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DEFINING SEXUAL ORIENTATION: A PROPOSAL FOR A NEW DEFINITION

*Andrew Park**

ABSTRACT

Laws prohibiting discrimination based on sexual orientation are becoming more common in all parts of the world. Few of these laws provide useful definitions of the term sexual orientation. As a result, the meaning and impact of these laws remains unclear. This Article reviews past and current definitions of sexual orientation according to how well they incorporate current empirical knowledge of sexual orientation, and how their use in human rights laws impacts the dignity, right to equality, and human development of sexual minorities. The Article gives particular attention to the definition of sexual orientation found in the Yogyakarta Principles which has been adopted by a number of jurisdictions throughout the world. Because this definition views sexual orientation through a heteronormative lens, its use restricts sexual freedoms and undermines the dignity of individuals with non-confirming sexual orientations. The Article proposes a multi-dimensional definition of sexual orientation grounded in current scientific knowledge of how sexual orientation is manifested in the lives of sexual minorities.

* Consultant, United Nations Development Programme, Deutsche Gesellschaft für Internationalen Zusammenarbeit (GIZ) GmbH, Outright Action International, the Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights (RFSL). The conclusions of this Article rely, in part, on interpretations of the drafting history of the Yogyakarta Principles. For purposes of disclosure, the author was involved in organizing the first experts meeting in Yogyakarta, Indonesia as well as follow-up efforts to promote the use of the Yogyakarta Principles. In this role he received support from Wellspring Philanthropic Fund and the Human Rights Funders Network. He was also a member of the secretariat for the Yogyakarta Plus Ten meetings in Geneva, Switzerland, with a number of duties including creation of rules of procedure and chairing a portion of the proceedings. In this role he received support from the Williams Institute, University of California Los Angeles School of Law where he was Director of International Programs. The author would like to acknowledge the efforts of Catherine H. Townsend, Ford Foundation, for her assistance reviewing earlier versions of this Article.

I. INTRODUCTION

Sexual minorities, or people whose sexual orientation does not conform to heteronormative cultural expectations, are vulnerable to violence and discrimination. International bodies and States in all parts of the world are responding to this concern by adopting laws protecting people from human rights abuses on the grounds of sexual orientation and seeking to include sexual minorities in programs intended to enhance human development.¹ Without an understanding of what is meant by the term sexual orientation, it is difficult to know what acts, behaviors, and identities are protected by these laws. The goal of this Article is to formulate a definition of sexual orientation that responds to human rights abuses experienced by sexual minorities and is grounded in current empirical knowledge about human sexuality.

Currently, most laws do not define the term sexual orientation.² Definitions that do exist do not provide a clear understanding of how sexual orientation is manifested in a person's life.³ According to some definitions, any sexual act is indicative of an individual's sexual orientation while other definitions reflect a view that sexual orientation is manifested only through intimate relations.⁴ Some include identity as an aspect of sexual orientation, while others do not.⁵ According to some definitions, the experience of attraction to one gender or another, even if never acted upon, is indicative of one's sexual orientation.⁶ Others disregard attractions that are not profound and emotional.⁷ These differences impact the ability of sexual minorities to seek remedy when they are treated differently from others.

Beyond individual claims, the use of the term sexual orientation by States carries a powerful, empowering message about the social and political legitimacy of people whose sexual orientation is marginalized.⁸ This symbolic value is muddled, however, by the uncertainty about who, exactly, is encompassed by inclusion efforts. When States seek to ensure sexual minorities are included in efforts to track and improve human development outcomes such as health, education and income, a definition of sexual orientation is needed in order to know whose outcomes to track

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1. See *infra* Section II.C.
 2. See *id.*
 3. See *id.*
 4. See *infra* Section II.D-F.
 5. See *id.*
 6. See *infra* Section II.D.
 7. See *infra* Section II.F.2.
 8. See *infra* Section III.a.

and what interventions to implement.⁹ This Article sets out how definitions of sexual orientation impact the recognition of marginalized communities and seeks to construct a definition that supports the full empowerment of such communities.

The first step in formulating a definition of sexual orientation is to review how the concept of sexual orientation originated and how it has been defined up until the present. This review, set out in Section II, is structured to reflect the interplay over time between legal advances regarding sexual orientation and increasingly enlightened medical and social science perspectives. Particular attention is given to the multi-dimensional model of sexual orientation, currently the predominant framework used by researchers, and to the definition of sexual orientation introduced in the Yogyakarta Principles, a recently popular definition used by international human rights bodies, courts, and legislatures throughout the world.¹⁰

After reviewing these definitions, the Article then turns to the task of assessing them in order to craft a definition that will expand human rights. The initial step in such an assessment is to clarify what functions a definition should serve. Section III discusses several functions, including that of enhancing the human rights of sexual minorities. Specifically, a definition should respect human dignity, promote equality through non-discrimination laws, and support the human development of sexual minorities.

Using this criteria, Section IV assesses the different approaches to defining sexual orientation. Same-gender attraction, sexual behavior, and sexual orientation identity are reviewed, in detail, to determine whether, and to what extent, they should be reflected in a definition of sexual orientation. The Yogyakarta Principles definition preferences those manifestations of sexual orientation which mimic heteronormative ideals of sex and sexual identity, potentially limiting sexual freedom and undermining the dignity of those whose sexual orientation does not conform to such norms.

In Section V, this Article proposes a new definition of sexual orientation. Additionally, that section includes a detailed description of who is and is not included, based on the acts, behaviors, and identities in which they engage.

This Article does not engage several otherwise worthwhile debates related to these issues. It does not contest the decision to use the term

9. See *infra* Section III.C.3.

10. See *infra* Section II.F.1.

sexual orientation instead of some other framework to address the concerns of sexual minorities. Sexual orientation is firmly established as part of the human rights lexicon. The job now is to get a good definition.¹¹ Neither does this Article address the origin of sexual orientation.¹² It is not necessary to resolve the “born this way”¹³ debate as courts and legislators have been able to resolve questions of sexuality, negatively and positively, without deciding this issue. Nor does it engage scenarios where an individual’s sexual orientation is determined by other people’s perceptions, such as when an individual brings a claim of discrimination based on perceived sexual orientation. This Article focuses on situations where the determination of an individual’s sexual orientation is made by examining whether an individual’s acts, behaviors and identities equate to a particular definition of sexual orientation.

Finally, this Article focuses on sexual orientation and not on gender identity or expression. This focus requires setting aside at least two circumstances in which gender and sexuality interact in the context of a discrimination analysis. The first is the impact of gender stereotypes on sexual minorities. Gender stereotypes, according to the UN Office of the High Commissioner for Human Rights, are preconceived notions about characteristics that are or ought to be possessed by men and women.¹⁴ These characteristics include a heterosexual orientation and adherence to standards of masculinity and femininity in behavior, appearance, and expression for men and women, respectively. Discrimination based non-conformity with gender stereotypes is considered a form of discrimination based on sex.¹⁵

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11. “Nevertheless, in many contexts—public debates, the media and school education—NGOs and activists need to switch from unproblematized, undefined uses of ‘sexual orientation’ and ‘gender identity’, to taking the opportunities that arise to offer careful, explicit definitions of the concepts that are compatible with the diversity of sexual and gender subjectivities discussed . . .” Matthew Waites, *Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137, 153 (2009).
 12. J. Michael Bailey, Paul L. Vasey, Lisa M. Diamond, S. Marc Breedlove, Eric Vilain & Marc Epprecht, *Sexual Orientation, Controversy, and Science*, 17 PSYCH. SCI. PUB. INT. 45, 46 (2016) [hereinafter Bailey et al.].
 13. Although some popular discourses suggest that sexual orientation is immutable, some scholars and activists have argued that the claim that same-sex desire is innate might impair the ability to argue in favor of sexual freedom. See Jeffrey Bennett, “Born This Way”: *Queer Vernacular and the Politics of Origins*, 11 COMM. CRITICAL/CULTURAL STUD., 211 (2014).
 14. *Gender Stereotyping: OHCHR and Women’s Human Rights and Gender Equality*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, [https://perma.cc/8XMC-2MX2].
 15. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13.

Because sexual minorities violate gender stereotypes, many jurisdictions consider discrimination based on sexual orientation to be a form of sex discrimination. Accordingly, LGB people may be able to bring claims of sex discrimination instead of, or in addition to, claims of sexual orientation discrimination. This article does not discuss a gender-stereotyping approach to discrimination against LGB people.

Secondly, this Article does not discuss how the increasing recognition of non-binary genders impacts a sexual orientation discrimination analysis. In a strictly binary gender system, a person's orientation is toward the same gender, the opposite gender, or both, producing the groupings of homosexuals, heterosexuals and bisexuals. If an employer were to fire a homosexual worker, a discrimination analysis might include looking at how that employer treated similarly situated heterosexual and bisexual workers. In systems with multiple genders, a person's orientation is toward the same gender, a different gender, or multiple genders. This produces more than three groupings of people as an individual might be oriented toward cisgender men, cisgender women, transgender men, transgender women, or other non-binary genders. Accordingly, if an employer were to fire a worker because of their orientation toward transgender people, a discrimination analysis might entail looking at multiple other groups.

As the number of people who identify as non-binary increases, adjudicators will need to grapple with the additional analytical complexities this may entail. The analysis in this Article rejects the binary-based formulation of the same and opposite gender orientations in favor of a same and different gender formulation which incorporates the existence of multiple genders. Thus, this Article recognizes the potential for multiple sexual minority subgroups. However, it stops short of discussing how the existence of a larger number of subgroups might impact a discrimination analysis.

For the purposes of this Article, the terms sexual minority and lesbian, gay, and bisexual (LGB) are used interchangeably to refer to those people whose sexual orientation does not conform to heteronormative expectations about sexual orientation, including people who may use terms other than lesbian, gay or bisexual to refer to their own sexual orientation.¹⁶ Keeping in mind the caveats above, the term LGB also in-

16. "Increasingly, nonheterosexual individuals are reporting sexual identities other than lesbian, gay, bisexual, or straight . . . While various non-traditional sexual identities exist, two of the more frequently adopted are queer and pansexual." James S. Morandini, Alexander Blaszczyński & Ilan Dar-Nimrod, *Who Adopts Queer and Pansexual Sexual Identities?*, 54 J. SEX RSCH. 911, 911 (2017) [hereinafter Morandini et al.]. In

cludes both cisgender people and people whose gender does not correspond to their gender as assigned at birth, such as transgender or non-binary people. Accordingly, this Article does not use the abbreviation LGBT, the last letter of which references transgender people as an additional group.

Similarly, the terms sexual majority and heterosexual are used interchangeably based on the assumption that the majority of people in all cultures are heterosexual. This Article is written with the general assumption that the purpose of referencing sexual orientation in human rights laws is to protect those whose human rights are at risk because of their sexual orientation.¹⁷ Accordingly, the issues are framed in terms of discrimination against sexual minorities or LGB people. This framing is not intended to negate the fact that human rights apply to all people and that heterosexuals can also be the target of discrimination based on sexual orientation.¹⁸

many areas of the world, sexual orientation is understood according to traditional indigenous identities such as takatapui, a Maori term used by in Aotearoa/New Zealand. See Gavin Brown, Kath Browne, Rebecca Elmhirst & Simon Hutta, *Sexualities in/of the Global South*, 4 GEOGRAPHY COMPASS 1567, 1573 (2010).

Additionally, people may identify themselves according to contemporary, yet culturally specific terms such as Tongzhi, used in China. See Holning Lau, Geoffrey Yeung, Rebecca L. Stotzer, Charles Q. Lau & Kelley Loper, *Assessing the Tongzhi Label: Self-Identification and Public Opinion*, 64 J. HOMOSEXUALITY 509, 519 (2017) [hereinafter Lau et al.].

17. See THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 7 (2007) [hereinafter Original Principles]. The introduction points out that human rights laws should “take account of the specific situations and experiences of people of diverse sexual orientation.” *Id.* at 9. Additionally, the U.N. Independent Expert on protection and violence discrimination based on sexual orientation and gender identity recommends that States adopt laws and policies that include sexual orientation among prohibited grounds of discrimination in order to combat human rights violations. HUM. RTS. COUNCIL, U.N. Doc. A/HRC/38/43, at 19-20 (May 11, 2018).
18. It is important to note the distinction between laws that provide protections only to LGB people and laws that protect the right of all people based on their sexual orientation. As affirmed by the Vienna Declaration and Programme of Action, “All human rights are universal, indivisible and interdependent and interrelated.” World Conf. on Hum. Rts., *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993). Use of the term sexual orientation rather than terms such as heterosexual, lesbian, gay, etc., reflects the universal reach and application of human rights law. A U.N. Independent Expert report recognizes that “everyone has some form of sexual orientation and that “human rights are inherent to all persons without distinction.” Hum. Rts. Council, *Rep. of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/35/36, at 3 (Apr. 19, 2017).

II. EVOLVING PERSPECTIVES OF SEXUAL ORIENTATION.

Sexual orientation is a relatively recent invention. While examples of same-gender sexual behavior can be found in all societies throughout history,¹⁹ concepts such as sexuality, sexual orientation, and categories such as homosexuality, heterosexuality, and bisexuality are socially constructed.²⁰ They are created and given meaning by society.²¹ In this section, we will highlight selected moments in the evolution of the understanding of sexual orientation, beginning with the creation of the concept of homosexuality in 1800s. This period marked the beginning of formal efforts to understand same-sex sexual behavior and desire in a positive light.

Over the next two centuries, researchers continuously hypothesized and refined new ways to explain how individuals develop their sexuality from birth to old age,²² and how sexual behavior, desire and other aspects of sexuality operate in an individual's life.²³ These evolving understandings of sexual orientation are reflected in the strategies and demands of LGB advocates as they adopt new concepts produced by scientific advancements and incorporated them in their advocacy.

A. *Emergence of Sexual Orientation*

The term homosexual first became popularized in 1886. Though the term had already been coined by others,²⁴ it was Richard von Krafft-

19. "All studies of human sexuality in all races throughout the world and throughout human history have documented the presence of homosexuality." Ministry of Health, Republic of Uganda, *Scientific Statement on Homosexuality*, Feb. 10, 2014.

20. ACADEMY OF SCIENCE OF SOUTH AFRICA, *DIVERSITY IN HUMAN SEXUALITY* 16 (2015).

21. *See Id.*

22. For a review of different models explaining the development of sexual orientation, see Michele J. Eliason & Robert Schope, *Shifting Sands or Solid Foundation? Lesbian, Gay, Bisexual, and Transgender Identity Formation*, in *THE HEALTH OF SEXUAL MINORITIES* 3–26 (Ilan. H. Meyer & M.E Northridge eds., 2007).

23. Frank R. Dillon, Roger L. Worthington & Bonnie Moradi, *Sexual Identity as a Universal Process*, in *HANDBOOK OF IDENTITY THEORY AND RESEARCH* 649, 657–659 (Seth Schwartz, Koen Luyckx, & Vivien Vignoles eds., 2011) [hereinafter Dillon et al.].

24. Foucault credits Carl Westphal's "Contrary Sexual Sensations" as the first modern medical account of homosexuality. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., 1978). *See also* EDWARD O. LAUMANN, JOHN H. GAGNON,

Ebing who popularized²⁵ it when he published his influential work, *Psychopathia Sexualis*.²⁶ The advent of the concept of homosexuality shifted the focus from the act of sodomy to the nature of the homosexual. Same-sex behavior and desire were understood to be components of homosexuality, a condition experienced by a particular type of person, namely the homosexual.²⁷

From the late 1800s through the mid-1900s, psychiatrists, physicians and psychologists proposed a number of theories to explain homosexuality.²⁸ These efforts included theories of pathology which tended to view homosexuality as a disease requiring cure.²⁹ The notion of sexual orientation, or a universal trait which included homosexuality, heterosexuality and bisexuality was not yet part of common understandings.

The high-profile reports on human sexual behavior, published in the mid-1950s by Alfred Kinsey, were a significant advancement in the study of homosexuality.³⁰ Kinsey proposed a scale based on sexual experience and desire that placed hetero- and homosexuality on a continuum from zero to six. A six is someone who is exclusively homosexual, and a zero is someone who is exclusively heterosexual.³¹ His reports popularized the belief that ten percent of the population is exclusively homosexual.³²

ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 283 (1994) [hereinafter LAUMANN]. Others attribute the first use of the term to Karl-Maria Kertbeny.

25. Beaulieu-Prévost & M. Fortin, *The Measurement of Sexual Orientation: Historical Background and Current Practices*, 24 *SEXOLOGIES* e15, e16 (2015).
26. RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (William Heinemann (Medical Books) Ltd, 1939).
27. *See, e.g.*, a 1950 Congressional report by the Committee on Expenditures in the Executive Departments where the Subcommittee on Investigations defined homosexuals as those “. . . who as adults engage in sexual activity with persons of the same sex.” S. COMM. ON INVESTIGATIONS, *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT*, S. Res. No. 81-280, at 2 (1950). Thus, homosexuality is defined by a series of behaviors. Entirely behavioral, though there is a recognition of “latent sex perverts” being those who have inclinations toward homosexuality but have not “indulge[d] in overt acts of perversion.” *Id.*
28. *See* Surya Monro, *LGBT/Queer Sexuality, History of Europe*, in *THE INTERNATIONAL ENCYCLOPEDIA OF HUMAN SEXUALITY* 649–719 (Patricia Whelehan & Anne Bolin eds., 2015). Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 *BEHAV. SCI.* 565, 566-70 (2015).
29. Drescher, *supra* note 28, at 566.
30. *See* ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1949); ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).
31. ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650-51 (1949).
32. *Id.* at 651.

