BRIDGING BISEXUAL ERASURE IN LGBT-RIGHTS DISCOURSE AND LITIGATION

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LGBT rights are at the forefront of current legal news, with "gay marriage" and other "gay" issues visible beyond dispute in social and legal discourse in the 21st Century. Less visible are the bisexuals who are supposedly encompassed by the umbrella phrase "LGBT" and by LGBT-rights litigation, but who are often left out of LGBT-rights discourse entirely. This Article examines the problem of bisexual invisibility and erasure within LGBT-rights litigation and legal discourse. The Article surveys the bisexual erasure legal discourse to date, and examines the causes of bisexual erasure and its harmful consequences for bisexuals, the broader LGBT community, and jurisprudential integrity as a whole. This Article contributes to the bisexual erasure discourse through a unique examination of bisexual erasure through a survey of relevant terminology in LGBT-rights cases, including and beyond recent same-sex marriage litigation. The study documents an almost complete systemic erasure of bisexuals in briefings and opinions, including an absence of any mention of bisexuals by majority opinions in cases where the briefings have set a tone of bi erasure by arguing alternatively for "gay and lesbian" rights, "gay marriage," or "same-sex marriage," while completely omitting reference to bisexuals. In addition to documenting the absence of bisexuals in litigation documents (despite the actual presence of bisexuals as litigants), this Article compiles anecdotal evidence of bisexual erasure by attorneys, courts, and the media.

The time is overdue for more widespread inclusion of bisexuality in LGBT-rights discourse and litigation. Increased bisexual in-

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clusion can provide a bridge toward more meaningful, holistic, and accurate discourse on the rights of disenfranchised sexual minorities in this country. The tide may finally be turning toward increased bisexual inclusion, however, as some courts and LGBT organizations have employed more inclusive terminology, and one federal judge has explicitly recognized for the first time that bisexuals, like gays, are harmed by same-sex marriage bans. Bisexuality, the last sexual orientation that dare not speak its name, is finally claiming its seat at the table of equal liberty, dignity and respect under law and in the eyes of the LGBT-community itself. The legal community should join this move toward more honest and holistic discourse that acknowledges the equal validity of bisexuality along with other sexual orientations. This Article is one of many steps that must be taken for more meaningful and inclusive LGBT-rights discourse.

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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 the 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 legal protections in a number of recent court decisions. For example, gender identity is increasingly being recognized as a form of gender discrimination under Title VII, even while sexual orientation discrimination continues to be generally un-

1. There are currently no out bisexual judges on the state or federal bench. "Pathways to the Judiciary" Panel, National LGBT Bar Association Lavender Law Conference (Aug. 23, 2014). *See also* R.J. Thompson, *How Does Judicial Diversity Impact Access to Justice for Our Communities?*, Lambda L. Blog (June 18, 2014), http://www.lambdalegal.org/blog/20140618_judicial-diversity-impacts-access-to-justice. At a recent National LGBT Conference panel presentation on LGBT judges, the panelists similarly described the absence of out bisexual judges on the federal and state bench when asked by the author if there were any out bisexual judges on the bench.

protected 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 the purpose of denying equal rights in the first place).[3] The accomplishments of transgender rights advocates 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 far from attaining 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, evidenced by the comparative absence of bisexuals in LGBT-rights litigation and legal discourse. While a scattering of legal scholars have examined why this is so, as I will discuss in this Article, my first task in addressing the subject of bisexual invisibility and erasure is to address why this issue matters.[5]

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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) (denying a male-to-female transgender individual a marriage license to marry male partner); 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).
4. Along with 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 time, not necessarily in the same way, and not necessarily to the same degree." 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, 68 (2010) (quoting Robyn Ochs, *Selected Quotes by Robyn Ochs*, http://www.robynochs.com/writing/quotes.html (last visited Sept. 23, 2015)); 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 was moved to add this explanation about why bisexual erasure matters at the suggestions of those who attended my scholarship presentation of this piece at the Central States Law Schools Association conference at the Louisiana State University Paul M. Hebert Law Center on October 11, 2014. The audience members were generous with their suggestions, spelling out for me that while the importance of bi erasure may seem obvious to those of us who have been battling it for decades, it is less intuitively a significant problem for those who are not bisexual, who have never given thought to the issue, and who may assume that where go gays, so go bisexuals,

The reasons why courts, scholars, attorneys, and the broader legal community should care about the problem of bisexual erasure are 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. In the custody context, for example, the cases herein will illustrate that bisexuals are sometimes viewed as too unstable to be trusted as parents.[6] In the immigration context, the claims of bisexuals seeking asylum from anti-LGBT countries or seeking to emigrate based on relationship status can be viewed with suspicion, due to confusion about how bisexuals may validly be in a same-sex relationship at one point and a different-sex relationship at another.[7] The resulting assumption that one of those relationships must be a "sham" relationship consequently threatens the potential ability of bisexuals to immigrate or even be granted asylum from countries hostile to LGBT individuals, as described in more detail in this Article.[8]

It is undeniable that many rights have trickled down to the bisexual members of the LBGT community from "gay rights" victories. In this regard, bisexuals certainly owe a great deal of gratitude to the "gay rights" movement. Nonetheless, it is also true that bisexual exclusion has a detrimental effect not only on bisexuals, but also on the broader LGBT community and on jurisprudential integrity. Many bisexuals have painful stories to recount about the emotional injury of being treated disparagingly, even by members of the very LGBT community many bisexuals have spent decades fighting for.[9] It is essential that stories such as these be shared. As Professor Ruth Colker wrote in the first law review essay to address the issue of bisex-

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and thus bisexuals must be doing just fine in this day of dramatically increasing LGBT rights. And while bisexuals certainly have been beneficiaries of such trickle-down rights, and in many contexts our interests and issues are fungible with those of gays and lesbians, this section spells out how continuing to write bisexuals out of LGBT-rights discourse nonetheless has a variety of harmful repercussions, and not just for bisexuals.

6. *See* discussion *infra* Section III.A.2.
7. *See* discussion *infra* Section III.A.1.
8. *Id.*
9. I could easily devote an entire 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 from other bisexual members of the legal

ual 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.[10] In her *Bisexual Jurisprudence* essay, Colker shares both her thoughts and her personal experiences with the issue, and, while so doing, poignantly emphasizes 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."[11]

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 that, over time, will hopefully become more welcoming toward others whose lives and realities do not conform to stifling binary definitional boxes. There are not 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.

There is a myriad of reasons for the bisexual closet. Too often the closet becomes a tempting refuge from pejorative assumptions about bisexuals made even by 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; or, in other words, those attracted to only one other sex), whose sexual orientation may be accurately assessed merely by the sex of their romantic partner. In 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,[12] is a flawed one. Bisexuals who wish to be "out of the closet"

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and LGBT communities, are important, my focus in this Article is on the broader impact and issues of bisexual erasure in LGBT litigation.

10. Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127, 127-28, 136-37 (1993). *See also* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL L. REV. 1699, 1708 (1990) (discussing the political as personal).

11. Colker, *supra* note 10, at 128.

12. 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

must frequently correct such assumptions; when dating someone of the opposite sex we must often clarify for others that we are still bisexual, not heterosexual (or, as female bisexuals who go from same- to opposite-sex relationships are sometimes pejoratively called, "hasbians"[13]), and when dating someone of the same sex, we must often correct the assumption that the same-sex relationship renders us gay rather than bisexual. The constant burden of being the embodiment of a never-ending teachable moment that requires a perpetual coming out of a "double closet"[14] is, quite frankly, exhausting.

Even more exhausting is the need to speak out against negative stereotypes that at times rise to the level of 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 exists about bisexuals.[15]

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 to ensure our own visibility, a shared responsibility lies both with our advocates, to include us in LGBT-rights arguments, and with the courts, to include us in LGBT-rights analyses and holdings in a positive manner. At this moment in history when the basic fairness of treating gays and lesbians with equal dignity has gripped the heartstrings of America, it is

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partner is still bisexual to the same degree as a polyamorous bisexual person who has both a male and female romantic partner (which is 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).

13. "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." Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98, 117 (1995). *See also* Colker, *supra* note 10, at 129 (describing how she was derogatorily dubbed a "hasbian" after marrying a man).
14. *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.").
15. *See* discussion *infra* Section II.A.

time for bisexuals to demand and be accorded the same respect[16] and recognition as our gay (and straight) friends.

Although bisexuals are relatively invisible in the halls of both courthouses and the legal academy, there are 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 continues that dialogue and examines the problem of bisexual erasure 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 of 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. Building upon the work of past scholars who have brought such incidents to light, I conducted a survey of 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, evidenced by 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 omits any reference to bisexuals, the courts have generally followed suit with similar non-inclusive language.

Part III addresses the negative consequences of bisexual 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 as other harms. This Part addresses harms specific to bisexuals in contexts including immigration and family law, as well as harms to the LGBT community and to jurisprudential integrity resulting from the erasure of bisexuality from LGBT-rights discourse.

Finally, Part IV offers suggestions for turning the page toward a new chapter of greater bisexual inclusion in LGBT-rights discourse and litigation. This section highlights some of the (sadly, still too rare) examples of recent advances toward greater bisexual inclusivity evidenced by (1) the 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 ex-

16. *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 . . . .").

plicit 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. Despite these positive developments, however, there is much more work that must still be done and much room for improvement. The tendency toward bisexual erasure in LGBT-rights cases culminated recently in the almost complete erasure of bisexuals from both the briefs and the final opinion in the Supreme Court same-sex marriage case, *Obergefell v. Hodges*,[17] even despite efforts by BiLaw—through its amicus brief and direct outreach to attorneys in the case—to be more bi-inclusive.

