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Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation

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I. Introduction: A Political and Personal Prelude

In recent years, the acronym “LGBT” -- for “Lesbian, Gay, Bisexual and Transgender” -- has become a widely used shorthand term of reference for those whose sexual orientation or gender identity sets them apart from mainstream dual-gendered heteronormative society, and who too often fall outside the full protection of the law due to their sexual orientation or gender identity. Although

the term is meant to be inclusive of all sexual minorities, it is too often the case that the inclusive intent underlying the use of "LGBT" by civil rights advocates has been undermined by the less inclusive surrounding context of its use.

In the context of LGBT-rights litigation, bisexuals have been rendered largely invisible, from the bench[1] to briefs and court opinions. Almost without exception, gays and lesbians have been the exclusive focus of cases addressing sexual orientation discrimination, most recently with rights of same-sex couples described solely in terms of "gays and lesbians," but not bisexuals.

As to the other member of the "BT" contingent of "LGBT," transgender individuals have attained significant visibility and legal protections over the years. While not as prominent in legal discourse as the "LG" contingent, transgender individuals have been extended rights protections in a number of recent court decisions, with gender identity increasingly being recognized as a form of gender discrimination under Title VII, for example, even while sexual orientation discrimination continues to be generally unprotected under federal employment discrimination statutes.[2] Indeed, transgender litigants were among the first to litigate the issue of same-sex marriage equality and recognition, illuminating the complex role gender can play in various legal contexts (and perhaps begging the question of whether the courts should be in the business of defining gender for purpose of denying equal rights in the first place).[3] The accomplishments of transgender rights advocates

[1] There are currently no out bisexual judges on the state or federal bench. Aug. 23, 2014 "Pathways to the Judiciary" Panel, National LGBT Bar Association Lavender Law Conference, New York, NY. *See also* R.J. Thompson, *How does Judicial Diversity Impact Access to Justice for our Communities*, Lambda Legal Blog (June 18, 2014), http://www.lambdalegal.org/blog/20140618_judicial-diversity-impacts-access-to-justice.

[2] *See infra* section III.B.4.b.

[3] *See, e.g., Littleton v. Prange,* 9 S.W.3d 223 (Tex. App. 1999)(asserting marriage recognition rights in context of surviving spouse medical malpractice claim); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987)(male-to-female transgender individual sought marriage license to marry male partner, but was denied); *M. T. v. J. T.*, 355 A.2d 204 (N.J. App. 1976)(recognizing marriage of transsexual woman to her husband for purposes of marital support and maintenance obligations).

is due in part to an impressive transgender rights movement which includes national organizations such as the Transgender Law Center, the Transgender Law and Policy Institute, the Sylvia Rivera Law Project and various transgender rights programs within the larger LGBT rights organizations. As a result, while still being far from having attained full equal rights and necessary legal protections, transgender advocates are years ahead of bisexuals in organizing to ensure their presence is felt and their interests included in the larger LGBT-rights discourse.

Bisexuality,[4] in contrast, has become virtually the last contingent of the LGBT community that dare not speak its name in court, or at least so it would seem from the absence of bisexuality in LGBT-rights litigation and legal discourse. The reasons why bisexual invisibility erasure matters is manifold. As Part III of this article will address, the harms suffered by bisexuals as a result of being omitted from legal discourse and litigation range from the stigmatizing indignity of being rendered invisible or secondary members of the LGBT community to more tangible concrete harms, such as being denied custody or immigration rights due to adjudicatory bodies viewing bisexuality more suspiciously than other sexual orientations, or utterly failing to acknowledge its existence. Furthermore, most bisexuals have stories upon stories to recount about the emotional injury of being treated with suspicion, or worse, by members of the same community for whose behalf many of us have spent decades fighting.[5] And these are stories that beg to be told. As Professor Ruth Colker

[4] As have other bisexual scholars and activists, I have adopted bisexual activist Robyn Ochs' definition of bisexuality: "I call myself bisexual because I acknowledge that I have in myself the potential to be attracted – romantically and/or sexually – to people of more than one sex and/or gender, not necessarily at the same tim3e, not necessarily in the same way, and not necessarily to the same degree." *See e.g.*, Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years after Bisexual Erasure*; 17 CORDOZO J.L. & GENDER 65, 68 (2010)(quoting Robyn Ochs, *Selected Quotes by Robyn Ochs*, http://www.robynochs.com/writing/quotes.html); SHIRI EISNER, BI: NOTES FOR A BISEXUAL REVOLUTION 21 (2013)(commending Ochs' definition as "by far the broadest and most enabling definition of bisexuality that I've found to date").

[5] I could easily devote a law review article to recounting anecdotes about bisexual erasure, including, in my own case, stories about LGBT groups I have volunteered for that would not allow bisexuals a visible seat at the table, groups where I was treated with suspicion after coming out as bisexual or, in the case of one lesbian organization, even being flatly told that I wasn't allowed to join. While such personal anecdotes, as well as countless similar stories I have heard

wrote in the first ever law review essay on bisexual jurisprudence, personal narratives are essential to counter the pervasive failure to include bisexuals in LGBT politics and legal discourse, where the personal truly is political.[6] Colker's *Bisexual Jurisprudence* essay contains a poignant personal story and a reminder from Colker of the importance of the personal narrative in developing previously unexplored areas of jurisprudence: "The first contribution that bisexuality can make to jurisprudence is . . . to encourage us to avoid categorization and to tell stories relentlessly. Those stories are more illuminating than theoretical attempts to define categories such as bisexuality or lesbianism."[7]

As a bisexual member of the legal academy and bar, I agree and am grateful for Colker's bravery in paving this path with powerful arguments both political and personal, a path which will hopefully become more welcoming over time toward others whose lives and realities do not conform to stifling binary definitional boxes. There aren't very many of us in the legal academic community -- at least, not many who are out of the closet and willing to openly identify as bisexual.

The reasons for the bisexual closet are myriad. Too often the closet becomes a tempting refuge from pejorative assumptions about bisexuals made by even our own allies in the LGBT community. Often, bisexuals get weary of having to come out of the closet on a frequent basis to correct assumptions based on the sex of their partners. Such assumptions may be true of monosexuals (i.e., heterosexuals and homosexuals – those attracted to only one other sex), whose sexual orientation may be accurately assessed merely by the sex of their romantic partner. In

from other bisexual members of the legal and LGBT communities, are important, my focus in this article is on the broader impact and issues of bisexual erasure in LGBT litigation.

[6] Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127-28, 136-37 (1993).

[7] *Id*. at 128.

contrast, for bisexuals, the assumption that our romantic partners are accurate indicators of our sexual orientation is one that must be corrected on a regular basis.

In other words, while being in a same-sex relationship may coincide cleanly with a gay person's sexual orientation, and being in an opposite-sex relationship reciprocally coincides exactly with a heterosexual person's orientation, for a bisexual person, the assumption about sexual orientation based on the sex or gender of that person's date, or even permanent relationship,[8] is a flawed one. Bisexuals who wish to be "out of the closet" must frequently correct such assumptions: when dating someone of the opposite sex we must engage in the extra work of explaining how they are still bisexual, not heterosexual (or, as female bisexuals who go from same- to opposite-sex relationships are sometimes pejoratively called, "hasbians"[9]) and when dating someone of the same-sex, we must often correct the assumption that the same-sex relationships render us gay rather than bisexual. The constant burden of being the embodiment of a never-ending teachable moment requiring a perpetual coming out of a "double closet"[10] is, quite frankly, exhausting.

[8] Misunderstandings about bisexuality notwithstanding, even a bisexual person who is married to someone of the opposite sex and never is romantic again with a same-sex partner is still bisexual, to the same degree as a polyamorous bisexual person who has both a male and female romantic partner (which is actually a less common form of bisexual romantic relationships than the more traditional marriage model. *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 450 (2012)("Though reliable numbers are scarce, it appears that most bisexuals are, as one man put it, 'committed . . . to the institution of marriage.' Self-identified bisexuals in the 2008 General Social Survey were only 20% less likely to be currently married than self-identified heterosexuals. Diamond's longitudinal study of 'bisexual and unlabeled' women found that, by the end of ten years, 80% were "in a committed monogamous relationship," two-thirds of which were with men; 'of these, half resulted in marriage.' A study of active members of San Francisco's Bisexual Center--no bastion of homophobia--found that many participants were or had been married and that '[e]ven among those who were divorced, a substantial number expressed a desire to [remarry].'"(citations omitted))).

[9] "There is, in fact, a word for traitors: hasbians. It is a powerful pun that invokes the abyss of not being what you had been thought to be, of really being nothing." Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. at 117 (1995). *See also* Ruth Colker's personal narratives describing how she was derogatorily dubbed a "hasbian" after marrying a man, in, BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 23 and Colker, *A Bisexual Jurisprudence*, 3 Law & Sexuality at 129.

[10] *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1795 (1996)("The trope of the double closet marks the situation in which a person is a member of two minority groups for which the closet is a shaping influence.").

Even more exhausting is the need to speak out against negative stereotypes that at times rise to the level of even denying our existence entirely. It is a common criticism, for example, that someone who identifies as bisexual is confused, and merely going through a phase, on her way to her true gay or lesbian orientation. These and other demeaning assumptions about bisexuals unfairly permeate much of the dialogue that does exist about bisexuals.[11]

At this critical historical juncture in LGBT-rights history, it is imperative that bisexuals not be rendered invisible in civil rights battles against discrimination. Despite the fact that bisexuals have played important roles in the development of LGBT rights, we have often done so behind the scenes, presumed to be gay or straight unless we are willing to come out of the closet on a frequent basis to correct common false assumptions of monosexual orientation.

While, ultimately, the greatest responsibility lies with bisexuals to keep coming out and ensure our own visibility, a shared responsibility lies with our advocates to include us in LGBT-rights arguments and with courts to include us in LGBT-rights analyses and holdings without doing so in a pejorative manner.

At this moment in history when the basic fairness of treating individuals of all sexual orientations with equal dignity has gripped the heartstrings of America, it is time for bisexuals to demand and be accorded the same respect[12] and recognition as our gay and straight friends. It is undeniable that many rights have trickled down[13] from "gay rights" victories to the bisexual members of the LGBT community. In this regard, bisexuals certainly owe a great deal of gratitude to the gay rights movement. Nonetheless, it is also true that bisexual invisibility and exclusion have

[11] *See infra* Section II.A.
[12] *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003)("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects").
[13] *But see supra* Section II.A., discussing the fallaciousness of a "trickle-down rights" justification.

a detrimental effect on bisexuals, as well as on the broader LGBT community and on jurisprudential integrity.

Although bisexuals remain relatively invisible in the halls of both courthouses and the legal academy, there is a small but growing number of legal scholars who in recent years have addressed the phenomenon of bisexual invisibility in LGBT-rights discourse, as described in more detail in Part I of this article. This article surveys the bisexual jurisprudence scholarship to date, continues the dialogue, and examines the problem of bisexual erasure particularly in the context of recent litigation, including and beyond same-sex marriage litigation.

Part II of this article documents anecdotal and statistical evidence of bisexual erasure in LGBT litigation, as well as the origins of "bi erasure" as a subject of legal scholarship. I discuss various anecdotal examples bisexual erasure, including regrettable incidents in which both LGBT-rights lawyers and media covering same-sex marriage litigation have engaged in bisexual erasure, for example, by misrepresenting or explaining away the sexual orientation of litigants who did not fit cleanly into a pure homosexual category.

To supplement the anecdotal evidence of bisexual erasure, I conducted a survey compiling specific data on the relevant terminology used in LGBT-rights litigation. The results of this study, set forth in Part II, reveal an almost complete systemic erasure of bisexuals in briefings and opinions through the lack of any mention of bisexuals. Critically, in cases where the briefings have set the tone by mentioning "gay and lesbian" rights, or otherwise employed language that omitting reference to bisexuals, the courts have generally followed suit with similar non-inclusive language.