During the same period as the publication of the Kinsey reports, the UK government instituted a review of its laws related to homosexuality and prostitution. In 1954, the UK government established the Committee on Homosexual Offences and Prostitution, chaired by Sir John Wolfenden, to make recommendations regarding the legal treatment of homosexual offenses and prostitution.³³ The British Medical Association's (BMA) report to that committee introduced the notion of sexual orientation as a universal characteristic. "Homosexuality is popularly understood to mean the commission of homosexual practices. This is not so . . . Most people, if not all, possess in different degrees both homosexual and heterosexual potentialities."³⁴ The BMA used the term "orientation" to describe an individual's capacity for attraction and sexual activity with the same or different sex.³⁵

After weeks of hearing testimony, the high-profile committee ultimately recommended that private same-gender conduct should not be a criminal offense.³⁶ A decade later, this recommendation led to the passage of the Sexual Offences Act of 1967. The law decriminalized "a homosexual act in private"³⁷ but specified that sex with more than two people, or sex in a public lavatory, would not be considered private.³⁸ Lord Wolfenden reviewed and approved of the provisions of the Sexual Offences Act, concluding that they appropriately balanced individual rights and public offense.³⁹

The issuance of the highly publicized Wolfenden report and the Kinsey study coincided with the formation and growth of an increasingly visible LGBT movement.⁴⁰ In 1969, a police raid on a gay bar in New York City, the Stonewall Inn, erupted into a series of violent demonstrations by the local LGBT community. The Stonewall riots, regarded by many

33. H.A. Hammelmann, *Committee on Homosexual Offences and Prostitution*, 21 Mod. L. Rev. 68, 68 (1958). For a more thorough discussion on the committee and its report, see Kate Gleeson, *Freudian Slips and Coteries of Vice: The Sexual Offences Act of 1967*, 27 PARLIAMENTARY HIST. 393, (2008).

34. British Medical Association, *Homosexuality and Prostitution: B.M.A. Memorandum of Evidence for Departmental Committee*, 2 BRIT. MED. J. 2656, 2656 (SUPP. 1955).

35. *Id.*

36. H. A. Hammelmann, *supra* note 33, at 68.

37. Sexual Offences Act 1967, c. 60, § 1(1) (UK) (repealed by Sexual Offences Act of 2003, c. 42 (UK)).

38. Sexual Offences Act 1967 at § (2)(a)-(b) (repealed by Criminal Justice and Public Order Act 1994, c. 33 (UK)).

39. Wolfenden himself said this reflected his report. See Gleeson, *supra* note 33, at 405.

40. Régis Schlagdenhauffen, *Gay Rights and LGBTIQ Movements in Europe*, ENCYCLOPÉDIE D'HISTOIRE NUMÉRIQUE DE L'EUROPE (2020) [https://perma.cc/6DKE-AJKS].

as the beginning of the contemporary LGBT movement, were a catalyst for the formation of advocacy organizations.⁴¹

Prompted initially by the use of the term “orientation” during the Wolfenden Committee hearing, advocates started using the concept of sexual orientation as a political strategy.⁴² Sexual orientation was a framework that applied to all people in the same way as race and sex, and advocates began making arguments against discrimination based on the immutability of homosexuality.⁴³ “The idea of an unchangeable orientation seemed to be,” as Mary Ziegler observed in her analysis of the term sexual orientation in the United States, “a potent argument against the selective application of the law to gays and lesbians.”⁴⁴

B. *Initial Policy Approaches*

Though the concept of sexual orientation was compelling, advocates differed on the term used to describe it. Some advocates favored the term sexual and/or affectional preference because they thought that sexual orientation inaccurately suggested that private sexual activity was the sole basis for classifying an individual’s sexuality.⁴⁵ Clinical psychologist Gary Schoener, who first proposed the term affectional or sexual preference, said that activists should describe homosexuality and bisexuality as positive choices rather than inborn traits suffered by those who were not innately heterosexual.⁴⁶ US-based lesbian feminists embraced the notion of sexual choice and the acknowledgement that sexuality was about more than just sexual acts, but also encompassed romantic, social, and political aspects.⁴⁷ Reflecting the efforts of advocates, some laws adopted during this period used the term “sexual preference” rather than sexual orientation.⁴⁸

41. URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 54-62 (1996).

42. Mary Ziegler, *What is Sexual Orientation?*, 106 Ky. L. J. 61, 75 (2017).

43. *Id.* at 84.

44. *Id.* at 76.

45. *Id.* at 97.

46. *Id.*

47. STEVEN SEIDMAN, *DIFFERENCE TROUBLES: QUEERING SOCIAL THEORY AND SEXUAL POLITICS*, 115-120 (1997).

48. *See, e.g.*, Cal. Exec. Order No. B-54-79 (1979) (prohibiting public-employment discrimination because of “sexual preference”). *See also* MINNEAPOLIS, MINN., CODE ORDINANCE § 139.20(s) (1974) (prohibiting discrimination based on sexual orientation, labeling it discrimination based on “affectional or sexual preference” and defining as “having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment”); H. R.

This broad, self-empowering view of sexuality quickly lost ground to anti-gay advocates who seized on the notion of sexual preference to portray it as not only a choice, but one that was immoral and preventable.⁴⁹ The LGBT movement ultimately adopted an immutability approach, asserting that sexual orientation was a born trait that could not be changed.⁵⁰ Ironically, the term sexual preference is now considered offensive by many LGBT advocates because of the belief that it is a product of anti-LGBT advocacy.⁵¹

In the 1970s and 1980s, a number of jurisdictions adopted laws that reflected a particular view of sexual orientation. In 1971, New York City passed an ordinance prohibiting discrimination based on sexual orientation, defined simply as “the choice of sexual partner according to gender.”⁵² This definition reflected a view that sexual orientation was entirely about sexual behavior. Some political leaders viewed homosexuality as involving recruitment and were unwilling to protect those who were open.⁵³ In 1972, New York City Mayor John Lindsay banned discrimination on the basis of “private sexual orientation” in city employment.⁵⁴ A 1974 law adopted in Minneapolis emphasized the consensual nature of relationships, possibly out of a concern of recruitment, when it prohibited discrimination based on sexual or affectional preference, defined as “having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment.”⁵⁵

451, 95th Cong., §§ 6, 11 (1st Sess. 1977) (introducing a proposal in the US Congress to prohibit discrimination in employment based on “affectional or sexual preference”).

49. Ziegler, *supra* note 42, at 100.

50. *Id.* at 104-05.

51. On October 13, 2020, the US Senate held a hearing on U.S. President Trump’s nomination of Amy Coney Barrett to serve as an Associate Justice on the U.S. Supreme Court. Barrett was known for her socially conservative views, including past opposition to LGBT rights. In that hearing, Barrett stated she would not discriminate based on “sexual preference.” Her use of the term triggered a vocal backlash from the political left who saw her use of the term as derogatory to the notion of rights of LGBT people. As one op-ed put it, the “internet erupted in flames.” Steven Petrow, Opinion, *Judge Barrett, Don’t Use ‘Sexual Preference’ for LGBTQ people. It’s Incorrect and Alarming*, USA TODAY (Oct. 14, 2020), [https://perma.cc/74Q3-NZ89]. The following day, Merriam Webster dictionary added a notation to the definition sexual preference indicating that its use was offensive. See Janice Williams, *Merriam-Webster Dictionary Adds ‘Offensive’ to ‘Sexual Preference’ Definition After Amy Coney Barrett Uses Term in Hearings*, NEWSWEEK (Oct. 14, 2020), [https://perma.cc/8LCR-77BP].

52. Mary Ziegler, *Perceiving Orientation: Defining Sexuality After Obergefell*, DUKE J. GEN- DER L. & POL’Y 223, 227 (2016).

53. *Id.* at 228.

54. *Id.*

55. MINNEAPOLIS, MINN., CODE ORDINANCE § 945.020(s) (1974).

Laws in other parts of the world also used a variety of approaches to name and define sexual orientation. A hate-speech law in Norway prohibited inciting persecution of anyone because of their “homosexuality, lifestyle or orientation.”⁵⁶ A 1985 law in France outlawed discrimination based on “moeurs,” (manners or customs).⁵⁷ Rather than define sexual orientation, a 1977 law in New South Wales prohibited discrimination based on “a characteristic that appertains generally” or is “generally imputed” to homosexuals.⁵⁸ Interestingly, this law did not prohibit discrimination against a particular class of people (homosexuals), nor did it specify which characteristics were ones that appertained, or were imputed to, homosexuals. Instead, the law aimed to challenge discriminatory treatments based on socially constructed aspects of homosexuality, whatever they may be. Clothing, mannerisms, social affiliations, location of residence, and degree of gender conformity, to name a few, might all be considered aspects of homosexuality, depending on the cultural context and prevailing stereotypes of homosexuals. The New South Wales definition leaves it up to the finder of fact to determine whether the basis for a discriminatory act equated to discrimination based on a characteristic tied to homosexuality.

Throughout the late 1900s, and up to the present, dozens of countries and local jurisdictions have adopted laws that provide protections based on sexual orientation, most leaving the term undefined.⁵⁹ Of the laws where a definition can be found, most are defined through a list of

56. GENERAL CIVIL PENAL CODE, §135(a) (1981) (Nor.). See also Sindre Bangstad, *Fighting Words: What's Wrong with Freedom of Expression?*, 40 J. ETHNIC & MIGRATION STUD. 266, 268 (2014).

57. Loi 85-772 du 25 juillet 1985 portant diverses dispositions d'ordre social [Law 85-772 of July 25, 1985 containing various social provisions], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 25, 1985, p. 8471; Loi 86-76 du 17 janvier 1986 portant diverses dispositions d'ordre social [Law 86-76 of January 17, 1986 containing various social provisions], Journal Officiel de la République Française [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 17, 1986, p. 888. See also SOPHIE LATRAVERSE, REPORT ON MEASURES TO COMBAT DISCRIMINATION FRANCE COUNTRY REPORT 2011 50 (2012), [<https://perma.cc/53S5-Y84W>].

58. *Anti-Discrimination Act 1977* (NSW) pt IVc div 1 49ZG(1) (Austl.) “a characteristic that appertains generally to homosexual persons or a characteristic that is generally imputed to homosexual persons.”

59. See LUCAS RAMON MENDOS, STATE-SPONSORED HOMOPHOBIA 2019: GLOBAL LEGISLATION OVERVIEW UPDATE, ILGA WORLD, (2019) (cataloguing laws using the term sexual orientation as well as the definition of the term sexual orientation—where such definitions exist).

types of sexual orientation.⁶⁰ For example, the Mauritius Equal Opportunity Act states that “‘sexual orientation’ means homosexuality (including lesbianism), bisexuality or heterosexuality.”⁶¹ Typology definitions do little to advance our understanding of sexual orientation as they depend on terms which are themselves undefined and contested.

C. *Multidimensional Models*

While legal definitions of sexual orientation did not evolve a great deal during the latter part of the 1900s, social scientists intensified their efforts to define the terms. New definitions began to emphasize multidimensional aspects of sexual orientation. In 1985, psychiatrist and researcher Dr. Fritz Klein identified seven aspects of sexual orientation: sexual attraction, sexual behavior, sexual fantasies, emotional preferences, social preferences, self-identification and lifestyle.⁶² Like Klein, other researchers also understood that a desire for physical/sexual activity with another person is not always accompanied by a desire for emotional/romantic interactions with that same person.⁶³ Shively and De Cecco defined sexual orientation according to physical preference (the preferred gender of sexual partners) and affectional preference (the preferred gender of emotional partners).⁶⁴ While these and other multidimensional measures helped advance knowledge about sexuality, they did not become popular among researchers and were criticized for their complexity.⁶⁵

60. Sexual orientation is fairly commonly defined through typological lists. CONSTANCE THOMAS & CATHERINE WEBER, INTERNATIONAL LABOUR ORGANIZATION INFORMATION PAPER ON PROTECTION AGAINST SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION AND SEXUAL CHARACTERISTICS (SOGIESC) DISCRIMINATION 26 (2019); *See, also* Human Rights Act 1993, subs 21(1)(m) (N.Z.) (defining sexual orientation” as “mean[ing] a heterosexual, homosexual, lesbian, or bisexual orientation. . . .”); Decreto No. 7041 de Julho de 2015, Diário Oficial do Rio de Janeiro [D.O.E.R.J.] de 15.07.2015 (Braz.) (“For the purposes of applying this Law, the term “sex” is used to distinguish men and women, while the term “sexual orientation” refers to heterosexuality, homosexuality and bisexuality.”).

61. Equal Opportunities Act 2008, §2 (Mauritius).

62. Fritz Klein, Barry Sepekoff & Timothy J. Wolf, *Sexual Orientation: A Multi-Variable Dynamic Process*, 11 J. HOMOSEXUALITY 35, 38-42 (1985).

63. *See, e.g.*, Lisa M. Diamond, *Emerging Perspectives on Distinctions Between Romantic Love and Sexual Desire*, 13 CURRENT DIRECTIONS PSYCH. SCI. 116, 116 (2004).

64. Michael G. Shively & John P. De Cecco, *Components of Sexual Identity*, 3 J. HOMOSEXUALITY 41 (1977).

65. Beaulieu-Prévost & Fortin, *supra* note 25, at e16.

In the late 1980s, a network of researchers headed by sociologist Edward Laumann began to work on the largest nationally representative survey of sexual practices in the United States. For operational and substantive concerns, Laumann settled on a definition of sexual orientation that included three separate dimensions: attraction, behavior, and identity.⁶⁶ Operationally, he sought an unambiguous definition that could form the basis of questions in a survey administered to a large population.⁶⁷ This meant a standardized set of questions that could be understood by the average person regardless of sexual orientation or gender. He noted that more complex definitions, particularly those used by Kinsey, were administered by highly trained staff conducting an intensive sex history interview.⁶⁸ Substantively, Laumann felt that the three dimensions capture the most important aspects of sexual orientation and that because each dimension described separate aspects of sexual orientation, they should be viewed independently from one another.⁶⁹ When the results of the study were published, it was called “the most comprehensive and trustworthy portrait of sexuality in America yet achieved.”⁷⁰ Since then, a scientific consensus has formed in support of using attraction, behavior and identity as the components of a multi-dimensional model.⁷¹ What follows is the explanation of each of these dimensions and their relation to one another.

66. LAUMANN, *supra* note 24, at 292-293.

67. *Id.* at 285-86.

68. *Id.* at 290.

69. *Id.* at 291.

70. Paul Robinson, *The Way We Do the Things We Do*, N.Y. TIMES (Oct. 30, 1994), <https://www.nytimes.com/1994/10/30/books/the-way-we-do-the-things-we-do.html> [<https://perma.cc/4RHY-U8AT>].

71. See, e.g., Margaret Wolff, Brooke Wells, Christina Ventura DiPersia, Audrey Renson & Christian Grov, *Measuring Sexual Orientation: A Review and Critique of U.S. Data Collection Efforts and Implications for Health Policy*, 54 J. SEX RES. 507, 509 (2017) [hereinafter Wolff et al.]; M. V. LEE BADGETT, THE WILLIAMS INSTITUTE, BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009). MARIE-ANNE VALFORT, LGBTI IN OECD COUNTRIES: A REVIEW, WORKING PAPER NO. 198, at 20 OECD Doc. DELSA/ELSA/WD/SEM(2017) (June 20, 2017), [<https://perma.cc/BG5S-3XK7>].

