

# Response: Hybrid Revisited

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## TABLE OF CONTENTS

INTRODUCTION . . . . .	1069
I. WHAT IS SEXUAL ORIENTATION? . . . . .	1071
A. SEXUAL-ORIENTATION RESISTERS . . . . .	1072
B. SEXUAL-ORIENTATION TILTERS . . . . .	1075
II. SEXUAL SOCIALIZATION . . . . .	1078
CONCLUSION . . . . .	1081

## INTRODUCTION

In *Sexual Reorientation*, Professor Elizabeth Glazer seeks to offer a “new way of understanding sexual orientation that reflects the lived experience of human sexuality.”<sup>1</sup> This new framework is based on the concepts of “specific orientation” and “general orientation.” “Specific orientation” is the “sex of the individual’s desired or actual partner(s).”<sup>2</sup> “General orientation” is the “sex toward which the individual is attracted as a general matter.”<sup>3</sup> Applying this framework, Glazer describes bisexuals as individuals who have a general orientation towards men and women even though they may be in a monoga-

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1. Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1004 (2012). Glazer uses the phrase “lived experience of human sexuality” throughout her article and, thus, I have used it in this Response within quotation marks. I do not know what she means by a “lived experience.” Are there experiences that are not “lived”?

2. *Id.* at 1002. The word “desired” within specific orientation is ambiguous because it is not clear how that is different than one’s “attraction” as part of general orientation. Glazer’s framework works best when a person has an actual partner because then the answer to the “actual partner” question is a discrete man or woman. Her framework is not clear when the “desired” question might include more than one person, such as both a man and a woman.

3. *Id.* at 1054. Somewhat confusingly, she also says that “one’s general orientation may be toward those with blue eyes, or women, or both men and women,” *id.* at 1055, even though we do not usually consider eye color to be part of one’s “sex.” I resolve that confusion by assuming that “general orientation” *always* refers to the *sex* of an individual’s potential sexual partners and *possibly* refers to other factors, such as eye color, that help the individual determine whom he or she might find attractive.

mous relationship with a particular man or a particular woman.<sup>4</sup> This framework seeks to offer “antidiscrimination law a model for the protection of living identities, with respect to sexual orientation.”<sup>5</sup> In particular, it aspires to facilitate antidiscrimination law’s recognizing and protecting bisexuals.

Glazer would classify as a bisexual someone like “Sandy” who ends a relationship with a man to get involved with a woman. Sandy’s current specific orientation is towards a woman but her<sup>6</sup> general orientation is toward “men and women.” Glazer would use Sandy’s specific and general orientations to classify her as a bisexual rather than as someone who transformed from a heterosexual to a lesbian. If Sandy were a plaintiff in a case involving a state’s ban on marriage between people of the same sex, her lawyer would be able to argue to a court that Sandy, as a bisexual, is constitutionally entitled to marry a woman without pretending she is an exclusive lesbian.<sup>7</sup>

The strength of Glazer’s framework is her attempt to describe sexual orientation in a way that can account for bisexuals without feeding into stereotypes, such as that bisexuals always have to be involved simultaneously with a man and a woman. Nonetheless, her framework is incomplete in three ways that I will discuss in this Response.<sup>8</sup> The first two problems relate to her incomplete description of sexual orientation. First, she does not account for sexual-orientation resisters who would want to answer “not applicable” when queried about their general orientation. Glazer presumes that the biological sex of one’s potential partner is among the traits on the general-orientation list. Sexual-orientation resisters, as a type of gender resistance, refuse to think in those terms. Although they may have been involved with both men and women, they would resist Glazer’s interest in labeling them as belonging to any of her sexual-orientation categories, including bisexuality, because those categories are devised in reference to the biological sex of their partner.

Second, Glazer does not account for sexual-orientation tilters who, in response to the general-orientation question, might want to say: “In general, I have a preference or a slight ‘tilt’ for women over men as sexual partners, but I am open to the possibility of a relationship with a man or woman.”<sup>9</sup> Glazer

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4. *See id.* at 1055.

5. *Id.* at 1003.