Part III addresses the negative consequences of bi erasure in LGBT-rights discourse and litigation. Such consequences, Part III explains, include problems with court opinions perpetuating inaccurate portrayals of the LGBT community as well asa myriad of other harms. This part address

both harms specific to bisexuals in contexts including immigration and family law; and harms to the LGBT community and to jurisprudential integrity resulting from the erasure of bisexuality from LGBT-rights discourse.

Finally, Part IV suggests a possible turning of the tide toward greater bisexual inclusion in LGBT-rights discourse and litigation, evidenced by (1) the increased use of more inclusive terminology by some courts, which falls short of explicit recognition of bisexuality as on par with lesbian and gay issues, but nonetheless implicitly keeps the door open for bisexual inclusivity; (2) the explicit recognition by one federal appellate judge that bisexuals are, like lesbians and gays, victims of marriage inequality, in an opinion that illustrates the utility of bi inclusion in legal analysis; and (3) the recent efforts of some LGBT organizations to be more inclusive of bisexuals in discourse and litigation, which has enabled the formation of the first ever national "BiLaw" organization. Ending on a positive note, I optimistically predict that the trajectory of justice will continue to become more inclusive in the future, with LGBT rights being accorded more meaningfully to all members of the LGBT community, and with the increased recognition that bisexuals are a meaningful part of that picture.

II. THE DOCUMENTATION AND DISCOURSE OF BISEXUAL ERASURE

This is a historic era of change and progress for LGBT rights, particularly in the area of marriage equality, which has been a dramatically and rapidly evolving area of litigation in recent years. While, as of the writing of this article, there are still a number of states that do not accord full marriage equality to same-sex couples,[14] the number is decreasing by the day, and the Supreme

[14] As of the writing of this article, thirty-five states and D.C. currently grant same-sex marriage rights to LGBT individuals. *See* http://www.freedomtomarry.org/pages/marriage-cases-seeking-supreme-court-review.

Court is poised in the near future to resolve the issue across the board for once and for all.[15] As society's acceptance of LGBT individuals has grown in the context of marriage equality and beyond, the body of LGBT-rights law has correspondingly developed into a holistic web of protections, an incomplete but growingly cohesive patchwork of legal rights and recognitions.

Despite the growing body of legal protections for LGBT individuals generally, there is a dearth of litigation in which the rights of bisexuals specifically have been addressed. Although the bisexuality of litigants has been noted in the rare, exceptional case,[16] bisexuality as an orientation just as worthy of protection as homosexuality has not been addressed in any substantive manner by courts in this country. There has been an absence of (acknowledged) bisexual parties in impact litigation and a general lack of reference to bisexuals in briefs and court filings addressing LGBT rights.[17] For the most part, and perhaps as a result, court opinions, in turn, have mirrored this lack of inclusive terminology in their corresponding opinions.

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[15] *See* United States v. Windsor, 133 S. Ct. 2675, 2698 (2013)(Scalia, J., dissenting)("The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case.").

[16] *See e.g.,* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446 (6th Cir. 1984):

> During the same period in the fall of 1974 the plaintiff told the same secretary that she, the plaintiff, was bisexual and that she had a female lover. She also informed the assistant principal of the school and several teachers who were personal friends that she was bisexual. In December the plaintiff had a meeting with the principal of Stebbins, the defendant DiNino, and he suggested that she resign. The plaintiff refused to resign and then told several other Stebbins teachers that she had been asked to resign because she was bisexual, and sought their support.

See also Dawkins v. Richmond Cnty Schs., 2012 WL 1580455 (M.D.N.C. May 4, 2012)("The Complaint alleges that Plaintiff is 'a bisexual/gay male'"), and *see* custody decisions described at Section III.A.2, *infra*.

[17] In the area of employment discrimination, Ann Tweedy and Karen Yeskavage have recently documented the lack of published cases addressing claims by bisexuals, and observing that even in those cases where bisexuals have brought forth employment discrimination claims, "it seems to be virtually unheard of for a bisexual plaintiff to succeed in such a claim on the merits." Tweedy et al., *Employment Discrimination against Bisexuals, supra* Note __.

A. The Origins of "Bisexual Erasure"

Although there has been a dearth of bisexual inclusivity in LGBT-rights litigation, there has been a growing discourse on bisexual issues in legal scholarship. Ruth Colker's original call for a bisexual jurisprudence has not gone unheeded by other legal scholars, a number of whom have added to the bisexual jurisprudence over the years and collectively developed a body of scholarship examining the problem of bisexual invisibility and erasure in law and society.

The bisexual invisibility discourse in legal scholarship began with Colker's 1993 article examining the need for a bisexual jurisprudence.[18] Two years later, Professor Naomi Mezey added to this dialogue.[19] In her 1995 article, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification*, Mezey challenged dichotomous hetero/homo-normative identity classifications and exposed the limitations of act-focused sexuality categories, spelling out how "homosexual conduct" -- the Court's focus in cases such as *Bowers v Hardwick* -- is a misnomer that excludes bisexuality and fails to capture the reality of homosexual and heterosexual conduct as well.[20] Mezey proposed a non-binary reclassification of sexual identity that deconstructs common couplings of identity and conduct and demands a more critical perspective about sexual identity that would embrace bisexuality and sexual fluidity beyond artificially exclusive dichotomies.[21]

The bisexual jurisprudence dialogue continued through subsequent legal scholarship by Colker and Mezey,[22] and was eventually joined by other legal scholars. In 2000, Professor Kenji

[18] Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127.
[19] Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification*, 10 BERKELEY WOMEN'S L. J. 98 (1995).
[20] *Id*. at 102-03, 122-32.
[21] *Id*. at 99-100, 132-33.
[22] *See* RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 15-38 ("A Bi Jurisprudence")(New York University Press, 1996); Naomi Mezey, *Response: The Death of the Bisexual Saboteur*, 100 GEO. L.J. 1093 (2012); Ruth Colker, *Response: Hybrid Revisited*, 100 GEO. L.J. 1069 (2012); Naomi Mezey, *Erasure*

Yoshino continued the bisexual jurisprudence dialogue with his article *The Epistemic Contract of Bisexual Erasure*,[23] which coined the phrase "bisexual erasure" (or "bi erasure").[24] Following the work of Colker and Mezey in his discussion of bisexual invisibility, Yoshino attributed that invisibility to the common (if subconscious) interests gay and straight communities may share in minimizing the existence of bisexuals through various forms of bi erasure, and explored possible motivating factors underlying bisexual invisibility.[25] Yoshino explained that invisibility of bisexuality in LGBT litigation cannot fairly be justified by reference to demographics, because bisexuals constitute a large percentage of the LGBT population.[26] Thus, their invisibility in American law is vastly disproportionate to their actual existence, and more accurately classified as "bisexual erasure."[27]

The most recent demographic data on LGBT populations bears out Yoshino's estimations at the turn of the century that the number of bisexuals within the LGBT community is significantly higher than one might gather from their lack of mention in litigation. Of the millions of individuals identified as LGBT,[28] by all recent counts, bisexuals are comparable in size to gay men and lesbians, and bisexual women outnumber lesbian women. For example, a recent Pew survey of LGBT individuals estimated that 57% identify as gay or lesbian, while 43% identify as bisexual; a Gates survey estimated that 48% identify as gay or lesbian, while 52% identify as bisexual; and a GSS

and Recognition: The Census, Race and the National Imagination, 97 NW. U.L. REV. 1701 (2003); Ruth Colker, *An Embodied Bisexual Perspective*, 7 YALE J. L. & HUMAN. 163 (1995).

[23] 52 STAN. L. REV. 353 (2000).

[24] Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 361, 363-88.

[25] Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 356-430.

[26] *Id.*

[27] *Id.*

[28] By the count of Dr. Gary Gates of the Williams Institute, 9 million (or 3.8%) adult Americans identify as lesbian, gay, bisexual, or transgender; 19 million Americans (or 8.2%) have reported engaging in same-sex behavior, while 25.6 million (or 11%) have reported same-sex sexual attraction. Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual and Transgender*, The Williams Institute (April 2011), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender/ .

(General Social Survey) data estimated that 47% identify as gay or lesbian, while 52% identify as bisexual.[29] The Pew survey further reported that 31% of women surveyed identified as bisexual, while only 20% identified as lesbian; the Gates survey reported that 33% identified as bisexual and 17% as lesbian; and the GSS survey reported that 37% identified as bisexual and 22% as lesbian.[30]

While exact numbers are debatable, the general point is relatively indisputable: any invisibility of bisexuality in LGBT discourse cannot be explained in terms of bisexuals' nonexistence. Rather, bi invisibility may be attributable to a lack of *awareness* of their existence, caused, perhaps, by bisexuals being disproportionately more likely to be "closeted" than gays and lesbians. To wit, while only 28% of those who identify as bisexual describe themselves as out of the closet, a substantially higher number of gays - 77% of gay men and 71% of lesbians - are out of the closet. That said, it is doubtful that LGBT-rights attorneys, in framing their arguments, leave out references to bisexuals because they do not believe that bisexuals exist.

So why the omission? Why, at this exciting juncture in LGBT civil rights history where the trajectory toward equal rights continues steadfastly every day, is there a continued reluctance to include reference to bisexuals in LGBT-rights litigation?

Yoshino offers a number of explanations for the cause of bisexual erasure, including gay and straight communities fearing that bisexuals threaten the stability of their own identities, as well as falsely associating bisexuality with dangers such as HIV concerns, assumptions of non-monogamy, and the perception that bisexuals are assimilationists who can avail themselves of "heterosexual privilege."[31] In addition to outlining various causes of bisexual erasure, Yoshino

[29] WALLACE SWAN, GAY, LESBIAN, BISEXUAL AND TRANSGENDER CIVIL RIGHTS, CRC Press, 2014.
[30] *Id.*
[31] *See* Mezey, *Dismantling the Wall*, 10 BERKELEY WOMEN'S L.J. at 117-18 ("'the lesbian and gay community abounds with negative images of bisexuals as fence-sitters, cop-outs, closet cases, people whose primary goal in life is to retain 'heterosexual privilege,' power-hungry seducers who use and discard their same-sex lovers like so many

identifies three forms of bisexual erasure: 1) categorical class erasure, through which some contend there is no such thing as bisexuality at all, 2) individual erasure, such as when celebrities come out as bisexual but are nonetheless reported as being gay rather than bisexual, and 3) delegitimization, i.e., minimizing the bisexual identity through disparaging stereotypes such as describing bisexuals as "fence-sitters," confused, unstable, or promiscuous.[32]

LGBT-rights attorneys cannot fairly be accused of engaging in the third type of erasure in their briefings, which are not the least bit hostile toward bisexuals in tone. Regardless, the bisexual invisibility in their briefing documented in the Appendix of this article may be attributable to strategic motivations for bisexual exclusion. Bisexual erasure in litigation could, perhaps be the result of advocates' efforts to offer the courts what they view as more palatable, straightforward messaging. Even if an intentional strategic choice to omit bisexuals, the intent may be relatively benign, based on the assumption that omitting bisexuals will not hurt them because, eventually, the rights gained by gays as a named class will trickle back down to the unnamed bisexuals.

A "trickle down rights" justification for bisexual erasure, however, is not so different from the now widely-decried similar excuses made for leaving transgender protections out of earlier versions of the Employments against Non-Discrimination Act,[33] for which even those groups originally proposing a "non-inclusive" ENDA have now apologized.[34] Furthermore, such a shortsighted strategy that is overly focused on winning immediate battles leads to missed

Kleenex'")(quoting Lisa Orlando, *Loving Whom We Choose*, in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT, at 223, 224 (1st Ed. 1991)).

[32] Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 395-99.

[33] *See* Glazer, *Sexual Reorientation*, 100 GEO. L.J. at 1015-16 (describing exclusion of transgender people from various drafts of ENDA, until increased public support for trans-inclusivity led to a more inclusive version of the bill).

[34] *See* Chuck Colbert, *HRC Apologizes to Trans Community, Pledges Push for Broad LGBT Bill*, BAY AREA REPORTER (Sept. 11, 2014), http://www.ebar.com/news/article.php?sec=news&article=70003.

opportunities that can be critical for more meaningful long-term successes in securing rights and in rectifying fallacious gender jurisprudence, as discussed in Section III. B.4, *infra*.