1. Dimensions

i. Attraction

The attraction dimension of sexual orientation relates to whether one is sexually and/or romantically attracted to people of the same gender, of another gender, or both. Although individuals are commonly categorized according to their sexual attraction to one or more genders, there is evidence that affectional components—romantic or emotional attraction—can be experienced separately from sexual attraction, particularly for women.⁷² Individuals can also experience different types of attraction depending on the context and type of activity pursued, such as casual hook-ups or romantic relationships.⁷³ Accordingly, some definitions specify that attraction can be sexual or romantic or both.⁷⁴

Attraction is not only experienced in a relationship, but it can also be experienced in the form of “attractions, fantasies, and arousals organized around gender/sex.”⁷⁵ Androphilia, for instance, refers to sexual attraction toward men generally (not just one man), and gynephilia to

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72. Lisa M. Diamond, *What Does Sexual Orientation Orient? A Biobehavioral Model Distinguishing Romantic Love and Sexual Desire*, 110 *PSYCH. REV.* 173, 173 (2003).
73. *See, e.g.*, Lisa M. Diamond, Susan B. Bonner & Janna Dickenson, *The Development of Sexuality*, in *HANDBOOK OF CHILD PSYCHOLOGY AND DEVELOPMENTAL SCIENCE* 888–931, 921 (Richard Lerner ed., 3rd ed. 2015) (stating that “sexual arousal and romantic love each involve different patterns of neurobiology, though they are not wholly independent nor are the wholly overlapping”); Ritch C. Savin-Williams, *Sexual Orientation: Categories or Continuum? Commentary on Bailey et al. (2016)*, 17(2) *PSYCH. SCI. PUB. INT.* 37, 38 (2016) (proposing “that different kinds of attraction can best be conceived as overlapping types arranged along a continuum.”).
74. *See, e.g.*, IOM (INSTITUTE OF MEDICINE), *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 27 (2011), [<https://perma.cc/QD8C-PR5J>]; Ritch C. Savin-Williams, *Who’s Gay? Does It Matter?*, 15(1) *CURRENT DIRECTIONS PSYCH. SCI.* 40, 41 (2006).
75. Sari M. van Anders, *Beyond Sexual Orientation: Integrating Gender/Sex and Diverse Sexualities via Sexual Configurations Theory*, 44 *ARCH. SEX. BEHAV.* 1177, 1179–80 (2015); *see also* Rebecca S. Geary, Clare Tanton, Bob Erens, Soazig Clifton, Philip Prah, Kaye Wellings, Kirstin R. Mitchell, Jessica Datta, Kirsten Gravningen, Elizabeth Fuller, Anne M. Johnson, Pam Sonnenberg & Catherine H. Mercer, *Sexual Identity, Attraction and Behaviour in Britain: The Implications of Using Different Dimensions of Sexual Orientation to Estimate the Size of Sexual Minority Populations and Inform Public Health Interventions*, 13 *PLOS ONE* 1 (2018) [hereinafter Geary et al.]; Bailey et al., *supra* note 12; Lieselotte Mahler & Goetz Mundle, *A Need for Orientation: The WMA Statement on Natural Variations of Human Sexuality*, *INT’L. REV. PSYCHIATRY* 1, 2 (2015).

women (not just one woman).⁷⁶ Thus, an individual's sexual orientation can be indicated by their attractions even if they are not in a relationship.

ii. Behavior

Behavior refers to the gender of the person or persons with whom the individual has had sex. What constitutes sex might vary widely depending on the individual and the cultural context.⁷⁷ Thus, the general consensus among researchers is to define sex according to whether each individual would consider a particular activity as sexual.⁷⁸ For example, to assess sexual behavior according to current best practices,⁷⁹ an individual might be asked the following: "In the past {time period, e.g., year} who have you had sex with? (a) Men only; (b) Women only; (c) Both men and women; (d) I have not had sex"⁸⁰ leaving it up to the respondent to apply their own interpretation of sex. The answer to this question, coupled with information about the respondent's gender, indicates whether sexual behavior is oriented toward the same or a different gender.

iii. Identity.

Sexual orientation identity refers to how an individual thinks about and labels their own sexual orientation.⁸¹ The most common way to determine a person's sexual orientation identity is to ask them,⁸² as identity is often described by use of a culturally specific term. People in English speaking cultures may be familiar with terms such as straight, lesbian, gay and bisexual. However, in many parts of the world, sexual minorities identify themselves using different terms. Some differences in terms are

76. Bailey et al., *supra* note 12, at 65.

77. See, e.g., Peter Davies, *Acts, Sessions and Individuals: A Model for Analysing Sexual Behaviour*, in CHALLENGE AND INNOVATION: METHODOLOGICAL ADVANCES IN SOCIAL RESEARCH ON HIV/AIDS 57-68 (Mary Boulton ed., 1994); FRANK PEGA, SEXUAL ORIENTATION DATA COLLECTION STUDY REPORT 1: SEXUAL ORIENTATION CONCEPTUAL FRAMEWORK 34-35 (2009), [<https://perma.cc/7C77-KBPE>].

78. See, e.g., Badgett *supra* note 71, at 9.

79. Currently, the best practice for the phrasing of such questions assume that potential sex partners are either male or female. As people with non-binary genders become more common, it is likely that researchers will develop questions that incorporate additional genders.

80. See, e.g., Badgett *supra* note 71, at ii.

81. JENNIFER L. GLICK & KATHERINE ANDRINOPOULOS, SEXUAL ORIENTATION AND GENDER IDENTITY MEASURES FOR GLOBAL SURVEY RESEARCH 25 (2019).

82. See, e.g., Dillon et al., *supra* note 23, at 651.

due simply to differences in language. Other differences are due to the existence of traditional, indigenous sexual minority communities that are known by culturally specific labels.⁸³ For example, in China, some LGB people identify as “Tongzhi” which roughly translates as comrade.⁸⁴ In Senegal, same-sex identities among men include *ubbi*, a man who takes a sexually passive role, *yoos*, which refers to the active partner, and *branché*, translated roughly as trendy.⁸⁵ People from Indigenous communities in North America sometimes use the term *niizh manitoag*, or two-spirit people.⁸⁶

2. Dimensions are Independent

Individuals may have a same-gender orientation in one, two, all three, or none of the dimensions.

Figure 1 depicts the overlap of the three dimensions, resulting in seven possible configurations of sexual orientation. The numbers in the Venn diagram each correspond to a different configuration of sexual orientation. A more detailed explanation of each of these configurations can be found in Table 1, Section V.B.

83. See, e.g., Day Wong, *Hybridization and the emergence of “Gay” Identities in Hong Kong and in China*, 24 HYBRID H. K. 199 (2013) (detailing same-gender identities that have emerged in China and Hong Kong); Vanessa Veronese, Emily Clouse, Andrea L. Wirtz, Kaung Htet Thu, Soe Naing, Stefan D. Baral, Mark Stooze & Chris Beyrer, *We Are Not Gays. . . Don’t Tell Me Those Things”: Engaging ‘Hidden’ Men Who Have Sex with Men and Transgender Women in HIV Prevention in Myanmar*, 19 BMC PUB. HEALTH 63 (2019); Peter A. Jackson, *Global Queering and Global Queer Theory: Thai [Trans]genders and [Homo]sexualities in World History*, 49 HASTINGS CENT. REP. 15 (2009).

84. Lau et al., *supra* note 16, at 510.

85. Joseph Larmarange, Annabel Desgrées du Lou, Catherine Enel, Abdoulaye Wade & Krystyna Horko, *Homosexuality and Bisexuality in Senegal: A Multifform Reality*, 64 POPULATION (Eng. Ed.) 635, 641 (2009) [hereinafter Larmarange et al.].

86. INST. MED., THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 320 (The Nat’l Academies Press ed., 2011).

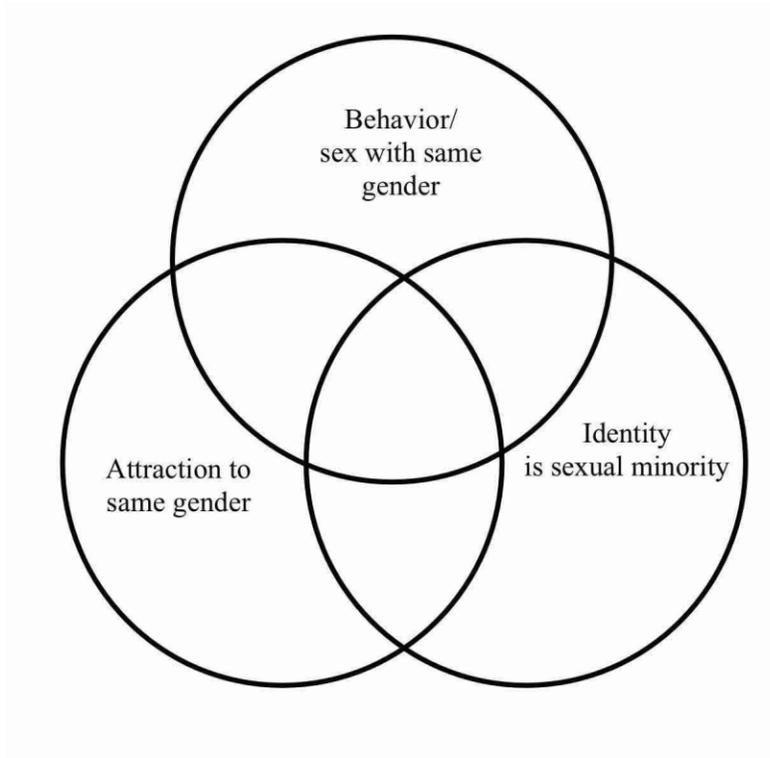


FIGURE 1 THREE DIMENSIONS OF SEXUAL ORIENTATION

Empirical experience from countries where such data is collected shows that a same-gender orientation in one of the three dimensions does not fully correlate to a same-gender orientation in the other two.⁸⁷ For example, in a single study in the UK, 6.5% of men and 11.5% of women reported experiencing same-gender attraction while 5.5% of men and 6.1% of women reported same-gender behavior, and only 2.5% of men and 2.4% of women reported a sexual minority identity.⁸⁸ The lack of correlation between dimensions is evident, especially for UK women who experience same-gender attraction. Of those women, roughly half will engage in same-sex activity and half will not. Of the half that engage in same-sex activity, less than half will adopt a sexual minority identity. Similar results are reflected in studies of other populations. In the US, 40%

87. See, e.g., *id.* at 90; M. Paz Galupo, Kyle S. Davis, Ashley L. Gryniewicz, & Renae C. Mitchell, *Conceptualization of Sexual Orientation Identity Among Sexual Minorities: Patterns Across Sexual and Gender Identity*, 14 J. BISEXUALITY 433, 439-449 (2014); Bailey et al., *supra* note 12; Larmarange et al., *supra* note 85, at 635.

88. Geary et al., *supra* note 75, at 1.

of women who have had same-gender sexual activity in the past year identify as heterosexual.⁸⁹ One study estimated that globally, 83% of people who engage in same-gender activity identify as heterosexual, mostly driven by high levels of structural stigma.⁹⁰ As is evident from these statistics, the experience of same-gender attraction or same-gender sex does not correlate to a sexual minority identity. Conversely, a sexual minority identity does not always correlate to same-gender behavior. A study in Australia revealed that between 10.9 percent of women and 17.2 percent of men who identified as queer had exclusively heterosexual sex, and 15.8 percent of women and 11.1 percent of men who identified as pansexual had exclusively heterosexual sex.⁹¹

D. *Men Who Have Sex with Men*

Due to the HIV/AIDS epidemic, the term men who have sex with men (MSM) and women who have sex with women (WSW) emerged as a means of identifying people without having to use sexual orientation labels.⁹² The Joint United Nations Programme on HIV/AIDS (UNAIDS) defines MSM as “males who have sex with males, regardless of whether or not they also have sex with women or have a personal or social gay or bisexual identity.”⁹³ The focus was on same-gender sexual behavior because sexual activity was believed to be the primary driver of the epidemic.⁹⁴ By avoiding identity labels, the MSM/WSW category also avoided the complications of needing to account for multiple kinds of identities, and the possibility that the Western identities of sexuality would garner more attention than other identities.⁹⁵

89. Greta R. Bauer & Jennifer A. Jairam, *Are Lesbians Really Women who Have Sex with Women (WSW)? Methodological Concerns in Measuring Sexual Orientation in Health Research*, 48 *WOMEN & HEALTH* 383, 399 (2008).

90. John E. Pachankis & Richard Bränström, *How Many Sexual Minorities are Hidden? Projecting the Size of the Global Closet with Implications for Policy and Public Health*, 14 *PLoS ONE* 1, 6 (2019).

91. James S. Morandini, Alexander Blaszczyński & Ilan Dar-Nimrod, *Who Adopts Queer and Pansexual Sexual Identities?*, 54 *J. SEX RES.* 911, 918 (2017).

92. Wolff et al., *supra* note 71, at 518.

93. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, UNAIDS TERMINOLOGY GUIDELINES, at 33, UNAIDS/JC2672E (2015). Women who have sex with women is defined similarly. *Id.* at 50.

94. Rebecca M. Young & Ilan H. Meyer, *The Trouble with “MSM” and “WSW”: Erasure of the Sexual-Minority Person in Public Health Discourse*, 95 *AM. J. PUB. HEALTH* 1144, 1144 (2005) [hereinafter Meyer et al.].

95. *Id.* at 1145.

In this Article, MSM/WSW is referred to as a category rather than a definition because the term was initially intended to be an epidemiological category of sexual minorities rather than a definition of sexual orientation. Rhetorically, MSM/WSW was seen as a non-western, non-white, non-elite term that could either compliment or subsume descriptions that denote Western, elite, white-identified man.⁹⁶ The term has become ubiquitous in research and public health contexts outside of the field of HIV, even when discussing the human rights of sexual minorities.⁹⁷ The MSM category is often used instead of identity-based classifications,⁹⁸ not only displacing recognition of LGB identities but also erasing the true social impact of stigma related to being openly LGB.⁹⁹ For these reasons, it is included in this Article as one approach used by many people to understand sexual orientation.

96. Tom Boellstorff, *But Do Not Identify as Gay: A Proleptic Genealogy of the MSM Category*, 26 CULTURAL ANTHROPOLOGY 287, 293 (2011).

97. Young & Meyer, *supra* note 94, at 1145.

98. *See, eg.*, Boellstorff, *supra* note 96, 300-4.

99. A recent example of this can be found in a study of the relationship between race, sexuality, and the experience of discriminatory police harassment (DPH). Jonathan Feelemyer, Dustin T. Duncan, Typhanye V. Dyer, Amanda Geller, Joy D. Scheidell, Kailyn E. Young, Charles M. Cleland, Rodman E. Turpin, Russell A. Brewer, Christopher Hucks-Ortiz, Medha Mazumdar, Kenneth H. Mayer & Maria R. Khan, *Longitudinal Associations Between Police Harassment and Experiences of Violence Among Black Men Who Have Sex with Men in Six US Cities: the HPTN 061 Study*, 98 J. Urb. Health 172 (2021). As pointed out in the report from that study, previous research has established a link between being openly LGB and a higher likelihood of discrimination by others, including police. In that study, black men who have sex with men were asked whether they had experienced DPH and, if so, whether they attributed the harassment to their race, their sexual orientation, or both. The researchers did not include any information regarding how the participants identified themselves, including whether they identified as straight, gay or as some other sexual orientation. The researchers refer to being BMSM as if it were a sexual minority identity when, in fact, the BMSM recruited into the study included men who identified as heterosexual. *See* HPTN 061 FEASIBILITY STUDY OF A COMMUNITY-LEVEL, MULTI-COMPONENT INTERVENTION FOR BLACK MEN WHO HAVE SEX WITH MEN DAIDS ID: 10666 41 (2009), [<https://perma.cc/T2RJ-YVBZ>]. In the report of the findings, researchers claim to identify the relationship between “sexual orientation” (also referred to as “sexual identity” when the actual sexual orientation identity of the participants was unknown. Not surprisingly, the study concluded that the sexual orientation was associated with a low rate of DPH. It is likely that this finding was driven by the fact that some of the participants identified as heterosexual and would not have faced the same level of stigma as someone who identifies as a sexual minority.

E. Yogyakarta Principles

Many State and non-state actors have relied on the definition of sexual orientation introduced the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (hereinafter “Original Yogyakarta Principles”) issued in 2007.¹⁰⁰ The Original Yogyakarta Principles were created by a group of internationally renowned human rights experts in order to provide a clear articulation of the human rights of people of diverse sexual orientation and gender identities,¹⁰¹ and to “collate and clarify States obligations under existing international human rights law.”¹⁰² Sexual orientation was defined as follows:

‘Sexual orientation’ refers ‘to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’¹⁰³

A brief review of the creation and evolution of the Original Yogyakarta Principles will aid in the understanding of the meaning of this definition. Over a decade earlier in 1994, the UN Human Rights Committee (HRC) recognized the concept of sexual orientation when it found that Tasmania’s sodomy law violated the prohibition of discrimination based on sex set out in the International Covenant for Civil and Political Rights (ICCPR), which it interpreted to include sexual orientation.¹⁰⁴ However, as noted by an organizer of the Yogyakarta meetings, the Committee “used the term ‘sexual orientation’ without quite clarifying what it meant How does one evaluate the concepts of sexual orientation and gender identity in this light? What is the range of identities, acts, behaviours which should be protected by law from violence and discrimination?”¹⁰⁵ By the time the Original Yogyakarta Principles were issued in 2007, UN

100. THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, 6 (2007), [hereinafter Original Principles].

101. *Id.* at 7.

102. *Id.*

103. *Id.* at 8.

104. *See Toonen v. Australia*, No. 488/1992, U.N. Doc. No. CCPR/C/WG/44/D/488/1992, ¶7.5 (1994).

105. Arvind Narrain, *The Yogyakarta Principles on Sexual Orientation and Gender Identity: Six Conceptual Advances Enabled by the Principles*, ARC INTERNATIONAL, [https://perma.cc/3FQU-CEHS]. (last visited Feb. 1, 2022).

officials and human rights leaders were still using a mix of terms to refer to LGB people and their sexuality, such as sexual orientation, sexual preference, sexual minorities, lesbians and gays, and sometimes transsexuality was referenced as a sexual orientation.¹⁰⁶ A similar situation existed with regard to gender identity.

In response, the Original Yogyakarta Principles used the terms sexual orientation and gender identity to describe the grounds of discrimination faced by LGBT people. A relatively detailed definition of each term was included in the Original Yogyakarta Principles in order to clear up confusion about terminology used to describe sexual and gender minorities.¹⁰⁷ The definitions were meant to communicate how human rights applied, according to the documents preamble, to “the lives and experiences of persons of diverse sexual orientation and gender identities.”¹⁰⁸ According to an organizer of Yogyakarta meetings, “The principles for the first time in international law defined both the terms ‘sexual orientation’ and ‘gender identity’ thereby enunciating how one’s rights could be violated.”¹⁰⁹

The Original Yogyakarta Principles were supplemented in 2017 with a set of additional principles reflecting changes in international law in the ten years after the Original Yogyakarta Principles were released. Entitled *The Yogyakarta Principles Plus 10: Additional Principles and State Recommendations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (hereinafter “Supplemental Yogyakarta Principles”),¹¹⁰ the Supplemental Yogyakarta Principles reaffirmed the same definitions of sexual orientation and gender

106. Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 232 (2008).