6. Throughout this Response, I use women as examples because I think women are more likely than men to identify as feminists who resist gender classification as part of their sexuality. Nonetheless, I do not mean to suggest that men cannot resist gender stereotypes or be feminists. For those who are interested in reading about how feminist theory can apply to gay male sexuality, see Marc Spindelman, *Gay Men and Sex Equality*, 46 *TULSA L. REV.* 123 (2012).

7. *See Glazer, supra* note 1, at 1057.

8. Other limitations with her framework include an assumption of monogamy, avoidance of discussion of the issue of consent, and an assumption of sexual dimorphism. The implication of these assumptions is beyond the scope of this Response.

9. Glazer’s use of the term “as a general matter,” *e.g., id.* at 1054, is confusing. I interpret her to be using it in the sense of “in general.” So, if there are fifty men and fifty women in a room and an individual finds forty of the men attractive and three of the women attractive, then the individual would report that she “generally” finds men attractive. She would only say that she finds “both men and

would put such people in the bisexual category if they are willing to answer “both men and women” to the general-orientation question, without recognizing their “tilt.” While trying to help us avoid recognizing what Glazer calls “extreme orientations like homosexuality and heterosexuality,”<sup>10</sup> she sets up bisexuality as another “extreme orientation” exactly in the middle between homosexuality and heterosexuality. She fails to recognize sufficiently the various points along the spectrum of sexual orientation.

Third, Glazer does not give sufficient attention to socialization as an aspect of sexual orientation, making her theory seem too biologically essentialist. Recognition of the interplay between socialization and sexual orientation can help us better understand the coercive effect that law and society have on expressions of sexuality. Law and society seek to coerce people to confine themselves to heterosexuality (or even homosexuality) rather than explore the full range of meaningful sexual interactions. Thus, it is not enough for us to know if a woman finds both men and women attractive to classify her sexual orientation. We also need to know if she is willing to resist socialization to be truly “open” to sexual relationships with individuals of either sex.

Although I agree with Glazer that we need better categories to explain individuals’ “lived experiences” and that the law needs better categories to address the harms suffered by bisexuals, Glazer’s concept of sexual “reorientation” does not entirely attain these goals. Recognition of sexual-orientation “resisters” and “tilters” could help strengthen Glazer’s framework, especially because those categories are crucial to the recognition of how socialization impairs choices about sexual expression in a way that law might seek to redress.

### I. WHAT IS SEXUAL ORIENTATION?

Glazer’s major contribution to defining sexual orientation is her assertion that people have both a “specific” sexual orientation and a “general” sexual orientation. Although her concept of “specific” sexual orientation as one’s current or desired partner is fairly clear,<sup>11</sup> her concept of general sexual orientation is too limited. She only provides three possible answers to the general-orientation question:

What is the sex toward which you are attracted as a general matter:

(A) men,

(B) women, or

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women” attractive if, in general, of the people who she finds attractive, there are roughly the same number of men and women. I make that assumption based on Glazer’s discussion of Yoshino’s observation that desire had to be “more than incidental” to count as part of a person’s general orientation. *See id.* at 1005–06.

10. *Id.* at 1002.

11. But as mentioned *supra* note 2, it is not clear how one’s “desired” partner is different than one’s “general orientation.”

(C) both men and women.

Her framework does not allow for three other answers to that question:

(D) a “tilt” towards women,

(E) a “tilt” towards men, or

(F) not applicable.<sup>12</sup>

Sexual-orientation “resisters” would want to answer (F) [not applicable] and “tilters” would want to answer (D) [tilt towards women] or (E) [tilt towards men]. Glazer’s framework does not allow them to accurately describe their “lived experience of human sexuality.”

#### A. SEXUAL-ORIENTATION RESISTERS

Glazer’s insistence that individuals identify the “sex toward which [they are] attracted as a general matter” would offend sexual-orientation resisters. It would not be consistent with sexuality as they experience it. Sexual-orientation resistance is a part of gender resistance<sup>13</sup>—a way to point out the overemphasis that society places on creating differences between the sexes.<sup>14</sup> When confronted by Glazer, sexual-orientation resisters would say: “stop asking!” Insisting that sexual-orientation resisters answer the question about which biological sex(es) they find attractive as a general matter forces them to participate in the regime of saying that the biological sex of one’s partner is of key importance in matters of self-identity. Glazer’s framework emphasizes, rather than challenges, the divide between sexes. Thus, sexual-orientation resisters want to answer (F)—not applicable. They do not self-identify based on the sex of people they find attractive.