Since Yoshino dubbed the phrase "bi erasure," several other legal scholars, including Elizabeth Glazer,[35] Ann Tweedy,[36] and Michael Boucai[37] have engaged in substantial discussions of bisexual erasure in their legal scholarship, along with a scattering of advocates outside the academy who added their voices to the dialogue within law journals.[38] In their bi erasure articles, Glazer describes the erasure of bisexuals in terms of insufficient paradigms of sexual orientation, Tweedy documents unique employment discrimination hurdles faced by bisexuals, and Boucai takes on the problem of bisexual erasure in the context of same-sex marriage litigation.[39]

Boucai's article describes bisexuality as "'virtually invisible' in same-sex marriage litigation," and criticizes what he describes as "'LGBT' advocates' meticulous avoidance of the subject" of bisexuality.[40] Boucai suggests specific reasons underlying this strategic bisexual erasure in marriage litigation, including how bisexuality is viewed as undermining the arguments that discrimination against same-sex couples is anti-homosexual discrimination, that same-sex marriage bans are sexual orientation discrimination, and that obtaining heightened scrutiny for LGBT litigants' claims requires successful application of immutability principles.[41] One by one, Boucai rebuts each of these justifications for bisexual erasure. He points out how same-sex marriage

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[35] *See* Elizabeth Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997 (2012).
[36] *See* Ann E. Tweedy and Karen Yescavage, *Employment Discrimination against Bisexuals: An Empirical Study*, ____ WM & MARY J. WOMEN & L. ____ [forthcoming]
[37] *See* Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415.
[38] *See, e.g.,* Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years after Bisexual Erasure*; 17 CORDOZO J.L. & GENDER 65 (2010); Note, Katherine Francys Lambrose, *Getting Back to Sex: The Need to Refine Current Anti-Discrimination Statutes to Include All Sexual Minorities*, 39 STETSON L. REV. 925, 942-49 (2010).
[39] Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2014).
[40] *Id*. at 452-53.
[41] *Id*. at 419-20, 460-72.

bans apply regardless of sexual orientation, for example, and he contends that even if bisexuality were somehow viewed as less immutable than other sexual orientations, which is highly questionable, immutability is no longer required for heightened scrutiny in current constitutional jurisprudence.[42]

Although varying in focus and analyses, the legal scholarship addressing bisexuality in the law has generally reflected a general consensus that the erasure of bisexuals in LGBT discourse is a significant problem.

B. Anecdotal Evidence of Bisexual Erasure in LGBT Litigation

Bisexual erasure scholars have collected and presented anecdotal evidence of bisexual erasure, which has at times been perpetuated even by advocates of LGBT rights. In her *Bisexual Jurisprudence* article, Ruth Colker tells the story of how, during a 1992 symposium, the ACLU Lesbian and Gay Rights Project presented as a seminal gay rights victory the case of *Rowland v. Mad River Local School District*, involving the vindication of a school guidance counselor who successfully sued upon being fired when she came out to her employers. Colker recounts how, at a Law & Sexuality symposium, even while hailing *Rowland* as a landmark case vindicating the right to be out about one's true sexual orientation, the (then)[43] ACLU Lesbian and Gay Rights Project director reportedly misrepresented the plaintiff's true sexual orientation when he described her as a lesbian although she had in fact been fired for coming out as *bisexual*.[44] Thus, while he

[42] *Id*. at 464-72.
[43] Not only is the director no longer the same, but the project these days has a more bi inclusive name as well; it is now the ACLU LGBT Project, *see* https://www.aclu.org/lgbt-rights, and is directed by Louise Melling, *see* https://www.aclu.org/aclu-centers.
[44] *A Bisexual Jurisprudence* at 134, citing in part Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446 (6th Cir. 1984). *See* language from *Rowland* unambiguously describing plaintiff as bisexual, *supra* note 16.

"believed *Rowland* was a very important case in the field of lesbian and gay rights, he did not acknowledge that it, in fact, involved a bisexual."[45] This example of individual (if benign in intent) erasure by an LGBT-rights organization is particularly unfortunate in light of the dearth of employment discrimination cases since then that bisexual victims of employment discrimination have been able to successfully bring, despite their numbers being comparable (and arguably greater, in the case of openly bisexual employees) to gays and lesbians who suffer employment discrimination.[46]

The conflation of bisexuality with homosexuality has occurred in court cases as well, with particularly significant and troubling results in the instance of the Supreme Court itself engaging in bisexual erasure in *Romer v. Evans*.[47] In that case, the text of Colorado Amendment 2, which the Court ultimately struck down, by its terms prohibited any "Protected Status Based on Homosexual, Lesbian or Bisexual Orientation."[48] Despite the amendment's text explicitly including bisexuals, however, the Court "subsumed bisexuals into the homosexual category, noting that it would refer to the 'named class' protected by the ordinances 'as homosexual persons or gays or lesbians.' Thus, the only references to bisexuals in the opinion occur in the quoted language of the ordinances and Amendment 2; when the Court speaks for itself, it speaks solely about homosexual persons."[49] As Natasha Silber describes, "by structuring the named class as homosexual persons, and excluding bisexuals," the Court in *Romer* "reified the construct of the gay-straight binary."[50]

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[45] *Id.*
[46] See generally discussion of employment discrimination against bisexuals in *Tweedy* et al., *Employment Discrimination against Bisexuals: An Empirical Study*, *supra* n. ____.
[47] 517 U.S. 620 (1996).
[48] Colorado Amendment 2 (former Colo. Const., Art. II, §30b).
[49] Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 367.
[50] Natasha J. Silber, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1899 (2013).

As revealed in this article's Appendix, which traces the evolving terminology of LGBT litigation, the word "bisexual" almost entirely disappeared from the face of all subsequent Supreme Court opinions addressing LGBT rights following the Court's litigant-approved bisexual erasure in *Romer*. In contrast, prior to *Romer*, in cases where LGBT-rights litigants themselves had been bi-inclusive in their brief-drafting, so too had the Court been.[51] *Romer* thus marked an historic and disturbing shift in jurisprudential linguistics, the point at which bisexuals were erased from the face of Supreme Court litigation addressing sexual orientation and the rights of LGBT individuals and same-sex couples.

More recent examples of bisexual erasure in LGBT-rights litigation are similarly troubling. Yoshino and Colker both have described, for example, a troubling line of questioning that Attorney Ted Olson subjected his own witness, Sandy Steir, to during the Proposition 8 trial leading to the Supreme Court *Perry* case. In that case, Steir was the wife of Kris Perry; the two women were among those couples challenging California's same-sex marriage ban. However, Steir was not what some call a "gold star" lesbian, i.e., a lesbian who has never been in a single heterosexual relationship.[52] To the contrary, she was previously married to a man before meeting Kris, which came up at trial. On the stand, Olson subjected Steir to invasive questioning about her orientation, apparently to preemptively address question the State might raise, demanding of his client, "How

[51] *See* Appendix, especially data for *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

[52] *See* Kathy Belge, *Gold Star Lesbian*, http://lesbianlife.about.com/od/comingout/g/GoldStar.htm ("A gold star lesbian is a lesbian who has never slept with a man and has no intention of ever sleeping with a man"). *See also* Carol Queen, *The Queer in Me*, in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT, at 19-20 (1st Ed. 1991)("We are not divided into straight and gay peoples. Visualize Kinsey's famous het-homo continuum. Bisexual begins the minute we step off the zero, heterosexual end. We don't hit unambiguous dry land again until we get to Six, at the other side of the ocean, where gold-star gays and lesbians dwell. Some of us, to be sure, swim right to it. For the rest of us, perhaps the journey, not the destination, is the thing").

Ironically, the very use of the categorization "gold star lesbian" as a way to separate out "pure" lesbians from those who have dated men itself is a form of bisexual erasure, in that it subsumes the bisexual identity within the categorization of non-gold star lesbians.

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." [53] In response, Steir explained away her previous marriage by testifying that the only time in her live she had fallen in love, it was with Kris Perry. [54] Under Olson's questioning, she disavowed having ever been in love with her ex-husband.[55]

In this exchange, it is not Steir's answer that is troubling so much as Olson's line of direct examination, which begs the underlying question: would it have mattered if Steir had answered that she had in fact been in love with her husband when she married him, just as she was now in love with Kris Perry, because she was, in fact, bisexual? Should it have mattered that she was previously married to a man, and whether she had been in love with him? A paramount argument for same-sex marriage equality, after all, is that the fundamental right to marry applies to all people, regardless of sexual orientation. And yet, the presumption implicit in Olson's line of questioning is that only if a party to a same-sex partnership is 100% homosexual is she or he entitled to equal marriage rights.

In at least two other incidents, bisexuals have been erased from the face of recent same-sex marriage litigation.

In one incident, during the 2005 *Marriage Cases* litigation challenging the sufficiency of California's Domestic Partner Act, the plaintiffs challenging the lack of full marriage equality provided by the Act engaged in bisexual erasure when they paraphrased the state's finding that "many lesbian, gay, *and bisexual* Californians have formed lasting, committed, and caring

[53] Transcript of Record at 166-67, Perry, 705 F.Supp.2d 921 (No. C-09, 2292), available at http://www.after.org/wp-content/uploads/2010/01/Perry-Vol-1-1-11-10.pdf .
[54] *Id.*
[55] *Id.*

relationships with person of the same sex"; their briefs erased the word "bisexual" and instead described the State as "intentionally den[ying] lesbians and gay men the right to marry, even though it also has determined that there is absolutely nothing wrong with gay and lesbian families."[56]

In another incident covered by LGBT media, Robyn Ochs, who is one of the most prominent bisexual visibility advocates in the country,[57] has nonetheless been incorrectly described as a lesbian by media accounts highlighting her prominent role as one of the members of a same-sex couple who helped make history as a plaintiff in a same-sex marriage case.[58] One Washington Post exclusive story on her wedding to her wife, for example, described the two as lesbians, to Ochs' dismay; she explained in a later article that the incident was troubling "because one of the challenges of identifying as bisexual is dealing with repeated erasure. . . . My identity is hard-won — I worked very hard and for a very long time to come to a place of comfort and pride about who I am, and it matters to me that people see me accurately."[59] As the LGBT newspaper interviewing Ochs in the subsequent article described it, when Ochs, who "has dedicated her career to educating straight and LGBT people alike on the bisexual community," and "is known for speaking nationally on bi erasure, biphobia, and monosexism (the idea that heterosexuality or homosexuality is superior to non-monosexual orientations),"was herself incorrectly labeled as a lesbian, "the very thing Ochs works to eradicate happened to her."[60]

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[56] *See* Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. at 455, quoting Respondent's Brief at 1, 6, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2005)(No. A110449), 2005 WL 3967315; Cal. Fam. Code 297 historical and statutory notes (West 2004)(emphasis added).

[57] *See* Eliel Cruz, *When Bisexual People Get Left out of Marriage*, Advocate.com (August 26, 2014), http://www.advocate.com/bisexuality/2014/08/26/when-bisexual-people-get-left-out-marriage ("Ochs not only identifies as bisexual but is a renowned bisexual activist"). *See also* Ochs' Wikipedia biography, at http://en.wikipedia.org/wiki/Robyn_Ochs .

[58] Cruz, *When Bisexual People Get Left out of Marriage*.

[59] *Id*.

[60] *Id*.

Each of these examples of bisexual erasure fits within Yoshino's first and second bisexual erasure categories i.e., the categorical and individual bisexual erasure categories.[61] To elaborate, the recasting of the bisexual *Rowland* plaintiff and of bisexual activist Robyn Ochs as lesbians are both examples of "individual erasure." The *Romer* litigants' and the Supreme Court's erasure of bisexuals from the named class in that case, despite bisexuals having been enumerated in the Colorado amendment language, is an example of categorical erasure. Ted Olson's examination of his witness in *Perry*, a line of questioning that demanded his client explain away any apparent bisexual orientation and, in effect, erase her past opposite-sex relationship, was similarly a form of categorical erasure. The intent of LGBT-rights advocates and members of the media who engage in such erasure is certainly benign compared to those who engage in disparaging delegitimization (Yoshino's third category of erasure). While not engaging in such blatantly discriminatory treatment of bisexuals, however, it is incumbent upon LGBT-rights advocates and members of the media to honor, rather than erase, bisexuality as a valid sexual orientation.