107. *Id.* at 237.

108. Original Principles, *supra* note 100, at 9.

109. Narrain, *supra* note 105.

110. THE YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES, 4-5 (2017) [hereinafter Supplemental Principles].

identity,¹¹¹ and they also introduced and defined the terms gender expression¹¹² and sex characteristics¹¹³ to describe additional, separate grounds of prohibited discrimination. The Original Yogyakarta Principles consisted of principles numbered one through twenty-nine, and the Supplemental Yogyakarta Principles followed with principles numbered thirty through thirty-eight. Accordingly, the Original Yogyakarta Principles and the Supplemental Yogyakarta Principles they should be read together as one set of Principles numbered one through thirty-eight (*hereinafter* “Principles”).

1. Global Significance

The Principles have become a central reference document for governments and advocates concerned with the rights of LGBTI people.¹¹⁴ Within a few years of their release, the Principles were affirmed by UN agencies, foreign ministries, parliaments, and civil society organizations.¹¹⁵ In his ten-year review of the Principles, the Rapporteur for the Original principles remarked “Among the most significant developments has been the manner in which the Yogyakarta categories of ‘sexual orientation’ and ‘gender identity’, with their respective definitions, have been embraced.”¹¹⁶ Among UN bodies, the definition of sexual orientation has been explicitly recognized by the Committee on Economic, Social and Cultural Rights,¹¹⁷ by the UN High Commissioner for Refugees in a

111. *Id.* at 6.

112. ‘Gender expression’ is defined as “each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.” *Id.*

113. Sex characteristics are defined as “each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.” *Id.*

114. See ‘Yogyakarta Principles’ a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, HUM. RTS. WATCH, (Mar. 26, 2007, 8:00 PM) [<https://perma.cc/P2P2-JE5C>].

115. The Principles “are intended to enhance LGBT activists” and advocates’ capacity to successfully challenge some of the more persistent human rights violations faced by the community.” See Paula L. Ettlbrick & Alia Trabucco Zerán, THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT 4 (2010).

116. Michael O’Flaherty, *The Yogyakarta Principles at Ten*, 33 NORDIC J. HUM. RTS. 280, 288 (2015).

117. Comm. on Econ., Soc., & Cultural Rts., General Comment 20, Non-discrimination in Economic, Social and Cultural Rights, ¶ 32 U.N. Doc. E/C.12/GC/20 (July 2, 2009).

guidance note¹¹⁸ as well as official guidance,¹¹⁹ by UNHCR in a submission to the Supreme Court of the UK,¹²⁰ by the UN Office on Drugs and Crime Handbook on Prisoners with Special Needs,¹²¹ in a joint UNDP /ILO report on employment discrimination,¹²² by UN Educational, Scientific And Cultural Organization in technical guidance on sexuality education,¹²³ in terminology guidance by the UN High Commissioner for Refugees and the International Organization for Migration in training materials¹²⁴ as well as a toolkit meant to give guidance on communicating about gender-related issues,¹²⁵ in terminology guidelines issued by UNAIDS,¹²⁶ by the United Nations Security Management System in its manual on gender inclusion,¹²⁷ by UN Women in a toolkit for implementing the Latin American Model Protocol for investigating femicide,¹²⁸ and by the UNDP in its work related to LGBTI populations in Asia.¹²⁹ Regional bodies have also adopted the definition, including an OECD review of

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118. U.N. High Comm'r for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, ¶ 5 (Nov. 21, 2008).
 119. U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 7-8, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).
 120. UNHCR Intervention Before the Supreme Court of the United Kingdom, at ¶ 18, *iHJ (Iran) and HT (Cameroon) v. Sec'y of State for the Home Dep't* (2010) UKSC 31 (appeal taken from EWCA Civ.).
 121. U.N. Off. on Drugs & Crime, Handbook on Prisoners with Special Needs, at 103, U.N. Sales No. E.09.IV.4 (2009).
 122. U.N. Dev. Programme & Int'l Labour Org., *LGBTI People and Employment: Discrimination Based on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics in China, the Philippines and Thailand*, at 76 (2018).
 123. U.N. Educ., Sci. & Cultural Org., *International Technical Guidance on Sexuality Education: An Evidence-Informed Approach*, at 113 (2018).
 124. U.N. High Comm'r for Refugees & the Int'l Org. for Migration, *Terminology Guidance*, at 1 (2017).
 125. Int'l Org. for Migration, *Gender-Responsive Communications Toolkit*, at 5 (2020).
 126. Joint U.N. Programme on HIV/AIDS (UNAIDS), *UNAIDS Terminology Guidelines*, at 42 (2015).
 127. U.N. Sec. Mgmt. Sys., *Gender Inclusion In Security Management Manual*, at 14 (Nov. 2019).
 128. U.N. Women, & Reg'l Off. for Cent. Am. of the U.N. High Comm'r for Hum. Rts., *Latin American Model Protocol for the Investigation of Gender-Related Killings of Women (Femicide/Femicide)*, at 9 (2014).
 129. The UNDP's program to address inequality, violence and discrimination on the basis of sexual orientation, gender identity or intersex status, is entitled "Being LGBTI in Asia and the Pacific." It has produced nearly 40 publications. See *Being LGBTI in Asia and the Pacific*, UNDP, [<https://perma.cc/T42W-PUYN>] (last visited Jan. 30, 2022).

the socio-economic status of LGBTI people,¹³⁰ the European Fundamental Rights Agency,¹³¹ and the Council of Europe Parliamentary Assembly Committee on Equal Opportunities for Men and Women.¹³² The Inter-American Commission on Human Rights endorsed the definition in a report on terminology,¹³³ and the InterAmerican Commission on Human Rights cited the definition in *Homero Flor Freire v Ecuador*, which referred to one of the principles as “international doctrine.”¹³⁴ Decisions by the high courts in India,¹³⁵ Nepal,¹³⁶ Philippines,¹³⁷ and Colombia¹³⁸ cite the definition. Given the global uptake of this definition, it is worth spending some time to understand the scope of the definition.

2. The Scope of the Definition

i. Sexual Orientation is Manifested in Profound, Intimate Relationships

Though not explicitly stated, the Yogyakarta Principles definition envisions sexual orientation as a characteristic manifested in close relationships, or other interpersonal involvements where one would experience profound, emotional, affectional, sexual, and intimate relations.

130. VALFORT, *supra* note 71, at 6.

131. See, e.g., E.U. Agency for Fundamental Rts., *European Union Lesbian, Gay, Bisexual and Transgender Survey: Results at a Glance*, at 8 (2013); E.U. Agency for Fundamental Rts. & Eur. Ct. of Hum. Rts., *Handbook on European Non-Discrimination Law 2018 Edition*, at 176 (2018).

132. Comm. on Equal Opportunities for Men & Women, Eur. Consult. Ass., *Discrimination on the Basis of Sexual Orientation and Gender Identity* ¶ 1, Doc. No. 12099 (Dec. 15, 2009).

133. Comm. on Jud. and Pol. Affairs, Inter-Am. Comm’n H.R. [IACHR], Org. of Am. States [OAS], *Sexual Orientation, Gender Identity, and Gender Expression: Key Terms And Standards*, ¶ 16, OAS Doc. OEA/Ser.G CP/CAAP-INF. 166/12 (April 23, 2012).

134. *Flor Freire v. Ecuador*, Merits, Inter-Am. Comm’n H.R. (ser. C) No. 81/13, ¶ 119 (Nov. 4, 2013).

135. *Naz Foundation v. Gov’t of NCT of Delhi & Others*, (2009) 160 Delhi Law Times 277, para. 44 (India).

136. *Pant v. Nepal Government*, (2008) 2 NAT. JUD. ACAD. L. J. 261 (translated), 278.

137. *Ang Ladlad LGBT Party v. Comm’n on Elections*, G.R. No. 190582, 3 (S.C., Apr. 8, 2008) (Phil.).

138. Corte Constitucional [C.C.] [Constitutional Court], marzo 26, 2012, *Sentencia No. T-248/12* (p. 57, para. 2.6.7, no. 32) (Colom.) (relying on the definition of sexual orientation expressed in the Principles to find that discrimination on the basis of sexual orientation merits strict scrutiny, which is the highest form of scrutiny applied by Colombian courts).

This underlying focus on relationships is indicated by the text, the drafting history, and explanatory comments of the drafters.¹³⁹

First, the definition recognizes only a single dimension of sexual orientation in which attractions and relations must be present together. Unlike the multidimensional definitions, where sexual orientation can be indicated by sexual activity alone, or attraction alone, the Yogyakarta Principles definition describes a single involvement with another person having a number of characteristics. Turning to the text of the definition itself, the clause that references attraction (“profound emotional, affectional and sexual attraction”) and the clause references behavior (“intimate and sexual relations”) are joined by the conjunctive “and,” indicating that one accompanies the other. Both clauses are dependent on the same ending clause (“ . . . individuals of a different gender or the same gender or more than one gender.”), further reinforcing their joint nature.¹⁴⁰

The use of “and” can be contrasted with the use of language in the same text where the drafters intended to list concepts in the alternative. The final clause of the definition lists three alternative options as the object of a person’s attractions and relations. Specifically, these are “. . . individuals of a different gender *or* the same gender *or* more than one gender.”¹⁴¹ As another example, the preamble states that everyone is entitled to human rights regardless of “. . . race, colour, sex, language, religion, political *or* other opinion, national *or* social origin, property, birth, *or* other status.”¹⁴² Clearly, the authors understood how to indicate that lists of

139. The Yogyakarta Principles do not have the force of a treaty as they are a declaration by experts and do not represent an agreement between States. Nonetheless, they are intended to be an interpretation of the standards articulated by human rights treaties and were authored by experts drawn from international treaty enforcement bodies and international human rights advocates. In this context, the Vienna Convention on the Law of Treaties embraces a textualist approach to interpretation of treaty language (Article 31) supplemented by interpretation based on “preparatory work of the treaty and the circumstances of its conclusion.” (Article 32). Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

140. The Parliament of Victoria recently passed an amendment to the definitions in Victoria’s Equal Opportunity Act, replacing the previous definition of sexual orientation with a definition modeled on the Yogyakarta Principles. In the amendment the definition replaces “and” with “or.” It defines sexual orientation as follows: “a person’s emotional, affectional and sexual attraction to, *or* intimate or sexual relations with, persons of a different gender or the same gender or more than one gender” (emphasis added). *Change or Suppression (Conversion) Practices Prohibition Bill 2020* (Vic), s 59(3) (Austl.).

141. *Id.* (emphasis added).

142. *Id.* (emphasis added).

potential grounds for discrimination were separable, and they did not do so when describing attraction and relations.

This is particularly evident when we look at the drafting history of the definitions related to sexual orientation and gender. The Original Principles included a definition of sexual orientation (set out above) as well as a definition of gender identity,¹⁴³ which describes several potential elements of gender, including a person's internal awareness of their own gender, body modification, and other expressions of gender such as dress, speech, and mannerisms.

Regarding the definition of gender identity, the chair of the drafting committee observed that "One of the principle issues is whether protection is only for those who alter their bodies to bring it in line with their deeply felt gender or is it also for those who do not wish to alter their bodies but choose to express their gender through dress, comportment and mannerisms?"¹⁴⁴ In other words, was gender identity indicated by body modification *and* other kinds of expression, or was it indicated by body modifications *or* other kinds of expression, or both. Consider, as an example, a worker who was assigned male at birth but has an inner awareness that her true gender is female. In order to live according to her true gender, that worker might express her gender by adopting feminine mannerisms and wearing women's clothes even though she has not made efforts to modify her body. If gender identity is defined only according to whether one has altered their bodies, then the worker may not have a claim of gender identity discrimination if she was fired for wearing women's clothes.

In response to these concerns, the drafting committee of the Supplemental Principles introduced the term "gender expression," defined to include dress, appearance, and mannerisms but not body modification.¹⁴⁵ The new principles appended the term gender expression to the previously existing term gender identity, so that all statements regarding discrimination based on gender identity now included both gender identity

143. Gender identity is defined as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms." Original Principles, *supra* note 100, at 6.

144. Narrain, *supra* note 105.

145. Gender expression is defined "as each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity". Supplemental Principles, *supra* note 110, at 6.

and gender expression. They also clarified that gender identity and gender expression should each be treated as independent dimensions of gender by adopting new language in the Supplemental Principles stating explicitly “gender expression may or may not conform to a person’s gender identity,”¹⁴⁶ affirming that they are each “distinct. . . grounds of discrimination.”¹⁴⁷

The drafting committee was faced with a similar issue regarding the definition of sexual orientation. The drafters considered a proposal to revise the definition of sexual orientation in order to clarify that “[i]dentity, attraction, and relations with other people are each separate components which make up sexual orientation. The definition should make it clear that one does not necessarily predict or correspond to another.”¹⁴⁸ In addition, the proposal also noted that the definition “limits the kinds of attractions and relationships that can be considered when assessing someone’s sexual orientation” and “[e]xcludes individuals whose sexual orientation is constituted of attraction that is simple, [or] fleeting . . . [and] . . . whose relations may be superficial.”¹⁴⁹

The committee rejected the proposal to alter the definition of sexual orientation. The Chair confirms that the terms in the definition are “pointing to the forming of sexual and intimate relations between people as an aspect of sexual orientation. Within this notion, one is not necessarily talking of the aspect of identity and personhood but rather the formation of *sexual and intimate relations between people as integral to sexual orientation*.”¹⁵⁰ Given that the definition is actually describing a relationship that includes all the listed components, it makes sense that its components cannot be separated into separate dimensions. Indeed, the phrase ‘sexual and intimate relations’ communicates a set of characteristics that are not just such sexual, but also relationship-like. The meaning of intimacy from a psychological perspective (e.g., feelings of understanding, validation, closeness, caring, support, and trust¹⁵¹) as well as common understandings of what kinds of relationships are considered intimate (e.g.,

146. *Id.*

147. Narrain, *supra* note 105.

148. Andrew Park, Commentary, *Commentary, Comment on the Definition of Sexual Orientation and Gender Identity Submitted to The Drafting Committee, Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity* at 3 (Feb. 17, 2017).

149. *Id.* at 2-3.

150. Narrain, *supra* note 105 (emphasis added).

151. See generally Sandra Šević, Iva Ičanković & Aleksander Štulhofer, *Emotional Intimacy Among Coupled Heterosexual and Gay/Bisexual Croatian Men: Assessing the Role of Minority Stress*, 45 ARCH. SEX. BEHAV. 1259 (2016).

spouses, lovers, co-habitants¹⁵²), indicates the characteristics of a relationship. Commentary from the Chair confirms that references to these characteristics are intended to be interpreted jointly: “While the word profound is read with ‘sexual, emotional and affectional’ it communicates a dimension which is linked to the sexual but also belongs to another domain in which sexual acts have deep meanings for those engaging in them.”¹⁵³

This emphasis on sex and attraction within relationships not only narrows the conception of sexual orientation, but it also subtly shifts how one’s sexual orientation is assessed, particularly with regard to attraction. Under the multidimensional definition, sexual orientation is assessed by looking at an individual’s attraction, generally, toward a particular gender or genders. The Yogyakarta Principles definition, on the other hand, directs us to look at the gender of the partner in a relationship in order to determine the orientation of attraction. The significance of this distinction will be addressed in section IV. A.

ii. Solely Sexual Acts are Not Indicative of Sexual Orientation

According to the Yogyakarta Principles definition, only acts that “have deep meanings for those engaging in them”¹⁵⁴ are considered indicative of sexual orientation. The Chair explained that “sexual acts [in the definition] are not sexual acts alone but expressive of something more fundamental. . . .”¹⁵⁵ Consequently, sexual behavior that is superficial, one-time, or based on purely physical attraction may be indicative of some aspect of an individual’s sexuality but not of an individual’s sexual orientation. However, under the multi-dimensional definition and the MSM category, any sexual encounter between two people is considered a manifestation of sexual orientation, regardless of its emotional context.

152. WORLD HEALTH ORGANIZATION [WHO], RESPONDING TO INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE AGAINST WOMEN: CLINICAL AND POLICY GUIDELINES vii (2013).

153. Narrain, *supra* note 105.

154. *Id.*

155. *Id.*

iii. Identity is Not Indicative of Sexual Orientation

The exclusion of identity as a manifestation of sexual orientation is plainly evident from the absence of any reference to identity in the definition itself as well as the drafting history and accompanying commentary. During the drafting process for the Supplemental Principles, the drafting committee also considered, but rejected, a proposal to add identity as an additional component of sexual orientation.¹⁵⁶ The Chair of the Drafting Committee expressed concern that including identity would “negate the fact that in large parts of the world people may not identify as gay or lesbian, but are subjected to violence and discrimination on grounds of the sexual acts which they perform.”¹⁵⁷ He explained that the “the protection of identities ends up excluding those who do not identify as gay or lesbian, but may engage in sexual acts with those of the same sex.”¹⁵⁸

If the definition of sexual orientation were constructed of elements that operated independently, as is the multi-dimensional definition, then someone could still make a claim of discrimination based on their sexual relations and attractions regardless of their identity. However, given that the Principles definition constructs sexual orientation as a single dimension with multiple required components, the only logical choice to avoid narrowing the scope of the definition is to exclude identity as a component. As a single dimension, each new component, like identity, would add a new requirement that must be met in order for an act, behavior, or identity to constitute sexual orientation. Those who identify as heterosexual could not be considered sexual minorities regardless of their experiences of same-gender attraction or sexual behavior. Thus, the exclusion of identity is driven by the single-dimension structure of the definition.