Oddly, Glazer is aware of sexual-orientation resisters even though they do not have a place in her classification system. Glazer talks about a high-school group

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12. I am using the “not applicable” category to describe someone who is a sexual-orientation resister, but I realize that someone might also answer “not applicable” if the person does not conceive of herself as a sexual being or as having a dimorphic sex. Those possibilities are beyond the scope of this Response.

13. This topic deserves further discussion beyond the scope of this Response. Glazer’s question, “who do you find attractive on the basis of sex,” is asking us to sexually objectify others to figure out who might be in which category in a way that is deeply antifeminist within some strands of feminism. See generally Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982). Do we keep a list of all the people whom we have found attractive and then count, as Glazer suggests, “the orientation one harbors toward the 99.9 percent of the world with whom one is not partnered”? Glazer, *supra* note 1, at 1055 (footnote omitted). That practice is inconsistent with fighting sexual objectification. See MacKinnon, *supra*, at 516. (“Sexuality is that social process which creates, organizes, expresses and directs desire, creating the social beings we know as women and men, as their relations create society.” (footnote omitted)). For further explication, see Spindelman, *supra* note 6.

14. See, e.g., RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* 112–15 (1996) (discussing the problem of gendered bathrooms as an example of the exaggeration of sex difference by society).

called the Cuddle Puddle.<sup>15</sup> They are “girls petting girls and girls petting guys and guys petting guys.”<sup>16</sup> The members of the group do not identify as gay, straight, or bisexual; instead they consider themselves to be “just sexual.”<sup>17</sup> Glazer uses the Cuddle Puddle to demonstrate the recent “hypervisibility” of bisexuals in our society.<sup>18</sup> It may be the case that *others* consider them to be bisexuals, but Glazer’s framework has no way to describe their *self-identity*. It is disrespectful to the self-identity of the Cuddle Puddle to force them to acknowledge “sex” as a defining characteristic of people they find attractive. They resist the importance or relevance of thinking in those gendered terms about sexual partners.

To better understand the lives of sexual-orientation resisters, we need to distinguish between sexual orientation as a matter of self-identity and sexual orientation as a socially created construct that defines people’s treatment by society.<sup>19</sup> Although members of the Cuddle Puddle may not consider the biological sex of a person to be a significant sorting mechanism in choosing a sexual partner, they are making the choice of a partner within a society that considers the biological sex of their partner to be of the utmost importance. The Cuddle Puddle is known around school as the “bi clique”<sup>20</sup> even though that is not a label they use for their own self-identity.

Until 2003, members of the Cuddle Puddle, if they had lived in various states outside of New York, could have faced significant criminal sanction if their sexual partners were of the same sex.<sup>21</sup> Even today, in every state, the members of the Cuddle Puddle could not attain the federal benefits of marriage if they chose to marry a partner of the same sex, because of the Defense of Marriage Act.<sup>22</sup> When they were interviewed for the article in *New York Magazine*, nearly all of them asked the reporter not to mention them by their real names out of fear of adverse treatment by others.<sup>23</sup> Although the Cuddle Puddle may resist

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15. Glazer, *supra* note 1, at 1054 (citing Alex Morris, *The Cuddle Puddle of Stuyvesant High School*, N.Y. MAG. (Jan. 28, 2006), <http://nymag.com/news/features/15589/>).

16. Morris, *supra* note 15.

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

18. See Glazer, *supra* note 1, at 1005.

19. For further discussion of the possible ramifications of that distinction, see COLKER, *supra* note 14, at 233–48 (applying the distinction to the collection of racial data for the U.S. Census).

20. Morris, *supra* note 15 (internal quotation marks omitted).

21. See *Bowers v. Hardwick*, 478 U.S. 186, 188–89 & n.2 (1986) (upholding the constitutionality of a Georgia statute criminalizing sodomy, as applied to homosexual sodomy); see also *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003) (overturning *Bowers*, and invalidating a Texas statute criminalizing homosexual sexual activity on the ground that it violated the right to liberty guaranteed by the Due Process Clause of the Fourteenth Amendment).

22. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

23. “Elle” asked to go by a nickname because she had not yet told her mother that she had gotten involved with a girl. See Morris, *supra* note 15. “Jane” requested that the author use her middle name because “My mom thinks I’m going to grow up and be ashamed of my sexuality.” *Id.* One mother who was interviewed for the article asked that her name be withheld because *her* “mother might read this.” *Id.* (internal quotation marks omitted).

sexual-orientation categories as a matter of self-identity, others may treat them adversely based on societal categories such as gay or bisexual. For example, if a man beats up two women who are holding hands in a park after yelling “dyke” at them, does it make sense for us to classify those women, based on their “real” identity as sexual-orientation resisters or bisexuals, if they were treated adversely because of the perception they were lesbians? Thus, we need to identify sexual-orientation resisters as individuals who can face discrimination on the basis of their perceived sexual orientation even if they resist the categories for which such discrimination is imposed upon them.

How do we develop a classification system that respects the validity of sexual-orientation resisters, yet helps us understand people’s treatment by others in society on the basis of their sexual orientation? Part of the difficulty with Glazer’s framework is that she assumes that one classification system can serve both purposes.

If the purpose of a sexual-orientation classification system is to describe people’s “lived identities,” then it does not make sense to pigeonhole the Cuddle Puddle into the bisexual category. If, by contrast, the purpose of such a system is to help maintain records about the existence of societal discrimination, and provide an appropriate legal response, then we need to know how society views a particular individual who has been subjected to adverse treatment. Society’s response to individuals is also part of those individuals’ “lived identities.”

With respect to societal discrimination, Glazer reports that bisexuals face employment and economic harms that are “both real and distinct from the harms faced by gays and lesbians.”<sup>24</sup> In support of that claim, she relies on two anecdotal studies from the United Kingdom in which self-identified bisexuals report that their colleagues view them as “unstable, unreliable, and [even] un-promotable.”<sup>25</sup> But Glazer does not tell us what definition of bisexuality was used by the employees to self-identify as bisexuals or what definition was used by their co-workers or bosses to allegedly discriminate against them on the basis of their bisexuality. Were people acted upon adversely because employers or others accurately perceived them to be bisexuals? Or were they treated adversely by those who mischaracterized them as lesbians or gay men, even though they self-identified as bisexuals? Or both?<sup>26</sup> Her classification system

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24. Glazer, *supra* note 1, at 1001.

25. *Id.* (citing BRENT CHAMBERLAIN, STONEWALL WORKPLACE GUIDES, BISEXUAL PEOPLE IN THE WORKPLACE: PRACTICAL ADVICE FOR EMPLOYERS 2–9 (2009), <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2017>, and Jane Fae, *Survey Finds Different Challenges for Bisexuals*, PINK NEWS (Oct. 25, 2010), <http://www.pinknews.co.uk/2010/10/25/survey-finds-different-challenges-for-bisexuals/>).

26. Glazer relies entirely on anecdotal reports of employment discrimination because the most rigorous existing empirical study on this issue does not support the claim that bisexuals suffer employment and economic discrimination at rates higher than those of gay men and lesbians. See Christopher S. Carpenter, *Self-Reported Sexual Orientation and Earnings: Evidence from California*, 58 INDUS. & LAB. REL. REV. 258, 270 (2005). First, this study does not lend support to the argument that bisexuals suffer employment and economic discrimination at rates higher than those of gay men and

cannot help us understand empirical data on employment discrimination if researchers did not use her classification system when reporting or collecting data, or society did not use that classification system when harming those who Glazer defines as bisexuals. Similarly, her framework cannot help courts and legislatures “protect bisexuals from the harms they face”<sup>27</sup> if her framework does not accurately describe how employers and others determine who it is they consider to be bisexuals. Her framework may accurately describe some bisexuals’ self-identity but there is no evidence that self-identity is the basis upon which individuals face discrimination.

The example of sexual-orientation resisters can therefore help us see the incompleteness of Glazer’s classification system, in which the self-identity of resisters has no place. Further, Glazer’s classification system fails to distinguish between societal perception and self-perception of individuals. This distinction can help us understand the way discrimination occurs in the lives of individuals even if they identify as sexual-orientation resisters.