On a final note in this introduction, while I realize that it is uncommon in a doctrinal article to frequently revert to first person and anecdotal language, I find it necessary to do so throughout this Article because, at the core, this critical issue is personal, not just political and legal. The exposition of bisexual erasure is at once both theoretical analysis and an intimate narrative for me. I welcome you to my world, and hope that you follow me to the end of this analysis and be open to my non-conventionality on this front. After all, flexibility and willingness to change linguistic traditions play important roles in this Article's ultimate conclusion, in which I hope to help facilitate a brighter path, a bridge toward greater bisexual inclusivity.

II. The Documentation and Discourse of Bisexual Erasure

This is a historic era of change and progress for LGBT rights, particularly in regard to marriage equality, a dramatically and rapidly evolving area of litigation that culminated in the Supreme Court's *Obergefell* decision. While there are still a number of states that do not accord include full civil rights protections to LGBT individuals in other contexts, such as employment, housing, and public accommodations,[18] this number is decreasing by

17. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

18. As of the writing of this Article, only nineteen states and D.C. extended protections against employment and housing discrimination on the basis of sexual orientation and gender identity, and only seventeen states and D.C. accorded protections against public accommodation discrimination on the basis of sexual orientation and gender identity. *See Non-Discrimination Laws*, Movement Advancement Project, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Sept. 9, 2015). Those numbers are significantly higher, however, than in 2008, when only thirteen states provided anti-discrimination protections against sexual orientation and gender identity discrimination in housing, employment, and public accommodations, and dramatically higher than in 1992, when only eight states protected against discrimination on the basis of sexual orientation (gender identity not yet being commonly protected along with sexual orientation at that point). *See* Matt

the day. 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 increasingly 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,[19] bisexuality as an orientation just as worthy of protection as homosexuality has generally not been addressed in any substantive manner by courts in this country, as this section will address in more detail, and as detailed in the Appendix to this Article.[20] 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.[21] For the most part, and perhaps as a result, court opinions have mirrored this lack of inclusive terminology in their corresponding opinions.

A. The Origins of "Bisexual Erasure"

Although there has been a noticeable lack 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 jurispru-

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Foreman, *Gay Is Good*, 32 NOVA L. REV. 557, 560 n.14 (2008); Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons As A Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 266 (1992).

19. *See* Flood v. Bank of Am. Corp., 780 F.3d 1, 4 (1st Cir. 2015) (describing plaintiff's allegations "that her former employers . . . subjected her to a special set of rules and standards, and otherwise discriminated against her, because of her bisexuality" and vacating summary judgment on the wrongful termination and hostile environment claims resulting from the alleged discrimination). *See also* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (also involving a discrimination claim by a plaintiff fired after coming out to her supervisor and colleagues as bisexual) and Dawkins v. Richmond Cnty. Schs., No. 1:12CV414, 2012 WL 1580455 at *2 (M.D.N.C. May 4, 2012) ("The Complaint alleges that Plaintiff is 'a bisexual/gay male'").

20. *See infra* Appendix.

21. In the area of employment discrimination, Ann Tweedy and Karen Yescavage have recently documented the lack of published cases addressing claims by bisexuals, and observed 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." Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Emperical Study*, 21 WM. & MARY J. WOMEN & L. 699, 709-10 (2015). There has been one recent exception to the lack of successful employment discrimination cases brought by bisexuals: *Flood*, 780 F.3d 1.

dence has been answered 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.[22] Two years later, Professor Naomi Mezey added to this dialogue.[23] 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.[24] 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.[25]

The bisexual jurisprudence dialogue continued through subsequent legal scholarship by Colker and Mezey[26] and was eventually joined by other legal scholars. In 2000, Professor Kenji Yoshino continued the bisexual jurisprudence dialogue with his article *The Epistemic Contract of Bisexual Erasure*, which coined the phrase "bisexual erasure" (or "bi erasure").[27] 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.[28] Yoshino explained that the invisibility of bisexuality in LGBT litigation cannot fairly be justified by reference to demographics because bisexuals constitute a large percentage of

22. Colker, *supra* note 10.

23. Mezey, *supra* note 13.

24. *Id.* at 102-03, 122-32.

25. *Id.* at 99-100, 132-33.

26. *See* RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 15-38 (1996) [hereinafter COLKER, HYBRID]; Ruth Colker, *An Embodied Bisexual Perspective*, 7 YALE J.L. & HUMAN. 163 (1995) [hereinafter Colker, *Embodied Bisexual Perspective*]; Ruth Colker, *Response: Hybrid Revisited*, 100 GEO. L.J. 1069 (2012); Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701 (2003); Naomi Mezey, *Response: The Death of the Bisexual Saboteur*, 100 GEO. L.J. 1093 (2012).

27. *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

28. *See id.* at 356-430.

the LGBT population.[29] Thus their invisibility in American law is vastly disproportionate to their actual existence, and is more accurately classified as "bisexual erasure."[30]

The most recent demographic data on LGBT populations continues to support Yoshino's findings; the number of bisexuals within the LGBT community remains significantly higher than one might gather from their lack of mention in litigation. Of the millions of individuals who identify as LGBT,[31] by all recent counts, bisexuals are comparable in size to gay men and lesbians, and bisexual women outnumber lesbian women. For example, in a recent survey of LGBT individuals, the Pew Research Center estimated that 57% identify as gay or lesbian, while 43% identify as bisexual; a survey by Dr. Gary Gates of the Williams Institute estimated that 48% identify as gay or lesbian, while 52% identify as bisexual; and a GSS (General Social Survey) data estimated that 47% identify as gay or lesbian, while 52% identify as bisexual.[32] 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.[33]

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, bisexual invisibility may be attributable to a lack of *awareness* of their existence, caused, perhaps, by the disproportionate number of bisexuals who are 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.[34]

However, even with bisexuals being comparatively more closeted (as to the potential causes of bisexual erasure in LGBT-rights litigation specifically) it is doubtful that LGBT-rights attorneys, in framing their arguments,

29. *See id.* at 388.

30. *See id.*

31. Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual and Transgender?*, WILLIAMS INSTITUTE 1 (April 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

32. GAY, LESBIAN, BISEXUAL AND TRANSGENDER CIVIL RIGHTS: A PUBLIC POLICY AGENDA FOR UNITING A DIVIDED AMERICA (Wallace Swan ed. 2015).

33. *Id.*

34. Kim Parker, *Among LGBT Americans, Bisexuals Stand Out When It Comes to Identity, Acceptance*, PEW RESEARCH CENTER (Feb. 20, 2015), http://www.pewresearch.org/fact-tank/2015/02/20/among-lgbt-americans-bisexuals-stand-out-when-it-comes-to-identity-acceptance/.

leave out references to bisexuals because we are not on their radar at all. This is especially the case considering the recent proactive outreach extended to LGBT-rights lawyers by bisexual activists seeking to increase the visibility of bisexuals in LGBT-rights litigation. During the period of time when the multitude of LGBT-rights lawyers representing the multiple parties in the same-sex marriage *Obergefell v. Hodges* were preparing their merits briefs to the Supreme Court, for example, I sent drafts of this Article to each main lawyer listed for the case, imploring them to consider bi-inclusive language in the briefing. My efforts were largely futile; only one main party brief referred to bisexuality, and with only a single reference,[35] as compared to numerous references to "lesbians and gays" as the class harmed by same-sex marriage bans.[36]

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 origins of bisexual erasure. Overall, he suggests, bisexual erasure is attributable to the shared interest of gays and straights in preserving strict binary sexual orientation dichotomies, as they both view the comparably fluid orientation presented by bisexuality as a threat.[37] Yoshino breaks down the motivating drives underlying what he coins as "bisexual erasure" into three areas. First, he explains, those who stifle discussions of bisexuality do so because they fear that so long as bisexuality is a valid possibility, the monosexual (i.e., gay or straight) identity can no longer be fairly inferred by one's partnerships and is thereby destabilized as a default identity.[38] Second, he offers, they are threatened by a world in which sex is no longer the primary distinguishing

35. "The Sixth Circuit's historical analysis is wrong. Invidious discrimination against lesbians, gay men, and bisexuals did not begin in the 1970s with Anita Bryant or criminal laws targeting gay people specifically." Brief for Petitioners, Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (No. 14-556), 2015 WL 860738, at *43.

36. *See infra* Appendix.

37. Yoshino, *supra* note 27, at 402-10.

38. In a poignant illustration of this fear, Yoshino quotes the following story related from bisexual activist Robyn Ochs: "When I have asked gay men to explain their fears about bisexuality and bisexual people, one theme has repeatedly arisen. As one gay man put it, 'Coming out as gay was the hardest and most painful thing I have ever done in my life. Now I'm finally at a place where I have a solid identity, a community, a place to call home. Bisexuals make me uncomfortable because their existence raises for me the possibility that I might be bisexual myself. And coming to terms with my identity was so hard for me the first time around, I cringe at the thought of having to go through such a long, hard, painful process a second time.'" *Id.* at 402.

characteristic of attraction.[39] Finally, some (rather unfairly, but commonly)[40] associate bisexuality with dangers such as HIV concerns, assumptions of non-monogamy, and the perception that bisexuals are assimilationists who can, unlike gays, avail themselves of "heterosexual privilege."[41]

In addition to outlining various causes of bisexual erasure, Yoshino 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.[42]

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 the choice to omit bisexuals from the face of LGBT-rights litigation were intentional and strategic, the intent may nonetheless be relatively benign, accompanied by the assumption that omitting bisexuals will not hurt us because eventually the rights gained by gays as a named class

39. *Id.* at 402-10.

40. Previous studies have shown that bisexual men are less at risk to contract STIs and HIV than are gay men, but as William Jeffries of the Division of HIV/AIDS at the Center for Disease Control's National Center for HIV/AIDS, Viral Hepatitis, and TB Prevention reports, "Societal biphobia—negative attitudes and behaviors toward bisexual individuals—is more prevalent than antigay sentiment" and "[i]t is sometimes perpetrated by lesbians and gay men, and public health professionals who interact with MSMW. Biphobia can manifest in erroneous beliefs that MSMW are closeted gay men and, particularly for black men, responsible for HIV transmission to women." *See* Eliel Cruz, *Study: Biphobia Puts Bisexual Men at Risk for STIs*, THE ADVOCATE (June 26, 2014, 4:17 PM), http://www.advocate.com/bisexuality/2014/06/26/study-biphobia-puts-bisexual-men-risk-stis.