156. See Andrew Park, Commentary *Comment on the Definition of Sexual Orientation and Gender Identity* Submitted to The Drafting Committee, Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (Feb. 17, 2017), [<https://perma.cc/E4BK-SGUE>]; See also July 5, 2017, e-mail from Arvind Narrain to Andrew Park and members of the drafting committee (July 5, 2017) (on file with author) (confirming that the proposal had been considered).

157. Narrain, *supra* note 105.

158. *Id.*

III. THE FUNCTION OF A LEGAL DEFINITION OF SEXUAL ORIENTATION

The preceding review helps us to understand different definitions of sexual orientation as they have evolved up until the present. However, before beginning the process of analyzing and formulating a new definition, it is useful to elaborate the functions such a definition needs to fulfill. First, a definition should clearly establish who is, and is not, included in the legal and social norms created by the use of the term sexual orientation. Secondly, advancing a definition that affirms the rights of sexual minorities can prophylactically avoid the risk that hostile states, judges and public officials will create definitions intended to limit the human rights of sexual minorities. Lastly, and probably most importantly, a definition can expand the human rights of LGB people. This section elaborates on each of these functions. In section IV, various possible dimensions of a definition will be assessed in light of whether they help to achieve each of the functions we have identified.

A. Establishing Criteria for Inclusion in Human Rights Norms

The term sexual orientation functions as a conceptual gateway, providing an explicit path to legal and social norms. Sexual orientation (and other terms such as race, sex, and religion) are often found in lists of prohibited ground of discrimination. These terms have been called “terms of inclusion” because they establish criteria for who is and who is not included on this path.¹⁵⁹

These terms, and the meanings they carry, provide inclusion on at least two levels. First is access to rights and remedies. If a person’s human rights are violated on the basis of traits or acts that fall within the meaning of a term of inclusion, that person has a potential claim for remedy. If, for example, an employer fires a woman of African descent because she wears her hair naturally in a so-called “Black” hairstyle, the employee might have a cause of action for discrimination based on race if hair, and the way it is worn, is considered a manifestation of race. If it is not, the employee may not have a human rights claim.

Secondly, the term of inclusion provides access to political power and social legitimacy. Its use by the States in human rights laws imbues it with a symbolic authority. LGB advocates have fought to have the term

159. Jena McGill, *SOGI. . .So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations*, 3 CAN. J. HUM. RTS. 1, 4 (2014).

used even in instances where the use of the term would only have symbolic value, such as in high-profile resolutions at the UN General Assembly.¹⁶⁰ Because the term sexual orientation is now routinely included in human rights discourse, it has become a symbol which defines who is, and is not, included in political discourse. It shapes our view of organizational and personal legitimacy. In doing so, it also encourages organizations and advocates to channel their goals and activities in ways that more easily fall within the term of inclusion. Thus, the term of inclusion shapes the constituents that it is intended to represent.

Accordingly, the remainder of this Article focuses on understanding where the border lies between, as the chair of the Yogyakarta Principles drafting committee put it, “the acts, behaviors and identities that should be protected,”¹⁶¹ and those that should not. Sexual orientation overlaps with other aspects of human experience such as sexuality, other interpersonal relationships, and other identities. Looking at each of these overlapping areas helps us clarify the conceptual borders between sexual orientation and other concepts that are related, but not included.

First, sexual orientation is part of an individual’s sexuality. The World Health Organization’s working definition of sexuality, one of the only definitions of sexuality provided by a global intergovernmental body, describes its many dimensions:

Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.¹⁶²

Sexuality also includes sexual preferences for, and attractions to, particular bodily characteristics, people of a particular religion, or specific sexual practices.

160. OUTRIGHT ACTION INTERNATIONAL, EVERYTHING YOU NEED TO KNOW ABOUT LGBTI ADVOCACY AT THE 2018 UNGA 2-5 (2018).

161. Narrain, *supra* note 105.

162. WORLD HEALTH ORGANIZATION [WHO], DEFINING SEXUAL HEALTH: REPORT OF A TECHNICAL CONSULTATION ON SEXUAL HEALTH 28-31 JANUARY 2002 5 (2006).

Second, interpersonal sexual interactions sit within the larger set of interpersonal relationships and interactions that we may all experience, including being a friend, a coworker, a spouse, a one-night stand, a flat mate, or an innumerable number of other relationship roles. Lastly, sexual orientation can be manifested as an identity, and can be intertwined with other personal and community identities such as gender, religion, race, indigenous status, class, caste, and others.¹⁶³ Sexual orientation refers to some, but not all, aspects of sexuality, interpersonal relationship, and identities. Near the end of the Article, we will revisit these three areas in order to assess what and who is included and excluded by the new, proposed definition.

B. *Foreclosing Regressive Definitions*

Many jurisdictions have left the term sexual orientation undefined. One benefit of such a strategy is that the term could be interpreted to incorporate culturally specific meanings and ease any challenges related to cross-cultural applicability of a global definition. However, there may be reasons to avoid leaving the definition an open issue. The term sexual orientation may be susceptible to regressive interpretation for several reasons. First, the concept is relatively new in human rights discourse and continues to be unfamiliar to many people involved in human rights activity.¹⁶⁴ Second, the term is tied to behavior, identities and attractions that continue to be viewed as criminal, diseased and sinful in some cultural contexts.¹⁶⁵ Leaving the definition open could provide an opportunity to define it in ways that perpetuate human rights violations against LGB people.¹⁶⁶

163. Individuals can have a number of different identities that have been ascribed to them, that they have elected and that have been formally recognized and established by official bodies. Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 756 (2015).

164. O'Flaherty & Fisher, *supra* note 106, at 232.

165. Dozens of countries continue to criminalize same-gender behavior as well as restrict the expression of sexual diversity. LUCAS RAMÓN MENDOS, KELLYN BOTHA, RAFAEL CARRANO LELIS, ENRIQUE LÓPEZ DE LA PEÑA, ILIA SAVELEV & DARON TAN, STATE-SPONSORED HOMOPHOBIA 2020: GLOBAL LEGISLATION OVERVIEW UPDATE 87–141 (2020).

166. Similar concerns about regressive definitions of terms of inclusion have led advocates to seek specific definitions of gender and disability. In the draft of the International Treaty on Crimes Against Humanity, the drafting committee avoided adopting an outdated definition of gender used in the Rome Statute of the International Criminal Court by making explicit its rejection of such an interpretation, “allowing the term to be defined based on an evolving understanding as to its meaning.” INTERNATIONAL

In recognition of this function, the analysis in this Article will seek to account for possible situations where undefined terms and concepts could result in regressive results.

C. *Advancing Human Rights*

A central reason to use the term sexual orientation in human rights laws is to ensure the enjoyment of human rights by LGB people. Accordingly, we should ask of any definition the extent to which it advances the human rights of LGB people. In order to provide an analytical structure for such an inquiry, we will look at prospective definitions according to three human rights goals: dignity, non-discrimination, and human development.¹⁶⁷ What follows is a simple formulation of each of these three goals.

1. Respecting Dignity

Dignity is a central, underlying principle of freedom, justice, and peace,¹⁶⁸ from which human rights are derived.¹⁶⁹ It is arguably the most commonly cited value in contemporary moral and political discourse,¹⁷⁰

LAW COMMISSION, *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries*, art. 12, cmt. ¶ 42, U.N. Doc. A/74/10 (2019). See also Rosemary Grey, Jonathan O'Donohue, Indira Rosenthal, Lisa Davis & Dorine Llanta, *Gender-based Persecution as a Crime Against Humanity: The Road Ahead*, 17 J. INT'L CRIM. JUST. 957 (2019)

167. Given the breadth and complexity of human rights norms and institutions, there are myriad ways to measure whether potential definitions expand or restrict the human rights of LGB people. The human rights principles of dignity, non-discrimination and human development have been chosen, somewhat arbitrarily, because they each represent priorities that are important to LGB people and they are relevant to a range of state actions, including those that are punitive, such as sodomy laws, to those that are supportive, such as laws to promote the health and well-being of LGB people.
168. See “[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . .” G.A. Res. 271 (III) A, Universal Declaration of Human Rights, ¶ 1 (Dec. 10, 1948).
169. See, e.g., International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 U.N.T.S. 172, (“[These rights derive from the inherent dignity of the human person.”); “[A]ll human rights derive from the dignity and worth inherent in the human person.” World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (July 12, 1993).
170. Christopher A. Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANA/O-LATINA/O L. REV. 15, 17 (2006)

and is recognized in 160 Constitutions.¹⁷¹ Dignity can mean many things.¹⁷² One of the appeals of dignity is its variable meaning. For the purposes of this Article, we are interpreting dignity as the capability of individuals to self-determine their own sexuality and identity and live life according to it.

This view of dignity is grounded in the belief that each person has inherent worth.¹⁷³ The Universal Declaration of Human Rights reflects the classical liberal view¹⁷⁴ that the basis for inherent human worth is that human beings “are endowed with reason and conscience.”¹⁷⁵ If we respect a person’s dignity, then we must respect the outcome of the individual’s reasoning process and allow them to follow their own conscience.¹⁷⁶ If we deny someone’s ability to do so, then we are denying them the ability to do what makes them human.¹⁷⁷

Recent high court decisions have relied on this view of dignity when striking down laws criminalizing same-sex sexual activity. In his opinion in *Navtej v. India*, striking down India’s sodomy law, Chief Justice Misra stated that “[the individual’s] autonomy establishes identity . . . becomes a part of dignity in an individual. This dignity is special to the man /woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom.”¹⁷⁸ Similarly, the High Court in Botswana held that the country’s sodomy law “goes to the core of [the plaintiff’s] worth as a human being. Put differently, it violates his inherent dignity and self-worth.”¹⁷⁹ Using these principles, we can assess how different definitions of sexual orientation expand or undermine the dignity of all people to formulate and live their life according to their own sexual orientation.

(“Dignity is arguably the premier value underlying the last two centuries of moral and political thought in Western Society.”).

171. Doron Shultziner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMP. L. 461, 461 (2013).

172. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

173. Laurie W. H. Ackermann, *Equality and Non-Discrimination: Some Analytical Thoughts*, 22 S. AFR. J. HUM. RTS. 597, 598 (2006).

174. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 200 (2011); Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 41 (Amy Gutmann ed., 1994).

175. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948).

176. See Rao, *supra* note 174, at 187–201.

177. *Id.*

178. *Johar v. Union of India*, (2018) 10 SCC 1, 149 (India).

179. *Motshidiemang v. Atr’y Gen.* (2019) MAHGB 000591-16 (Bots.).

2. Non-Discrimination

Equality is a core human rights value, and non-discrimination is an integral part of equality. Ordinarily, a discussion of equality and non-discrimination might be encompassed in the discussion of dignity as being singled out for unfair treatment is a violation of dignity. However, non-discrimination deserves special attention. Not only is there evidence that LGB face discrimination in all parts of the world,¹⁸⁰ but there is evidence that LGB civil society organizations have identified discrimination as a core concern.¹⁸¹

For the purposes of this Article, the concept of discrimination is defined as any distinction between people based on sexual orientation which has the effect of impairing opportunities, rights, and freedoms. This definition is consistent with the definition of discrimination in international treaties including the International Labor Organization Discrimination (Employment and Occupation) Convention 111,¹⁸² the Convention on the Elimination of Racial Discrimination¹⁸³ and the Convention on the

180. Hum. Rts. Council, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, ¶ 26, U.N. Doc. A/HRC/38/43 (May 11, 2018).

181. There are no mechanisms to directly determine the core concerns of LGB people globally. However, the statements and activities of NGOs working on behalf of LGB communities are a possible indication of those concerns. ILGA World (the International Lesbian, Gay, Bisexual Trans and Intersex Association) is a worldwide federation of 1,700 organizations from 160 countries campaigning for LGBTI rights. References to discrimination and equality outnumber references to any other right or social justice issue both in the preamble to its Constitution (The Int'l Lesbian, Gay, Bisexual, Trans and Intersex Ass'n, *Constitution of ILGA World*, ¶¶ C1.1 - C1.7 (2019)) as well as its vision and mission statement (The Int'l Lesbian, Gay, Bisexual, Trans and Intersex Ass'n, *ILGA World Strategic Plan, 2019-2023 Advancing Our Rights, Deepening Our Strengths* (March 2019)). A review of the mission statements of the largest US based LGBTQ organizations and the institutions that provide financing to them also confirm that equality is the central ideal. Andrew S. Park, *Respecting LGBTQ Dignity Through Vital Capabilities*, 24 J. GENDER, RACE & JUST. 271, 276-78 (2021).

182. Discrimination is defined as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” Int'l Labor Org. [ILO], *Convention Concerning Discrimination in Respect of Employment and Occupation*, art. 1 ¶ 1 (June 25, 1958).

183. “In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” International Convention on the Elimination of all Form of Racial Discrimination, art. 1, ¶ 1, Jan. 4, 1969, 1660 U.N.T.S. 195.

Elimination of All Forms of Discrimination Against Women.¹⁸⁴ This formulation of equality requires an examination of why one person might be considered unlike another person, and whether that reason is tied to sexual orientation. Consequently, the definition of the term sexual orientation becomes a determining factor in the scope of non-discrimination protections. A definition that encompasses a broad range of acts, behaviors, and identities will provide more expansive protections. A narrower definition will provide narrower protections.

By assessing potential definitions using both dignity and nondiscrimination, we are able to look at the legal treatment of sexual orientation from two complimentary perspectives. The goal of dignity calls us to scrutinize actions that treat people as if they are, or should be, the same. Laws that assume people are similar to one another undermine an individual's decision to live their life differently than others. The goal of non-discrimination leads us to scrutinize actions that treat people as if they are different. Laws that favor specific identities and sexualities may perpetuate stigma and inequality. Together, a dignity/nondiscrimination approach means people should have the ability to self-determine how they will live their life according to different sexual orientations, while at the same time ensuring that their choices will not impair their opportunities, rights, and freedoms.

3. Eliminating Human Development Disparities

Human development is a broad concept, defined initially by the first United Nations Human Development Report in 1990, as the “process of enlarging people’s choices. The most critical of these wide-ranging choices are to live a long and healthy life, to be educated and to have access to resources needed for a decent standard of living.”¹⁸⁵ In 2015, the UN General Assembly adopted the 2030 Agenda¹⁸⁶ which included a number of sustainable development goals relevant to LGB people: health, education, work, safe communities, gender equality, hunger, and others. Individual communities may also adopt goals specific to their population.

184. As defined in Article 1, “discrimination against women” is understood as “any distinction, exclusion or restriction made on the basis of sex . . . in the political, economic, social, cultural, civil or any other field.” Convention on the Elimination of All Forms of Discrimination against Women, art. 1, Mar. 1, 1981, 1249 U.N.T.S. 13.

185. U.N. Dev. Programme, *Human Development Report 1990*, at 1 (May 1, 1990).

186. G.A. Res. 70/1 (Sept. 25, 2015).

Empirical evidence increasingly reveals that LGB people face disparities in many dimensions of human development.¹⁸⁷

In this Article, the concern is not about a particular human development goal. Rather, it is about who is included in efforts to meet these goals. One of the central strategies to advance human development is to track population-level outcomes. For LGB people, the question is whether a disparity exists between their outcomes and the outcomes of non-LGB people, and if so, what interventions can be implemented to eliminate such disparities. Disparities between the outcomes of LGB and non-LGB people can indicate patterns of discriminatory treatment, the impact of social stigma, or other causes requiring a systematic response.

A definition of sexual orientation determines whose outcomes are tracked. A standard method of tracking outcomes is to include questions about sexual orientation on large scale demographic, health and living condition surveys. For example, determining who is in the category of MSM/WSW would simply entail asking about sexual experiences.¹⁸⁸ Using the multi-dimensional model would require additional questions to assess attraction and identity.¹⁸⁹ A question based on a Yogyakarta Principles definition might ask whether an individual has had intimate and sexual relations with someone to whom they are profoundly, emotionally and affectionally attracted. Each of these questions produces a different group of people who would answer yes.

Ultimately, we need a definition that can be used to understand and remedy any deprivations faced by LGB people, both across various aspects of human development and across different geographic and cultural settings. Accordingly, the question that will be addressed below is whether particular definitions can be used to accomplish these purposes.

187. For a review of evidence of disparities in human development outcomes, see ANDREW PARK & LUCAS RAMÓN MENDOS, *FOR ALL: THE SUSTAINABLE DEVELOPMENT GOALS AND LGBTI PEOPLE* (2019). For a comprehensive review of literature regarding LGBTQ health, see ILAN H. MEYER & DAVID M. FROST, *Minority Stress and the Health of Sexual Minorities*, in *HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION* 252 (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013).

188. Jennifer L. Glick, Katherine Theall, Katherine Andrinopoulos & Carl Kendall, *For Data's Sake: Dilemmas in the Measurement of Gender Minorities*, 20 *CULTURE, HEALTH & SEXUALITY* 1362, 1369 (2018).

