DRAWING BISEXUALITY BACK INTO THE PICTURE: HOW BISEXUALITY FITS INTO LGBT LEGAL STRATEGY TEN YEARS AFTER BISEXUAL ERASURE

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[I]f I am not free and if I am not entitled equal to heterosexuals and homosexuals then homosexual men and women have joined with the dominant heterosexual culture in the tyrannical pursuit of E Pluribus Unum and I a bisexual woman committed to cultural pluralism and, therefore to sexual pluralism, can only say, you better watch your back![1]

INTRODUCTION

In 2000, Kenji Yoshino published a paper exploring the social erasure of bisexuality.[2] He introduced the paper by empirically proving that bisexuality was invisible through a quick survey of popular news sources that featured volumes more articles about homosexuality than bisexuality.[3] Once he showed that bisexuality was invisible, he made sure to distinguish between the incidental invisibility of bisexuality, perhaps because of the low number of bisexuals, and its deliberate erasure. Yoshino theorized that monosexuals—individuals who are attracted to only one gender, such as heterosexuals and homosexuals—created an epistemic contract[4] to erase bisexuality in social culture.[5] He argues that

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1 June Jordan, *On Bisexuality and Cultural Pluralism*, *in* AFFIRMATIVE ACTS 132, 138 (1998).

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

3 *Id*. at 368. To continue under his presumption and to make sure that bisexuality has not suddenly reached a place of prominence in today's society, I performed similar searches to the same result. One search that I conducted demonstrated that from Jan. 1, 2000 to Jan. 1, 2010, the New York Times published well over 3000 stories including the word "homosexuality" and only 111 with the word "bisexuality." Another search that I performed revealed that in the same time frame, Reuters had 2343 stories containing "homosexuality" and only thirty-eight containing "bisexuality." Finally, a search that I conducted of all law journals over the same time period came up with over 3000 results for "homosexuality" and only 425 results for "bisexuality."

4 "As [Yoshino] define[s] it, an epistemic contract is a contract in the sense that a social contract is a contract. In other words, it is not a conscious arrangement between individuals, but rather a social norm that arises unconsciously." Yoshino, *supra* note 2, at 391-92. "It is as if these two groups, despite their other virulent disagreements, have agreed that bisexuals will be made invisible." *Id*. at 362.

5 *Id*. at 389.

monosexuals erase bisexuals in three ways—class erasure,[6] individual erasure,[7] and delegitimization[8]—and proposes that monosexuals have three reasons for participating in and encouraging this erasure: "1) an interest in the stability of sexual orientation categories; 2) an interest in the primacy of sex as a diacritical characteristic; and 3) an interest in the preservation of monogamy."[9]

My article, written on the tenth anniversary of Yoshino's seminal piece, is not an update on whether bisexuality has gained social visibility in the last ten years or an examination of whether invisibility is still maintained by a contract among monosexuals. Rather, I begin from the position that bisexuality is invisible in legal culture, like in Yoshino's social culture, and pose two hypotheses for this invisibility. First, I believe that while Yoshino's analysis retains viability when analogized to the legal context—which he explores within sexual harassment jurisprudence[10]—I propose that bisexuality is inherently invisible to the law, beyond the reach of deliberate erasure. A plaintiff's bisexuality is only at issue in the law where there has been an affirmative outing. That is, in cases where sexuality is at issue, plaintiffs are presumed monosexual, and must either declare their own bisexuality or have it found for them.[11] I explore this legal invisibility in two contexts in Part I of this article.

Second, I argue that where bisexuality *is* legally relevant it has been erased within the legal culture because it is complicated and muddles legal arguments that depend upon the binary of sexuality. Yoshino addresses this reliance on the binary of sexuality as a fundamental part of homosexual investment in stabilizing sexual orientation by erasing bisexuality,[12] but I argue that this factor is much more

6 "Class erasure occurs when [monosexuals] deny the existence of the entire bisexual category." *Id*. at 395.

7 "Individual erasure recognizes that bisexuals exist as a class, but contests that a particular individual is bisexual." *Id*. at 396.

8 "[D]eligitimization occurs when [monosexuals] acknowledge the existence of individual bisexuals, but attach a stigma to bisexuality." *Id*. at 396.

9 *Id*. at 399. Yoshino defines those three interests: "Bisexuality destabilizes sexual orientation by making it logically impossible to prove that one has a monosexual identity." *Id*. at 400. "[B]isexuals are seen to destabilize the primacy of sex as a diacritical axis. Straights and gays have a shared investment in the primacy of sex because their orientation identities rely on it." *Id*. at 410. "The investment in [the norms of monogamy] shared by straights and gays is the sexual jealousy both groups experience in nonmonogamous (or potentially nonmonogamous) relationships." *Id*. at 420-21.