41. *See* Lisa Orlando, *Loving Whom We Choose*, *in* BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT 224 (Loraine Hutchins & Lani Kaahumanu eds., 1st ed. 1991) ("[T]he lesbian and gay community abounds with negative images of bisexuals as fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain 'heterosexual privilege,' power-hunger seducers who use and discard their same-sex lovers like so many Kleenex."). *See generally* Colker, *supra* note 10, at 132-34 (discussing how bisexuals must deal with the distrust of the gay and lesbian community).

42. *See* Yoshino, *supra* note 27, at 396-99.

will trickle back down to the unnamed bisexuals. A "trickle down rights" justification for bisexual erasure, however, is not so different from the similar, now widely-decried, excuses made for leaving transgender protections out of earlier versions of the Employment Non-Discrimination Act,[43] for which even those groups originally proposing a "non-inclusive" ENDA have now apologized.[44] Furthermore, such a shortsighted strategy that is overly focused on winning immediate battles leads to missed 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,[45] Ann Tweedy,[46] and Michael Boucai[47] 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.[48] In their respective 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.[49]

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.[50] 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 suc-

43. *See* Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L. J. 997, 1014-16 (2012) (describing the strategic 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).

44. *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 (summarizing the apology of Chad Griffin, Human Rights Campaign President, for failing to represent the transgender community).

45. *See* Glazer, *supra* note 43.

46. *See* Tweedy & Yescavage, *supra* note 21.

47. *See* Boucai, *supra* note 12, at 415.

48. *See, e.g.*, Greenesmith, *supra* note 4, at 65; Katherine Francys Lambrose, Note, *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).

49. *See* Boucai, *supra* note 12, at 415.

50. *Id.* at 452-53.

cessful application of immutability principles.[51] One by one, Boucai rebuts each of these justifications for bisexual erasure. For example, he points out how same-sex marriage bans apply regardless of sexual orientation, 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.[52]

Although varying in focus and analyses, the legal scholarship addressing bisexuality in the law has generally reflected a general consensus that the absence of bisexuals in LGBT discourse and litigation is evidence not of the nonexistence of bisexuality, but rather, of its erasure by members of other sexual orientations.

B. Anecdotal Evidence of Bisexual Erasure in LGBT Litigation

Over the years, bisexual erasure scholars have collected and presented anecdotal evidence of bisexual erasure, demonstrating that even advocates of LGBT rights have, at times, perpetuated bi erasure. 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][53] 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*.[54] Thus, while he "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."[55] This example of individual erasure by an LGBT-rights organization is particularly unfortunate in light of the lack of successful employment discrimination challenges brought by bisexual victims of

51. *Id.* at 419-20, 460-72.

52. *Id.* at 469-472.

53. 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 and is directed by Louise Melling. *See* ACLU, https://www.aclu.org/lgbt-rights (last visited Sep. 15, 2015); ACLU, https://www.aclu.org/bio/louise-melling (last visited Sep. 15, 2015).

54. *See* Colker, *supra* note 10 at 134 (citing Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446 (6th Cir. 1984)). The court in *Rowland* unambiguously described plaintiff as "bisexual."

55. *Id.*

employment discrimination, despite the numbers of bisexuals being comparable (and arguably greater, in the case of openly bisexual employees) to gays and lesbians who suffer employment discrimination.[56]

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*.[57] In that case, Colorado Amendment 2 (which the Court ultimately struck down) had explicitly prohibited civil rights protections for lesbians, gays, and bisexuals, with the text of the amendment prohibiting any "Protected Status Based on Homosexual, Lesbian or Bisexual Orientation."[58] Despite the amendment's text explicitly including bisexuals, however, the Court stated that it would be referring throughout the opinion solely as "homosexuals or gays or lesbians."[59] As Natasha Silber comments, "by structuring the named class as homosexual persons, and excluding bisexuals," the Court in *Romer* "reified the construct of the gay-straight binary."[60]

Why did the *Romer* Court drop "bisexual" from its vernacular? A closer look at the briefs of the LGBT-rights advocates in that case provides the answer. The respondents' brief sent an initial signal that condoned subsuming bisexuality within the umbrella label (in effect, erasing bisexuals) with the statement: "Nevertheless, Amendment 2 prevents gay people - *and only gay people* - from bringing 'any . . . claim of discrimination' under § 24-34-402.5 for relief from discrimination based on 'homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.' "[61] The brief continued to signal that "bisexual" should be subsumed under the heading "gay," and to maintain that only gay individuals were affected by the Amendment despite the more expansive language of the offending state constitutional provision:

> Amendment 2 Intentionally Excludes Only Gay People from Equal Opportunity to Participate in the Political Process.
>
> There can be no question that the plain language of Amendment 2 specifically targets gay people: Amendment 2 deprives persons

56. For a discussion of employment discrimination against bisexuals, *see* Tweedy & Yescavage, *supra* note 21, at 699.
57. Romer v. Evans, 517 U.S. 620, 641 (1996).
58. *Romer*, 517 U.S. at 624 (quoting COLO. CONST. art. II, § 30(b)).
59. *Romer*, 517 U.S. at 624.
60. Natasha J. Silber, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1899 (2013).
61. Brief for Plaintiff-Respondent, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008447, at *11 (emphasis added).

> of any remedy for discrimination only to the extent that government or others discriminate on ""the basis of" 'homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships.' Thus, Amendment 2 specifically bars only gay people from seeking a basic kind of "protection of the laws" that any other group is free to seek and obtain. . . . .
>
> In addition to Amendment 2's facially discriminatory application to gay people alone, the record of this case also shows that Amendment 2 was intended to render ineffective only gay persons' political efforts to seek protection against public and private discrimination.[62]

The Court, following these cues from LBGT-rights attorneys themselves, subsequently made bisexual erasure even more explicit, marking the turning point toward almost complete bisexual erasure from LGBT opinions. As revealed in this Article's Appendix, which traces the evolving terminology of LGBT litigation following the *Romer* Court's litigant-approved bisexual erasure, the word "bisexual" almost entirely disappeared from the face of all subsequent Supreme Court opinions addressing LGBT rights. In contrast, prior to *Romer*, in cases where LGBT-rights litigants themselves were bi-inclusive in their brief-drafting, so too was the Court.[63]

Romer thus marked a historic and disturbing shift in jurisprudential linguistics, the point at which bisexuals were erased from the face of Supreme Court litigation addressing sexual orientation.

More recent examples of bisexual erasure in LGBT-rights litigation by LGBT-rights attorneys are even more disturbing. Yoshino and Colker both have described, for example, a troubling line of questioning to which attorney Ted Olson subjected his own witness, Sandy Steir, during the Proposition 8 trial leading to the Supreme Court *Perry* case. In that case, Steir and her wife Kris Perry were among those couples challenging California's same-sex marriage ban. Steir, however, was not what some call a "gold star" lesbian, i.e., a lesbian who has never been in a single heterosexual relationship.[64] To the contrary, she was previously married to a man before meeting Perry, a fact that came out at trial. On the stand, Olson subjected Steir to

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62. *Id.* at *33 (footnote omitted).

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

64. *See* Kathy Belge, *Gold Star Lesbian*, ABOUT.COM, http://lesbianlife.about.com/od/comingout/g/GoldStar.htm (last visited Sep. 15, 2004) ("A gold star lesbian is a lesbian who has never slept with a man and has no intention of ever sleeping with a man").

invasive questioning about her sexual orientation, apparently to preemptively address questions the State might raise, demanding of his client, "How convinced are you that you are gay? You've lived with a husband. You said you loved him. Some people might say, Well, it's this and then it's that and it could be this again. Answer that."[65] In response, Steir explained away her previous marriage by testifying that the only time in her life she had fallen in love had been in her relationship with Kris Perry.[66] Under Ted Olson's questioning, Steir disavowed having ever been in love with her ex-husband.[67]

In this exchange, it is not Steir's answer that is troubling so much as Olson's apparent need to engage in such an offensive line of direct examination in the first place, which begs the underlying question of whether it would 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. Couldn't that have indeed been the case if she was, in fact, bisexual, and so what if it was? 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 if a party to a same-sex partnership is 100% homosexual, only then is she or he entitled to equal marriage rights.

In at least three other incidents, bisexuals have been erased from the face of recent same-sex marriage litigation. First, during the 2005 *Marriage Cases* litigation challenging the sufficiency of California's Domestic Partner Act, the LGBT-rights lawyers, in the course of discussing the state's legislative determination that "many lesbian, gay, *and bisexual* Californians have formed lasting, committed, and caring relationships with person of the same sex,"[68] engaged in bisexual erasure. In other words, rather than accurately quote the state's findings regarding lesbians, gays, and bisexuals, their briefs erased the word "bisexual" and instead described the State as denying only "lesbians and gay men" the right to marry.[69]

In another incident covered by LGBT media, Robyn Ochs, one of the most prominent bisexual visibility advocates in the country, was nonetheless

65. Transcript of Proceedings at 166-67, Perry v. Schwarzenneger, 704 F. Supp.2d 921 (N.D. Cal. 2010) (No. C-09-2292-VRW), *available at* http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-1-1-11-10.pdf.

66. *Id.* at 167.

67. *Id.* at 165.

68. Respondent's Brief at 1, 6, In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Ct. App. 2005)(No. A110449), 2005 WL 3967315.

