whether and how, for example, the rights of bisexuals and transgender individuals can or should be taken into consideration. After all, if one chooses the name “gays and lesbians” as opposed to “LGBT” or “SOGI,” one makes a choice about who is included and excluded from one’s domain. But only once we initiate a widespread conversation about naming can we highlight the substantive issues embedded in the names we choose. Those substantive issues may include the conflation of general and specific orientations, which may in turn explain discrimination against those for whom these newly named subcategories of sexual orientation are not identical. Conversely, the naming and attendant disaggregation of general and specific orientations may ameliorate such discrimination.

2. Preserving Categories

Our current vocabulary cannot save even the most well-intentioned individual from the trap of the heterosexual/homosexual binary. Thus, in proposing an alternative to that binary, one must be sensitive to this challenge. The distinction presented in this Article can overcome this challenge because the words that this Article introduces fit into the sort of rigid, binary, categorical structure that this Article argues against. Although one might argue that this aspect of the Article’s proposal is hypocritical, one might alternatively argue that this characteristic increases the proposal’s likelihood of adoption into the general vocabulary and collective consciousness. Moreover, the project of increasing bisexual visibility is one that has generated these sorts of hypocritical responses from all of those who have attempted it. Mezey admitted that, when trying to promote bisexual visibility, “[t]he challenge, finally, is pragmatic: to craft a reformulated vision of sexual identity that is both socially feasible and politically viable.” Colker conceded that “[c]ategorization under the law . . . is inevitable.” And Yoshino explained why his own logical and precise approach to sexual orientation was, while arguably an ironic way of approaching something that defies logic, a way of compensating for that defiance:

The logical approach of the article may be read as compensation for the often parrothy imprecise terms in which debates about sexuality in general and bisexuality in particular are conducted. Yet the fact that it may also be read as overcompensation is important. Sexual identity has always struck me as a kind of illogic, given that sexuality is such a powerful solvent of identity, a modality that expands the consciousness through shock and surprise. If this is right, then bisexuality may be the sexual identity that best reflects the oxymoronic nature of all sexual identity, insofar as bisexuality, too, is a contradiction, a class and its own dissolution.

. . . [I]f we are concerned about the “logical” regulation of sexuality as

426. See supra notes 394-402 and accompanying text.
427. Mezey, supra note 2, at 133.
428. Colker, supra note 1, at xiii.
failing to respect sexuality’s fluid and narrative nature, we might do worse than to begin by looking at the sexual identity—bisexuality—that best represents that nature.\textsuperscript{429}

Like others who have engaged with the topic of bisexuality, I wish to admit openly that in order to best represent the interests of those who have been excluded by the definition of sexual orientation, I have appealed to the definition’s most salient, and most frustrating, aspect, namely its refusal to define.

3. The Categorical Protection of Living Identity

Moreover, the distinction that this Article introduces between general and specific orientations answers the call in legal scholarship about sexual-orientation law to characterize sexual orientation by reference not only to status but also conduct.\textsuperscript{430} A general orientation makes reference to an individual’s sexual-orientation status, whereas a specific orientation describes the way the individual behaves with respect to a particular and current partner.

Arguments based on conduct, according to some, “more accurately reflect the reality of lesbian and gay lives.”\textsuperscript{431} But, as Cain observed, “the status/conduct distinction has met with minimal success in the courts . . . [which] may be explained in part by the fact that in most cases it is virtually impossible to make a claim that the discrimination occurred solely because of the plaintiff’s status.”\textsuperscript{432}

Classifying sexual orientation on the basis of status and not conduct is risky because of an uneasiness about tying protections to immutability and also because of the extent to which sexual-orientation status does not reflect the actual experience of human sexuality. But classifying sexual orientation on the basis of conduct and not status is also risky because it might be difficult to determine why some conduct and not other conduct is protected without reference to an individual’s sexual-orientation status.

Distinguishing between general and specific orientations is appealing because it characterizes sexual orientation by referring to an individual’s status as well as the individual’s conduct. An individual’s general orientation can be heterosexual, homosexual, or bisexual while the same individual’s specific orientation might express the individual’s act of partnering with someone whom the individual might not have been attracted to as a general matter.

The debate about protecting status versus conduct has found particular application in the sexual-orientation-discrimination context with regard to whether to protect an individual versus the couple. Another related longstanding debate has existed about how to manage the tension between individual and group rights.\textsuperscript{433}

\textsuperscript{429} Yoshino, \textit{supra} note 3, at 461.
\textsuperscript{430} See discussion \textit{supra} Part IV.
\textsuperscript{431} Cain, \textit{supra} note 47, at 1553.
\textsuperscript{432} Id. at 1627.
Group rights and individual rights are "[b]y their nature . . . intertwined." But group and individual rights are not identical to each other. "For example, an individual qua individual cannot demand self-government for herself only. But individuals can speak on behalf of their group. Thus, an individual Native American can assert a moral claim on behalf of her tribe, such as the moral claim to institutionalize Native American self-rule." This debate, and the tension that goes along with it, have found particular application in legal scholarship concerning the rights of gays and lesbians. It is of course possible to conceive of gay or lesbian identity individually (that is, one individual person can be gay or lesbian), but commentators have identified a few reasons why it might make sense to conceive of these identities relationally instead of individually. Consider, for example, the public accommodations context. Both Sandsals Resort and eHarmony at one time had policies that discriminated against potential customers on the basis of sexual orientation. At Sandsals, a resort for couples, the policy prohibited any person from sharing a hotel room with a member of the same sex. On eHarmony, a dating website, members could not search the website for members of the same sex. Though both companies eventually changed their policies each company had presumably instituted its initial policy on the theory that the policy did not violate public accommodations laws that prohibited discrimination on the basis of sexual orientation because it did not deny access to gay or lesbian individuals (as opposed to those same gays and lesbians in their coupled states). As Holning Lau has argued, defining "access" under public accommodations laws by reference to a gay or lesbian individual made little sense as applied to the problem of sexual-orientation discrimination in places of public accommodation. If the unit for purposes of analysis is the individual, Sandsals’s and eHarmony's policies did not deny access to gay individuals. Lau proposed to change the analytical unit for purposes of public accommodations law from the gay individual to the gay couple.