10 Yoshino discusses the bisexuality exemption in sexual harassment jurisprudence:

> "[L]iability under Title VII only lies if the sexual harassment occurs 'because of . . . sex.' Under one interpretation, this doctrinal formulation permits bisexuals to evade liability when they sexually harass men and women, because no victim can claim that the harassment occurred 'because of' the victim's 'sex.' Bisexuals are thus not only distinguished from heterosexuals and homosexuals, but are rhetorically privileged above both."

Id. at 435. Under this theory, a bisexual supervisor could not be prosecuted for sexual harassment if he or she equally harassed female and male employees because the behavior would not be based on "sex." *See*, *e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

11 *See*, *e.g.*, Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991).

12 *See* Yoshino, *supra* note 2, at 408.

prominent in legal culture than the social context. In Part II of this article, I use the suspect class analysis under the Equal Protection Clause to show how bisexuality complicates legal arguments, and propose two solutions through which bisexuality can be introduced into the Equal Protection analysis without compromising sexual orientation's suspect classification.

The erasure of bisexuality, representative of all sexual identities between 100% homosexual and 100% heterosexual puts the fight recognition of sexual and gender minorities at a disadvantage. Not acknowledging sexualities along a continuum, weakens arguments for granting rights to and preventing discrimination against the lesbian, gay, bisexual, and transgender (LGBT) community. I conclude with the proposition that inclusion of bisexuality, and indeed of all non-binary identities, is crucial for the LGBT civil rights movement

I. BISEXUALITY

Kenji Yoshino defines sexual orientation along three axes: desire, conduct, and self-identification.[13] He postulates that one's definition of bisexuality depends on which axis is used.[14] For the purposes of his paper, Yoshino uses the pure desire-based definition because he wishes to include those who have "unacted same-sex desires."[15] He further limits the definition to those with a sexual appetite or lust for both sexes and whose desire is more than incidental.[16]

There are few mentions of sexual orientation, much less bisexuality, in federal legislation. The general service requirements of the United States Armed Forces require that members of the armed forces neither 1) engage in, attempt to engage in, or solicit another to engage in a homosexual act or acts; nor 2) state that

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[13] *Id.* at 371.

[14] Along the conduct axis, bisexuality can be broken into the following categories:

> [1] 'Defense Bisexuality' (defending against homosexuality in societies where it is stigmatized), [2] 'Latin Bisexuality' (the insertive role in certain 'Mediterranean cultures' is not regarded as homosexual, so that men who participate in same-sex encounters may consider themselves nonetheless heterosexual), [3] 'Ritual Bisexuality' (as with the Sambia of Papua-New Guinea, in which younger males fellate older men in order to ingest their 'masculinizing' semen, a practice that is part of a rite of initiation, may continue for years, and is apparently replaced by exclusive heterosexuality after marriage), [4] 'Married Bisexuality,' [5] 'Secondary Homosexuality' (more frequently called 'situational bisexuality' - sex with same-sex partners in prisons or other single-sex institutions, in public parks or toilets, or for money), [6] 'Equal Interest in Male and Female Partners' (so-called true bisexuality), [7] 'Experimental Bisexuality,' and [8] 'Technical Bisexuality' (with partners who may be dressed as members of the other sex, or have had some form of gender reassignment: transsexuals or members of a 'third sex' in some cultures).

Id. (citing MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 30 (1995)). If the desire axis is used, then several of those categories drop out—like "defense," ritual," and "situational." Likewise, if the self-identification axis is used, then "defense" bisexuality "would probably be the only category that was not seriously diminished." Yoshino, *supra* note 2, at 372.

[15] *Id*. at 375

[16] *Id*.

he or she is a homosexual or bisexual.[17] A bisexual is defined as someone who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts."[18] The proposed Employment Non-Discrimination Act—ENDA—when passed, will contain the only federal definition of "sexual orientation."[19] ENDA would define sexual orientation as "homosexuality, heterosexuality, or bisexuality."[20] The Act would prevent discrimination on the basis of an employee's real or perceived sexual orientation or gender identity.[21]

Robyn Ochs's term of "professional bisexual"[22] defines bisexuality along the following lines: "I call myself bisexual because I acknowledge that I have in myself the potential to be attracted—romantically and/or sexually—to people of more than one sex and/or gender, not necessarily at the same time, not necessarily in the same way, and not necessarily to the same degree."[23] Her definition raises larger issues of pluralism and cross-categorization: bi-racialism and multi-racialism, transsexuality and gender queer, polyamory and pansexuality. Ruth Colker calls people who are legally hard to define "hybrids."[24] She struggles with "naming" bisexuality as such and argues that categorization can cause harms such as invisibility and the reinforcement of pejorative values.[25] On the other hand, she recognizes that categorization can serve constructive purposes such as widening people's understanding of sexual identity and serving the ameliorative purpose of providing different perspectives on race, gender, sexual orientation, and disability.[26]

I realize, as Yoshino does,[27] that the issue at stake is not merely the invisibility of bisexuality, but the invisibility of all alternative sexualities. In this paper, I take an interpretation of bisexuality that is hopefully representative of a vast array of alternative sexualities. For example, the same analyses I use in this paper to examine the invisibility of bisexuality could be applied to pansexuality, polyamory, fluid sexuality, and queerness, among others. While I will use the term bisexual, I hope to expand from Yoshino's definition of "more than incidental

17 10 U.S.C.S. § 654 (2010).