69. *Id.*

incorrectly described as a lesbian by media accounts highlighting her prominent role as a plaintiff in a historic same-sex marriage case.[70] The 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."[71] Subsequently, one LGBT newspaper interviewing Ochs described that incident as "the very thing Ochs works to eradicate happen[ing] to her," because Ochs "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)."[72]

Most recently, as previously described, as a member of the first national organization of bisexual lawyers, law professors and law students, BiLaw, I reached out to over a dozen lawyers representing the various petitioners in the Supreme Court's landmark *Obergefell* marriage equality decision. Not only did I send early drafts of this Article to them, imploring bisexual inclusivity in the Supreme Court briefing, but BiLaw filed an amicus brief with the Court, prior to the filing of several of the final merits briefs in that case,[73] again seeking bisexual inclusivity in the discussion of same-sex couples' rights in that case, all to no avail. In the end, only one party's brief—that of the lead plaintiff in the case, Mr. Obergefell—mentioned bisexuals, and it did so only once.[74] Here, again, the Court followed the lead of the LGBT-rights lawyers in that case, and completely omitted bisexuals from the final decision.[75]

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.[76] To elaborate, the recasting of the bisexual *Rowland* plaintiff and of bisexual activist Robyn Ochs as lesbians are both exam-

70. *See* Eliel Cruz, *When Bisexual People Get Left Out of Marriage*, THE ADVOCATE (August 26, 2014, 7:15 AM), 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").

71. *Id.*

72. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

73. Brief for Bilaw as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (No. 14-574), 2015 WL 1041665.

74. Brief for Petitioners, *Obergefell*, 135 S.Ct. 2584 (No. 14-556), 2015 WL 860738, at *43.

75. *Id.*

76. Yoshino, *supra* note 27, at 365-67.

ples 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, effectually erasing her past opposite-sex relationship, was similarly a form of categorical erasure. Finally, the *Obergefell* briefs' and majority opinion's failure to mention bisexuals, even after being lobbied to be bi-inclusive, may also be considered a form of categorical erasure, to the extent that bisexuals are treated as nonexistent by the language in the briefs and opinions describing same-sex couples as being comprised only of gay and lesbian people, and same-sex marriage bans only affecting gays.

To be fair, the intent of LGBT-rights advocates, courts, 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, courts, members of the media, and all others engaged in LGBT-rights discourse 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 Supreme Court opinions related to LGBT rights, and also within the briefs and opinions in federal appellate same-sex marriage decisions following the Supreme Court's *Windsor* and *Perry* decisions. 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."[77]

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."[78] The umbrella term "LGBT" has not

77. *See infra* Appendix.

78. *Id.*

been used at all by the courts and litigants in these cases.[79] However, the phrase "same-sex" has become the Supreme Court's preferred umbrella term (at least in the cases addressing rights of same-sex couples), which the Court used exclusively in *Windsor* and *Perry*.[80] The briefs of the LGBT-rights advocates in those cases, in contrast, alternated between references to "same-sex couples" and "lesbian and gays."[81] It remains to be seen, however, if "same-sex" will continue to translate into an inclusive umbrella catch phrase in future cases where the rights at issue arise in the context of individuals, not couples.

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 after the Court followed the LGBT-rights lawyers' lead in *Romer*.[82] 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, Inc.*,[83] a case in which the plaintiff's name itself included bisexuals. The litigants in that case, challenging the exclusion of the "Gay, Lesbian and Bisexual Group" from the St. Patrick's Day parade in Boston were clearly, as their name indicated, bisexual-inclusive. So, consequently, was the Supreme Court, at least in that case. But the bisexual inclusivity lasted only a short time; it was a year later that the LGBT-rights litigants in *Romer* dropped "bisexual" from the named class, signaling to the Court that it could do the same, and the Court did so, shepherding in the post-*Romer* era of bisexual erasure in Supreme Court litigation.[84]

The word "bisexual" has not appeared in a single Court opinion since *Romer,* other than in a description of the language from the state constitutional amendment in *Romer*.[85] Ironically, that anti-LGBT provision itself was more bisexual-inclusive than the Court's and LGBT advocates' own

79. *Id.*
80. *Id.*
81. *Id.*
82. *See infra* Appendix. *See also supra* Section II.B (describing how the Court in *Romer* followed the decision made by the attorneys to drop "bisexual" from the named class).
83. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).
84. *See supra* Section II.B.
85. Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("*Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosex-

language in that case, and in the vast majority of LGBT-rights briefs and opinions since.[86]

Bisexual erasure was even more blatant in the *Windsor*, *Perry*, and *Obergefell* merits briefs filed with the Supreme Court on behalf of the same-sex couples who brought those actions for marriage equality. While there were hundreds of references to "gays," "homosexuals," or "gays and lesbians," in the main party briefs filed by LGBT-rights proponents in those cases,[87] in dramatic contrast, there were a grand total of *zero* references to bisexuals in the body of any of the *Windsor* or *Perry* briefs, and only one mention of bisexuals in a single *Obergefell* merits brief (out of the four filed).[88] The only reference to bisexuals in the *Windsor* or *Perry* briefs by the plaintiff-respondents 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.[89] Other than that, the *Obergefell*, *Windsor*, and *Perry* main party briefs failed to acknowledge that bisexuals, as well as gays and lesbians, have a serious stake in the outcome of same-sex marriage litigation: when bisexuals are in same-sex partnerships (as they often are), they are harmed by marriage bans, just as gays and lesbians are. Rather than acknowledge this reality, however, the briefs consistently described same-sex life partnerships as entered into only by gays and lesbians, not bisexuals.[90]

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 the general failure to mention bisexuality in those cases' party briefings.[91] It is unsurprising that, for the most part, the opinions from the federal appellate courts have largely mimicked the language of those briefs, never mentioning bisexuals as either

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uals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships' . . . .") (quoting Romer v. Evans, 517 U.S. 620, 624 (1996)).

86. *See supra* Part II.B. *See also infra* Appendix (detailing the disappearance of "bisexual" from Supreme Court opinions and briefs after *Romer)*.

87. *See infra* Appendix.

88. *Id.*

89. Brief of Plaintiff-Appellee, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (Nos. 12-2335-cv, 12-2435), 2012 WL 3900586, at *25 n.16 ("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.").

90. *See infra* Appendix.

91. *See infra* Appendix.

litigants or affected classes within the context of same-sex marriage.[92] Not that correlation proves causation; one should not lay the blame entirely at the feet of the attorneys in those cases for setting the tone for bisexual erasure. As legal scholars have noted, bi erasure has occurred not just among attorneys, but also across the board throughout the LGBT community.[93]

There are many factors that go into bisexual erasure, as bi erasure scholars have described, and as previously discussed. An additional factor may be that there is not a single "out" [of the metaphoric closet] bisexual jurist on the federal (or perhaps even state) bench as of the writing of this Article.[94] 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.

No matter 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 the more inclusive umbrella phrase "same-sex" couple, at least in the context of marriage cases. This catch-all term neither explicitly includes nor omits either gays or bisexuals. Because same-sex marriage bans are not written in terms 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," is perfectly appropriate. At the very least, using this terminology is 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, Professor Ben-Asher criticizes 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."[95] This analysis misses two key points. First, "same-sex marriage" is not just the new homosexual: it is the new homosexual *and* bisexual, for both mono- and bi- sexuals enter into same-sex marriages. Second, as documented in the Appendix and chronicled on the preceding pages of this Article, it is only the erasure of the words "homosexual" and "lesbian" from the

92. *Id.* A happy exception is Judge Berzon's concurrence in *Latta v. Otter*, discussed *infra* Section III.B.4.b.

93. *See supra* Section II.B.

94. *See* Thompson, *supra* note 1.

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

Court's opinions that is new; bisexuals 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 same-sex marriages, not just gays and lesbians, is preferable to the bisexual-exclusion the Court and many LGBT-rights litigants had been perpetuating since *Romer*. 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" and "same-sex couples," 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. To help facilitate much-needed progress on that front, LGBT rights lawyers should take the lead in setting the tone for greater inclusivity in their own legal writing.

III. Consequences of Bisexual 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 harms done by bisexual erasure, including both direct harms to bisexuals and indirect harms that flow to the broader LGBT community and that threaten the integrity of our legal system as it confronts sexual orientation and gender issues.

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 gay members of same-sex couples who are discriminated against because of the gender of their partners, 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,[96] and are more likely to attempt or commit suicide.[97]

In the legal context, there are two specific areas of law in which bisexuals face particular concrete harms through lack of bisexual recognition: 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, for example, potentially being required to prove they are "gay enough" to warrant protection from persecution by their home countries. One of the most critical dangers of immigration boards uneducated about the valid existence of bisexuals is that if an individual seeking asylum on the basis of sexual orientation had previously been in an opposite-sex marriage, some officials might deem the subsequent same-sex relationship to be a sham. The United States has recognized persecution on the basis of sexual orientation as a basis for asylum since 1994.[98] To receive asylum on that basis, sexual minorities who fear persecution may apply for asylum as refugees under 8 U.S.C. § 1158(a),(b)(1). However, these protections do not always come easily to bisexuals, who may be viewed as being in "sham" relationships when the validity of sexual orientation may evade the comprehension of the immigration officer or judge evaluating that person's life from the outside and making life-altering decisions about the bisexual asylum-seeker. To a bisexual seeking asylum from a country where same-sex relationships are persecuted and LGBT people are threatened with violence

96. Mark S. Friedman, et al., *A Meta-Analysis of Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Sexual Nonminority Individuals*, 101 AM. J. PUB. HEALTH 1481, 1486-87 (Aug. 2011).

97. *See* Sharita Forrest, *Bisexual Teens at Highest Risk of Bullying, Truancy, Suicide*, U. ILL. NEWS BUREAU, (Oct. 13, 2011), http://news.illinois.edu/news/11/1013teens_DorothyEspelage_JosephRobinson.html ("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.").

98. *See Applying for Asylum*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum/; *see also* 8 C.F.R. § 1208.13 (2013)(establishing asylum eligibility).

or even killed, an asylum board's decisions takes on life-or-death significance.