#### B. SEXUAL-ORIENTATION TILTERS

Glazer’s classification system also does not sufficiently account for sexual-orientation “tilters.” “Tilters” view their sexual orientation as somewhere between rigid homosexuality and rigid heterosexuality. Nonetheless, they also recognize they have an inclination or “tilt” towards one sex as a sexual partner, as part of what Glazer would call their “general orientation.” A hypothetical individual, “Pat,” would say that her specific partner is a man and her general-orientation “tilt” is towards women. She would struggle with Glazer’s general-orientation question. She would want to answer (D) [a “tilt” towards women] rather than (B) [women] or (C) [both men and women].

Although Pat may “tilt” in one direction as a general matter, she is generally open to the possibility of sexual relations with either sex. Glazer would probably expect Pat to answer “both men and women” to the question about her general orientation,<sup>28</sup> but Pat may feel that that answer provides a misleading

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lesbians. For self-reported bisexuals in California, the author concludes that there is no earning penalty for bisexual men once one controls for occupation. *See id.* at 265. For bisexual women, the author concludes there is “some evidence” of a 10.6% earnings penalty when comparing bisexual women to other women but the level of “significance” is only reported at the 10% level. *Id.* The 10% significance level is usually reported as a “trend” and is not considered statistically significant. More importantly, for my purposes, these data are based on self-reported sexual orientation. The category of bisexuals includes many individuals who are married to someone of the opposite sex. Of the 479 women in the study who self-identified as bisexual, 123 (25.6%) were married to a man. *See id.* at 264. Even if it is the case that bisexual women earned 10% less than other women, it is not clear that they were perceived to be bisexual, especially if they were married to a man. Hence, at most, the study suggests correlation rather than causation and fails to demonstrate that bisexuals suffered economic discrimination because of their self-identity as bisexuals.

27. Glazer, *supra* note 1, at 1068.

28. I make this assumption because of Glazer’s discussion of the five softball-team members who were summoned before the North American Gay Amateur Athletic Association to determine if they were “gay enough” to play in the league. Presumably, they were summoned because they were in an

sense of her preferences. As someone who is involved with a man, Pat can only express her preference for women, under Glazer's framework, if she indicates that she identifies with the "extreme orientation" of homosexuality or heterosexuality. In this sense, Glazer sets up bisexuality as another "extreme orientation" exactly in the middle between homosexuality and heterosexuality by requiring answer (C) [both men and women] without allowing for the various points along the spectrum of sexual orientation.

The concept of "tilt" also creates other difficulties under Glazer's framework. Do we always label someone as a bisexual when her general orientation reflects openness to relationships with either biological sex despite her "tilt" in one direction? Or is there a point where the "tilt" is so strong that we do not categorize the person as a bisexual, despite her purported openness to a relationship with either biological sex? Jane, a member of the Cuddle Puddle, reflects on this problem of providing categories for those who seem to "tilt" in one direction but who are members of the group. "[E]ven with all the same-sex activity going on, it's still hard for the girls to find other girls to actually date. Jane says this is because the girls who like girls generally like boys more, at least for dating."<sup>29</sup> At what point would Glazer categorize these girls as heterosexual if they "generally like boys" for dating yet are members of the Cuddle Puddle?

Glazer's framework is also incomplete in that she fails to ask whether one is "open" to relationships with both men and women. In the above example, Pat is involved with a man despite her self-perceived "tilt" towards women. Why is that? Maybe Pat has met a man whom she loves so deeply that she chose him over the pool of available women. That was possible, in part, because her preference towards women was modest (that is, only a "tilt"). But there could also be another explanation. Maybe, although Pat finds women quite attractive in general, she is not "open" to a relationship with a woman due to social or religious pressures in her life. To attain that revelation, Glazer needs a third question: are you *open* to a relationship with both men and women? The "open" question is important because not every woman who recognizes, for example, that she feels an attraction to a woman would be "open" to acting on that attraction, given the existence of discrimination against same-sex partners in our society. Sexual orientation is not merely about one's innate biological feelings; it is also about how one expresses those feelings in the context of a homophobic