18 *Id*. at § 654(f)(2).

19 Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2010).

20 *Id*.

21 *Id*.

22 BiNetUSA, http://www.binetusa.org/faces.html (last visited Oct. 24, 2010).

23 Robyn Ochs, *Selected Quotes by Robyn Ochs*, http://www.robynochs.com/writing/quotes.html.

24 *See* RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW XI (1996).

25 *Id.* at 21.

26 *Id.* at 26, 32, 36.

27 "In asking why bisexuals are invisible and/or erased, I assume that there is a category of individuals who can be denominated as bisexuals." Yoshino, *supra* note 2, at 359. Yoshino defines bisexuality as a "more than incidental desire for both sexes." *Id*. at 377.

desire for both sexes"[28] into a broader definition that includes the range of sexualities between 100% monosexual to 100% queer. While Yoshino and I both address the invisibility of bisexuality as a class of persons, it is truly everyone between the two polar ends of the spectrum that is being erased.

A. Legal Invisibility

Bisexuality is legally invisible: a court will treat someone as heterosexual or homosexual, based on his presentation, his self-identification, his conduct, or the affirmative statements of others until he indicates otherwise. Bisexuality is never the presumption.[29] That being said, once bisexuality has been acknowledged, there appear to be two distinct types of bisexuality. The first I will refer to as "identity bisexuality." For the purposes of this paper, "identity bisexuality" is indicated by an affirmative identification by an individual as being "bisexual." "Conduct bisexuality," on the other hand, is contextual, implied from the individuals sexual or romantic activities. Courts treat identity bisexuals differently; a court's treatment of identity bisexuals depends on the court's perception of their sexual or romantic activities.

1. Identity Bisexuality

In general, speech or expressive conduct—conduct that carries an important message—is protected by the First Amendment.[30] This includes speech about one's sexual orientation, or coming out speech.[31] Federal courts have been conflicted about the level of protection that declarations of sexuality by school-teachers should receive. In *Weaver v. Nebo School District*,[32] a federal district court held that a lesbian volleyball coach's sexuality became a matter of public

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[28] *Id.* at 377.

[29] Rarely is homosexuality the presumption either. Unless there is an affirmative statement by either party otherwise, I would not hesitate to say that in 99% of cases involving one of the party's sexuality, the party is presumed heterosexual. But the fact remains that when a declaration is made that rebuts the presumption of heterosexuality, the court will leap to the conclusion that the party is now homosexual. Bisexuality is the last on the list.

[30] U.S. CONST. amend I.

[31] *See*, *e.g.*, Gay Students Org. of the Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974) (holding that the Gay Students Organization had a right to association); Gay Law Students Ass'n v. Pac. Tel., 24 Cal.3d 458 (Cal. Sup. Ct. 1979) (finding that coming out as homosexual constituted political speech and was thus protected). Sex itself is expressive conduct. *See* James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves that It Should*, 12 LAW & SEXUALITY 159 (2003). In a study of thousands of men who have sex with men, Mr. Garland found that nearly all of them considered sex an expression of love or trust. *Id*. at 259-63. In *Boy Scouts of America v. Dale*, the Boy Scouts argued that they had a right to hire only scoutmasters whose sexual conduct expressed heterosexuality. Boy Scouts of America v. Dale, 530 U.S. 640 (2000). However, men who have sex with men also have a right to express love and acceptance of homosexuality through their sexual conduct as well. Garland, *supra* note 31, at 227-42.

[32] Weaver v. Nebo School Dist., 29 F.Supp. 2d 1279 (D. Utah 1998).

concern when the school brought it up. Thus, the letters that the school district wrote to Ms. Weaver, warning her not to talk about her sexuality, abridged her first amendment rights. "Because the restrictions imposed on Ms. Weaver . . . only targeted speech concerning homosexual orientation and not heterosexual orientation, the restrictions are properly considered viewpoint restrictions. Such a one-sided approach to sexual orientation is classic viewpoint discrimination and is 'presumptively invalid.'"[33]