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*, 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.[99] The immigration board never addressed the possibility that the man was bisexual.[100]

A second, related case is currently pending in the United Kingdom. In the case of Orashia Edwards, a bisexual man seeking to emigrate from Jamaica (where same-sex relationships are illegal) to the United Kingdom, Edwards was originally denied asylum due to a finding of "dishonest sexuality," because the British Home Office did not view as valid his two-year relationship with another man, in light of the fact he had previously been married to a woman.[101] In a move reflecting degrading desperation, Edwards, who fears being killed for his same-sex relationship if he is sent back to Jamaica, took the drastic step of sending photos of himself having sex with his male partner to the British Home Office, as a last resort in trying to prove his bisexuality is not dishonest sexuality, but is in fact his true sexual orientation.[102]

A third example of the dangers caused by bisexual erasure in an immigration context is a case arising out of the United States. In the pending case of Ivo Widlak, a Polish journalist who has been married to his wife for over twelve years, Widlak, since coming out as bisexual, has been threatened with deportation after being accused of being in a sham marriage.[103] His case illustrates the dangers faced by immigrants who are accused of being in

99. Garcia-Jaramillo v. INS, 604 F.2d 1236, 1239 (9th Cir. 1979).

100. *See Garcia-Jaramillo*, 604 F.2d 1236.

101. Thom Senzee, *Bisexual Seeking Asylum Resorts to Photos When Asked to Prove It*, ADVOCATE.COM (May 11, 2015), http://www.advocate.com/world/2015/05/10/bisexual-asylum-seeker-humiliated-trying-prove-sexuality-uk-officials-0. *See also* Joe Morgan, *Mother of Bisexual Asylum Seeker Will Sue Britain if They Send Her Son Home to Die*, GAY STAR NEWS (April 24, 2015), http://www.gaystarnews.com/article/mother-bisexual-asylum-seeker-will-sue-britain-if-they-send-her-son-home-die240415/ (citing Edwards' mother and partner who believe Jamaica is not a safe place for Edwards after his deportation battle in England).

102. Senzee, *supra* note 101.

103. *See Popular Chicago Journalist Facing Deportation*, CHICAGOLAND RADIO AND MEDIA, Sept. 26, 2013, http://chicagoradioandmedia.com/news/5980-popular-chicago-journalist-facing-deportation; *see also* Faith Cheltenham, *The Curious Case of Ivo Widlak*, HUFFINGTON POST, Dec. 12, 2012, http://www.huffingtonpost.com/faith-cheltenham/the-curious-case-of-ivo-widlak_b_2317756.html.

sham same-sex partnerships when one's past opposite-sex partnerships or bisexual identification is discovered.

These dangers are particularly acute in the cases of bisexual immigrants seeking asylum who risk being sent back to a country where non-heterosexual conduct is a crime for which they may be severely punished. In this context, therefore, bisexual erasure has the gravest of repercussions, putting bisexuals' lives in peril if they are denied asylum based on a failure to understand their bisexual orientation, as in the aforementioned case of Orashia Edwards.

2. Custody and Adoption

In an area of law rife with opportunity for subjective bias, family law can be particularly harsh on bisexuals. Some scholars have addressed the hurdles faced by LGBT individuals in custody and adoption cases,[104] with gays at times discriminated against when they are deemed to be a moral threat to children.[105] Bisexuals face the same risk of discriminatory treatment in family court and then some; as explained below, bisexuals are even more likely to be adjudged unstable, and, consequently, unfit parents, due to their sexual orientation.

As a preliminary matter, opinions from courts in adoption and custody cases tend to 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), as described below.

When bisexuality is acknowledged, courts are often inclined to view the difference as an even *greater* indicia of emotional or moral danger to children. To wit, courts faced with bisexual parents in custody and adoption petition cases have, in some cases, appeared to view bisexuality as a form of emotional instability that casts into doubt the healthy parenting abilities of the bisexual individual seeking custody or adoption.

For example, an appellate court in Arizona, reviewing a lower court's decision to deny a bisexual man's adoption petition, stated:

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104. *See* 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).

105. Morality is often mentioned in cases denying custody to homosexuals and bisexuals both. One example is the decision of a trial court reversed on appeal to deny custody on moral grounds 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).

> The amicus brief centers its argument on the self-presumed fact that the trial court based its decision solely on appellant's sexual orientation. The dissent also maintains that appellant's bisexuality was the sole reason for the denial of his petition to be certified as acceptable to adopt children. We disagree. As we have stated, we find ample evidence to support the trial court without examining that issue.
>
> However, we believe appellant's *ambivalence in his sexual preference* was very appropriately a concern of the court. As we have stated previously, the primary concern of the court, to the exclusion of all else, is the best interest and welfare of any child. Certainly the sexual orientation of one who petitions to be certified as acceptable to adopt a child is a factor to be reviewed and evaluated by the court.[106]

In a more recent decision, a reviewing Mississippi court held:

> [I]n addition to the mother's bisexual lifestyle, the chancellor was disturbed at the mother's lack of financial and emotional stability. He was extremely concerned that the mother quit a well-paying full time job to move to Gulfport to start a business. The chancellor was most impressed 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. As in *Weigand* and *Thompson*, although the morality of the mother's lifestyle was one important factor to the chancellor's decision, it was not the sole factor; thus, there was no clear error and the chancellor did not abuse his discretion in awarding custody to the father.[107]

Courts in other cases, while not using the word "bisexual" to reference a parent who has dated both men and women, nonetheless appear to 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:

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106. *In re* The Appeal in Pima Cnty. Juvenile Action B-10489, 727 P.2d 830, 834 (Ariz. Ct. App. 1986) (emphasis added).
107. S.B. v. L.W., 793 So. 2d 656, 661 (Miss. Ct. App. 2001).

> [*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.[108]

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.[109]

Other comparable cases never make it into written opinions or the scholarship addressing "lesbian and gay" custody issues, with bisexuality often omitted in the legal analysis of custody cases.[110] However, in my years of work with the LGBT community, I have encountered a number of parents who recount courts viewing with suspicion the perceived fluctuating "lifestyle" choices of a parent who goes from an opposite-sex marriage to a same-sex relationship. Furthermore, the common pejorative presumption that bisexuals are more promiscuous than monosexuals may also feed into such biases against bisexuality by courts deciding custody and adoption issues.[111]

The delegitimization of bisexuals by depicting them as less stable than monosexuals is 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 seem to take into account how such parents identify; in the above examples, for instance, bisexuality is not mentioned by the courts. Rather, 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

108. Dorn v. Dorn, 724 So. 2d 554, 556 (Ala. App. 1998) (citing Corl v. Corl, 560 So. 2d 774 (Ala. Civ. App. 1990)) (emphasis added).

109. *See* COLKER, HYBRID, *supra* note 26, at 39.

110. *See, e.g.*, Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIM. LAW. 95 (2002)(discussing non-heterosexual custody cases almost exclusively in terms of gays and lesbians, not bisexuals).

111. *See* Yoshino, *supra* note 27 (addressing deligitimization of bisexuals as promiscuous).

community, especially those who do 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 that result from bisexual erasure. In marriage equality cases and otherwise, the erasure of bisexuals imposes a variety of stigmatizing harms, rendering them second-class in status.

The relegation of bisexuals to an invisible status not worthy of a single mention in *Obergefell*'s affirmation of same-sex marriage rights is especially troubling. In particular, the Supreme Court's declaration in *Obergefell* that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society,"[112] is infuriatingly ironic: just as it demeans gays and lesbians to be excluded from an important institution in society, it demeans bisexuals to be excluded from the Court's recognition of that very point. The irony of bisexual exclusion in cases affirming lesbian and gay rights, in other words, is that such relegation to second-class status is precisely the type of stigmatizing harm that has been deemed unconscionable when directed toward members of same-sex unions generally. For example, even before the *Obergefell* decision, Justice Ginsburg decried the second-class status imposed on same-sex couples to whom only limited marriage rights are offered, describing the less-than-full marriage recognition for same-sex couples as "skim milk marriage."[113]

The Supreme Court's decisions in *Obergefell*, *Windsor*, *Lawrence*, and *Romer* have in various ways affirmed that singling out LGBT individuals as second-class citizens violates the principle that separate is never equal. The cases affirm that unequal treatment based on one's identity is constitutionally suspect for the deep dignitary harms it imposes on psychic and emotional levels.[114] Most strikingly, Justice Kennedy, writing for the court in *Lawrence*, 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

112. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

113. *See* Transcript of Oral Argument at 71, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

114. *See, e.g., Obergefell*, 135 S. Ct. at 2597-98, 2604, 2606; United States v. Windsor, 133 S. Ct. 2675, 2691-96 (2013); Lawrence v. Texas, 539 U.S. 558, 574-75 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996).

of liberty."[115] With *Obergefell* and *Windsor* extending this principle to the context of same-sex marriage recognition,[116] it is deeply ironic that in doing so without any reference to bisexuals, the Court has, while elevating gays and lesbians to more of an equal status, simultaneously relegated bisexuals to a lesser status.

Part of the harm to bisexuals when they are subsumed under a "lesbian and gay" label results from the presumption that bisexuality is synonymous with gay, and the assumption that LGBT individuals will favor those of the same sex in choosing life partners. That failure to honor the different life circumstances of many bisexuals indirectly deprives them of their full ability to be autonomous and self-defining in their most intimate life choices.[117]

While bisexuals are harmed by their erasure in LGBT-rights litigation, they were also harmed in unique ways by same-sex marriage bans, which makes their erasure from same-sex marriage litigation even less palatable. Not only did bisexuals who were in same-sex partnerships face the same harms as gays when they were denied equal access to marriage rights, but they faced additional harms from marriage inequality. As Yoshino explained, the cross-sex requirement of laws prohibiting same-sex marriage presented a harm specific to those bisexuals who identify as being "sex-blind" (i.e., falling in love based primarily on traits other than biological sex): "This harm is that the state is contributing to sex-consciousness in society by distinguishing in this way between men and women. For the sex-blind bisexual [as opposed to for gays and straights], this consciousness is in itself a harm, because it impedes her from seeing 'through' sex to other traits that she may find more important."[118]

Michael Boucai described another unique harm bisexuals suffered under same-sex marriage bans: opposite-sex-only marriage restrictions imposed on them what amounted to an unnatural and coercive imposition of an unfair choice between their full sexual liberty and the thousands of bene-

115. *Lawrence*, 539 U.S. at 574-75 (quoting Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 851 (1992)). *See also* Boucai, *supra* note 12, 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).