C. Statistical Data on Bisexual Erasure in Litigation: A Survey of Terminology in Same-Sex Marriage Litigation and LGBT-Rights Supreme Court Cases

To supplement this anecdotal evidence and more fully assess current trends in bisexual-exclusive LGBT terminology, and in an effort to pinpoint the current landscape of bisexual (in)visibility in LGBT litigation terminology, I engaged in a survey of LGBT terminology in LGBT-rights cases. The study, detailed in the attached Appendix, examined relevant terminology within federal appellate same-sex marriage decisions following the Supreme Court's *Windsor* and *Perry* decisions and within the main party briefs filed in those cases, as well as within previous LGBT-

[61] *See supra* n. ___ and accompanying text.

rights cases. Specifically, through term searches of the main party briefs and majority opinions in those cases, the survey tracked the appearance of the word "bisexual," as compared to "gay," "lesbian," "homosexual," "same-sex," and "LGBT."[62]

Not surprisingly, as the survey results in the Appendix of this article reveal, the word "bisexual" cannot be found in the vast majority of LGBT-rights court opinions and briefs, in contrast with the frequent appearance of "gay," "lesbian," and "homosexual."[63] The umbrella term "LGBT" has not been used at all by the courts and litigants in these cases. However, the phrase "same-sex marriage" has become the Supreme Court's preferred umbrella term, which the Court used exclusively in *Windsor* and *Perry*.[64] The briefs of the LGBT-rights advocates in those cases, in comparison, alternated between references to "same-sex couples" and "lesbian and gays,"

The erasure of "bisexual" in both opinions and briefs dates back to *Romer*, as previously explained. The use of the word phrase "same-sex marriage," without specifically referencing the gay, lesbian, or bisexual orientation of those who enter into same-sex marriage, is a relatively new occurrence in Supreme Court opinions, compared to the disappearance of "bisexual" from the Court's vernacular following *Romer*.[65] In contrast, there had been a brief moment in Supreme Court jurisprudence when bisexuals were mentioned nearly as frequently as homosexuals: in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[66] a case in which the plaintiff's name itself included bisexuals. The litigants in that case were clearly, as their name indicated, bisexual-inclusive. So, consequently, was the Supreme Court, at least in that case. But the bi inclusivity lasted only a year; it was a year later that the LGBT-rights litigants in *Romer*

[62] *See* Appendix.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] 515 U.S. 557 (1995).

dropped "bisexual" from the named class, signaling to the Court that it could do the same, and the Court did, shepherding in the post-*Romer* era of bisexual erasure in Supreme Court litigation.[67]

The word "bisexual" has not appeared in a single Court opinion since *Romer* other than in a quotation of the language from the state constitutional amendment in *Romer* (which, ironically, was more bisexual inclusive than the LGBT advocates' own language in that case, the Supreme Court language in that case, and the vast majority of LGBT-rights briefs and opinions since).[68]

Bisexual erasure is even more blatant in the *Windsor* and *Perry* main party briefs; while there were hundreds of references to "gays," "homosexuals," or "gays and lesbians," in the main party briefs filed by LGBT-rights proponents in *Hollingsworth v. Perry* and *United States v. Windsor*,[69] in dramatic contrast, there was a grand total of *zero* references to bisexuals in the body of any of these briefs.[70] The only reference to bisexuals in the briefs by the parties seeking marriage equality in those cases was a reference in a footnote of Edie Windsor's brief to an expert statement regarding the immutability of gay, lesbian, and bisexual sexual orientations.[71] The *Windsor* and *Perry* main party briefs utterly failed to acknowledge that bisexuals have a serious stake in the outcome of same-sex marriage litigation as well as gays and lesbians, and are equally harmed by marriage bans when they are (as bisexuals often are) in partnerships with someone of the same sex.

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[67] *See supra* Section II.B.

[68] *See supra* discussion of bisexual erasure in the *Romer* briefing and opinion at Section II.B, and *see* Appendix, detailing disappearance of "bisexual" from Supreme Court opinions and briefs after *Romer*.

[69] *See* Appendix.

[70] *Id*.

[71] U.S. v. Windsor, 2012 WL 3900586, Br. of Respondent ("As for BLAG's contentions as to the 'fluidity' of women's sexuality, BLAG Br. 31, Professor Lisa Diamond, the leading expert on women's sexuality, who was originally *cited by BLAG* in opposition to Ms. Windsor's motion for summary judgment, definitively answered the question as follows: 'If the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes.' JA-964 at ¶ 10.'").

Instead, the individual members of same-sex couples in those marriage equality challenges were inevitably referred to as "gays" and "lesbians," but never as also potentially being bisexuals.[72]

Similarly, in the lower appellate courts, there have been no references to bisexuals in the majority opinions of any of the federal decisions affirming same-sex marriage rights, which mirrors a general failure to mention bisexuality in the party briefings in those cases as well.[73] It is unsurprising that, for the most part,[74] the court opinions from the federal appellate courts have largely mimicked the language of the briefs, never mentioning bisexuals as either litigants or affected classes within the context of same-sex marriage. Not that correlation proves causation; one should not lay the blame entirely at the feed of the attorneys in those cases for setting the tone for bisexual erasure, which has occurred across the board throughout the LGBT community, not just among attorneys.

There are many factors that go into bisexual erasure, as previously discussed. An additional factor may be that not a single "out" (of the metaphoric closet) bisexual jurist is on the federal (or perhaps even state) bench as of the writing of this article.[75] This complete lack of representation on the bench, along with many of the factors identified by the bi erasure scholars, may well be a substantial contributing factor to bi invisibility and erasure in federal court opinions.

Whatever the underlying reasons for the failure of courts to mention bisexuals alongside lesbians and gays in past opinions, the more recent trend is for the Supreme Court to use a more inclusive umbrella phrase, at least in the context of marriage cases, that neither explicitly includes

[72] *See* Appendix.
[73] *Id.*
[74] A happy exception is the Judge Berzon concurrence in *Latta v. Otter*, discussed more in depth in Section III, *infra*.
[75] *See supra* note 1, citing R.J. Thompson, *How does Judicial Diversity Impact Access to Justice for our Communities*, Lambda Legal Blog (June 18, 2014), http://www.lambdalegal.org/blog/20140618_judicial-diversity-impacts-access-to-justice.

nor omits either gays or bisexuals: the catch-all phrase "same-sex" couple. Because same-sex marriage bans are written in terms not of sexual orientation but rather in terms of the sex of those persons getting married, the phrase "same-sex marriage" and corresponding reference to "same-sex couples," are perfectly appropriate – certainly more appropriate and inclusive than if the Court had imposed an artificial "gay and lesbian" descriptor to capture those entering into same-sex marriages, omitting bisexuals, as has too often been the case in past opinions and briefs.

In a 2014 article title, Professor Ben-Asher decries the Windsor Court's use of the phrase "same-sex marriage" as a replacement for naming gays, lesbians, and bisexuals, writing: "The Supreme Court's historic decision in *United States v. Windsor* is striking for, among other things, the conspicuous absence of the words 'homosexual,' 'lesbian,' or 'bisexual.' In place of these characters, *Windsor* introduces us to the new legal homosexual: the same-sex couple."[76] This analysis misses two key points, however. First, "same-sex marriage" is not just the new homosexual; it is the new homosexual *and* bisexual, for both mono- and bisexuals enter into same-sex marriages. Second, as documented in the Appendix and discussed throughout this article, it is only the erasure of "homosexual" and "lesbian" from the Court's opinions that is new; bisexuals have had a long jump start on being erased, and have been erased in both opinions and briefs since long before *Windsor*.

Thus, I would come to the opposite conclusion as Ben-Asher and posit that the Court's use of the comparatively bisexual-inclusive phrase "same-sex couples," rather than the bisexual-exclusive phrase "gays and lesbians," should be viewed as progress. With bisexuals long having been erased from Supreme Court terminology, a more inclusive phrase that includes all persons in

[76] Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J. L. & GENDER 243, 245 (2014).

same-sex marriages, not just gays and lesbians, is preferable to what the Court and many LGBT-rights litigants had been doing since *Romer*: naming gays and lesbians to the exclusion of bisexuals. Thus, the use of the phrase "same-sex marriage" arguably denotes a move toward greater inclusivity. To seal that inclusivity, however, it would be even better if courts were to not only use inclusive phrases such as "same-sex marriage," "same-sex couples," and LGBT (the latter, which the Court has yet to utter), but to also explicitly spell out that bisexuals as well as gays are detrimentally affected by same-sex marriage bans, and thus are included within the umbrella of "same-sex couple" terminology.

III. CONSEQUENCES OF BI ERASURE

Having painted a more complete picture of bisexual erasure, including the origin of the phrase and the anecdotal and statistical evidence of the problem in a litigation context, I return now to the seminal question of why bisexual erasure matters. Here, I will examine the particular problems caused to bother bisexuals and others by bisexual erasure.

A. Harms Specific to Bisexuals

Bisexuals themselves are most immediately harmed by bisexual erasure, although, as will be explained in the following section, bisexual erasure is harmful to those outside the bisexual community as well. In addition to facing the same threats as any member of a same-sex couple discriminated against because of the gender of one's person, bisexuals face additional threats as a result of the lack of recognition of bisexuality as a valid sexual orientation. Statistical surveys and studies have revealed that bisexual youth are more likely to be bullied and threatened than gay and

lesbian youth,[77] and are more likely to be victims of bullies, to attempt suicide, and to commit suicide.[78]

In the legal context, two specific contexts in which bisexuals face particular concrete harms through lack of bisexual recognition are immigration and family law. In addition, bisexual erasure causes a number of serious psychic harms as well. Each of these is explored below.

1. Immigration

In the context of immigration, bisexuals may be faced with unique hurdles, potentially being required to prove they are "gay enough" to warrant protection from persecution by their home countries. The problem with an immigration board uneducated about the valid existence of bisexuals is that if an individual had previously been in an opposite-sex marriage, some officials might deem that a subsequent same-sex marriage is a sham marriage. The possibility that a bisexual person might validly be in a same-sex partnership despite having once been in an equally meaningful opposite-sex relationship might, sadly, evade the comprehension of some officials

[77] Friedman, et al., *A Meta-Analysis of Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Nonminority Individuals*. AMER. J. OF PUBLIC HEALTH, 101 (8), 1481-1494 (2011).

[78] *See* Sharita Forrest, *Bisexual Teens at Highest Risk of Bullying, Truancy, Suicide*, University of Illinois News Bureau, (October 13, 2011), http://news.illinois.edu/news/11/1013teens_DorothyEspelage_JosephRobinson.html, citing study that found:

> A little more than 7 percent of straight youth reported thinking about suicide during the prior 30 days, versus 33 percent of LGBTQ students. Bisexual youth were at especially high risk (44 percent), as were questioning youth (32 percent). Bisexual youth also were at elevated risk of suicide attempts, with more than 21 percent reporting that they had made at least one attempt during the prior year.
>
> Nearly twice as many LGBTQ students as straight students – 39 percent versus 20 percent – reported having been bullied, threatened or harassed over the Internet. Again, bisexual youth reported the highest levels of victimization – 49 percent – among sexual minority youth.

evaluating that person's life from the outside and making life or death decisions about the asylum-seeker without an adequate understanding of bisexuality.

This is not merely a hypothetical scenario. By way of example, three cases in particular highlight the egregious harms bisexual erasure can cause in an immigration context. First, in *Garcia-Jaramillo v. INS*,[79] the immigration board rejected a man's marriage as a sham marriage after asking "an inordinate number of questions concerning [his] homosexuality" and found that because of his past homosexual inclinations, his opposite-sex marriage must be a sham. The immigration board never addressed the possibility that the man was bisexual.