Nebo contrasts sharply, however, with *Rowland v. Mad River Local School District*,[34] decided thirteen years earlier, in which the school district suspended Ms. Rowland from her position as a guidance counselor after she made declarations of her bisexuality.[35] The federal district court found that, indeed, she had been suspended for no other reason than her bisexuality and that the school district had violated her first amendment rights under *Pickering v. Board of Education*,[36] which held that teachers cannot be fired solely on the basis of their speech on issues of public importance.[37] The Sixth Circuit reversed upon the school district's appeal,[38] finding the Supreme Court's ruling in *Connick v. Myers*[39] to be more applicable than *Pickering*.[40] The *Connick* court held that issues not of public concern are not protected by the First Amendment.[41] The Supreme Court denied cert.[42] In an impassioned dissent, Justice Brennan and Justice Marshall bemoaned the application of *Connick* and stated that *Rowland* provides the Court with the opportunity to find that sexuality, and one's own sexuality, is indeed a matter of public concern. Brennan stated:

> I think it is impossible not to note that a similar public debate [to racial discrimination] is currently ongoing regarding the rights of homosexuals. The fact that the petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate speech that 'touches upon' this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.[43]

Nebo represents a modern, more nuanced understanding of what "coming out"—declaring one's sexuality—entails. By labeling the school's actions for what they were—viewpoint discrimination—the *Nebo* Court corrected the law. Ms.

33 *Id*. at 1286 (citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992)).
34 Rowland v. Mad River Local School Dist., 470 U.S. 1009 (1985).
35 *Id.* at 1009-10.
36 Pickering v. Bd of Educ., 391 U.S. 563 (1968).
37 *Id.* at 574.
38 Rowland v. Mad River Local School Dist., 730 F.2d 444, 446 (6th Cir. 1984).
39 Connick v. Myers, 461 U.S. 138 (1983).
40 *See Rowland*, 730 F.2d at 449.
41 *Connick*, 461 U.S. at 147.
42 *Rowland*, 470 U.S. at 1009.
43 *Id.* at 1012.

Rowland's self-identification as well as her bisexuality, may have distinguished her from Ms. Weaver's private identification as a lesbian. Nevertheless, even though Brennan did not see the difference between claiming one's identity and having someone else claim it for you, the Court did.

2. Conduct Bisexuality

The second type of bisexuality can be referred to as 'conduct bisexuality.' Conduct bisexuality is defined by an outsider's view of an individual's sexuality, and often depends on a court's view of certain evidence presented. In *Schowengerdt v. United States*,[44] the Naval Reserve Board of Officers made a legal finding that Schowengerdt was a bisexual, despite his protest.[45] They made this finding based on photographs and correspondence found in an envelope that the plaintiff had asked to be destroyed, showing him in "heterosexual and homosexual" situations.[46] Upon appeal, the Ninth Circuit held that Schowengerdt's first amendment rights were not violated because he was not discharged from the Navy for saying he was bisexual, but for being bisexual, despite his statements to the contrary.[47] A bisexual, according to the Secretary of the Navy Instructions, is "a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts."[48]

A finding of bisexuality by the court depends on a certain type of sexual behavior. I theorize that a court would not be comfortable making a finding of bisexuality if the party entering the evidence only has evidence of homosexual or heterosexual behavior, not both, even if the entering party says that the individual in question has identified themselves to be bisexual. This is because bisexuality is often colloquially equated with "pure bisexuality": the even distribution of sexual desire and behavior between both sexes; perhaps conflated with the stereotype of bisexual promiscuity.[49] If a party can only show that an individual has had sexual desire and relations with one gender, I argue that a court would find it difficult to label the individual a bisexual; preferring to label the individual heterosexual or homosexual.

In *In the Matter of the Appeal in Pima County Juvenile Action B-10489*,[50] the appellant was denied his petition for adoption. He sued, claiming that he was

44 Schowengerdt v. U.S., 944 F.2d 483 (9th Cir. 1991).

45 *Id.* at 486.

46 *Id.* at 485.

47 *Id.* at 489.

48 *Id.* at 490 (citing Secretary of the Navy Instructions (SECNAVINST) 1900.9D).

49 *See*, *e.g.*, Sharon Forman Sumpter, *Myths/realities of bisexuality* in BI ANY OTHER NAME, 12 (1991) ("MYTH: Bisexuals are promiscuous/swingers. . . . MYTH: Bisexuals are equally attracted to both sexes.").

50 In the Matter of the Appeal in Pima County Juvenile Action B-10489, 151 Ariz. 335 (Ariz. Ct. App. 1986).

denied his petition solely because the court had found that he was "a bi-sexual individual who has had, and may have in the future, sexual relationships with members of both sexes . . . ."[51] The Court of Appeals affirmed, holding that despite their finding, "[t]he fact that the appellant is bisexual is not unlawful, nor standing alone, does it render him unfit to be a parent. It is homosexual conduct which is proscribed."[52] So despite the petitioner's declarations otherwise, the court affirmed the denial of his petition for adoption based on the fact that he had had same-sex sexual encounters in the past and that it would be disingenuous for the state to condemn homosexual behavior on the one hand and hold a bisexual up as a model parent on the other.[53] The dissent vehemently stated, "[i]t is clear from the record that both the trial judge and the majority of this department have no intention of ever letting a bisexual adopt a child. I refuse to participate in such a decision."[54]

The dissenting opinion makes it clear that the majority put much weight on the petitioner's sexual past, on his sexual interaction with men and women, on his "pure bisexuality," his "conduct bisexuality."[55] If the petitioner had never had sexual relationships with men, but had fantasized about homosexual conduct, I wonder if the court would have denied him the petition. Yet under Yoshino's definition, and mine, he would still have been bisexual. He would not, however, have fit the court's definition.