116. *See* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) ("This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State sought to dignify." (*citing Lawrence*, 539 U.S. 558)).

117. *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").

118. Yoshino, *supra* note 27, at 459.

fits and rights that go along with marriage.[119] As Boucai explained, "[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."[120] 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.' "[121]

Such a coerced choice, he analogized, 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*, in which the Arkansas Supreme Court recently recognized was analogous to same-sex adoption bans.[122] Boucai offered that the same rationale could 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.[123]

But LGBT-rights briefs in favor of same-sex marriage in *Obergefell* ultimately did not contain such an argument, or even, as detailed herein, almost any reference to bisexuals at all.[124] This absence of bisexuality from the arguments and analyses in opinions and briefs in LGBT-rights cases, despite the ways in which the inclusion of bisexuality could actually strengthen LGBT-rights arguments, is deplorable. Bisexual erasure in LGBT-rights litigation sends the harmful message that bisexuals 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 in decades of work fighting for the rights of the larger LGBT community. The slights and wounds, however, are real, and

119. *See* Boucai, *supra* note 12, at 416-18, 431-32. This argument should not be confused with an assertion that bisexuals can choose to be bisexual in the first place, or can choose with whom to fall in love. Rather, Boucai describes the choice to marry; comparisons are drawn to smaller decisions, such as whether to place an ad in the "seeking men," "seeking women," or "seeking both" section of a personal ad website. *See* Yoshino, *supra* note 27, at 443. Bisexuals may (and in my case, I can attest do) feel as if they have more of a choice as to which communities or genders upon which to focus our dating (and ultimately, marital, for those of us so inclined) energies.

120. Boucai, *supra* note 12, at 417 (footnote omitted).

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

122. *Id.* 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)).

123. *Id.* at 417, 431-32.

124. *See infra* Appendix.

should not be dismissed as insignificant, any more than gays and lesbians would wish courts to dismiss as insignificant the wounds 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. LGBT-rights advocates who persist in omitting all mention of bisexuals from their briefings, in contrast, know better and have more of a responsibility to represent all the members of the LGBT community affected by their impact litigation. While LGBT-rights advocates may think they are making a stronger or cleaner case by omitting a large portion of affected persons from the dialogue, the longer they continue to make the mistake of leaving bisexuals out of LGBT-rights analyses and argument, the harder it will be to repair the resulting harms 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 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 caused by bisexual erasure, not just to bisexuals, but to other members of the LGBT community, and to a justice system that prides itself on prizing truth and equity.

1. Statistical Inaccuracies

As set forth earlier, recent surveys estimate bisexuals at 43% to 52% of the LGBT population.[125] The misleading inferences to the contrary, omitting bisexuals from LGBT-rights discourse as statistically irrelevant—when in fact bisexuals comprise nearly half of the LGBT population—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 im-

125. *See supra* Part I.A.

portance of veracity should not perpetuate the reckless promotion of statistical inaccuracies. It is shamefully inaccurate for court opinions, especially when following the lead of our own advocates, 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 discriminated against due to 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, 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 Paradigm

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.[126]

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 simplistically dichotomous categorizations of sexual orientation. Unfortunately, this inaccurate portrayal of sexual orientation as a simple "gay or straight" 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 not only fails to capture the reality of the lives of bisexuals and transgender individuals, whose more nuanced and

126. Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, Sexual Behavior in the Human Male 639 (1948); Glazer, *supra* note 43, at 1041; Mezey, *supra* note 13, at 103-04; Yoshino, *supra* note 27, at 356 n.5.

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 for the embrace of a bisexual perspective as a more holistic approach to understanding sexuality.[127] Colker describes "the categories of heterosexual and homosexual as inventions that do a disservice to the realities of [bisexuals'] lives, feelings, and relationships."[128] 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 homosexual," and advocates an "embodied bisexual perspective" as a way to define "sexual orientation in such a nonstatic, fluid way [that] would deeply challenge sexual dualities and the defining of gay, lesbian, and bisexual people as purely sexual."[129]

Professor 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.' "[130] To the extent that both groups fall outside the norm by failing to "adhere strictly to a binary,"[131] 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.[132]

In *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*,[133] Naomi Mezey similarly writes of the need to challenge limiting dichotomies in legal discourse. Mezey suggests that it is 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

127. Colker, *Embodied Bisexual Perspective*, *supra* note 26 at 174-175.

128. *Id.* at 174.

129. *Id.* at 174-75.

130. Glazer, *supra* note 43, at 1017 (quoting Yoshino, *supra* note 14, at 356 (footnotes omitted)).

131. *Id.* at 1017.

132. *Id.*

133. Mezey, *supra* note 13.

to forge unprecedented and potentially powerful alliances."[134] In proposing that a broader, more inclusive approach to sexual politics could allow for a strategically necessary bridge 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)[135] could become that bridge.

There are other bridges to cross as well: the omission of bisexuality in LGBT discussion is indicative of an intersectional and related failure to fully include the realities of many people of color. As Colker argues, the bisexual perspective adds important holistic dimensions to discussions of law and morality. She points out that bisexual inclusivity leads to more comprehensive cross-sectionality with race in particular, as there is a significantly high percentage of people of color who identify as bisexual or engage in bisexual behavior.[136]

As Colker notes, the problem with an oppressed group discriminating against its own, even subtly, through non-inclusion, was illustrated in Audre Lorde's book *This Bridge Called My Back*.[137] Lorde's writings poignantly call out the feminist movement for often neglecting the voice of women of color in its cries for equality and justice.[138] In a similar manner, while bisexuals can truly serve as a bridge between heterosexuals and homosexuals, it would be a perpetuation rather than an alleviation of injustice for the LGBT movement to treat the bi bridge with no more respect than the metaphoric "bridge called my back" of Audre Lorde, ignoring or even exploiting the bridge-building offerings of communities that could help build constructive intersectionality.

In her own book on bridge building (from a bisexual perspective), Colker explains that the dangers of rigid binary constructs of sexual orientation mirror the false binaries that keep multiracial individuals from being

134. *Id.* at 133.

135. *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).

136. *See* Colker, *Embodied Bisexual Perspective*, *supra* note 26, at 175-76 (citing John L. Peterson, *Black Men and Their Same-Sex Desires and Behaviors, in* GAY CULTURE IN AMERICA: ESSAYS FROM THE FIELD 147, 148 (Gilbert H. Herdt ed., 1992)). *See also* COLKER, HYBRID, *supra* note 26, at 17-18, 26-36.

137. Colker, *Embodied Bisexual Perspective, supra* note 26, at 167-68 (citing letter from Audre Lorde, civil rights activist, to Mary Daly, feminist philosopher, *in* A BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 94-97 (Cherrie Moraga & Gloria Anzaldua eds., 1981)).

138. *Id.*

recognized as having valid identities.[139] In both categories, she writes, bisexuality can help illuminate the possibilities and "implications of living between categories,"[140] and in the context of race in particular, "[a] bi perspective may . . . enhance our understanding of race by encouraging us to make an intracategorical investigation of racial categories."[141] With members of these groups denied full recognition by law and society, they similarly embody the limitations of binary identity constructs and the contrasting freedom that fluidity can offer, whether in the context of race, sexual orientation, or beyond.

Bringing these issues back to the context of LGBT-rights litigation, this intersectionality of race and sexual orientation is further illustrated in the *Apilado v. North American Gay Amateur Athletic Alliance* case, brought by the National Center for Lesbian Rights. In that case, described in more detail in Part IV of this Article, not only were the plaintiffs all bisexual men, but they were also men of color, resulting in a claim of race discrimination included among the complaint allegations in the Gay Softball World Series lawsuit.[142]

For all these reasons, bisexuals, along with transgender individuals and people of color, 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, the relegation of bisexuals to a subsumed existence secondary to the primary identities of gays and heterosexuals 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* helped establish 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.[143] Thus, the second-class status imposed 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 mentioning that the inconsistency of arguments made by LGBT-

139. COLKER, HYBRID, *supra* note 26, at 36-38.

140. *Id.* at 36.

141. *Id.* at 38.

142. Complaint at 37-39, 52, Apilado v. North Am. Gay Amateur Athletic Challenge, 792 F.Supp.2d 1151 (W.D. Wash. 2010) (No. 2:10-cv-00682).

143. *See supra* Section III.A.3.

rights advocates who fight for equal dignity even while engaging in bi erasure is counterproductive, ultimately undermining their *own* cause. To argue that gays and lesbians are entitled to equal liberty and dignity on one hand, but to simultaneously deny that same recognition to bisexuals on the other, harms not just bisexuals, but also those LGBT-rights advocates whose arguments may thereby be weakened by such apparent hypocrisy.

Conversely, it would only strengthen the arguments of LGBT-rights advocates to include bisexuals as fully acknowledged members of the class affected by same-sex marriage bans. To do so would improve the cohesiveness of the overall constitutional claims by LGBT-rights litigants and their advocates.

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

The jurisprudential utility of bisexual 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.

In particular, bisexuals, along with transgender individuals, can help illustrate the harmful role that false gender and sexual orientation dichotomies can play when those dichotomies become rigidly infused into judicial doctrine. Bisexuals can also help establish that sexual orientation discrimination is, in fact, a form of gender discrimination, which could benefit all LGBT individuals 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 establish binary sex and gender definitions, even when human beings do not smoothly sort themselves into black-and-white sex and gender categories, as the law would have them do.[144] The transgender dialectic can help illustrate the absurdity of such artificial sex and gender constructs within the law. Similarly, bisexuals can help bridge the gap between binary boxes and illustrate why rigid dichotomous constructs

144. For a comprehensive exposition of this issue, *see generally* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943 (2015).

of sex and gender by the courts are unworkable, and also why they are unnecessary. Some examples follow.