Second, is the case of Ivo Widlak, a journalist from Poland who has been married to his wife for over twelve years, but who has been threatened with deportation since coming out as bisexual and consequently being accused of being in a sham marriage.[80] Widlak's case, which is still pending, illustrates the dangers faced by immigrants who are accused of being in sham same-sex partnerships in the States when their past opposite-sex partnerships or, as in Widlak's case, their bisexual orientation is discovered. These dangers are particularly acute in the cases of bisexual immigrants who seek asylum in this country for their sexual orientation, coming from a country where non-heterosexual conduct is a crime for which they may be severely punished if they are denied asylum based on a failure to understand their bisexual orientation.

Finally, although a case arising out of the United Kingdom, not the United States, the case of Orashia Edwards, who was denied asylum from Jamaica, where being gay or bisexuality is a punishable offense and those perceived as LGBT are often victims of violence. In Edwards' case,

[79] 604 F.2d 1236, 1239 (9th Cir. 1975).
[80] *See* LGBT News, *Popular Chicago Journalist Facing Deportation Because of Bisexuality* (Sept. 26, 2013), http://ivowidlak.com/ivo-widlak-popular-chicago-journalist-facing-deportation-chicago-radio-media-tv/; Faith Cheltenham, *The Curious Case of Ivo Widlak, Huffington Post Blog* (Dec. 12, 2012), http://www.huffingtonpost.com/faith-cheltenham/the-curious-case-of-ivo-widlak_b_2317756.html .

the British immigration court denied him asylum on the basis because it concluded that Edwards, who is bisexual, was "dishonest" about his sexual orientation.[81] Edwards fears for his life if he is deported.[82]

2. Custody and Adoption

In an area of law rife with opportunity for subjective bias, family law in some cases has been particularly harsh on bisexuals. Although some scholars have addressed the hurdles faced by LGBT individuals in family law generally,[83] bisexuals face more than just the same general risk that gays face of being discriminated against for their same-sex romantic relationships in custody and adoption battles, such as being considered a moral threat to their children.[84] Bisexuals also face discriminatory treatment unique to bisexuals, in that they are more likely to be presumed to be unstable due to their sexual orientation.

As a preliminary matter, most published opinions from courts in adoption and custody cases describe formerly married persons in same-sex relationships as "gay" or "homosexual," rather than acknowledging bisexuality as a valid sexual orientation (perpetuating Yoshino's second and third form of bisexual erasure). When bisexuality is acknowledged, courts are often inclined to view the difference as an even *greater* indicia of emotional or moral danger to children, as described below.

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[81] See Eliel Cruz, *Bisexual Jamaican Denied U.K. Asylum Due to 'Dishonest Sexuality,'* THE ADVOCATE (July 1, 2014), http://www.advocate.com/bisexuality/2014/07/01/bisexual-jamaican-denied-uk-asylum-due-dishonest-sexuality.

[82] *Id.*

[83] *See*, especially, Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49 (1996)(addressing hurdles lesbians, gays, and bisexuals face in adoption law).

[84] Morality is often mentioned in cases denying custody to homosexuals and bisexuals both. One example is decision of a trial court reversed on appeal to deny custody on moral groups to a woman on the basis of her "admitted bisexuality and involvement in lesbian relationships," Maradie v. Maradie, 680 So. 2d 538, 540 (Fla. Dist. Ct. App. 1996).

Courts at times also view bisexuals as being more able to choose to comply with a judicial demand to give up their same-sex partners for the sake of their children.[85]

Courts faced with bisexual parents in custody and adoption petition cases have described bisexuality as indicia of emotional instability that raises questions about healthy parenting abilities. One appellate court, reviewing a lower court's decision to deny a bisexual man's adoption petition, ruled, that the bisexual appellant's *"ambivalence in his sexual preference* was very appropriately a concern of the court" going to the best interest of the child.[86] In a more recent decision, a reviewing Mississippi court held that "the mother's bisexual lifestyle" was properly viewed alongside her "lack of financial and emotional stability" in contrast "with the father's ability to provide a stable environment for his daughter in the form of an established home in which she would have her own bedroom and would be living in a traditional family environment."[87]

Courts in other cases, while not always referencing those who date both men and women sa "bisexuals," nonetheless view such bisexual dating as evidence of instability. An Alabama court, for example, reversed a lower court's custody ruling and instead denied custody to a mother after extensively citing a guardian ad litem's detailed report with the following passage:

> [*T]he [mother] lacks stability*; that she has admitted driving with the minor child after consuming alcoholic beverages; that she has admitted not using proper child restraints while transporting the minor child; that she has been diagnosed with situational depression and thereafter failed or refused to take her prescribed medication; that she threatened to leave the State with the minor child; *that she engaged in a lesbian relationship while the minor children were in close vicinity*; that she slapped her stepdaughter; that she has written bad checks; that she lied to the Court regarding the loss of her job; *that she had sexual relations with a man prior to obtaining a divorce from the [father]*; and she failed to obtain counselling after the same was recommended to her by a psychiatrist.[88]

[85] *See* COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW,at 39.
[86] Matter of Appeal in Pima Cnty. Juvenile Action B-10489, 727 P.2d 830, 834 (Ariz. App. 1986)(emphasis added).
[87] S.B. v. L.W., 793 So. 2d 656, 661 (Miss. App. 2001).
[88] Dorn v. Dorn, 724 So. 2d 554, 556 (Ala. App. 1998)(emphasis added).

Other comparable cases never make it into written opinions, but it is not uncommon in the practice of family law to hear non-heterosexual parents recount horror stories of courts being suspicious of the stability or perceived fluctuating "lifestyle" choices of a parent who goes from an opposite-sex marriage to same-sex relationships. Furthermore, the more partners a parent has, the more courts have traditionally viewed their romantic relationships as endangering children, and the common pejorative that bisexuals are more promiscuous than monosexuals may thus also feed into such biases against bisexuality by courts deciding custody and adoption issues.[89]

By delegitimizing bisexuals as less stable than monosexuals, such decisions are a form of Yoshino's third type of bisexual erasure. Such delegitimization harms not just parents who identify as bisexual, but also those who have gone from being in opposite-sex relationships to identifying as gay. Courts do not appear particularly swayed by how such parents identify; it is the conduct of having gone from an opposite-sex to a same-sex relationship that is punished. Thus, all members of the LGBT community, many of whom may not identify as bisexual but were once in opposite-sex relationships, would do well to open their eyes to the harmful nature of custody decisions based on negative stereotypes about bisexuals.

3. Unique Intangible Harms

There are other intangible harms as well that result from bisexual erasure. In marriage equality cases and otherwise, the erasure of bisexuals imposes a variety of stigmatizing harms.

[89] *See* Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 420 (addressing delegitimization of bisexuals as promiscuous).

For one thing, the comparative invisibility of bisexuals renders them in essence second-class characters in the unfolding play of marriage equality, and such second-class stigmatization is precisely the type of stigmatizing harm the courts themselves have recognized as unconscionable, when directed toward members of same-sex unions. For example, Justice Ruth Bader Ginsberg decried the second-class status imposed on same-sex couples who are offered less than full marriage rights, describing the less-than-full marriage recognition for same-sex couples as "skim milk marriage."[90] The Supreme Court's decisions in *Windsor*, *Lawrence* and *Romer*, as well as scores of lower-court decisions, have in various ways affirmed that singling out LGBT individuals as second-class citizens violate the principle that separate is never equal, because unequal treatment based on one's identity is constitutionally suspect for the deep dignitary harms it imposes on psychic and emotional levels. Most strikingly, in *Lawrence,* writing for the Court, Justice Kennedy explained that substantive due process protections include protections for "'the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,'" as well as "the right to demand respect for conduct protected by the substantive guarantee of liberty."[91] With *Windsor* extending this principle to the context of same-sex marriage recognition, it would be deeply ironic for bisexuals to be left out of the fold and relegated to second class status through subsequent same-sex marriage litigation.

In his bisexual erasure article, Yoshino notes another intangible but serious harm done to bisexuals through their erasure in the same-sex marriage context specifically: bisexuals, by being subsumed by the "lesbian and gay" categorization that proliferates same-sex marriage briefs and

[90] Transcript of Oral Argument at 71, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).
[91] Lawrence, 539 U.S. at 574-75 (quoting *Casey*, 505 U.S. at 851). *See also* Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. at 426-38 (arguing that the principles of *Lawrence* and *Casey* are undermined when same-sex marriage bans impose coercive force on bisexuals in violation of their individual autonomy and liberty).

opinions, are in essence being forced to prioritize sex over other traits, even if a bisexual person may highly value being sex-blind, or merely focusing on other traits than gender, in selecting a life partner.[92] When categorizations presume that LGBT individuals will favor those of the same sex in choosing life partners (a false assumption in many cases involving bisexuals), bisexuals are deprived of their full ability to be autonomous and self-defining in their most intimate life choices.[93]

More recently, Michael Boucai has described yet another unique harm posed to bisexuals by same-sex marriage bans, a harm compounded by their erasure in same-sex marriage litigation: the fact that bisexuals are especially harmed by the coercion imposed by an opposite-sex-only institution of marriage, which in essence requires bisexuals to choose between their sexual liberty and the thousands of benefits and rights that go along with marriage.[94] As Boucai explains, "[i]t is precisely because a bisexual possesses the 'meaningful alternative' denied an exclusive homosexual – because she can marry someone of a sex she desires – that her prerogatives are so readily and understandably manipulated by marriage's enormous prestige and benefits."[95] In other words, "it is in the lives of bisexuals, whose desires and dispositions are not categorically limited by sex, that the traditional definition of marriage is best poised, as *Lawrence* puts it, to 'control their destiny.'"[96]

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[92] Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 459.

[93] *See Casey*, 505 U.S. at 851 (describing due process liberty protections for "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.").

[94] *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. at 416-18, 431-33.

This argument regarding the unique choices bisexuals may face, coercive pressures aside, should not be confused with an assertion that bisexuals can choose to be bisexual in the first place, or can choose with whom we fall in love. Rather, the choice Boucai describes here is regarding whether to marry or not, akin to such smaller choices he elsewhere describes, such as whether to place an ad in the "seeking men," "seeking women," or "seeking both" section of a personal ad website. *See id* at 443. It is in such contexts that bisexuals may (and in my case, I can attest do) feel as if they have more of a choice insofar as which communities or genders upon which to focus our dating (and ultimately, marital, for those of us so inclined) energies.

[95] *Id*. at 417.

[96] *Id*., citing Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Such a coerced choice, he analogizes, should be deemed as invalid as forcing a Sabbatical religious observer to choose between her religion and her right to work (or to receive unemployment compensation benefits), as the Court recognized in *Sherbert v. Verner*, which the Arkansas Supreme Court recently recognized was analogous to same-sex adoption bans.[97] Boucai offers that the same rationale can be extended to successfully challenge same-sex marriage bans, particularly by reference to the bisexual, who has even more of a choice than the homosexual as to whether to marry someone of the opposite sex.[98]

Finally the facial absence of bisexuality from opinions and briefs in LGBT-rights cases sends the harmful message that we do not exist, or, that if we do, we may not be equally entitled to protections accorded to other sexual orientations. There are not sufficient words suitable for a law review article to describe the psychic injury of being left out time and time again despite having put decades of work fighting for the rights of the larger LGBT community. The slights and wounds, however, are real, and should not be dismissed as insignificant, any more than gays and lesbians would wish courts to dismiss as insignificant the wound of being left out of the equal dignity and liberty protections afforded by full marriage recognition.

To the extent that courts may be merely mirroring the language of LGBT-rights attorneys, who for strategic reasons may decide to exclude specific references to bisexuality or bisexuals, it is understandable that courts will follow the cues of the advocates who brief the issues to them. While courts are not entirely blameless for perpetuating bisexual erasure in both the LGBT and broader communities, LGBT-rights advocates who persist in omitting all mention of bisexuals from their

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[97] Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV.at 431-32, discussing *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) and the Arkansas Supreme Court's discussion of *Sherbert* in *Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429 (Ark. 2011).