434. Lau, supra note 410, at 1284.
435. Id. (citing Peter Jones, Group Rights and Group Oppression, 7 J. Pol. Phil. 353, 354–55 (1999)).
436. See, e.g., id. (arguing that courts interpreting public accommodations statutes’ applicability to the problem of sexual-orientation discrimination should do so by reference to the couple, not the individual).
438. Lau, supra note 410, at 1272–73.
An individualist account of sexual orientation takes the individual as the analytical unit. This account makes intuitive sense because not every person who is gay is a part of a gay couple. However, as Case has argued, "[a]t some point, it seems, almost definitionally, coupling or the desire to couple must figure in same-sex orientation. In the words of the adage, 'It takes two women to make a lesbian." Thus, it also seems to make some sense to analyze at least some forms of discrimination against people on the basis of sexual orientation by reference to the couple instead of the individual.

For the purpose of engaging with this Article, one need not pick between the individual and the couple as analytical units. It merely bears noting that distinguishing between general and specific orientations satisfies concerns on both sides of this debate. One’s general orientation describes one’s individual sexual orientation, whereas one’s specific orientation describes one’s sexual orientation once coupled.

4. Protecting Against Covering Demands by the Majority and Minority

Lastly, distinguishing between general and specific sexual orientations has the potential to quell Russell Robinson’s concerns about Yoshino’s covering theory. As stated earlier, in Covering, Yoshino offered a powerful account of the harms that minority individuals face by having to silence the performance of certain conduct because of demands to do so by the majority. Robinson criticized Yoshino for failing to account for the fact that members of a minority also place pressures on their own minority members to silence the performance of certain conduct. This Article has demonstrated that sexual orientation law’s “one act rule” has been enforced by both heterosexuals and homosexuals. By distinguishing general from specific orientations, individuals have the freedom to sever their statuses from their sexual conduct. As a result, individuals can occupy a general-orientation status without fearing that their specific-orientation conduct will ruin their status. Moreover, by severing the relationship between status and conduct in sexual-orientation law, individuals can avoid pressures from both heterosexuals and homosexuals to cover constitutive traits. If the law adopts the reorientation proposal presented in this Article, the incentive to demand covering of nonconforming sexual conduct will disappear, whether that demand is placed upon bisexuals by homosexuals or heterosexuals. Such a demand is unnecessary if the law protects against discrimination on the basis of an individual’s specific orientation that fails to conform to an individual’s general orientation. Sexual reorientation names those aspects of sexual orientation—General and Specific Orientations—the tension between which has troubled members of the sexual-orientation majority and minority alike.

439. Case, supra note 102, at 1650.
440. See discussion supra section IV.C.
441. See id.
442. See discussion supra section IV.B.
443. See discussion supra section V.B.1.
CONCLUSION

This Article picks up where Colker, Mezey, and Yoshino—who theorized about bisexual erasure—left off by introducing a distinction between general and specific sexual orientations as a way to redefine the concept of sexual orientation under the law. The proposal presented in this Article should interest not only bisexuals but all people with a sexual orientation. Bisexuality represents what is uncomfortable about stagnant categories of sexual orientation, the kinds of categories that do not reflect the dynamic experience of sexuality. This Article has offered a vocabulary with which people can express a specific sexual orientation that differs from their general sexual orientation. Thus, the bisexual who partners with a member of the opposite sex need not identify as heterosexual, nor need the heterosexual who partners with a member of the same sex identify as homosexual. For many people the freedom to differentiate between two subcategories of sexual orientation is superfluous; their specific and general orientations are identical. But for individuals whose specific and general orientations differ—for example, the monogamous, partnered bisexual—this freedom can mean the ability to incorporate the range of their sexual experience into a single cohesive identity.

If adopted, this distinction could help to combat the harmful effects of bisexual erasure and bisexual spotlighting. Whether bisexuals have been erased or are hypervisible, the law has been unable to address the harms they suffer and the political LGBT rights movement has been reluctant to incorporate their interests. Bisexuals are different from gays and lesbians because bisexuals challenge the sexual-orientation binary to which gays and lesbians adhere. More particularly, bisexuals challenge that binary because their sexual orientation is a mix of status and conduct. Neither antidiscrimination law nor the LGBT rights movement has been able to accommodate the protection of individuals on the basis of their status as well as their conduct. Thus, it is unsurprising that bisexuals have been excluded from legal protection and political recognition. The observation that bisexual orientation is rooted in both status and conduct explains why bisexuals have continued to suffer harms even though they no longer seem to be erased. And the division between general and specific orientations addresses the ways in which bisexual orientation—along with any orientation that exists along a continuum of sexual orientation—is both status and conduct based. By adopting this distinction, courts, legislatures, and the LGBT rights movement can protect bisexuals from the harms they face. Moreover, antidiscrimination law can look to the conception of sexual orientation as a model for the protection of living identities, which it has failed to do not only with respect to sexual orientation, but also with respect to other classes deserving protection.