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."[145] 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.[146] 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."[147] 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."[148]

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 sex,"[149] 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 being disinclined to believe that bisexuals exist, or doubtful that bisexuals would avail themselves of the doctrine, where doing so would require defending themselves through the confession of additional sexual harassment.[150] 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

145. *See* Holman v. Indiana, 211 F.3d 399, 401 (7th Cir. 2000).

146. Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e, 2000e-2 (West, Westlaw through 2015 legislation).

147. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

148. *Holman*, 211 F.3d at 404 (second emphasis added).

149. Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e, 2000e-2 (West, Westlaw through 2015 legislation).

150. Colker, *supra* note 10, at 136.

bisexuals and giving employers additional excuses not to hire bisexuals.[151] 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]."[152]

While perhaps not 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 sex" 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 sex discrimination may also take varied forms, particularly when transgender and other gender fluidity factors are at play. This success became dramatically evident in a historic moment in LGBT history in which transgender rights successes paved the path for others: on April 20, 2012, the EEOC issued a ruling explicitly affirming protections against employment discrimination for transgender employees under Title VII of the Civil Rights Act of 1964.[153]

In the landmark EEOC ruling, *Macy v. Holder*, the plaintiff was a police detective who was denied a job with the ATF after she revealed during the background check portion of the job interview that she was transgender and transitioning from male to female.[154] The EEOC granted Macy's gender discrimination claim, following past federal cases that recognized Title VII claims on the basis of gender identity stereotyping, including the Supreme Court *Price Waterhouse* decision.[155] 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."[156] Then, on December 18, 2014, Attorney General Eric Holder issued a Memorandum announcing that the Department of Justice will henceforth recognize that

151. *Id.*

152. *Id.* at 135.

153. Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012).

154. *Id.* at 1-2.

155. *Id.* at 6; *see also*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

156. *Macy*, EEOC Appeal No. 0120120821 at 7.

Title VII protections against gender discrimination include claims of discrimination based on an individual's transgender status.[157]

These developments are historical watershed moments, establishing that which has long been recognized by both bisexuals and transgender members of the LGBT community 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 do its victims, which the law is increasingly beginning to recognize.

More recently, it has become apparent that the *Macy* decision opened the door not just to transgender protections under Title VII, but to greater protections for other LGBT individuals as well, under a broader approach now taken by the EEOC in bringing discrimination claims under federal law. To wit, the EEOC has already brought 1,200 such claims since 2013,[158] although some courts are more resistant than others to extend gender discrimination protections to LGBT individuals.[159] Ironically, the *New York Times* reports that this new trend of EEOC claims brought against sexual orientation discrimination have been brought for "lesbians, gays and transgender" people; at least from this report, it appears that bisexuals continue to be left out of this effort, revealing yet another incident of bisexual erasure (if only in the reporting of the development by the Times).[160]

b. Illuminating Sexual Orientation Discrimination as a 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 estab-

157. Memorandum from the Office of the Attorney General to United States Attorneys Heads of Department Components, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.

158. Miles Bryan, *For People Fired for Being Gay, Old Court Case Becomes a New Tool*, NAT'L PUB. RADIO (Nov. 10, 2014), http://npr.org/2014/11/10/363049315/for-people-fired-for-being-gay-old-court-case-becomes-a-new-tool.

159. *See, e.g.*, Eure v. Sage Corp., 61 F.Supp.3d 651, 662 (W.D. Tex. 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.").

160. *See* Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES, June 28, 2015, at A1 (The EEOC "has determined that discrimination against gay men, lesbians and transgender people amounts to illegal sex discrimination under Title VII of the Civil Rights Act, and it is bringing or endorsing lawsuits under that provision.").

lish sexual orientation discrimination as a form of sex or gender discrimination. In a constitutional law context, bisexuals can serve as a bridge by illustrating the links between sexual orientation and gender, thereby helping gays and lesbians better understand and frame their oppression as a form of gender discrimination, which would entitle them to heightened scrutiny in constitutional challenges.[161] In the marriage equality context in particular, bisexuals can help illustrate that sexual orientation is indeed a form of 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.[162]

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 was 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

161. *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) (unpublished student paper *available at* 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).

162. Marcus, *supra* note 161, at 31 n.54.

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.[163]

Even more critical for purposes of bisexual jurisprudence, Judge Berzon's *Latta v. Otter* concurrence represented, for the first time in a federal opinion,[164] that bisexuals in same-sex partnerships were recognized as also being victims of marriage bans, explaining:

> 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

163. Latta v. Otter, 177 F.3d 456, 481-82 (9th Cir. 2014) (Berzon, J., concurring) (citations omitted).

164. At the state level, one judge, Judge Johnson, concurring in part and dissenting in part in the New Jersey 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, *supra* note 12, 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 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.[165]

Not only did Berzon acknowledge that bisexuals were also affected by same-sex marriage bans, which discriminated on the basis of gender regardless of sexual orientation, she also explained that, therefore, intermediate scrutiny should be the appropriate level of constitutional review.[166] Berzon's concurrence in this respect can be invaluable in helping LGBT-rights litigants frame their future arguments, both to be bisexual-inclusive and to result in an application of heightened scrutiny to state actions that are discriminatory against members of same-sex couples. 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 would bypass what some view as a problematic aspect of strict scrutiny analysis: the immutable characteristic factor.[167] 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 protection jurisprudence.[168] In contrast, affirmative action programs explicitly benefiting women, subject only to intermediate scrutiny, have been upheld.[169]

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165. *Latta*, 177 F.3d at 482 n.5.

166. *Latta*, 177 F.3d at 484.

167. 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 as having less immutable sexual orientations, just because the fluidity of a non-binary orientation seems more subject to "change" of some sort. However, immutability should not always be the primary criteria for according strict scrutiny. *See* Greensmith, *supra* note 4, at 77-78 (analogizing to Schroer v. Billington, 577 F.Supp.2d 293 (D.C. Cir. 2008) which recognized that employment discrimination occurred 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").

168. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down affirmative action program under strict scrutiny); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)(same).

169. *See, e.g.,* Califano v. Webster, 430 U.S. 313 (1977) (upholding remedial gender-based social security benefit program); Schlesinger v. Ballard, 419 U.S. 498 (1975)

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*.[170]

Although the Supreme Court did not ultimately address the gender discrimination issue in its *Obergefell* decision, at least one justice appeared to flirt with the concept briefly two years prior; during the *Hollingsworth v. Perry* oral argument, Justice Kennedy had inquired, "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."[171]

Other courts have also danced with the idea of LGBT-discrimination as a form of gender discrimination. The Tenth Circuit's decision in *Kitchen v. Herbert*, for example, affirmed a lower court ruling that Utah's same-sex marriage ban was a form of both unconstitutional sex and sexual orientation discrimination.[172] In so ruling, the Tenth Circuit joined *Baehr v. Lewin*,[173] the Hawaii Supreme Court case that got the same-sex marriage litigation ball rolling in temporarily striking down Hawaii's marriage ban as an unconstitutional form of gender discrimination.

With these cases, and the recent developments in EEOC litigation in mind, bisexuals can help provide a bridge for future courts to traverse similar paths recognizing the intersectionality of sexual orientation discrimination and gender discrimination.

IV. Turning the Page: 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 at times using "same-sex couples" in lieu of a less inclusive catch-all "gays and lesbians" phrase to describe same-sex couples) is encouraging,

(upholding remedial gender-based federal statute giving female Naval officers additional years of commission service before subjecting them to mandatory discharge).

170. *See* Marcus, *supra* note 161, at 32-39 (addressing rational basis with bite as applied to *Windsor* and preceding LGBT-rights Supreme Court decisions).

171. Transcript of Oral Argument at 13, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

172. Kitchen v. Herbert, 755 F.3d 1193, 1233 (10th Cir. 2014).

173. Baehr v. Lewin, 74 Haw. 530 (1993).

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 have the greatest impact in facilitating more inclusive 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.[174] Until more jurists and members of the legal community come to similar recognitions and are willing to move beyond simplistic binary distinctions, the harms resulting from excluding bisexuals in the framing of LGBT-rights discourse and litigation will persist. Bisexual erasure is shortsighted as well in its failure to realize, or perhaps care about, the difficulty of reversing the effects of precedent that are potentially harmful to bisexuals by continuing to render them invisible or "less than" in the eyes of the law. The more that 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 the lack of preferable semantics. No matter how strategically advantageous an attorney may think it to keep the mention of bisexuality out of briefing, this strategy is misguided and shortsighted, and one that does not further the integrity of a justice system that relies on advocates to accurately portray their issues and constituencies. To engage in bisexual erasure in the name of simplifying "the message" is not to give courts much credit; they are better at tackling complex issues than the average Joe, after all. The more courts receive and act upon the message that bisexuals are not worth mention in opinions addressing LGBT rights, the more difficult 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, as indicated by some recent developments.