[98] Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. at 417, 431-32.

briefings, know better and have more of a responsibility to represent all the members of the LGBT community affected by their impact litigation. While they may think they may be making a stronger or cleaner case by omitting a large portion of affected persons from the dialogue, the longer advocates continue to make the mistake of leaving bisexuals out of LGBT-rights analyses and argument, the harder it will be to repair the injury to bisexuals down the road.

B. Broader Harms

In addition to harms specific to bisexuals, bisexual erasure in LGBT litigation also has negative repercussions for the rest of the LGBT community, for members of the bar and bench in their work on tangentially related issues, and, arguably for society as a whole. Bisexual erasure in litigation can result in missed opportunities for refining legal dialogues and strengthening legal protections for equal liberty and justice in a more doctrinally integrated, cross-cultural and cohesive manner. Furthermore, advocates for LGBT rights undercut their own arguments for equal dignity when they fail to accord such dignity to the bisexuals within their own community by relegating them to second-class status or utter invisibility in their legal arguments. There are many other harms as well caused by bisexual erasure, harms which extend to gays, lesbians, and heterosexuality, and to a justice system that prides itself on prizing truth and equity.

1. Statistical Inaccuracies

As earlier set forth, recent surveys estimate bisexuals at 43% to 52% of the LGBT population.[99] The misleading inferences to the contrary resulting from equating same-sex couples

[99] *See* Section II.A, *supra*.

with gays and lesbians, as if bisexuals were either nonexistent or too small a percentage of the LGBT population to warrant mention, simply does not reflect reality. Courts are in the business of discerning truth and being factually accurate in their analyses. A legal system that emphasizes the importance of veracity should not perpetuate the reckless promotion statistical inaccuracies. Such inaccuracies, however, inevitably result from legal discourses that paint bisexuals as statistically irrelevant, when in fact bisexuals comprise nearly half of the LGBT population. Thus, it is shamefully inaccurate for court opinions to address the rights of those in romantic same-sex partnerships in terms of "gay" or "gay and lesbian" rights only, leaving out a substantial segment of the LGBT population.

To be accurate, discussions of disenfranchised LGBT individuals who are targets of discrimination for their sexual orientation or gender identity should include references to bisexuals and transgender individuals, and not just to gays and lesbians. In the same vein, analyses confined to the subject of sexual orientation should take into account that "gay" and "straight" are not the only possible sexual orientations. Bisexuals not only exist, but we exist in substantial numbers. By failing to acknowledge both our existence and the reality that bisexuals too are harmed by sexual orientation discrimination, the courts become complicit in perpetuating misleading myths.

2. Perpetuation of False Dichotomies and Isolationist Paradigms

In a passage quoted by several bisexual erasure legal scholars, Alfred Kinsey and his co-authors, in describing the fluid, rather than dichotomous, nature of sexual orientation, famously wrote:

> 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.[100]

What may have been obvious to Kinsey after his extensive studies of human sexuality, and what may seem clear to those who are bisexual, is not as intuitive for those who cling to binary categorizations of sexual orientation. Unfortunately, this inaccurate portrayal of sexual orientation as a simple binary has negative repercussions far beyond the slight to bisexuals who are left out. Additionally, the simplistic framing of complex issues of gender as well as sexual orientation in such black-and-white dichotomous terms fails to capture the reality of the lives of not just bisexuals and transgender individuals, whose more nuanced and fluid gender and sexual realities threaten some binary-identified members of society, but also lends itself to disingenuous legal analysis by courts and advocates.

Professor Colker, the first to apply Kinsey's critique of artificial binary categorizations to the context of bisexual jurisprudence, did so in the context of advocating the embrace of a bisexual perspective as a more holistic approach to understanding sexuality in her initial bisexual jurisprudence article. She describes "the categories of heterosexual and homosexual as inventions that do a disservice to the realities of [bisexuals'] lives, feelings, and relationships."[101] She offers that "[t]he term bisexual may . . . often be an accurate way to describe the complex ways that people live their lives, not conforming to the rigid bipolar categories of heterosexual and homosexuals," and advocates an "embodied bisexual perspective" as a way to define "sexual orientation in such a

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[100] ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 639 (1948); Glazer, *Sexual Reorientation*, 100 GEO. L.J.at 1041; Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. at 103-04; Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. at 356 n.5.

[101] Colker, *An Embodied Bisexual Perspective*, 7 YALE J.L. & HUMAN. at 174.

nonstatic, fluid way [that] would deeply challenge sexual dualities and the defining of gay, lesbian, and bisexual people as purely sexual."[102]

Professors Glazer's bisexual jurisprudence article, while advocating a different definitional system, echoes Colker's critique of the binary. She similarly writes that, just as transgender individuals "challenge the pervasive gender binary" that functions as a normative foundation in our communities and legal system, bisexuals similarly "challenge the pervasive sexual-orientation binary that 'contemporary American society . . . insist[s] on.'"[103] To the extent that both groups fall outside the norm by failing to "adhere strictly to a binary,"[104] Glazer suggests that the use of binary models to alienate both transgender and bisexual individuals has resulted in them becoming minorities within minorities, victimized by society's desire to dictate normalcy through dichotomies.[105]

In *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*,[106] Naomi Mezey similarly writes of the need to challenge limiting dichotomies in legal discourse. Mezey suggests that it important to move from rigid dichotomous hetero/homo identity-based classifications to a more fluid approach to sexual politics and laws. She argues that the gay and lesbian rights movement would do well to include bridges to its allies, to "pragmatically craft a reformulated vision of sexual identity that is both socially feasible and politically viable, one that allows us to forge unprecedented and potentially powerful alliances."[107]In proposing that a broader, more inclusive approach to sexual politics could allow for a strategically necessary bridge

[102] *Id*. at 174-75.
[103] Glazer, *Sexual Reorientation*, 100 GEO. L.J.at 1017 (quoting Yoshino, The *Epistemic Contract of Bisexual Erasure*, 52 STAN L. REV. at 356 (footnotes omitted)).
[104] Glazer, *Sexual Reorientation*, 100 GEO. L.J.at 1017.
[105] *Id*.
[106] 10 BERKELEY WOMEN'S L.J. 98 (1995).
[107] *Id*. at 133.

between gays and their allies, Mezey suggests that bisexuals (including those who have either identified as bisexual or whose conduct might render them somewhere in the middle range of the Kinsey scale[108]) could become that bridge.

There are other bridges to be crossed as well: the omission of bisexuality in LGBT discourse is indicative of a failure to fully include realities of many queer women and people of color. As Colker argues, the bisexual perspective adds important holistic dimensions to discussions of law and morality. To be inclusive of bisexuality leads to more comprehensive cross-sectionality with race and gender, in particular, she points out, as there is a significantly high percentage of both women and people of color, as opposed to white men, who identify as bisexual.[109] Colker's point about the overlap between race and sexual orientation is illustrated in the *Apilado v. North American Gay Amateur Athletic Alliance* case, in which not only were the plaintiffs all bisexual men, they were also men of color, resulting in a claim of face discrimination also being added to the complaint in the Gay Softball World Series lawsuit.[110]

The dangerously rigid binary constructs of sexual orientation parallel false binaries that keep multiracial individual from being recognized as having valid identities, as well as in other contexts, such as gender and sexual orientation. In each category, as Colker writes, bisexuality can help illuminate the possibilities and "implications of living between categories,"[111] and in the context of race in particular, "[a] bi perspective may . . . enhance our understanding of race by encouraging us

[108] *See id*. at 103-07 (describing studies of Alfred Kinsey, whose comprehensive and highly respected work on sexuality has established, along with others' studies, that a large percentage of both men and women are not exclusively homosexual or heterosexual, but rather fall in between a 0 and a 6 on a seven-point scale of sexual orientation, once their same-sex sexual experiences are taken into account).
[109] Colker, *An Embodied Bisexual Perspective*, 7 YALE J.L. & HUMAN. at 169, 173, 175-77. *See also* COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW, at 17-18, 26-36.
[110] Complaint, *Apilado v. North American Gay Amateur Athletic Challenge*, Case No. 2:10-cv-00682 at ¶52 (W. Dist. Wash.)(April 20, 2010).
[111] COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW, at 36.

to make an intracategorical investigation of racial categories."[112] With members of these groups denied full recognition by law and society, they share in common the embodiment of the limitations of binary identity constructs.

For all these reasons, and in each of these contexts, bisexuals can help illuminate the limitations of binary isolationist models, and can offer a more holistic and cross-cultural model for understanding and addressing identity.

3. Undermining Equal Liberty Arguments

As previously discussed, another problem with relegating bisexuals to an invisible subsumed existence secondary to the primary identities of gays and heterosexuals is that such bisexual erasure conflicts with the equal liberty and dignity-focused themes and arguments being made in LGBT-rights cases. The Supreme Court in *Romer, Lawrence* and *Windsor h*elped established a solid platform upon which LGBT individuals may ground further equal dignity-based arguments, admonishing against making any disfavored group of persons second-class citizens under the law.[113] Thus, the second-class status imposed on through bisexual erasure violates the very principles of equal respect, autonomy and dignity that LGBT litigants have sought to protect through constitutional litigation.

The resulting harms to bisexuals have already been addressed, but here it is worth mention that the inconsistency of, on the one hand, arguing that gays and lesbians are entitled to equal liberty and dignity but, on the other, then denying the same to bisexuals as a result of perpetuating their erasure, LGBT-rights advocates fighting for equality undermine their own cause when they engage in bi erasure. On the flip side, it would only strengthen the liberty arguments of LGBT-rights

[112] *Id*. at 38.
[113] *See supra* Section III.A.3.

advocates to include bisexuals as fully acknowledged members of the class affected by same-sex marriage bans.

4. *Other Missed Opportunities in Refining Gender Law and Heightened Scrutiny Analyses*

The jurisprudential utility of a bi inclusivity is not just in the potential for overcoming fallacious arguments and false dichotomies, but also in illustrating other interrelated points of legal doctrine. In particular, bisexuality helps illuminate some of the absurdities and complexities of gender law.

Bisexuals help illustrate the harmful role that false gender and sexual orientation dichotomies can play when those dichotomies become incorporated in overly rigid manners into judicial doctrine. Bisexuals can also help establish that sexual orientation discrimination is, in fact, a form of gender discrimination, which could benefit LGBT individuals in general who are presenting challenges to courts that might warrant heightened scrutiny. Each of these points is discussed in more detail below.

a. Beyond Rigid Gender Binaries: Title VII and Bisexual and Transgender Employees

Sex discrimination jurisprudence has, at times, tied itself into knots through judicial efforts to clear, binary sex and gender definitions, even when human beings do not so smoothly sorts themselves out into such black and white sex and gender categories as the law would have them do. Bisexuals can help bridge the gap between binary boxes and illustrate both why rigid dichotomous constructs of sex and gender by the courts are unworkable, and also why they are unnecessary.

One commonly noted absurd result of bisexual invisibility (although bi erasure is not as commonly cited as the source of the problem) is an oddity in sexual harassment law: the problem

of the equal opportunity harasser. This absurdity is an accidental sexual harassment loophole under which bisexual employers in some jurisdictions may find themselves able to evade liability if they sexually harass both men and women because they are then not viewed by some courts as having discriminated against someone "because of sex," as required for Title VII liability.[114] As the D.C. Circuit Court noted in one case, this "equal opportunity harasser" problem could exist where, "[i]n the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."[115] The Seventh Circuit has similarly accepted a type of harasser immunity defense, writing that it is not "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."[116]

So long as sex and gender are rigidly circumscribed by a Title VII jurisprudence that requires that either women or men (but never both) be a target of harassment for that harassment to be deemed "because of gender," such an "either/or" dichotomous construct will eventually hit a logical wall, even if the logical conundrum posed by the binary category-defying equal opportunity bisexual harasser is a rare case.