This is underlined by *D.L. v. R.B.L.*,[56] in which a wife asserted that her husband should not be granted custody of their children because he was a bisexual.[57] The trial court found that the husband was indeed bisexual, because of his "attachment to the more feminine-type articles [of furniture],"[58] but the Court of Civil Appeals wisely eschewed this reasoning for a preference for solid facts: if the wife could not show that her husband had sex with men, the court would not find him bisexual.[59] The court appeared to rely on "conduct bisexuality." Still, the court did affirm the ruling of custody to the wife, finding that the husband worked nights and the kids could remain together with her.[60]

In conclusion, bisexuality is largely *de facto* invisible in the legal world. The legal presumption of a person's sexuality is first heterosexuality, then homosexuality. If bisexuality is acknowledged, it must either be through the self-

51 *Id.* at 337.
52 *Id.* at 340.
53 *Id.*
54 *Id.*
55 *See id.*
56 D.L. v. R.B.L., 741 So.2d 417 (Ala. Civ. App. 1999).
57 *Id.* at 418-19.
58 *Id.* at 419.
59 *Id.* at 420.
60 *Id.*

identification of the individual or through the affirmative statements of another. Where that affirmative statement occurs, it must be supported by evidence indicating "pure bisexuality." The consequence of a revelation of bisexuality is generally negative: Ms. Rowland was fired, Schowengerdt was discharged and a father was prevented from adopting.

Interestingly, the military understands the distinction between these two manifestations of bisexuality, and wrote the general service requirements to prohibit both. By defining bisexuality as "engaging in" or having the "desire" or "intention" to engage in homosexual and heterosexual conduct, the military is insuring that conduct and identity bisexuals are prohibited from serving in the military, or, more likely, allowing the military the leeway to use any evidence to find that a service-member is bisexual and thus expelled.

II. COMPLICATION OF LEGAL ARGUMENTS

Of Yoshino's three incentives that monosexuals have in erasing bisexuality, the most important is the stabilization of sexual orientation.[61] He proposes that heterosexuals and homosexuals share an investment in stabilizing sexual orientation because to acknowledge the existence of bisexuality would make it more difficult to prove same-sex or opposite-sex desire to the exclusion of the other.[62] "[C]ontrast the ease of proving one is straight or gay in a world in which bisexuals are not acknowledged to exist with the difficulty of proving the same thing in a world in which bisexuals are recognized."[63] Erasing bisexuality "relieves" monosexuals "of the anxious work of identity interrogation."[64] Yoshino suggests that as the privileged orientation class, straight people also have their own distinct investment in the stabilization of sexual orientation.[65] If bisexuality is acknowledged, heterosexuality may not be the presumption.

Finally, Yoshino introduces the uniquely homosexual investment in stabilizing sexual orientation: "a desire to retain the immutability defense."[66] Yoshino asserts that "immutability has exonerative force because of the widely held belief that it is abhorrent to penalize individuals for matters beyond their control."[67] Yoshino delicately addresses the possibility that bisexuality may threaten immutability.[68] He is careful to establish that bisexuality itself may be immutable,[69] but establishes two ways in which bisexuality can be perceived as

61 Yoshino, *supra* note 2, at 400.
62 *Id.* at 453.
63 *Id*. at 400-01.
64 *Id*. at 402.
65 *Id*.
66 *Id*. at 405.
67 Yoshino, *supra* note 2, at 405.
68 *Id.*
69 *Id*.

overturning the concept of immutability.[70] First, the acknowledgement of bisexuality may make it impossible for a homosexual person to "prove" that she is homosexual.[71] Second, and more importantly, despite a bisexual arguing that he is immutably bisexual, he will always be perceived as having a "choice."[72] A bisexual will always be perceived as having a choice "because immutability offers absolution by implying a lack of choice."[73]

A. Equal Protection

Equal Protection prohibits state[74] and federal[75] governments from discrimination. In order to determine whether a government action is discriminatory and a violation of the Fourteenth Amendment, a court must first determine whether the group of people claiming to suffer from discrimination is worthy of constitutional protection. If the group is worthy of protection, the second determination is the level of scrutiny that should be applied to the government action in question. Justice Stone first introduced the idea that some groups of people should automatically be afforded constitutional protections; he called these groups "discrete and insular minorities."[76]

Over the past century, the Supreme Court developed an understanding that classification based on race, religion, and national origin is immediately suspect and subject to the highest level of scrutiny.[77] For other classes, there are three elements in the test for suspect classification under Equal Protection analysis, which determines which level of scrutiny the classification will receive.[78] In order to gain suspect classification, a group must be historically disadvantaged, politically powerless, and have a common immutable characteristic.[79] The Court has used this test to find *quasi-suspect* classification for sex.[80]

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[70] *Id.*

[71] *Id*.