One group of LGBT-rights litigators, the National Center for Lesbian Rights, has gone to bat for bisexuals in its impact litigation. In 2010, the NCLR became the first organization to represent a group of bisexual plaintiffs challenging their exclusion from an LGBT organization.[175] 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

174. Latta v. Otter, 771 F.3d 456, 479-96 (9th Cir. 2014) (Berzon, J., concurring).

175. *See* Complaint, Apilado v. North Am. Gay Amateur Athletic Challenge, 792 F.Supp.2d 1151 (W.D. Wash. 2010) (No. 2:10-cv-00682).

of state anti-discrimination laws, public accommodations laws, and other rights.[176] 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 Amateur Athletic Association and "were asked to state whether they were 'predominantly' attracted to men or to women."[177] When they asked if being bisexual was a possible answer, were told, "this is the Gay World Series, not the Bisexual World Series."[178] 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.[179] The NCLR achieved a settlement in the case, including promises by the League of greater inclusivity and better treatment of bisexuals in the future.[180]

While NCLR is the first to represent bisexual plaintiffs against a discriminatory LGBT group, other organizations have also increasingly acknowledged the importance of not subjecting an important segment of their population to stigma, for example, engaging in name changes to be more inclusive of both bisexuals and transgender members of their communities.[181]

And bisexual members of the legal community ourselves have stepped up. In 2013, I was one of several co-founders of the premiere 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,[182] 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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176. *Id.*
177. *Id.* at 29, 36.
178. *Id.*
179. *Id.* at 39-43.
180. *See* Glazer, *supra* note 43, at 1000-01 n. 9 (citing Natalie Hope McDonald, *The Meaning of LGBT in Sports*, PHILADELPHIA MAGAZINE'S G PHILLY, Nov. 29, 2011, http://blogs.phillymag.com/gphilly/2011/11/29/meaning-lgbt-sports/.
181. As previously mentioned, the ACLU's former Lesbian and Gay Rights Project has been renamed The LGBT Project, *see supra* note 53. Similarly, the National Lesbian and Gay Task Force has been renamed National LGBTQ Task Force (*see Mission & History*, NAT'L LGBTQ TASK FORCE, http://www.thetaskforce.org/about/mission-history.html), and the Lesbian and Gay Law Association has been renamed the National LGBT Bar Association (*see* THE NAT'L LGBT BAR ASS'N, http://www.lgbtbar.org).
182. *See Friday, August 22, 2014 - Lavender Law 2016*, LGBT BAR FOUND., http://lgbtbar.org/annual/program/friday-august-22-2014/.

The following year, the National LGBT Bar Association continued the tradition, hosting not only the second annual BiLaw Caucus, but also a concurrent session specific to bisexual jurisprudence issues.[183] In the year in between, BiLaw's work included not only filing the amicus brief in *Obergefell*,[184] but also giving various presentations by BiLaw members at conferences and events across the country, including Harvard Law School's first ever Bisexuality Day,[185] an educational podcast on bisexual jurisprudence,[186] an Advocate Magazine op-ed on bisexual erasure in same-sex marriage litigation,[187] and the formation of a task force that provides comments to agencies on regulatory issues relating to bisexuals.[188]

Since the filing of BiLaw's amicus brief in *Obergefell,* at least one federal court has taken notice of the brief and taken steps toward greater bisexual-inclusivity in its LGBT-rights analysis. In *Roberts v. United Parcel Service*,[189] a federal district case in the Eastern District of New York involving a hostile work environment state civil rights law claim brought from a lesbian employee claiming sexual orientation-based harassment, bisexuality was not directly at issue. Nonetheless, in his opinion upholding a jury verdict for the plaintiff and rejecting the employer's motions to set aside verdict and for a new trial, Judge Weinstein seemed to go out of his way to include references to the BiLaw brief in his extensive discussion of LGBT-rights. First, Judge Weinstein cited *Lawrence*, *Romer*, *Windsor*, *Obergefell*,

183. *See Thursday, August 6, 2015 - Lavender Law 2016*, LGBT BAR FOUND., http://lgbtbar.org/annual/thursday-august-6-2015/ (advertising the BiLaw Caucus in addition to the "B: The Forgotten Letter in LGBT—Not Anymore" concurrent workshop).

184. *See* Brief of Amicus Curiae BiLaw in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), *available at* http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_BiLaw.pdf.

185. *See Bisexuality & Law at Harvard Law School!*, HEYEVENT.COM, http://heyevent.com/event/bnrwvfsbk5hzia/bisexuality-law-at-harvard-law-school (advertising "BiLaw: Bisexuality and Law at Harvard Law School"). *See also, e.g., 2015 Workshop Schedule*, BECAUSE CONFERENCE, http://www.becauseconference.org/workshop-schedule.html ("BiLaw! BiLawrriors Discuss Bringing Bisexuals to Legal Discourse and Bringing the Law to Bisexuals") *and LGBT Diversity and Inclusion Conference*, OHIO STATE BAR ASS'N, http://downloads.ohiobar.org/cle/2015/15-136.pdf (advertising Ohio State Bar Association 2015 LGBT Diversity and Inclusion panel, "Visibility: Serving Bisexual Clients and Bi-Specific Needs").

186. *See* Interview with Nancy Marcus, Assistant Professor, Indiana Tech, THE BICAST, http://www.thebicast.org/podcast/interview-bilaw-with-nancy-marcus/.

187. Toby Adams et al., *Op-ed: How We're Asking the Supreme Court to End Bi Erasure*, THE ADVOCATE MAGAZINE, Mar. 4, 2015, http://www.advocate.com/commentary/2015/03/04/op-ed-how-were-asking-supreme-court-end-bi-erasure.

188. Letter from BiLaw to FDA (Jul. 14, 2015) (on file with author).

189. Roberts v. United Parcel Serv., Inc. No. 13–CV–6161, 2015 WL 4509994 (E.D.N.Y. Jul. 27, 2015).

and a Yale Law Journal Forum article to describe how federal courts have, like the general public, " 'shifted their trajectory' with respect to gay and lesbian rights," becoming more open to constitutional claims in LGBT-rights cases.[190] However, in the next breath, Weinstein added a "but see" acknowledgment of BiLaw's plea for greater inclusivity of bisexuals, ending his string citation of LGBT-rights progress in the Court with the addendum: "But see Brief of BiLaw as Amicus Curiae in Support of Petitioners at 5, *Obergefell*, ___ U.S. ___, 135 S.Ct. 2584, ("In litigation affecting gay and bisexual individuals, there has been an unfortunate trend of bisexual exclusion from briefings and court opinions."). The bisexual inclusivity continued in the next paragraph; after citing a number of sources in a detailed description of ongoing discrimination faced by LGBT individuals, Weinstein again quoted BiLaw's amicus brief to add the acknowledgement that: "Bisexuals . . . face consistent prejudice and exclusion from both the heterosexual and gay communities, and lack the same protective sense of community when faced with bias and discrimination."[191] Not only did Weinstein go out of his way to include these passages from BiLaw's *Obergefell* amicus brief but, even more critically, he employed language through his comprehensive LGBT-rights opinion in *Roberts* that is, as BiLaw has implored from courts, bisexual-inclusive. As compared to the almost complete lack of references to bisexuals as compared to lesbians and gays detailed in the appendix of this Article, Judge Weinstein's *Roberts* opinion mentions bisexuals a whopping twenty-three times,[192] a much-appreciated gesture of inclusiveness in a case when the plaintiff was not even identified as bisexual.

So, while BiLaw's amicus brief may not have affected the terminology in the Supreme Court's terminology or that of the LGBT-rights advocates in *Obergefell*, between Judges Weinstein and Berzon, the lower federal bench is showing encouraging signs of receptivity toward our cries for greater inclusivity in this new era of equal rights and recognition under the law for LGBT individuals.

As an organization, BiLaw's work on this front is just beginning, as the group moves forward in promoting greater visibility and understanding of bisexuals in the legal community and in the law. For some, the importance of forming a "BiLaw" community is primarily 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

190. *Id.* at *12 (quoting Katie Eyer, *Brown, Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J. FORUM 1, 5 (2015)).

191. *Id.* (quoting Brief of BiLaw as Amicus Curiae Supporting Petitioners at 13, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

192. *Id.* at 10, 12-18.

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 and continuing the work from our inaugural years. 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. We need allies in the LGBT community, in the broader legal community, and fair-minded jurists who do not want to be complicit in perpetuating bisexual erasure to step up and do the right thing as well. No longer should the rights of same-sex couples be framed exclusively in terms of "homosexuals," "gays" and "lesbians," without mention of the substantial number of bisexuals who are also in loving same-sex relationships, but who, unlike gays and lesbians, have yet to be explicitly 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 individuals affected by sexual orientation-focused laws in particular (i.e., where gender identity is not at issue), I recommend using the phrases "lesbian, gay and bisexual," or even just "gay and bisexual."[193] There are a number of linguistic options available that are bisexual-inclusive, and there is no sufficient justification for continuing to exclude us in legal discourse.

Courts and advocates involved in LGBT-rights litigation should also bear in mind that the "same-sex" umbrella will not suffice in every case. "Same-sex couples" are not always going to be the subject of LGBT-rights litigation in future cases where same-sex partnerships are not directly at issue. Thus, to the extent that many rights of LGBT *individuals* remain at issue, the comparatively inclusive "same-sex" catch-all will not, in fact, catch all future cases.

As such, when the sexual orientation of individuals is at issue in future cases, both litigants and courts must, to be more accurate and fair, develop a greater comfort level with the phrases "gay and bisexual" or "gay, lesbian and bisexual." Where gender identity is also at issue, there is no reason why LGBT-rights litigation should continue to shy away from use of the inclusive "LGBT" acronym common to LGBT-rights discourse in non-legal arenas and media. "Lesbian and gay" is dated, inaccurate, and perpetuates

193. Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006) (explaining that use of the phrase "gay and bisexual" encompasses gay men and women as well as bisexuals, and thus leaves out no homo- or bisexual orientation).

harmful exclusions among groups of persons who are already embattled enough to begin with.

It is my hope that greater improvements toward bisexual inclusivity will evolve in future years. 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. But it is not too late.

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 "HOMOSEXUAL(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"
OBERGEFELL V. HODGES, 2015 WL 2473451	0	4	16	75	0
Obergefell brief of plaintiffs-petitioners plaintiff-petitioners Obergefell et al	0	17	7	78	1
Obergefell brief of plaintiff-petitioners Tanco *et al*	0	0	15	105	0
Obergefell brief of plaintiff-petitioners DeBoer, *et al*	0	19	14	117	0
Obergefell brief of plaintiff-petitioners Bourke, *et al*	0	14	12	110	0
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 "homosexual(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, Inc., 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