The liability loophole, or favored status, for bisexuals under Title VII may be an illusory one, however. As Colker describes, "[t]he doctrine is actually a joke," with most courts not inclined to believe that bisexuals exist, or doubtful that bisexuals would avail themselves of the doctrine, because doing so would require defending themselves through the confession of additional sexual

[114] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, 2000e-2.
[115] Barnes v. Costle, 561 F.2d 983, 990 n. 55 (D.C. Cir. 1977).
[116] Holman v. Indiana, 211 F.3d 399, 404 (7th Cir. 2000).

harassment.[117] Thus, the doctrine is a tease, but not one without harms, for "[t]he doctrine sends the message that bisexuals would be the most inappropriate individuals to hire as supervisors, because they can harass workers with impunity," perpetuating negative stereotypes about bisexuals and giving employers additional excuses not to hire bisexuals.[118] Furthermore, as Colker points out, the loophole does not provide bisexuals legal protection in any holistic sense, because "men and women can receive legal protection when they are harassed by a same-sex harasser supervisor but cannot get legal protection under Title VII if they are fired for being gay or lesbian [or bisexual]."[119] While not, perhaps a viable defense, the bisexual equal opportunity immunity loophole nonetheless serves as an important illustration of the limitations of gender dichotomies in jurisprudence.

Indeed, in Title VII law, both bisexual and transgender members of the LGBT community play important, though different roles, in highlighting how gender discrimination and LGBT discrimination are intertwined. While, in the case of sexual harassment, bisexuals help illustrate how discrimination "because of gender" may take on different meanings when more fluid views of sexual orientation are considered, transgender-rights attorneys have been successful in demonstrating in Title VII cases that discrimination against transgender individuals is very much a form of gender discrimination.

In a watershed moment in LGBT history in which development in transgender rights paved the path for others, the EEOC issued a ruling explicitly affirming protections against employment discrimination for transgender employees under Title VII of the Civil Rights Act of 1964. In the landmark EEOC ruling, *Macy v. Holder*, the plaintiff was a police detective who was denied a job after with the ATF after she revealed during the background check portion of the job interview that

[117] Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY at 136.
[118] *Id*.
[119] *Id*. at 134.

she was transgender, and transitioning from male to female.[120] The EEOC granted Macy's gender discrimination claim, following federal cases over the years that recognized Title VII claims on the basis of gender identity stereotyping, including the Supreme Court *Price Waterhouse* decision.[121] The EEOC explicitly affirmed that transgender discrimination is a form of sex discrimination, ruling that Title VII's protections are far-reaching "in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[122] Then, on December 18, 2014, Attorney General Eric Holder issued a Memorandum announcing that, the Department of Justice will henceforth recognize that Title VII protections against gender discrimination include claims of discrimination based on an individual's transgender status.[123]

These developments affirm that which has long been recognized by both bisexuals and transgender members of the LGBT but is foreign territory for many others: the reality that gender is a much broader construct than a black and white dichotomous understanding of biological sex. Consequently, gender discrimination takes many forms, as does its victims, as the law is increasingly beginning to recognize.

As a result of the increased access to recourse through Title VII, a large number of LGBT individuals have finally been able to successfully bring employment discrimination claims under federal law. To wit, the EEOC has already brought 1200 claims since 2013,[124] although some courts

[120] Macy v. Holder, Appeal No. 0120120821 (EEOC April 20, 2012).
[121] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[122] Macy v. Holder, Appeal No. 0120120821 (EEOC April 20, 2012).
[123] Office of Attorney General Memorandum to United States Attorneys Heads of Department, "*Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*," (Dec. 18, 2014), available at http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.
[124] Miles Bryan, *For People Fired For Being Gay, Old Court Case Becomes A New Tool* (Nov. 10, 2014), http://www.npr.org/2014/11/10/363049315/for-people-fired-for-being-gay-old-court-case-becomes-a-new-tool.

are more resistant than others to extending gender discrimination protections to LGBT individuals.[125]

b. Illuminating Sexual Orientation Discrimination as Form of Gender Discrimination

Title VII is not the only context in which both transgender and bisexual individuals have transcended rigid gender dichotomies and helped establish sexual orientation discrimination as a form of sex, or gender, discrimination. In a constitutional law context, by helping illustrate the links between sexual orientation and gender, bisexuals serve as a bridge, helping lesbians better understand and frame their oppression as a form of gender discrimination, entitling them to heightened scrutiny in constitutional challenges.[126] In the marriage equality context in particular, bisexuals can help illustrate that sexual orientation is indeed a former gender discrimination in the following manner, as I previously set forth in the footnote to an article:

> One of the clearest illustrations of why the denial of marriage equality is a form of sex discrimination is this: if I were to apply for a marriage license in [a] state [that] prohibits same-sex marriage, and if, in the process, I announced to the clerk issuing marriage licenses that I am bisexual and want to marry a man, my state would allow me to do so. If, on the other hand, I were to approach the clerk with the statement that I am bisexual and want to marry a woman, I would be refused a marriage license. The only thing that would have changed is the sex of the person I want to marry, and not my sexual orientation, which was bisexual all along. Thus, the denial of marriage equality for same-sex couples is a form of sex discrimination, based on the sex of those in the partnership, and not, necessarily, on sexual orientation. It is my hope that the Court will engage in an analysis of this issue in a future decision.[127]

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[125] *See, e.g., Eure v. Sage Corp.*, No. 5:12-CV-1119-DAE, 2014 WL 6611997, at *7 (W.D. Tex. Nov. 19, 2014)("[A]lthough *Price Waterhouse* provides a vehicle for transgender persons to seek recovery under Title VII, neither the Supreme Court nor the Fifth Circuit have held that discrimination based on transgender status is per se gender stereotyping actionable under Title VII.").

[126] *See* Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality after Windsor*, 23 TUL. J.L. & SEXUALITY 17, 59 n. 54 (2014); Toby Adams, "*Bisexual Marriage": A Sex Discrimination Argument for Heightened Scrutiny of Same-Sex Marriage Bans* (2011), http://tobyshome.files.wordpress.com/2013/04/bisexual-marriage.pdf . *See also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994)(generally discussing sexual orientation discrimination as a form of sex discrimination).

[127] Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle,"* 23 TUL. J.L. & SEXUALITY at 59 n. 54.

In October of 2014, a federal judge for the first time – albeit in a concurrence -- explicitly acknowledged that in such a scenario, it is indeed the case that a same-sex marriage ban is a form of sex discrimination, writing:

> [S]ame-sex marriage prohibitions, if anything, classify more obviously on the basis of sex than they do on the basis of sexual orientation. . . The statutes' gender focus is also borne out by the experience of one of the Nevada plaintiff couples:
>
> > When Karen Goody and Karen Vibe went to the Washoe County Marriage Bureau to obtain a marriage license, the security officer asked, "Do you have a man with you?" When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application ... [because] "[t]wo women can't apply" ... [and] marriage is "between a man and a woman."
>
> Notably, Goody and Vibe were not asked about their sexual orientation; Vibe was told she was being excluded because of her gender and the gender of her partner.
>
> Of course, the reason Vibe wants to marry Goody, one presumes, is due in part to their sexual orientations. But that does not mean the classification at issue is not sex-based. . . . [A] statute that imposes a sex qualification, whether for a marriage license or a job application, is sex discrimination, pure and simple, even where assumptions about sexual orientation are also at play.[128]

Even more critical for purposes of bisexual jurisprudence, Judge Berzon's *Latta v. Otter* concurrence also represented the first time in a federal opinion[129] that bisexuals in same-sex partnerships were recognized as being as equally affected by same-sex marriage bans to bisexuals also being victims of marriage bans) footnote:

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[128] Latta v. Otter, 14-35420, 2014 WL 4977682 at *15 (9th Cir. Oct. 7, 2014)(Berzon, J., concurring)(citations omitted).

[129] At the state level, one judge, Judge Johnson, concurring in part and dissenting in party in the Vermont Supreme Court same-sex marriage case, has implicitly acknowledged that same-sex marriage bans also affect bisexuals. Without naming bisexuals by name, she engaged in a roundabout illustrative hypothetical discussion of a woman courted alternatively by a man and by a woman seeking to marry her, which arguably "'vindicates the rights of . . . bisexuals.'" *See* Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. at 438-41, quoting Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1220 (2010)(citing Baker v. State, 744 A.2d 864, 906 (Vt. 1999)(Johnson, J., concurring in part and dissenting in part).

> The need for such a presumption, as to a factor that does not appear on the face of the same-sex marriage bans, suggests that the gender discrimination analysis is, if anything, a closer fit to the problem before us than the sexual orientation rubric. While the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender—i.e. lesbians, gay men, *bisexuals, and otherwise-identified persons with same-sex attraction*—the individuals' actual orientation is irrelevant to the application of the laws.[130]

Not only does Berzon acknowledge that bisexuals are also affected by same-sex marriage bans, which discriminate on the basis of gender regardless of sexual orientation, she also explains that, therefore, intermediate scrutiny is the appropriate level of constitutional review.[131] Berzon's concurrence in this respect can be invaluable in helping LGBT-rights litigants frame their arguments to both be bisexual-inclusive and to result in an application of heightened scrutiny.

From an advocate's perspective, intermediate scrutiny might even be preferable to strict scrutiny for two reasons. First, an appeal to intermediate scrutiny instead of strict scrutiny this would bypass what some view is a problematic aspect of strict scrutiny analysis: the immutable characteristic factor.[132] Second, strict scrutiny is not the end all be all of equal protection; in affirmative action cases, strict scrutiny is actually used to defeat remedial racial measures in equal

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[130] *Id*. at n.5 (emphasis added).

[131] Latta v. Otter, 2014 WL 4977682 at *15 (Berzon, J., concurring).

[132] As previously discussed (*see supra* section II.A), the immutability issue may be one reason LGBT-rights attorneys are wary of including bisexuals in their arguments, because they incorrectly view bisexuals has having less immutable sexual orientations, just because the fluidity of a non-binary orientation seems more subject to "change" of some sort. *See supra* note ___ (expert testimony in *Windsor* established that bisexuality is immutable, like homosexuality). However, immutability should not always be the primary criteria for according strict scrutiny. *See* Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years After Bisexual Erasure*, 17 CARDOZO J.L. & GENDER 65, 77-78 (2010)(analogizing to *Schroer v. Billington*, 577 F.Supp.2d 293 (D.C. Cir. 2008)(recognizing that employment discrimination occurring against transgender person "because of" gender even though the apparent gender of the plaintiff had changed); noting that various scholars, including Reva Siegel and Ruth Colker, "have explored the possibility of decreasing the emphasis on immutability, arguing that constitutional protection should be based on the relative subordination of different groups, and not determined through the traditional Equal Protection analysis"; and concluding that "removing immutability from Equal Protection analysis or using anti-subordination theory could be a way to insure the inclusion of all alternative sexualities [including bisexuality] under the umbrella of sexual orientation").

protection jurisprudence.[133] In contrast, affirmative action programs explicitly benefiting women, subject only to intermediate scrutiny, have been upheld.[134] Thus, as between strict scrutiny and intermediate scrutiny, LGBT individuals are well positioned, especially with bisexuals and transgender litigants highlighting the gendered nature of sexual orientation discrimination, to make the case for an intermediate form of heightened scrutiny, beyond the "rational basis with bite" standard applied in *Romer*, *Lawrence*, and *Windsor*.[135]

The Supreme Court may well be receptive to framing marriage equality as a gender discrimination issue. Justice Kennedy, widely recognized as the swing vote who will likely be the deciding vote in a same-sex marriage case, brought up the issue during oral argument of the *Hollingsworth v. Perry* case, asking, "Do you believe this can be treated as a gender-based classification? . . . It's a difficult question that I've been trying to wrestle with it."[136]

The Tenth Circuit same-sex marriage affirming decision in *Kitchen v. Herbert* recently affirmed a lower court ruling that Utah's same-sex marriage ban was a form of both unconstitutional sex and sexual orientation discrimination.[137] In so ruling, the Tenth Circuit joined *Baehr v. Lewin*,[138] the Hawai'i Supreme Court case that got the same-sex marriage litigation ball rolling in temporarily striking down Hawai'i's marriage ban as an unconstitutional form of gender

[133] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003)(striking down affirmative action program under strict scrutiny); Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)(same).
[134] Califano v. Webster, 430 U.S. 313 (1977)(upholding remedial gender-based social security benefit program); Schlesinger v. Ballard, 419 U.S. 498 (1975)(upholding remedial gender-based federal statute giving female Naval officer additional years of commission service before subjecting them to mandatory discharge).
[135] *See* Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After Windsor*, 23 Tul. J.L. & Sexuality 17, 32-39 (2014)("Rational Basis Bites Back: Freedom from Government Animus-Driven Subordination and Indignity" section of article addressing rational basis with bite as applied to *Windsor* and preceding LGBT-rights Supreme Court decisions).
[136] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf, archived at http://perma.cc/C662-FXNG).
[137] Kitchen v. Herbert, 755 F.3d 1193, 1201. 1229-30 (10th Cir. 2014).
[138] 852 P.2d 44 (Haw. 1993).

discrimination. Along with these cases, bisexuals can help provide an additional bridge for the Supreme Court to make a similar journey and affirm equal marriage rights as a form of constitutional protections against discriminatory gender-based legislation.