189. Badgett, *supra* note 71, at ii.

IV. ANALYZING COMPONENTS OF A DEFINITION

Having clarified the functions that we wish to fulfill with a definition of sexual orientation, we can now assess the various definitional approaches reviewed in section II to formulate a definition that would meet these purposes. In this section, we will assess the dimension of attraction, behavior, and identity. Each assessment will begin with a review of how that dimension is reflected in current definitions. Then we will assess whether various components of definitions expand or undermine human rights according to the three part test of dignity, nondiscrimination and human development.

A. *Attraction*

1. Current Definitions.

Sexual orientation is often defined to include attraction. Attraction is the central dimension of sexual orientation according to the Office of the United Nations High Commissioner for Human Rights, which defines sexual orientation as “a person’s physical, romantic and/or emotional attraction towards other people.”¹⁹⁰ The American Psychological Association defines sexual orientation as “one’s enduring sexual attraction to male partners, female partners, or both,”¹⁹¹ and even those who supported the pathologizing of homosexuality agree that homosexuality is defined by an “interest in sexual relations or contact with members of the same sex.”¹⁹² Attraction is not relevant to the MSM/WSW category which is only based on sexual behavior. The Principles definition includes attraction that is profound, emotional, and sexual, and accompanied by “intimate and sexual relations.” Thus, if someone were experiencing a form of attraction that does not fall within this description, it would not be cognizable as a manifestation of sexual orientation under the Principles definition.

190. Office of the U.N. High Comm’r for Hum. Rts., *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, U.N. Doc. HR/ PUB/12/06/Rev.1 (2019).

191. AM. PSYCH. ASS’N, *APA DICTIONARY OF PSYCHOLOGY* (2nd ed. 2015).

192. ROBERT L. SPITZER, AM. PSYCH. ASS’N, *HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II*, 6TH PRINTING, at 44 (1973).

These divergent definitions of sexual orientation beg the question of whether attraction, or a particular kind of attraction, should be considered a manifestation of sexual orientation. We will take this question in two parts, first looking at whether attraction should be included at all and then looking at whether only particular kinds of attraction should be included. The first question, whether attraction should be included at all, can be answered using the three-part human rights criteria, beginning with dignity.

i. Dignity

Regarding dignity, we are primarily concerned with the capability to live in accordance with our own reasoned choices regarding our sexual orientation. There are at least two reasons why one might conclude that the experience of attraction is not an outcome of an individual's autonomous decision-making process related to sexual orientation and that respecting a person's dignity does not require recognizing such attraction. First, many people feel sexual attraction is something that is experienced innately and nonvolitionally, not the product of reasoned choice.¹⁹³ The inherent worth of human beings is based, according to a classical liberal view of dignity, on the human ability to reason and make rational and moral choices about one's life.¹⁹⁴ All animals, human and non-human, experience some form of sexual attraction or drive to mate. If sexual attraction does not arise from the human ability to reason and make choices, then there may be an argument that it may not qualify as an aspect of human nature that contributes to a person's inherent worth or deserves respect as part of human dignity. Analogous human experiences include other types of preferences that are shared among all animals such as a desire for food, shelter, or warmth. An individual's dignity is respected when they are able to sufficiently feed, shelter, and cloth themselves. However, respecting dignity does not require ensuring that individuals feel hunger and a desire for warmth. Similarly, an individual's dignity is respected when they are able to carry out decisions related to sexuality. Dignity does not necessarily require ensuring that individuals experience sexual attraction, or so the argument would go.

193. David Tierney, Elliot S. Spengler, Elena Schuch & Patrick R. Grzanka, *Sexual Orientation Beliefs and Identity Development: A Person-Centered Analysis among Sexual Minorities*, 58 J. SEX RES. 625, 626 (2021).

194. Martha Nussbaum, *Beyond the Social Contract: capabilities and Global Justice*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 196. (Gillian Brock & Harry Brighouse, eds., 2005).

Secondly, the relationship between attraction and the behavior and identity dimensions of sexual orientation, both of which involve affirmative volitional choices, is weak. Statistically, someone who experiences same-gender attraction may not engage in any same-gender sexual activity, and they are as likely to identify as a heterosexual than as a sexual minority.¹⁹⁵ From this perspective, same-gender attraction is similar to other kinds of mental states or intents that are not legally cognizable until they are acted upon.

Both of these arguments hinge on the belief that the experience of attraction, though very real, can be disconnected from the deliberative, self-aware processes involved in living one's life according to a particular sexual orientation. However, if we look at those processes, we see that attraction is actually critical to the formation of sexual orientation. During youth, early feelings of attraction are considered an initial step in an individual's awareness of their own sexuality.¹⁹⁶ For heterosexuals, the route from these early feelings to the development of a sexual orientation is supported by social norms and may be relatively unnoticeable. For others, feelings of same-gender attraction triggers a realization that they are different from other people, leading to a psychological process of personal identity development.

A number of different models are used in the social sciences to describe this process for LGB people. "Stage theories" identify a number of stages through which an individual may cycle, non-sequentially, throughout their life. These stages include periods of identity confusion, comparison, tolerance, acceptance, pride, and synthesis.¹⁹⁷ Other models focus on specific milestone events such as sexual debut, relationship formation, and community affiliation. Other models focus on a single aspect such as

195. See III.C.2. explaining how attraction does not correlate to behavior or identity.

196. Eliason & Schope, *supra* note 22, at 13.

197. Vivienne Cass identified six stages (stages include periods of identity confusion, comparison, tolerance, acceptance, pride and synthesis). Vivienne C. Cass, *Homosexual Identity Formation: Testing a Theoretical Model*, 20 J. SEX RES. 143 (1984). Ritch Savin-Williams and Kenneth Cohen identified feeling different, experiencing same-gender attraction, questioning assumed heterosexuality, onset of sexual behavior, self-identification, disclosure, romantic relationship, self-acceptance and synthesis as developmental milestones. Ritch C. Savin-Williams & Kenneth M. Cohen, *Developmental Trajectories and Milestones of Lesbian, Gay, and Bisexual Young People*, 27 INT'L REV. PSYCHIATRY 357 (2015). Lifespan models seek to take social context into account by identifying social processes that may occur over a lifetime: 1. Exiting heterosexual identity (experiencing same-gender attraction), 2. Developing a personal LGB identity, 3. Developing social LGB identity, 4. Becoming an LGB offspring, 5. Developing an LGB intimacy status, 6. Entering a LGBT community. Brent L. Bilodeau & Kristen A. Renn, *Analysis of LGBT Identity Development Models and Implications for Practice*, 2005 NEW DIRECTIONS FOR STUDENT SERVICES 25, 28-29 (2005).

behavior or desire, and others that focus on interaction with groups.¹⁹⁸ However, what all models have in common is that they all start with an inner awareness of the experience of same-gender attractions, and they all proceed from there to later phases involving important choices.¹⁹⁹

For those experiencing same-gender attractions, the outcome of this process may be a sexual minority identity or a heterosexual identity. In either case, the experience of same-gender attraction was the initial trigger. Thus, the connection between attraction and identity is not that a same-gender attraction likely leads to a sexual minority identity. Rather, it is that same-gender attraction triggers the process that leads to whatever identity is ultimately adopted. From a dignity perspective, the inherent worth of each person requires us to support the capability of each person to develop their own sexuality. The experience of attraction is a part of this capability, at least insofar as the process of forming one's sexuality happens in light of attractions they have experienced. A respect for an individual's sexuality means little without a respect for the capability to form it. Accordingly, including attraction as a dimension of the sexual orientation is necessary for the protection of human dignity.

ii. Non-Discrimination

The next question is whether recognizing attraction as a manifestation of sexual orientation would expand the right to non-discrimination. The answer is found in the patterns of human rights abuses faced by those who experience same-gender attraction. Attraction alone, or "atypical feelings," has been sufficient for some mental health professionals to consider a person disordered.²⁰⁰ People who experience same-gender attraction continue to be pathologized throughout the world, resulting in LGBT people subjecting themselves, or being subjected to, sexual orientation

198. Ritch Savin-Williams and Kenneth Cohen identified feeling different, experiencing same-gender attraction, questioning assumed heterosexuality, onset of sexual behavior, self-identification, disclosure, romantic relationship, self-acceptance and synthesis as developmental milestones. Lifespan models seek to take social context into account by identifying social processes that may occur over a lifetime: 1. Exiting heterosexual identity, 2. Developing a personal LGB identity, 3. Developing social LGB identity, 4. Becoming an LGB offspring, 5. Developing an LGB intimacy status, 6. Entering a LGBT community. Brent L. Bilodeau & Kristen A. Renn, *Analysis of LGBT Identity Development Models and Implications for Practice*, in GENDER IDENTITY AND SEXUAL ORIENTATION 28-29 (2005).

199. Eliason & Schope, *supra* note 22.

200. Drescher, *supra* note 28, at 566. The diagnosis of sexual deviance in DSM-1 included based on sexual interests as well as behaviors. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 44 (2nd ed. 1968).

change efforts (SOCE) or so-called “conversion therapy.”²⁰¹ There is a solid scientific consensus that SOCE are scientifically and medically invalid,²⁰² are harmful to physical and mental health,²⁰³ and constitute torture and other human rights violations.²⁰⁴ Thus, if attraction is not included in the definition of sexual orientation, then subjecting people to SOCE based solely on their experience of same-gender attraction might not be considered based on sexual orientation.

iii. Human Development

The next question is whether including attraction advances the human development of LGB people. Empirical research has identified two ways by which those who experience same-sex attraction are impacted by social and structural stigma. First, individuals who experience same-gender attraction often internalize the negative messages and stereotypes of LGB people.²⁰⁵ Secondly, those who experience attraction often have to conceal their attraction from others. Concealment can require significant psychological resources, particularly if an individual develops a pre-occupying fear of discovery.²⁰⁶ Additionally, the individual is denied the psy-

201. See LUCAS RAMÓN MENDOS, *CURBING DECEPTION* 22 (2020).

202. Independent Forensic Expert Group, *Statement on Conversion Therapy*, 72 J. FORENSIC AND LEGAL MED. 1, 3 (2020); Hum. Rts. Council, Practices of So-Called “Conversion Therapy”: Rep. of the Indep. Expert on Prot. Against Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/44/53 (May 1, 2020).

203. U.N. GAOR, Practices of So-Called “Conversion Therapy”, U.N. Doc. A/HRC/44/53 (May 1, 2020). Amy Przeworski et al., 28 *A Systematic Review of the Efficacy, Harmful Effects, and Ethical Issues Related to Sexual Orientation Change Efforts*, CLINICAL PSYCH. SCI. PRAC. 1 (2020).

204. Hum. Rts. Council, *supra* note 202, at ¶¶ 55-74.

205. See Annesa Flentje, Nicholas C. Heck, James Michael Brennan, & Ilan H. Meyer, *The Relationship Between Minority Stress and Biological Outcomes: A Systematic Review*, 43 J. BEHAV. MED. 673 (2019) [hereinafter Flentje et al.]; Constance Rubino, Rosalind Case, & Alastair Anderson, *Internalized Homophobia and Depression in Lesbian Women: The Protective Role of Pride*, 30 J. GAY & LESBIAN SOC. SERV. 244 (2018).

206. Eric W. Schrimshaw, Karolynn Siegel, Martin J. Downing Jr., & Jeffrey T. Parsons, *Disclosure and Concealment of Sexual Orientation and the Mental Health of Non-Gay-Identified, Behaviorally Bisexual Men*, 81 J. CONSULTING AND CLINICAL PSYCHOL. 141 (2013); CHARLOTTE PATTERSON & ANTHONY R. D’Augelli, *HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION* (2013); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCH 674 (2003); John E. Pachankis, *The Psychological Implications of Concealing a Stigma: A Cognitive-Affective-Behavioral Model*, 133 PSYCH. BULL. 328 (2007).

chological and health benefits that come from honest and authentic relationships with others. Being compelled to conceal one's same-sex attractions sexual orientation can result in significant psychological and other harms.²⁰⁷

The impact of internalized homophobia and concealment has been shown to contribute to poor health outcomes such as anxiety, depression, heart problems, substance use disorders, and suicide.²⁰⁸ These effects have been shown across each of the dimensions of sexual orientation, including attraction.²⁰⁹ Physical problems including increased substance abuse, changes in cardiovascular and metabolic and hormonal outcomes, cancer risk. Therefore, efforts to improve human development outcomes for LGB people need to account for the role of same-gender attraction.

Protecting the capability of a person to experience same-gender attraction is important for human dignity, non-discrimination, and human development. Moreover, as illustrated by the examples above, the role of same-gender attraction is important even if an individual does not have a same-gender orientation with regard to behavior or identity. Attraction, alone, is part of the process of formulating sexual orientation, can trigger human rights abuses, and can impact human development. Thus, attraction should be considered an independent dimension of sexual orientation and a separate basis for prohibited discrimination. Now we turn to the question of what types of attraction should be considered part of sexual orientation.

The Principles definition and the multi-dimensional definition illustrate two different views of the kind of attraction that indicates a person's sexual orientation. The multi-dimensional definition includes attraction that is sexual and/or affectional, though a simple version of this definition focuses on sexual attraction. The Principles definition identifies attraction that is profound, emotional, and sexual, of the type that occurs in close relationships.²¹⁰ This focus on relationship-based attraction raises concerns relevant to each of the three human rights criteria, dignity, non-discrimination, and human development. First, as will be discussed be-

207. U.N.H.C.R., *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relation to the Status of Refugees*, ¶ 33, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

208. Flentje et al., *supra* note 205.

209. See Brian A. Feinstein & Christina Dyar, *Bisexuality, Minority Stress, and Health*, 9 CURRENT SEXUAL HEALTH REP. 42 (2017).

210. See *infra* Section II.F.2.1. Sectional orientation is manifested in profound, intimate relations.

low, it marginalizes attractions that fall outside of an intimate sexual relationship model. People who experience attraction that is solely sexual and superficial are unprotected by the Yogyakarta Principles definition. The definition reflects current social stigma of people and relationships that are perceived as sexual.²¹¹ At the same time, people who experience attraction that is solely emotional, lacking sexual content, may also be excluded. Studies show that between 0.4 to 3.3 percent of people experience asexuality, defined as a lack of sexual attraction.²¹²

Second, by focusing on attractions that occur in the context of a relationship, the definition undermines sexual orientations that are broader or more fluid than those manifested in a particular relationship. This focus has a particularly stark impact on bisexuals. If sexual orientation is assessed according to attractions felt in a relationship, bisexuality becomes invisible. Their sexual orientation is absorbed into a heterosexual or homosexual identity based on the gender of their partner.²¹³ This, again, reflects already existing prejudicial tendencies to disbelieve the legitimacy of bisexuality and to mistrust bisexuals.²¹⁴ There is little rationale for limiting the type of attraction. The same kinds of human rights considerations that supported the inclusion of attraction writ large also support the inclusion of attractions that are sexual as well as those that are affectional. As a result of the analysis preceding analysis, the definition should include attraction, including attraction that is sexual and affectional.

B. *Sexual Behavior*

Most definitions of sexual orientation consider sexual behavior, in some form or another, to be manifestations of sexual orientation. Applying the three-part human rights criteria, it is easy to conclude that sexual

211. See Long Doan, Lisa R. Miller & Annalise Loehr, *The Power of Love: The Role of Emotional Attributions and Standards in Heterosexuals' Attitudes Toward Lesbian and Gay Couples*, 94 SOC. FORCES 401 (2015).

212. Lori A. Brotto & Morag Yule, *Asexuality: Sexual Orientation, Paraphilia, Sexual Dysfunction, or None of the Above?*, 46 ARCHIVES SEXUAL BEHAV. 619, 619 (2017).

213. Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1055 (2012).

214. Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 714-718 (2015).

behavior should be considered a manifestation of sexual orientation. According to high Courts in the US,²¹⁵ India,²¹⁶ and Botswana,²¹⁷ respecting dignity requires protecting the freedom to engage in sexual activity (notwithstanding the limitations noted below); those who engage in same-gender sexual activity are targets of discriminatory treatment throughout the world,²¹⁸ and the potential stigma,²¹⁹ health benefits,²²⁰ and risks²²¹ associated with sexual activity are directly relevant to human development.

The more complicated issue is whether any sexual act, or just certain sexual acts, should be considered part of sexual orientation. The multi-dimensional definition and the MSM/WSW category include any act that the individual feels is sexual. The Principles definition only includes sexual acts that are intimate and, in the words of the Chair of the Drafting Committee, “are not sexual acts alone but expressive of something more fundamental. . . .”²²²

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215. “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by [the Constitution]. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.” *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).
216. “The provision [§ 377] runs counter to the constitutional values and the notion of human dignity which is considered the cornerstone of our Constitution.” *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277, ¶ 113 (India).
217. “. . . the applicant’s sexual orientation, lies at the heart of his fundamental right to dignity.” *Letsweletse Motshidiamang v. Attorney General*, [2019] MAHGB-000591-16, ¶ 153 (High Ct. Bots. at Gaborone) (Bots.).
218. See MENDOS, *supra* note 59.
219. Meyer et al., *supra* note 94.
220. See Roy J. Levin, *Sexual Activity, Health and Well-being - The Beneficial Roles of Coitus and Masturbation*, 22 *SEXUAL & RELATIONSHIP THERAPY* 135 (2007); Hui Liu, Linda J. Waite, Shannon Shen, & Donna H. Wang, *Is Sex Good for Your Health? A National Study on Partnered Sexuality and Cardiovascular Risk Among Older Men and Women*, 57 *J. HEALTH & SOC. BEHAV.* 276 (2016); Maria Kleinstäuber, *Factors Associated with Sexual Health and Well Being in Older Adulthood*, 30 *CURRENT OP. PSYCHIATRY* 358 (2017); Sarah E. Jackson, Lin Yang, Ai Koyanagi, Brendon Stubbs, Nicola Veronese, & Lee Smith, *Declines in Sexual Activity and Function Predict Incident Health Problems in Older Adults: Prospective Findings from the English Longitudinal Study of Ageing*, 49 *ARCHIVES SEXUAL BEHAV.* 929 (2020); Shlomit Brandis Kepler, Tal Hasin, Yael Benyamini, Uri Goldbourt, & Yariv Gerber, *Frequency of Sexual Activity and Long-term Survival After Acute Myocardial Infarction*, 133 *AM. J. MED.* 100 (2020).
221. Nicole M.C. van Kesteren, Hospers, & Gerjo Kok, *Sexual Risk Behavior Among HIV-Positive Men Who Have Sex with Men: A literature review*, 65 *PATIENT EDUC. & COUNS.* 5 (2007).
222. Narrain, *supra* note 105.