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opposite-sex relationship. Glazer criticizes the league for determining that three of them were not gay enough to be in the league, suggesting that they refused to acknowledge the category of bisexuality despite the league's openness to the gay, lesbian, bisexual, and transgender community. *See id.* at 1000, 1028–29. Because two of them "passed," it is also possible that the league simply concluded that they were in the wrong place on the spectrum to be classified as bisexuals. In any event, that example suggests that Glazer has an expansive definition of bisexuals under which she assumes these men would have wanted to answer "both men and women" to a question about their general orientation rather than suggest a tilt in one direction or the other.

29. Morris, *supra* note 15.

society, as will be explored more fully in Part II.

The concept of “openness” creates further problems for Glazer’s framework. Because Glazer confines her discussion to monogamous relationships, this ambiguity about “openness” exists for nearly everyone whom Glazer would describe as a bisexual but who is currently in an opposite-sex relationship. How do we determine whether someone who is in an opposite-sex relationship is really “open” to a same-sex relationship? Is there some point at which we stop giving weight to an individual’s insistence that she is generally attracted to both men and women—despite a decade, or two decades, or a lifetime of an exclusive relationship with a man? What is the point of classifying a woman as a bisexual, merely based on her own feelings of general attraction towards men and women, if she is not genuinely open to acting on her feelings of attraction towards women?

Glazer’s framework works particularly well for one kind of situation—a woman, such as Sandy Stier, who ends a relationship with a man to get involved with a woman.<sup>30</sup> Glazer argues that Stier has not necessarily gone from being a heterosexual to being a lesbian. Instead, if we inquire about her general orientation and she answers “both men and women,” Glazer argues that we should classify her as a bisexual. But was she also a bisexual for the decades during which she was involved with that man, but retained a theoretical openness to a relationship with a woman? What if socialization had caused her not even to realize she was attracted to women while she was married to a man?

As with sexual-orientation resisters, we can only begin to answer these questions by asking what is the *purpose* of a sexual-orientation classification system. If the purpose of a classification system is to help us understand how people self-identify, then Glazer needs to add more questions and possible answers to her list. She needs to let people report how they “tilt.” She also needs to ask people if, despite (or because of) their “tilt,” they are “open” to relationships with men and women.

But if the purpose of a sexual-orientation classification system is to understand the phenomenon of discrimination then we need to ask how society would view these “tilters.” It is hard to imagine that a woman who has been married to a man for decades would find herself a victim of nonheterosexual sexual-orientation discrimination even if she is “open” to a relationship with a woman. Do researchers include her in data about discrimination against bisexuals in society? Should they? Thus, as with sexual-orientation resisters, Glazer’s framework provides an incomplete description of self-identity and the phenomenon of societal discrimination on the basis of sexual orientation as experienced by “tilters.”

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30. See Glazer, *supra* note 1, at 1031–35 (discussing *Perry v. Schwarzenegger*, 702 F. Supp. 2d 921 (N.D. Cal. 2010) (overruling Proposition 8’s ban on same-sex marriage), *aff’d sub nom. Perry v. Brown*, No. 10-16696, slip op. at 4–6 (9th Cir. Feb. 7, 2012) (affirming the unconstitutionality of Proposition 8 but narrowing the grounds for its invalidation)).

## II. SEXUAL SOCIALIZATION

Glazer does not sufficiently consider the role that socialization plays in one's sexual orientation as part of the harm that law needs to address. Sexual orientation is not simply an inherent quality that one needs to "discover."<sup>31</sup> Sexual orientation is a product of the interplay between biology and socialization. Recognition of that interplay can also help us see the coercive effects of law on human sexuality. As she does with sexual-orientation resisters and tilters, Glazer provides examples of this phenomenon but does not place it within her framework.