[72] *Id*. at 406.

[73] Yoshino, *supra* note 2, at 406.

[74] U.S. CONST. amend. XIV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws. Id.* (emphasis added).

[75] *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Due Process Clause of the Fifth Amendment incorporates Equal Protection.)

[76] U.S. v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

[77] *See* Korematsu v. United States, 323 U.S. 214 (1944) and Loving v. Virginia, 388 U.S. 1 (1967).

[78] *See* City of Cleburn v. Cleburn Living Center, 473 U.S. 432 (1985), Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and Perry v. Schwatzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[79] Cleburn at 442-446.

[80] *See*, *e.g.*, U.S. v. Virginia, 518 U.S. 515 (1996) (holding that the Virginia Military Institute had to admit women because there was no equivalent educational facility available in the state. The Court

It is disputed as to whether sexuality should receive suspect or quasi-suspect classification. In *Romer v. Evans*, the Supreme Court overturned the passage of a Colorado amendment that prohibited any political body in the state from protecting people on the basis of sexual orientation.[81] But, rather than determining whether sexual orientation deserved suspect classification, Justice Kennedy held that the amendment would not even pass rational basis review, the lowest level of constitutional scrutiny.[82] In his dissent, Justice Scalia argued that "homosexuals" should not be afforded any suspect classification: he pointed to the political success of the LGBT rights movement as evidence of the group's political power.[83] There was no discussion in any of the opinions, however, about the relative historical disadvantage or immutability of sexuality.[84]

In 1989, seven years before *Romer*, the Ninth Circuit in *Watkins v. U.S. Army* did come to the conclusion that homosexuality deserved suspect classification.[85] The court examined each facet of suspect classification analysis, finding 1) that "homosexuals have historically been the object of pernicious and sustained hostility"[86] and 2) that even when gay and lesbian people do participate openly in politics, the lingering animosity towards homosexuality renders the participation ineffective.[87] The court then addressed immutability, acknowledging that while the Supreme Court has never rested suspect class analysis *solely* on immutability, it is nevertheless an important factor of the analysis.[88] The court easily found that because it would be abhorrent to ask a gay man to not only abstain from homosexual conduct, but to *change* his orientation, sexuality can be considered immutable for constitutional purposes.[89] This analysis led the court to find that homosexuality deserved suspect classification.[90]

Yoshino's illustration of the dependence on the immutability argument is brought into prominence through *Watkins*. Would the court have thought it so abhorrent to ask a bisexual man to abstain from homosexual conduct? Perhaps not. Again, this hypothesis has no bearing on the actual immutability of homosexuality or bisexuality. It is the public and legal perception of immutability that is threatened by bisexuality. If the Ninth Circuit were asked to determine if bisexuals deserved suspect classification, they might find it less "abhorrent" to ask a bisexual

applied intermediate scrutiny to the program) (citing Craig v. Boren, 429 U.S. 190 (1976)).

81 *See* Romer v. Evans, 517 U.S. 620 (1996).

82 *Id*. at 632.

83 *Id*. at 646 (Scalia, J., dissenting).

84 *See Romer*, 517 U.S. 620.

85 *See* Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988).

86 *Id.* at 1345 (citing Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.)).

87 *Id*. at 1348.

88 *Id*. at 1347.

89 *Id*. at 1347-48.

90 *Id*. at 1349.

to abstain from homosexual conduct, and therefore find him less deserving of constitutional protection.

B. Solutions

There are two solutions through which bisexuality can be successfully introduced into Equal Protection analysis without endangering suspect classification. The first solution comes from Yoshino's discussion of monosexuals' shared investment in the stabilization of sexual orientation.[91] The second solution arises from analysis of other protected classes.

The first solution to introducing bisexuality into Equal Protection analysis is by taking a broader view of immutability. Yoshino introduces this concept as "validity" as opposed to "immutability."[92] He argues that emphasizing the immutability of an identity compromises its validity, and vice versa.[93] He recognizes that immutability is an important step in the process of gaining acceptance and understanding of homosexuality, but at the same time worries that the emphasis on immutability alienates those that do not experience their sexuality as immutable.[94]

Legally, moving towards an argument of validity instead of immutability would be difficult, but there are glimmers of hope. The court in *Watkins* even understood that immutability is not complete immutability—it is "a traumatic change of identity."[95]

> Although the Supreme Court considers immutability relevant, it is clear that by 'immutability' the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes 'pass' for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. Reading the case law in a more capacious manner, 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a

91 Yoshino, *supra* note 2, at 400.
92 *Id.* at 406.
93 *Id.*
94 *Id.* at 407.
95 Watkins v. U.S. Army, 847 F.2d 1329, 1347 (9th Cir. 1988).