This focus on intimate sex in the Principles definition is consistent with the vision of same-gender sexuality found in the opinions of several high courts. Understanding the substance and impact of their holdings will help inform our three part assessment of the role of sexual behavior in the definition. While these Courts were not attempting to define sexual orientation, they explicitly construct a paradigm of same-gender sexuality as one where sex plays a very specific role. In striking down Botswana's anti-buggery laws, that country's High Court found that same-sex anal sexual penetration²²³ was an "an expression of love and intimacy,"²²⁴ and that the law criminalized "love or finding fulfillment in love,"²²⁵ abridging the "right to choose a sexual[ly] intimate partner."²²⁶ The Trinidad and Tobago High Court of Justice described sexual activity as an "[u]ltimate expression of love and affection is crystallized in an act which is statutorily unlawful."²²⁷ The US Supreme Court, in declaring sodomy laws to be unconstitutional, stated that the issue was not about the right to engage in sexual conduct²²⁸ but the right to engage in intimate relations, the "most private human conduct,"²²⁹ which is "but one element in a personal bond that is more enduring."²³⁰ The High Court of India upheld the right of same-gender sexual intercourse to consenting adults, "so long as . . . it is confined within their most private and intimate spaces."²³¹ Even though each of these courts was reviewing a law that criminalized all same-sex sexual activity, the holding of the Courts was limited to protections for sex-in-service-to-intimacy, leaving little room for the protection of other forms of sexual activity.

223. The Court summarized the buggery laws as criminalizing "anal sexual penetration and any attempt thereof are prohibited and criminalized by Sections 164(a), (c) and 165 of the Penal Code." *Letsweletse Motshidiemang v. Attorney General*, [2019] MAHGB-000591-16, ¶ 153 (High Ct. Bots. at Gaborone) (Bots.).

224. *Motshidiemang*, MAHGB-000591-16, at ¶ 150.

225. *Motshidiemang*, MAHGB-000591-16, at ¶ 141.

226. *Motshidiemang*, MAHGB-000591-16, at ¶144.

227. *Jones v. Att'y Gen.*, Case No, CV2017-00721, ¶ 91 (High Ct. of Just. 2018) (Trin. & Tobago).

228. Referring to an earlier challenge to a sodomy law, Justice Kennedy clarifies "To say that the issue . . . was simply the right to engage in certain sexual conduct demeans the claim that the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). His view is that sex between same-sex couples is comparable to sex between heterosexual married couples.

229. *Lawrence*, 539 U.S. at 567.

230. *Lawrence*, 539 U.S. at 567.

231. *Joharv. Union of India*, (2018) 10 SCC 1, ¶ 221 (Misra J.). A majority of the judges also formulated the right in this way.

Indeed, Courts that have recognized the right to same-sex intimate relations have continued to uphold State restrictions on sexual activities outside of romantic relationships.²³² After the Supreme Court holding in *Lawrence v. Texas*, courts have upheld prohibitions of distribution and possession of sex toys,²³³ public or quasi-public sexual conduct,²³⁴ sex in the military,²³⁵ sex in sex clubs,²³⁶ and criminal prosecutions for sodomy where the punishment is more severe than for vaginal intercourse.²³⁷ The European Court of Human Rights has noted that the right to privacy does not extend to private consensual sexual activity that involves multiple people, that is photographed, that uses private spaces outfitted specifically for sex, or that involves sado-masochistic activities for the purpose of sexual gratification.²³⁸

These court decisions advance the view that certain types of sexual activity are worthy of State approval and protection and certain types are not. This dichotomy between preferred sexual activity and disfavored sexual activity is mirrored in the Principles definition and can serve as an example of the impact of such a perspective on the dignity, human rights, and human development of LGBTI people.

i. Dignity

We can evaluate whether a focus on intimate relations benefits LGB and other people using the three-part human rights criteria, starting with dignity. The central issue here is whether such a focus respects people's choices of sexual activity. Though most instances of sex probably occur

232. Laura A Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L. J. 809, 829-35 (2010) [hereinafter Rosenbury et al.]; Catherine M. Grello, Deborah P. Welsh & Melinda S. Harper, *No Strings Attached: The Nature of Casual Sex in College Students*, 43 J. SEX RSCH. (2006) [hereinafter Grello et al.].

233. *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001), *aff'd after remand and appeal sub nom.*, *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1234-38 (11th Cir. 2004) (holding that *Lawrence* did not establish a fundamental right to engage in sex).

234. *See, e.g.*, *Tjan v. Commonwealth of Virginia*, 621 S.E.2d 669, 675-76 (Va. Ct. App. 2005) (upholding felony charges for oral sex in public even though public vaginal intercourse is only a misdemeanor).

235. *See, e.g.*, *United States v. Marcum*, 60 M.J. 198, 212-13 (C.A.A.F. 2004) (Crawford, J., concurring) (distinguishing the "romantic relationship" in *Lawrence* from a situation which "occurred after a night of drinking when Senior Airman H 'crashed' on Appellant's couch, wearing only boxer shorts and a T-shirt, and awoke to find Appellant performing oral sex on him.").

236. *832 Corp. v. Gloucester Twp.*, 404 F. Supp. 2d 614, 623 (D.N.J. 2005).

237. *See, e.g.*, *In re R.L.C.*, 643 S.E.2d 920, 921-25 (N.C. 2007).

238. *Laskey and Others v. United Kingdom*, 24 Eur. Ct. H.R. 36 (1997).

between married heterosexual people,²³⁹ many people throughout the world are choosing to engage in sexual activity that falls outside the paradigm of intimate relations. Sex outside of marriage is becoming more common in all parts of the world,²⁴⁰ as is sex for pleasure, casual sex with no expectation of romantic or emotional intimacy, hookup sex and sex for money.²⁴¹

Many LGB people choose to have sex outside of intimate, private, and marital contexts simply because those are the most available options. In some societies, women do not have access to their own private spaces unless they are given access by male family members or unless they have sufficient wealth to create their own privacy.²⁴² The opportunities for private, intimate sexual relations are particularly limited for lesbians and transgender men living in such cultural contexts.²⁴³ Additionally, same-sex relationships are not legally recognized in many countries.²⁴⁴ Therefore, either because of contemporary patterns of sexual activity or because of constrained opportunities, many people, including LGBTI people, are engaging in non-intimate sexual activity.

Consequently, excluding non-intimate sexual activity from the definition of sexual orientation is damaging to the dignity of those who engage in sexual acts that do not conform to the privileged model of intimate sexuality. Moreover, such an exclusion supports a natural law view

239. Kaye Wellings, Martine Collumbien, Emma Slaymaker, Susheela Singh, Zoé Hodges, Dhaval Patel & Nathalie Bajos, *Sexual Behaviour in Context: A Global Perspective*, 368 LANCET 1706 (2006).

240. *Id.*

241. See Justin R Garcia, Chris Reiber & Ann M Merriwether, *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCHOL. 161 (2013); Ryan J. Watson, Shannon Snapp & Skyler Wang, *What We Know and Where We Go From Here: A Review of Lesbian, Gay, and Bisexual Youth Hookup Literature*, 77 SEX ROLES 801 (2017); Ashley E. Thompson & E. Sandra Byers, *Heterosexual Young Adults' Interest, Attitudes, and Experiences Related to Mixed-Gender, Multi-Person Sex*, 46 ARCH. SEX. BEHAV. 813 (2017); Roy F. Baumeister & Juan Pablo Mendoza, *Cultural Variations in The Sexual Marketplace: Gender Equality Correlates with More Sexual Activity*, 151 J. SOC. PSYCH. 350 (2011); Grello et al., *supra* note 232; Keith Sabin, Jinkou Zhao, Jesus Maria Garcia Calleja, Yaou Sheng, Sonia Arias Garcia, Annette Reinisch & Ryuichi Komatsu, *Availability And Quality Of Size Estimations Of Female Sex Workers, Men Who Have Sex With Men, People Who Inject Drugs and Transgender Women in Low- and Middle-Income Countries*, 11 PLOS ONE 1 (2016).

242. Surabhi Shukla, *The L Word: Legal Discourses on Queer Women*, 13 NUJS L. REV., 1, 3–9 (2020).

243. *Id.*

244. MENDOS, *supra* note 59, at 139-56.

of sex, one of the most commonly used philosophical perspectives to defend State disapproval of homosexuality.²⁴⁵ This view, based on a secular analysis of culture and the human body, advocates for a “one-flesh union” model where the only appropriate use of one’s genitals is for the purposes of reproduction or, for couples not able to conceive, to give expression to a reproductive-like commitment to one’s opposite sex, monogamous, lifelong, marital spouse.²⁴⁶ For same-sex couples, intimacy replaces procreation as the state-approved function of sex.²⁴⁷

This view contributes to the stigmatization of those who engage in sex that deviates from a heteronormative model.²⁴⁸ This includes lesbians whose sexuality does not include men²⁴⁹ as well as heterosexual women who may be stigmatized when exercising independent sexuality.²⁵⁰ Gay men have been particularly stigmatized as being hyper sexual, and experiments have shown that gay men perceived as promiscuous produce higher level of negative social reaction,²⁵¹ and political opposition to gay rights,²⁵² and that opposition to gay rights decreases when gay men are perceived as not promiscuous.²⁵³

245. “Today, natural law theory offers the most common intellectual defense for the differential treatment of gays and lesbians.” Brent L. Pickett, *Natural Law and the Regulation of Sexuality: A Critique*, 8 RICH. J. L. & PUB. INT. 39 (2004).

246. Natural law advocates see sex as having “intrinsic aptness” to actualize, consummate, and give expression to a commitment to one’s (opposite-sex) spouse. For these advocates, the “one-flesh union” of a monogamous, heterosexual marriage is seen as the only legitimate use of human genitals. John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 100 (1997).

247. Rosenbury et al., *supra* note 232, at 825.

248. CARLOS BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 121 (1st ed. 2002); ; Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, in *NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS* 31-2 (Robert George ed., 2001).

249. “What is therefore particularly threatening to patriarchy is the idea of intimate same-sex relationships where a dominating male is absent and where women’s sexuality can be defined without reference to reproduction.” Sylvia Tamale, *Out of the Closet: Unveiling Sexuality Discourses in Uganda*, in *AFRICA AFTER GENDER?* 17, 19 (Catherine M. Cole, Takyiwaa Manuh & Stephan M. Miescher, eds. 2007).

250. Kelly L. Reddy-Best, *LGBTQ Women, Appearance Negotiations, and Workplace Dress Codes*, 65 J. HOMOSEXUALITY 615 (2018).

251. Corey L. Cook & Catherine A. Cottrell, *You Don’t Know Where He’s Been: Sexual Promiscuity Negatively Affects Responses Toward Both Gay and Straight Men*, 22 PSYCH. MEN & MASCULINITIES 63 (2021).

252. David Pinosof & Martie G. Haselton, *The Political Divide Over Same-Sex Marriage: Mating Strategies in Conflict?* 27 PSYCH. SCI. 435 (2016).

253. David Pinosof & Martie G. Haselton, *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights*, 12 PLOS ONE 1, (2017).

ii. Non-Discrimination

From a nondiscrimination perspective, there is no reason to conclude that people who engage in non-intimate sexual acts are not vulnerable to human rights abuses. In fact, the opposite might be true. As mentioned above, empirical research has shown that gay men perceived as promiscuous trigger high levels of negative response. This is reflected in a legal structure which permits less favorable treatment for those engaging in non-intimate sex. The Inter-American Commission on Human Rights has recognized people engaging in public displays of affection are vulnerable to violence because such physical interactions are seen as transgressing social norms.²⁵⁴

iii. Human Development

From a human development perspective, limiting sexual choices negatively impacts sexual health. Sex activity,²⁵⁵ as well as sexual choice, is good for health. The World Health Organization has stated that “sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.”²⁵⁶ Laws that only permit sex inside of marriage have a negative health impact²⁵⁷ as does self-stigma, or socially driven guilt and shame experienced by those whose sexuality does not follow privileged norms.²⁵⁸

As a result of the above analysis of the role of sexual behavior in sexual orientation, sexual behavior should be included in the definition of sexual orientation as independent grounds for prohibited discrimination and as a separate basis for tracking human development outcomes. Additionally, any limitations on the type of sexual behavior would result in a

254. Inter-Am. Comm’n H.R., 2015 Annual Report 34-79 (2015).

255. Emmanuele A. Jannini, William A. Fisher, Johannes Bitzer & Chris G. McMahon, *Is Sex Just Fun? How Sexual Activity Improves Health*, 6 J. SEX. MED. 2640 (2009). Rosanne Freak-Poli & Sue Malta, *An Overview Of Sexual Behaviour Research In Later Life—Quantitative And Qualitative Findings*, 39 AUSTRALASIAN J. AGEING 16 (2020).

256. *Defining Sexual Health: Report Of A Technical Consultation On Sexual Health* 28-31 January 2002, Geneva, WORLD HEALTH ORGANIZATION [WHO] 5 (2006).

257. U.N.G.A., Anand Grover, *Report on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Rep. of the Special Rapporteur*, ¶¶ 6-7 U.N. Doc. A/HRC/14/20 (Apr. 27, 2010).

258. Gregory M. Herek, *A Nuanced View of Stigma for Understanding and Addressing Sexual and Gender Minority Health Disparities*, 3 LGBT HEALTH 397, 398 (2016). See also *supra* Part IVA.

narrower scope of protection, most likely impacting those people who engage in the most stigmatized forms of sexual behavior.

C. *Sexual Orientation Identity*

Sexual orientation identity, defined as how an individual views their own sexual orientation, is considered a manifestation of sexual orientation according to some, but not all, definitions. The United Nations, in its global campaign against homophobia and transphobia, defines sexual orientation as a person's "physical, romantic, and/or emotional attractions," but then adds "[e]veryone has a sexual orientation, which is part of their identity."²⁵⁹ This seems to imply that identity is not part of sexual orientation, but that sexual orientation is subsumed into a larger personal identity, and that there is a correlation attraction and identity. The multidimensional model includes identity as a dimension which operates independently from attraction and behavior. The MSM/WSW category and the Principles definition do not include identity as a manifestation of sexual orientation.

i. Dignity

We turn to our three-part analysis of whether including identity would impact the human rights of LGB people, beginning with dignity. Here, the concern is whether a person has a right to formulate their own identity or whether it is permissible to require someone to alter their identity in response to the preferences of the State or other non-State actors. In his opinion declaring India's sodomy law unconstitutional, Chief Justice of India Dipak Misra recognized the "eminence of identity,"²⁶⁰ at the core of which "lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience."²⁶¹ He adds, "All human beings possess the equal right to be themselves instead of transitioning or conditioning themselves as per the

259. "Sexual orientation refers to a person's physical, romantic and/or emotional attraction towards other people. Everyone has a sexual orientation, which is part of their identity." UNITED NATIONS FREE & EQUAL, DEFINITIONS,

[<https://perma.cc/G4T7-9UKE>]. This definition of sexual orientation is based solely on attraction. It is unclear whether sexual orientation is part of a person's sexual orientation identity, or part of their general personal identity. Either way, empirically, there is no evidence that same-gender attraction leads to a particular identity.

260. *Johar v. Union of India*, (2018) 10 SCC 1, 65 (India).

261. *Johar*, 10 SCC 1.

perceived dogmatic notions of a group of people.”²⁶² His view reflects that of other jurists from around the world²⁶³ that respect of dignity requires preserving the right of LGB people to identity.

ii. Non-Discrimination

The importance of protecting identity is particularly evident when we apply the second aspect of our human rights test, a nondiscrimination lens. The reality of self-identifying as LGB is easy to understand. The more “out” an LGB person is, the more likely they will face discrimination and violence.²⁶⁴ In fact, of all the dimensions of sexual orientation, identity is most closely associated with stigma. When researchers and national statistical organizations want to gather data about patterns of violence and discrimination against LGB people, they choose to look at how people identify, rather than attraction or behavior because “identity is the component of sexual orientation most closely related to experiences of disadvantage and discrimination. . . .”²⁶⁵

If identity is not included as a manifestation of sexual orientation, then restrictions on identity might not be considered discrimination based on sexual orientation. The “Don’t Ask Don’t Tell” policies, which uphold the rights the rights of LGB people as long as they don’t reveal their sexual orientation to others, would not be considered discriminatory. Neither would policies that prohibit particular identities. For example, an employer might have a policy that welcomes people regardless of their sexual behavior or sexual attractions, but prohibits workers who identify their sexual orientation as “queer.” These policies reflect a common social demand made on LGB people to conceal or downplay their

262. *Johar*, 10 SCC 1 at 64.