IV. A TURNING TIDE TOWARD GREATER BISEXUAL INCLUSIVITY?

Judge Berzon's concurrence in *Latta* may have been the first federal opinion to explicitly include bisexuals in a same-sex marriage case, but her opinion is not the only encouraging sign that courts are becoming more receptive to bisexual-inclusive language. The fact that courts are now using the phrase "same-sex marriage" rather than "gay marriage" (and, as discussed, are using "same-sex couples" in lieu of a less inclusive catch-all "gays and lesbians" phrase to describe same-sex couples) is encouraging, in that "same-sex" terminology is inclusive of all individuals who marry partners of the same sex, not just gays.

Where the Berzon concurrence may pave the path most significantly for increasingly positive discussions of bisexuality in jurisprudence and legal discourse is her recognition that same-sex marriage bans do not turn on a person's sexual orientation; they harm all members of same-sex couples, whether the members of same-sex couples identify as gay, bisexual, or otherwise.

Until more jurists and members of the legal community come to similar recognitions and are willing to move beyond simplistic binary distinctions, however, there is arguably more harm than benefit to excluding bisexuals in the framing of LGBT-rights discourse and litigation. To engage in bisexual erasure in the name of simplifying messaging is not to give courts much credit; they are better at tackling complex issues than the average Joe, after all. Bisexual erasure is shortsighted as well in its failure to realize, or perhaps care about, the difficulty of reversing the

effects of precedent that is potentially harmful to bisexuals by continuing to render them invisible or "less than" in the eyes of the law. The more courts receive the message that bisexuality is not a valid sexual orientation, the harder it is to undo that damage.

The error of bisexual erasure is a graver misstep than a typographical error in a court opinion. No matter how strategically advantageous an attorney may think it to keep the mention of bisexuality out of briefing, this is a misguided and shortsighted strategy, and one that does not further the integrity of a justice system that relies on advocates to accurately portray their own issues and constituencies. The more courts receive and act upon the message that bisexuals are not worth mention in opinions addressing LGBT rights, the harder it will be in the long run to reverse the harmful trend of bisexual erasure.

I am hopeful, however, that, in the same-sex marriage context and beyond, there is an incremental but meaningful movement toward greater bisexual inclusivity in recent years.

One group of LGBT-rights litigators in particular, the National Center for Lesbian Rights, has truly gone to bat for bisexuals. In 2010, the NCLR became the organization to represent a group of bisexual plaintiffs challenging their exclusion from an LGBT organization.[139] The lawsuit against the North American Gay Amateur Athletic Alliance (a softball league hosting the Gay Softball World Series tournament in Seattle), alleged that the "Gay" softball league subjected bisexual men to invasive questioning and then excluded them from play as not being gay enough, in violation of state anti-discrimination laws, public accommodations laws, and other rights.[140] The softball players who brought the action described how they had been summoned into a room where they were questioned in front of a group of over two dozen observers by the North American Gay

[139] *See* Complaint, Apilado v. North American Gay Amateur Athletic Challenge, Case No. 2:10-cv-00682 (W. Dist. Wash.)(April 20, 2010).
[140] *Id*.

Amateur Athletic Association and "were asked to state whether they were 'predominantly' attracted to men or to women."[141] When they asked if being bisexual was a possible answer, were told, "this is the Gay World Series, not the Bisexual World Series."[142] Without giving the men the option of identifying as bisexual, the panel questioning them then labeled the men "non-gay" and recommended disciplinary measures against the men and their softball team, including disqualifying their team from the Gay World Series, for having too many "non-gay" players.[143] The NCLR achieved a settlement in the case, including promises by the League of greater inclusivity and better treatment of bisexuals in the future.[144]

Although NCLR is the first to represent bisexual plaintiffs against an LGBT group that discriminated against them, other groups as well having increasingly acknowledged the importance of not stigmatizing an important segment of its population, for example, engaging in name changes to be more inclusive of both bisexuals and transgender members of their communities.[145]

And bisexual members of the legal community ourselves have stepped up. In 2013, I was one of several co-founders of the first ever national "BiLaw" organization for bisexual lawyers, law professors, law students and our allies. On August 22, 2014, the National LGBT Bar Association hosted BiLaw's inaugural National BiLaw Caucus, which was met with a large turnout of grateful, enthusiastic new BiLaw members, many of whom spoke with great emotion about how long they have felt excluded from LGBT legal discourse and communities, and how overdue such a group is.

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[141] *Id*. at ¶¶36, 29.
[142] *Id*.
[143] *Id*. at ¶¶39-43.
[144] *See* Glazer, Sexual Reorientation, 100 Geo. L.J. at 1000-01 n. 9 (citing 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/).
[145] As previously mentioned, the ACLU's former Lesbian and Gay Rights Project has been renamed The LGBT Project, *see supra* note ___. Similarly, the National Lesbian and Gay Task Force has been renamed National LGBTQ Task Force, *see* http://www.thetaskforce.org/; and the Lesbian and Gay Law Association has been renamed the National LGBT Bar Association, *see* www.lgbtbar.org.

For some, the importance of forming a community is simply to have a group they can open up to without fear of biphobic reaction, a group of kindred spirits to connect with after a long, dry spell of feeling like isolated minorities within a larger minority group. For others, we are looking forward to working together to establish more of a voice in legal discourse and litigation, from working closely with LGBT organizations to writing educational materials and amicus briefs advocating bisexual inclusivity.

Together, we are working to build a "bi bridge" to bring bisexuality back into LGBT litigation and legal dialogues and to reverse the trend of bi exclusion during this important chapter in LGBT-rights history.

But we cannot do it alone. Bisexual erasure is still pervasive throughout both the LGBT community and broader society.[146] Thus, bisexuals very much need allies in the LGBT community, in the broader legal community, and fair-minded jurists who do not want to be complicit in perpetuating bi erasure to step up and do the right thing as well, no longer speaking of the rights of same-sex couples exclusively in terms of "homosexuals," "gays" and "lesbians," without mention of the substantial number of us who are also in loving same-sex relationships, but are not monosexual, and who, like gays and lesbians, have yet to be accorded full protections under the law.

To begin with, jurists on the bench and allies off the bench can make efforts to be more inclusive in their terminology, for example, using the bi-inclusive phrases "LGBT individuals" and "same-sex couples" rather than "gays and lesbians." When referencing those affected by sexual orientation-focused laws in particular (i.e., where gender identity is not at issue), I recommend using

[146] *See, e.g.*, Eliel Cruz, *The Year in Bisexual Invisibility*, THE ADVOCATE (Dec. 30, 2014), http://www.advocate.com/year-review/2014/12/30/year-bisexual-invisibility?page=0,0 .

the phrases "lesbian, gay and bisexuals," or even just "gay and bisexual."[147] There are a number of linguistic options available that are bisexual-inclusive, and there is no sufficient justification for continuing to exclude them in legal discourse.

It is my hope that this trajectory toward bisexual inclusivity will continue. Toward that end, I propose the adoption by both courts and LGBT-rights advocates of a new, more inclusive tone for LGBT-rights terminology and discourse in opinions and litigation, one which embraces the concept of a "bi bridge" rather than engaging in continued bi erasure, and which engages the "BT" as well as the "LG" aspects of LGBT issues in LGBT-rights discourse. As with transgender inclusion, bisexual inclusion in LGBT-rights litigation and discourse would benefit the broader legal and LGBT communities and improve the integrity and coherence of our legal system as it addresses issues pertaining to gender, sexual identity, and personal liberty. Being bi inclusive is, quite simply, the right thing to do. It is not just time; it is overdue.

[147] If "LGBT" is rejected as the inclusive term of choice, I prefer this phrase, and used it almost exclusively throughout my article, Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006). It encompasses gay men and women as well as bisexuals, and thus leaves out no homo- or bisexual orientations.

APPENDIX

Survey of terminology within text of majority opinion/main LGBT-advocate party briefs (statement of case/facts, summary of argument/ introduction and argument sections only, not including attachments, syllabus, table of contents, other brief sections). Language within quotations or titles is not counted.

	"LGBT/Q"	**"Gay(s)" or "homo-sexual(s)" (without "lesbian(s)" or "bisexual(s)")**	**"Gay and lesbian" or "gay men within 10 words of lesbians/ women" (without "bisexual")**	**"Same-sex" or "same sex"**	**"Bisexual"**
***Latta v. Otter*,** 2014 WL 5151633 (9th Cir.)	0	0	5	53	0
***Latta* brief of plaintiffs-appellees,** Case No. 14-35420, Docket Entry 76-1 (9th Cir. 2014)	0	0	4	107	0
***Herbert v. Kitchen*,** 755 F.3d 1193 (10th Cir. 2014)	0	1	2	90	0
***Herbert* brief of plaintiffs-appellants,** 2014 WL 897509 (10th Cir.)	0	7	14	212	3
***Bostic v. Schaefer*,** 760 F.3d 352 (4th Cir. 2014)	0	0	1	84	1 (describing *Romer* Amd. 2 language)
***Bostic* brief for Appellees,** 2014 WL 1398088 (4th Cir.)	0	4	66	62	0
***Baskin v. Bogan*,** 766 F.3d 648 (7th Cir. 2014)	0	53	2	105	1.
***Baskin* brief of plaintiffs-appellees,** 2014 WL 3909319	0	6	16	83	0
***Hollingsworth v. Perry*,** 133 S.Ct. 2652 (2013)	0	0	0	8	0
***Perry* brief for respondents,** 2013 WL 648742	0	6	89	43	0
***United States v. Windsor*,** 133 S.Ct. 2675 (2013)	0	0	0	43	0
***Windsor* brief of plaintiff-appellee,** 2012 WL 3900586	0	27	30	41	0
***Lawrence v. Texas*,** 539 U.S. 558 (2003)	0	53	0	13	1 (describing *Romer* Amd. 2 language)

	"LGBT/Q"	**"Gay(s)" or "homo-sexual(s)" (without "lesbian(s)" or "bisexual(s)")**	**"Gay and lesbian" or "gay men and lesbians/ women" (without "bisexual")**	**"Same-sex" or "same sex"**	**"Bisexual"**
***Lawrence*, brief for petitioners,** 2003 WL 152352	0	66	29	32	1
***Boy Scouts v. Dale*,** 530 U.S. 640 (2000)	0	7	2	0	1 (describing "Irish–American gay, lesbian, and bisexual group" in *Hurley*)
***Dale* brief of respondents,** 2000 WL 340276	0	92	2	1	1 (describing *Hurley*)
***Romer v. Evans*,** 517 U.S. 620 (1996)	0	12	8	0	0, other than quoting Amendment language or others' descriptions of it.
***Romer* brief for respondents,** 1995 WL 17008447	0	69	7	0	14 (all paraphrases of Amd. Language)
***Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).**	0	1	2	0	6
***Hurley* brief of Respondents,** 1995 WL 143532	0	3	1	2	8
***Bowers v. Hardwick*,** 478 U.S. 186 (1986)(overruled by *Lawrence v. Texas*)	0	14	0	0	0
***Bowers* brief of Respondent,** 1986 WL 720442	0	10	0	1	0