> person for refusing to change them, regardless of how easy that change might be physically.[96]

Following the Ninth Circuit's instructions and "reading the case law in a more capacious manner," other courts could allow parties to choose their own identities, and honor those identities—favoring "validity" over "immutability." The court would obviously take into consideration the same issues of credibility and truthfulness, but instead of the party's sexuality being a legal issue, the court would allow the party's declaration a presumption of validity.

The second solution through which bisexuality could be introduced to Equal Protection analysis without endangering suspect classification would be to remove immutability from the analysis altogether. There are several arguments for this: first, in some determinations, immutability is not taken into consideration at all. For example, religion is afforded suspect classification, while changing one's religious orientation is reverentially respected. Immutability is not a factor of determining whether religious freedom should be protected.[97] This suggests that immutability is not necessary for suspect classification analysis. Second, immutability continues to lose relevance as a factor with the continued globalization of the world and the continued increase in "pluralisms." As the Ninth Circuit implied above, many formerly immutable characteristics are now becoming pluralized.[98] Emphasis should be placed on political powerlessness and historical disadvantage instead of immutability. Courts are not in a place to make a scientific determination of immutability,[99] and nor should they be.

In *Schroer v. Billington*, Judge Robertson recognized that if the Constitution protects those who change their religion, we should protect those who change their sex.[100] The case was one of employment discrimination, not Equal Protection, but the analogy is valid:

> Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have

[96] *Id.*

[97] The debate on the immutability of sexuality is not settled. I propose that it does not matter whether sexuality is immutable or not. Some might argue that bisexuality proves that sexuality is mutable simply because the same person appears to "choose" people of different sexes or genders as romantic or sexual partners. One might compare religion similarly. Devout practitioners would no doubt argue that true religion is immutable and those that "change" or "choose" their religions are not true practitioners. But Equal Protection analysis assumes that Americans do not want to closely examine our neighbor's religious lives, instead granting them respect and protection. I propose we do the same with sexuality, granting our neighbor's sexualities the same respect and protection, despite any outward appearances of "choice" or "change." Removing immutability from the analysis creates those protections.

[98] *See id.*

[99] *See id.*

[100] *See* Schroer v. Billington, 577 F. Supp.2d 293 (D.D.C. 2003).

> traditionally carved such persons out of the statute by concluding that 'transsexuality' is unprotected by Title VII. In other words, courts have allowed their focus on the label 'transsexual' to blind them to the statutory language itself.[101]

Judge Billington held that while Diane Schroer changed her sex, which would make it mutable and by definition not protected by Equal Protection, she was in fact discriminated against *because of* sex, removing immutability from the analysis. By analogy, was immutability removed from the anaylsis of the protection of sexuality as a suspect class, the scientific and moral battle would be rendered moot. It would simply not matter whether someone "changed" their sexuality because any discrimination based on their sexuality would be suspect.

Reva Siegel and others have explored the possibility of decreasing the emphasis on immutability, arguing that constitutional protection should be based on the relative subordination of different groups, and not determined through the traditional Equal Protection analysis.[102] Anti-subordination theory allows for flexibility in analysis—allows groups to earn protection and others to slip out of protection as their relative subordination changes.[103] Ruth Colker pushes the use of anti-subordination theory as a more flexible framework by which courts can understand affirmative action policies.[104] By analogy, I believe that removing immutability from Equal Protection analysis or using anti-subordination theory could be a way to insure the inclusion of all alternative sexualities under the umbrella of sexual orientation.

Indeed, using a more flexible analysis could open the protections of the Constitution more explicitly to all of the erased sexualities between 100% heterosexual and 100% homosexual. If sexual orientation is understood to be valid and the court's determination is instead focused on the relative subordination of the group in question, protection could be made available to those who truly need it.

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[101] *Id.* at 306.

[102] *See* Reva Siegel & Jack Balkin, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

[103] Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups. As elaborated by Fiss and subsequent proponents, including Catharine MacKinnon, Charles Lawrence, Derrick Bell, Laurence Tribe, and Kenneth Karst, this principle is variously called the antisubordination principle, the antisubjugation principle, the equal citizenship principle, or the anticaste principle. The latter expression evokes the famous statement of John Marshall Harlan in *Plessy v. Ferguson* that there is no caste in the United States, as well as statements by framers of the Fourteenth Amendment that the amendment was designed to prohibit "class legislation" and practices that reduce groups to the position of a lower or disfavored caste. Fiss called his version of the antisubordination approach the "group disadvantaging principle" and he defined it as the principle that laws may not "aggravate" or "perpetuate" the subordinate status of a specially disadvantaged group. *Id*. at 9-10 (internal citations omitted).