263. *See generally* section III.C.

264. David Sylva, Gerulf Rieger, Joan A. W. Linsenmeier & J. Michael Bailey, *Concealment of Sexual Orientation*, 39 ARCH. SEX. BEHAV. 141, 141 (2010); Joshua C. Collins & Jamie L. Callahan, *Risky Business: Gay Identity Disclosure in a Masculinized Industry*, 15 HUM. RESOUR. DEV. INT. 455, 455 (2012).

265. LUCY HASELDON & THEODORE JOLOZA, MEASURING SEXUAL IDENTITY A GUIDE FOR RESEARCHERS 5 (2009); M. Paz Galupo, Kyle S. Davis, Ashley L. Gryniewicz & Renae C. Mitchell, *Conceptualization of Sexual Orientation Identity Among Sexual Minorities: Patterns Across Sexual and Gender Identity*, 14 J. BISEXUALITY 433, 433–56 (2014), “Discussion with potential data users points to information on sexual identity being most relevant for general social statistics, such as those monitoring social well-being, whereas sexual behaviour continues to be more relevant in the health context.” Statistics New Zealand, *Considering Sexual Orientation as a Potential Official Statistic: Discussion Paper*, 10.

identity.²⁶⁶ For example, studies in Thailand²⁶⁷ (known for its tolerance of sexual and gender diversity²⁶⁸), Croatia²⁶⁹ (a country with some of the most protective laws in the world²⁷⁰), and China²⁷¹ reveal that being told to hide one's identity was one of the most common forms of discrimination experienced by LGB people. Thus, it is common for identity to be a target of human rights abuses even when behavior and attraction may not be.

iii. Human Development

Identity is also important to the human development of LGB people, the third aspect of our human rights test. First, evidence points to a connection between the ability to be open about one's sexuality and higher levels of health and well-being, at least for those LGB people living in cultures with relatively lower levels of stigma.²⁷² This also tells us that if we are going to want to know more about the relationship between sexual orientation and health, we need to track outcomes according to sexual orientation identity. In conclusion, protecting the ability of LGB people to self-determine their own identity is important to dignity, non-discrimination, and human development.

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266. Andrew S. Park, *Vital Capabilities: a Development Framework for Sexual and Gender minorities*, 48 OXFORD DEV. STUD. 18, 25 (2020).
267. U.N. Dev. Programme, *Tolerance but not Inclusion: A National Survey On Experiences Of Discrimination and Social Attitudes Towards LGBT People in Thailand* (2019); WORLD BANK GROUP, ECONOMIC INCLUSION OF LGBTI GROUPS IN THAILAND (2018).
268. U. N. Dev. Programme, *supra* note 267, at 31.
269. Željka Kamenov, Aleksandra Huić, Margareta Jelić, *Minority Stress and Mental Health of Homosexual and Bisexual Men and Women: A Review of Research on the Minority Stress Model From a Croatian Perspective*, 23 CRIMINOLOGY SOC. INTEGR. J. 63 (2015).
270. MENDOS, *supra* note 59 at 175.
271. U. N. Dev. Programme, *Being LGBT in China: A National Survey on Social Attitudes Towards Sexual Orientation, Gender Identity and Gender Expression* 27-8 (2016).
272. John E. Pachankis, Conor P. Mahon, Skyler D. Jackson, Benjamin K. Fetzner & Richard Br. . nström, *Sexual Orientation Concealment and Mental Health: A Conceptual and Meta-Analytic Review*, 146 PSYCH. BULL. 831 (2020); Most of the research regarding sexual orientation identity has focused on lesbian and gay identities. Relatively little research has been done on bisexuality or heterosexuality. Dillon et al., *supra* note 23, at 650; Larissa A. McGarrity & David M. Huebner, *Is Being Out About Sexual Orientation Uniformly Healthy? The Moderating Role of Socioeconomic Status in a Prospective Study of Gay and Bisexual Men*, 47 ANNALS BEHAV. MED. 28 (2014); Bauer & Jairam, *supra* note 89; Wendy B. Bostwick, Carol J. Boyd, Tonda L. Hughes, & Sean Esteban McCabe, *Dimensions of Sexual Orientation and the Prevalence of Mood and Anxiety Disorders in the United States*, 100 AM. J. PUB. HEALTH 468 (2010).

The next issue is whether identity should be an independent basis for discrimination or whether it should be considered jointly with other dimensions. The answer can be found by looking at different patterns of discrimination associated with different manifestations of sexual orientation. Two people may have entirely the same history of same-gender attraction and same-gender behavior, yet one might identify as gay and the other identify as straight. Based on our empirical knowledge of how stigma and prejudice operate, the person who identifies as a sexual minority is more likely to face discrimination, violence, and poor human development outcomes than a person who does not. Thus, it should be an independent basis.

As a result of the above analysis of the role of sexual orientation identity in sexual orientation, sexual orientation identity should be included in the definition of sexual orientation as an independent ground for prohibited discrimination and as a separate basis for tracking human development outcomes. As for which identities to include, any identity that an individual claims as a sexual orientation identity should be included in the definition.

V. PROPOSAL FOR NEW DEFINITION

A. *Proposed Definition*

Based on the analysis above, the definition should reflect the manifestation of sexual orientation through a person's experience of attraction to, and sexual behavior with, one gender or more genders, as well as self-determined sexual orientation identity. Moreover, sexual orientation is manifested through any type of emotional or sexual attraction, or any type of behavior that is considered sexual. Finally, the definition should recognize that the sexual orientation of an individual may differ depending on the orientation of any one of the three dimension of attraction, behavior, and identity. The following definition reflects these considerations:

An individual's sexual orientation is indicated by one or more of the following: how a person identifies their own sexual orientation, a person's capacity for experiencing sexual and/or affectional attraction to people of the same and/or different gender, and/or a person's sexual behavior with people of the same and/or different gender.

B. *Identities, Acts And Behaviors That Are Included.*

The proposed definition recognizes that individuals can be differentiated, and therefore face prejudice and discrimination, according to multiple aspects of sexual orientation. Figure 2 portrays the same three dimensions of sexual orientation as the multi-dimensional definition. Individuals who have a sexual minority orientation in any one of the three dimensions can be placed in one of the several areas in the Venn Diagram, numbered one through seven.

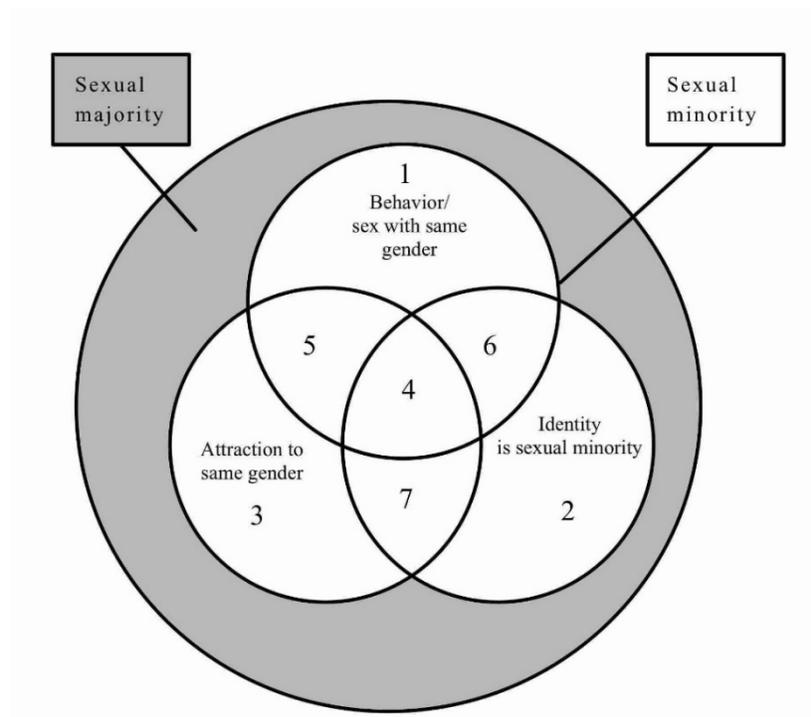


FIGURE 2: SEVEN SEXUAL MINORITY GROUPS

Individuals who are in the sexual majority according to all three dimensions would fall outside the intersecting circles. Therefore, this definition identifies a total of eight groups of people according to different configurations of sexual orientation. In Table 1, each group is listed according to whether the attraction and behavior is oriented heterosexually (to that of different gender people), homosexually (toward same-gender people) or bisexually (toward people of different genders). Identity is categorized according to whether it is heterosexual or a sexual minority identity (such as gay, queer, or some other non-heterosexual identity). The

largest group is the sexual majority. The remaining seven groups constitute the sexual minority. The groups are assigned numbers that correspond to the numbers in figure 2.

TABLE 1: GROUPS ACCORDING TO ORIENTATION OF ATTRACTION, BEHAVIOR, AND IDENTITY²⁷³

Subgroup	Attraction	Behavior	Identity
Sexual majority	Het.	Het.	Het.
This group includes those who are heterosexual according to all dimensions of sexual orientation.			
Sexual minority group 1	Het.	Homo. or bi.	Het
Individuals with this configuration have engaged in same-gender sexual behavior but are not attracted to individuals of the same gender, nor do they have a same-gender identity. Individuals with this configuration are not common. An example might be someone engaging in same-gender sexual behavior because it is their only opportunity for human affection, such as someone in a single gender prison or school, ²⁷⁴ or someone who is experimenting with different forms of sexuality. Everyone in this group would be categorized as MSM/WSW.			
Sexual minority group 2	Het.	Het.	Min.
This group includes those who are heterosexual in every respect except that their identity is something other than heterosexual. For example, a signifi-			

273. Table 1 Abbreviations: Het. = Heterosexually oriented; Homo. = Homosexually oriented; Bi. = bisexually oriented; Min. = Minority sexual orientation identity (e.g., lesbian, gay, bisexual, queer, pansexual, and indigenous identities)

274. Juliet Richters, Tony Butler, Karen Schneider, Lorraine Yap, Kristie Kirkwood, Luke Grant, Alun Richards, Anthony M. A. Smith & Basil Donovan, *Consensual Sex Between Men and Sexual Violence in Australian Prisons*, 41 ARCH. SEXUAL BEHAV. 517 (2012); Tomer Einat & Gila Chen, *Female Inmates' Perspectives Toward Consensual Same-Sex Sexual Relationships in an Israeli Prison*, 36 INT. J. COMPAR. APPLIED CRIM. JUST. 25 (2012); Christopher Hensley & Richard Tewksbury, *Inmate-to-Inmate Prison Sexuality: A Review of Empirical Studies*, 3 TRAUMA, VIOLENCE, ABUSE 226 (2002).

cant number of people who identify as “queer” do so in order to resist heteronormative social norms even though their attractions and sexual behavior are heterosexually oriented. ²⁷⁵			
Sexual minority group 3	Homo or bi.	Het.	Het.
This group includes those who are heterosexual in every respect except they have experienced same-gender attraction. ²⁷⁶			
Sexual minority group 4	Homo or bi.	Homo or bi.	Min.
This group includes those who, in all respects, are sexual minorities. Everyone in this group would be categorized as MSM/WSW.			
Sexual minority group 5	Homo or bi.	Homo or bi.	Het.
This group includes those who identify as heterosexual but, in all other respects, are sexual minorities. Many people who have experienced same-gender attraction and behavior identify as heterosexual either because they fear discrimination or violence, or because they authentically see themselves as heterosexual. ²⁷⁷ Everyone in this group would be categorized as MSM/WSW.			
Sexual minority group 6	Het.	Homo or bi.	Min.
This group includes those who identify as a sexual minority and who have same-gender sexual activity but who are not attracted to people of the same-gender. Individuals with this configuration are not common. Examples might include a sex worker or someone who is experimenting with their sexuality as part of their growth process. Asexuals who do not experience certain types of attraction might fall into this group. ²⁷⁸ Everyone in this group would be categorized as MSM/WSW.			
Sexual minority group 7	Homo or bi.	Het.	Min.

275. James S. Morandini, Alexander Blaszczynski & Ilan Dar-Nimrod, *Who Adopts Queer and Pansexual Sexual Identities?*, 54 J. SEX RSCH. 911, 919 (2017).

276. Robert J. Zeglin, *The MSM (Non)Identity: Toward Understanding Sexual Behavior and Identity in Health Research and Practice with Straight Men Under the Umbrella*, 17 SEXUALITY RSCH. SOC. POL'Y 343 (2020).

277. Pachankis & Bränström, *supra* note 90, at 8-9.

278. Brotto & Yule, *supra* note 212, at 619.

This category includes people who have only had different gender sex but are attracted to those of the same-gender and identify themselves as a sexual minority. This category might include those who identify as “queer” as a personal expression of opposition to heteronormative patriarchy, as well as those who identify as bisexual or pansexual but who have not engaged in same-sex activity This would also include someone who does not have sex at all but who experiences same-gender attractions and identifies as gay, celibate, asexual or some other non-heterosexual identity.²⁷⁹

C. Acts, Behaviors, and Identities Not Included

Knowing what acts, behaviors and identities are not included in the term sexual orientation is important to those seeking redress under human rights laws that use this term. Additionally, clarifying the limitations of current human rights standards helps identify the need for additional human rights standards. One way to understand what is not included in the term sexual orientation is to look at areas of human experience that overlap sexual orientation to determine where the conceptual border lies. Three such areas, sexuality, interpersonal relationships, and identity, were identified in Section III.A.

Sexual orientation is a component of an individual’s sexuality, but many aspects of sexuality are not included in sexual orientation. The proposed definition focuses on sexual desires where the object is one or more specific genders. Charles Moser has proposed a definition of sexual orientation that focuses on whether a sexual desire, regardless of its object, is lifelong and immutable.²⁸⁰ For Moser, a desire for a particular gender would constitute one such orientation as would a desire for particular practices or personal attributes such as (BDSM (Bondage and Discipline, Dominance and Submission, and Sadism and Masochism), fetishes, sex toys, sex for pay or personal attributes (hair color, body shape and racial types) if such desires had an onset at an early age and lasted throughout one’s life.²⁸¹ Because the proposed definition is organized more narrowly around desire for a particular gender, other desires would probably not

279. See Conor Friedersdorf, *A Gay, Celibate Christian’s Conflicted Take on Same-Gender Marriage*, ATLANTIC (Feb. 28, 2013), [<https://perma.cc/6WT4-7DZS>] (describing the experience of a gay man who chooses to remain celibate because of religious beliefs); Mark A. Yarhouse, Tranese Morgan, Kristin Anthony, Julia Sadusky, *Celibate Gay Christians: Sexual Identity and Religious Beliefs and Practices* 71 J. PASTORAL CARE & COUNSELING 52-59 (2017).

280. Charles Moser, *Defining Sexual Orientation*, 45 ARCHIVES SEXUAL BEHAV. 505 (2016).

281. *Id.* at 507.

be considered a manifestation of sexual orientation unless these preferences were oriented toward a particular gender or genders.

Regarding interpersonal relationships, the second area of overlapping human experience, it is unlikely that the proposed definition would protect someone based on a preference for non-sexual and/or non-affectional interpersonal relationships. A preference to work with for people of one gender rather than another, for example, would probably not be considered a manifestation of sexual orientation.

With regard to identity, the third overlapping area, the proposed definition would probably not consider broader identities, such as religious or political identities, as manifestations of sexual orientation. There is also an argument that claiming a sexualized identity might not be considered a manifestation of sexual orientation. For example, some women have embraced a slut identity as a means of protesting “slut-shaming”—the practice of blaming female sexuality for the sexual assault of women by men.²⁸² Such an identity can exist adjacent to, but separate from, sexual orientation identity because it may not orient toward a particular gender. However, any identity that an individual claims as a sexual orientation identity should be considered as such. If someone says their sexual orientation is Protestant or Socialist or “slutty,” then those identities would be part of their sexual orientation.

Over the past century, the legal perspective on diverse sexual orientations has dramatically changed from one of disease and criminality to one of protection and support. This change has been driven, at least in part, by advancements in the scientific knowledge of sexual orientation. The proposed definition is grounded in contemporary views of sexual orientation in the fields of social and medical science and represents the next stage in legal understandings of sexual orientation. Looking to the future, sexual orientation will continue to evolve as societies become more accepting of variations in sexuality. Given the historic constancy of sexual behavior and sexual attraction, the evolution will probably be driven by the emergence of new sexual identities. The drive of sexual minorities to self-determine their own lives will naturally lead to new and evolving forms of sexual orientation.²⁸³ Because the proposed definition does not privilege any particular identity, instead recognizing whatever identity an

282. Joetta Carr, *The SlutWalk Movement: A Study in Transnational Feminist Activism*, 4 J. FEM. SCHOLARSHIP 24, 24 (2013).

283. “The insistence of diverse groups on naming themselves and achieving recognition of their distinctness and variety will go on as long as aspirations for democracy exist. . . .” Rosalind Petchesky, *Language of Sexual Minorities and the Politics of Identity: A Position Paper*, 17 REPROD. HEALTH MATTERS 105, 109 (2009).

individual chooses, the proposed definition can accommodate the emergence of new identities and continue to provide legal protections to those with novel sexual orientation identities. States can, and should, consider using the proposed definition in efforts to protect the human rights of sexual minorities. ♣