"Elle," one of the Cuddle Puddle members, provides an excellent example of sexual-orientation socialization. Elle recounts a conversation she had with her mother about her sexual feelings. She asked her mother, "Mom, what if I have these feelings for girls?" Her mother then replied, "Do you have feelings for boys too?" and Elle answered, "Yeah." Her mother advised, "Then you have to ignore the ones you have for girls. If you can be straight, you have to be straight."<sup>32</sup> Elle did not heed her mother's advice and got involved with a girl. But we can understand Elle's story as reflecting the existence of a sexual-orientation spectrum along with socialization influences. Her attraction towards girls was strong enough that she ignored her mother's advice and got involved with a girl, but she also reports that she ultimately plans to marry a man,<sup>33</sup> caving to societal norms as reflected by her mother's admonition. Glazer's framework does not account for this sexual-orientation recalibration and socialization. It only allows us to understand that society would categorize Elle as bisexual. But Elle's own understanding of her sexual identity is much more complicated than "bisexual" because her identity only exists as part of a social context. She defies her mother by getting involved with a girl but ultimately plans to follow social norms by marrying a man, in response to what Adrienne Rich has called a patriarchal system of "compulsory heterosexuality."<sup>34</sup>

The connection between sexual orientation and socialization is also exemplified in the story that Glazer tells about Sandy Stier. Stier was one of the female plaintiffs in the California same-sex-marriage litigation.<sup>35</sup> Glazer criticizes Ted Olson—Stier's lawyer—for his questioning of Stier during her testimony.<sup>36</sup> Stier had been married to a man and now desired to marry a woman, but her marriage to a woman was not permitted under the laws of California. Olson was challenging this exclusion as a violation of her right to equal protection of the law.<sup>37</sup> Olson elicited testimony from Sandy in which she claimed that she

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31. *See id.*

32. Morris, *supra* note 15.

33. *Id.*

34. ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, reprinted in BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985, at 23 (1986).

35. *Perry*, 704 F. Supp. 2d at 927, 1003.

36. *See Glazer, supra* note 1, at 1033–35.

37. *Perry*, 704 F. Supp. 2d at 929–30.

discovered that she was gay “fairly late in life” but was now certain that she was “gay” and would love only one person the rest of her life—a woman.<sup>38</sup> Nonetheless, Stier also testified that she entered her marriage to a man “with the best intentions” and “loved him when she married him.”<sup>39</sup>

Glazer criticizes Olson’s examination of Stier because it rested on the importance of showing that Stier was a “real lesbian” who was constitutionally entitled to marry someone of the same sex. Olson seemed concerned that the judge might perceive Stier “merely” to be a bisexual and, therefore, not entitled to choose to marry a same-sex partner. Glazer criticizes Olson for failing to argue for Stier’s right to marry a woman irrespective of whether she was a lesbian or bisexual.<sup>40</sup>

Although I agree with Glazer’s critique, I also think it is the case that Stier’s story—if properly understood, in part, as a story of socialization—would strengthen Olson’s constitutional argument. Stier grew up in a society in which heterosexuality was the norm. She found some men attractive so she was able to act consistently with conventional social norms and marry a man whom she loved. She was probably not aware of how societal norms were affecting her choice of sexual partner. Nine years into her marriage, however, she met a woman whom she came to realize was deeply attractive to her. Moreover, she lived in a region of the country in which same-sex relationships were becoming more acceptable. In response to these various forces, she decided to become romantically involved with this woman and to divorce her husband. She and her female partner have been very happy together over the last decade and, hence, would like to marry. In retrospect, she might regret that socialization subconsciously precluded her from considering women as potential sexual partners for so many decades. The ban on same-sex marriage was part of the socialization process that caused her not to consider the happiness she might find in a same-sex relationship.

Olson could have used that story to argue that the law does not just hurt gay men and lesbians by giving them second-class status, but that it also hurts those who are potentially open to sexual relationships with either sex<sup>41</sup> by coercing them into not realizing the full extent of their sexuality. The law of marriage’s influence is like Elle’s mother—persuading her to date boys rather than date both boys and girls (and certainly not to date only girls). Unfortunately, no court has recognized that the law of marriage contributes to this kind of harm by coercing those who can make sexual-orientation choices to limit themselves to

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38. Transcript of Record at 161, 167, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-1-1-11-10.pdf>.

39. *Id.* at 162, 165.