[104] *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U.L. REV. 1003 (1986).

C. Marriage

Marriage is another area of the law in which bisexuality is virtually invisible. Same-sex marriage is a contentious topic among queer legal and non-legal theorists. Some theorists argue that the fight for same-sex marriage perpetuates the invisibility of bisexuality and other queer identities. *Bisexuality and Same-Sex Marriage* explores these themes.[105] Some opponents of same-sex marriage argue that if gays are permitted to marry, polygamy, polyamory, incest, bestiality, and who knows what else would have to be permitted.[106] This slippery slope conflation deserves dissection. There is a deep distinction between polygamy and polyamory on one hand and incest and bestiality on the other. Polygamy and polyamory involve relationships between or among consenting adults, just as same-sex and opposite-sex marriage do. Incest and bestiality involve parties that, for legitimate government reasons, we have decided do not have the capacity to consent to a sexual or marital relationship.[107]

Does it matter how many consenting adults are in the relationship as long as they have all consented? The answer touches upon issues of chauvinism, feminism, the best interests of children, and the availability of government benefits. But stepping outside of the legal theory, when a proponent of same-sex marriage argues that allowing same-sex marriage would *never* lead to legalization of polygamy or polyamory, she is erasing all non-dyadic relationships from the LGBT community. When we recognize bisexuality, a small collection of dots on the continuum between 100% homosexual and 100% heterosexual, we will begin to recognize all the other dots as well.

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[105] *See*, *e.g.*, Mia Ocean, *Bisexuals are Bad for the Same Sex Marriage Business*, 173 and Hameed (Herughuti) S. Williams, *A Bisex-Queer Critique of Same-Sex Marriage Advocacy*, 178 in BISEXUALITY AND SAME-SEX MARRIAGE (M. Paz Galupo ed., 2009).

[106] *See* Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, dissenting).

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

Id. *See also* Dale Carpenter, *Bad Arguments Against Gay Marriage,* 7 FLA. COASTAL L. REV. 181, 208 (2005).

> Slippery-slope arguments offer a parade of horribles that might be brought about by gay marriage, but they always take this form: "If we allow gay marriage, we will also have to allow [policy X], which would unquestionably be bad." The usual bad destination claimed to await us after gay marriage is polygamy, but one occasionally hears that gay marriage will also bring incestuous marriages, bestial marriages (humans marrying dogs, horses, or other animals), adult-child marriages, and marriages between humans and inanimate objects. Here only the polygamy variant of the slippery-slope argument is discussed, but the analysis applies equally to the other variants.

Id.

[107] Incest can be between consent adults, but public policy against child abuse and historic health concerns around sharing genetic material have lead to a societal disapproval.

CONCLUSION

> *It is that fearful emulation of this history of the Dominant Culture's response to those who differ/who choose to be different. It is fear that an already marginalized and jeopardized status will become confused and or obscured and/or extinguished by yet another complicated sexual reality seeking its safety and equal rights.*[108]

The trend of American civil rights is heading towards inclusion and protection. There will always be resistance from those wary of the expansion of positive rights and government power. It is the job of communities and allies to ensure that the trend continues as it has, protecting those who need protection and including those lacking inclusion.

Those struggles will often be difficult. The struggle for women's suffrage was hard fought and at the expense of black suffrage. The fight for black suffrage was hard fought and at the expense of many lives. The struggle for the removal of sexual orientation from a determination of one's worthiness to receive government benefits is still being fought, as is the fight to be free from discrimination. The LGBT community will need everyone to be invested in the fight.

In 2008, ENDA passed in the House of Representatives without protection for gender identity. The LGBT community rose almost as one to protest this outrage and demanded that employment protections cover both sexual orientation *and* gender identity. It was this display of solidarity that ensured that the next time ENDA was introduced, it covered both sexual orientation and gender identity. The uprising was the result of two movements: the transgender community's refusal to be marginalized and the larger LGBT community's understanding that it needed to stand by its brothers and sisters in this fight.[109]

The queer community is stuck with one another. We are lucky enough to represent all humans. Everyone has a sexual orientation and a gender identity, just as everyone has a race, a national origin, and a creed. We cannot, as a community, allow the complexity of human identity and sexuality to be our excuse for forgetting those among us who do not fit along the binary or into a neat definition. As humanity continues to expand and evolve, we will continue to discover new identities and expressions. We must be prepared to accept and address human sexuality and identity or we will fail as a movement.

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[108] Jordan, *supra* note 1, at 137-38.

[109] *See*, *e.g.*, Emily Douglas, *An Uneasy Alliance*, THE AMERICAN PROSPECT, Oct. 27, 2008, *available at* http://www.prospect.org/cs/articles?article=an_uneasy_alliance_08 and GetEqual, *ENDA Timeline: Broken Promises*, GetEqual.org, July 22, 2010, *available at* http://getequal.org/2010/07/enda-timeline-broken-promises/.