40. See Glazer, *supra* note 1, at 1033–35.

41. Unlike Olson, I am not giving Stier a label. Glazer wants to classify her as a bisexual, whereas Olson wants to classify her as a lesbian. I want to acknowledge that her life history reflects openness to sexual relationships with men or women. But I have no way of knowing where she finds herself on the sexual-orientation spectrum—how far she tilts towards women or towards men.

opposite-sex relationships in order to avoid social stigma and legal repercussions. As with the sodomy laws that were eventually found to be unconstitutional,<sup>42</sup> it is wrong for the law to tell people whom they should love in the context of an adult, consensual relationship.

The closest any judge has come to such a recognition was Judge Norris in a short-lived decision for the Ninth Circuit, in which he wrote to strike down the military's ban on openly gay military personnel:

Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. But the possibility of such a difficult and traumatic change does not make sexual orientation "mutable" for equal protection purposes. To express the same idea under the alternative formulation, we conclude that allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.<sup>43</sup>

Judge Norris's statement is deeply problematic, while also offering some progressive possibilities. He buys into a strict sexual-orientation-dichotomy notion when he suggests that one can only move from exclusively opposite-sex relationships to exclusively same-sex relationships through "extensive therapy, neurosurgery or shock treatment," failing to recognize the potential fluidity of sexuality. Two decades later, Stier testified about a transformation from a marriage with a man to a marriage with a woman without any suggestion of "extensive therapy, neurosurgery or shock treatment." She simply came to understand her sexuality better "later in life." So Norris's statement is deeply problematic because he refuses to recognize the fluidity of sexuality as an option within human sexuality.

Nonetheless, Norris's argument is helpful because he recognizes that it is wrong for society to try to coerce people into changing their sexual identity. Even if sexual orientation is mutable, Norris argues that we should not "penalize the failure to change such a central aspect of individual and group identity" to attain equal treatment under the law. His statement leaves space for a lawyer to argue, as a constitutional matter, that it is wrong for the law to seek to coerce bisexuals into limiting their sexual relationships to those of the opposite sex. It is wrong for the law to coerce Stier or Elle into thinking that they should

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42. *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003).

43. *Watkins v. U.S. Army*, 847 F.2d 1329, 1347–48 (citations omitted) (9th Cir. 1988), *withdrawn upon reh'g en banc*, 875 F.2d 699 (9th Cir. 1989).

confine their choice of partners to men when they realize they are open to relationships with men or women.

One harm under our current sexual-orientation regime is that most people are *not* open to the possibility that they might be happy with partners of either biological sex. Of course, we should not penalize people for “the failure to change such a central aspect of individual and group identity,” but we should encourage people to explore a wider range of possibilities with respect to their individual and group identities. More legal protection for bisexuals might facilitate resistance to the power of sexual-orientation socialization.

#### CONCLUSION

A key purpose of Glazer’s article is to offer a “new way of understanding sexual orientation that reflects the lived experience of human sexuality.”<sup>44</sup> In this Response, I have tried to show that this new framework does not adequately describe some of the people that Glazer discusses in her article. Some might respond that I am wrong—that her framework works in the context of Glazer’s examples and their own experiences. They would argue that many people would be willing to respond that they are attracted to both men and women as part of Glazer’s theory of “general orientation,” thereby broadening our ability to categorize them as bisexuals. We would no longer pigeonhole them in the categories of gay or straight based on the identity of their current partner.

My own discomfort with Glazer’s framework is attributable to the fact that I cannot find myself within her framework. Her framework makes me feel less rather than more visible as a sexual being. It makes me uncomfortable to be required to give so much attention to gender or sex as a defining principle in my life. Further, her framework feels too rigid, as if my sexual orientation has to be at one of three places on the spectrum of sexuality. Finally, her framework is inconsistent with my sense of myself as having a sexual orientation in relationship to society, rather than as a biologically innate facet of my life. That relationship must play a crucial role in a sexual-orientation framework if we are to develop adequate legal responses to societal mistreatment and coercion on the basis of sexual orientation. Nonetheless, I am sure that many people will find Glazer’s framework useful, and I commend her for trying to continue the discussion about how to recognize and protect bisexuals, as well as other sexual-orientation misfits,<sup>45</sup> under the law.

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44. Glazer, *supra* note 1, at 1004.

45. *See generally* COLKER, *supra* note 14.