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Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy 10 Years after Bisexual Erasure

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"*if 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 introduces 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 shows that bisexuality is invisible, he makes sure to distinguish between the incidental invisibility of bisexuality, perhaps because of the low number of bisexuals, and its deliberate erasure. Erasure is a deliberate act that involves the participation of people who seek

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

2 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. From January 1, 2000 to January 1, 2010, the New York Times published well over 3000 stories including the word "homosexuality" and only 111 with the word "bisexuality." Search of Lexis News and Business Database, New York Times (May 4, 2010). In the same time frame, Reuters had 2343 stories containing "homosexuality" and only 38 containing "bisexuality." Search of Lexis News and Business Database, Reuters News (May 4, 2010). A search of all law journals over the same time period came up with over 3000 results for "homosexuality" and only 425 results for "bisexuality." Search of Lexis Law Reviews, CLE, Legal Journals & Periodicals Combined Database (May 4, 2010).

to erase. Yoshino theorizes that monosexuals (heterosexuals and homosexuals) created an epistemic[4] contract to erase bisexuality in social culture.[5] He argues that 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 a update on whether bisexuality has gained social visibility in the last ten years or an examination of whether that 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

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4 "As [Yoshino] defines 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." Bisexual Erasure at 392. "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.

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 impossible to prove a sexual orientation." *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 411. "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 sexuality harassment jurisprudence: " . . . liability 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,

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] Second, I argue that where bisexuality *is* legally relevant it has been erased within the legal culture because it is complicated—because it muddles legal arguments that depend upon the binary of sexuality. Yoshino addresses this reliance on the binary as a fundamental part of homosexual investment in stabilizing sexual orientation by erasing bisexuality, but I argue that this factor is much more prominent in legal culture than Yoshino presents it in the social context. I use the suspect class analysis under Equal Protection to show how bisexuality complicates legal arguments, and propose two solutions through which bisexually can be introduced into the Equal Protection analysis without compromising sexual orientation's suspect classification.

Bisexuality

Kenji Yoshino defines sexual orientation along three axes: desire, conduct, and self-identification.[12] He postulates that one's definition of bisexuality depends on which axis is used.[13] For the purposes of his paper, Yoshino uses the pure desire-based definition because he

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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. US, 944 F.2d 483 (Ninth Cir. 1991).

12 Yoshino, *supra* note 2 at 371.

13 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]

wishes to include those who have "unacted same-sex desires."[14] He further limits the definition to those with a sexual appetite or lust for both sexes and whose desire is more than incidental.[15]

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 he or she is a homosexual or bisexual.[16] 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."[17] The proposed Employment Non-Discrimination Act (ENDA), when passed, will contain the only federal definition of "sexual orientation."[18] ENDA would define sexual orientation as "homosexuality, heterosexuality, or bisexuality."[19] The Act would prevent discrimination on the basis of an employee's real or perceived sexual orientation or gender identity.[20]

Robin Ochs, "professional bisexual,"[21] 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

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"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 11 (1995) (numbering added). 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 at 372.

14 *Id*. at 375

15 *Id*.

16 10 USCS § 654 (2010).

17 *Id*. at § 654(f)(2).

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

19 *Id*.

20 *Id*.

21 BIOGRAPHY, BINETUSA, http://www.binetusa.org/faces.html.

the same time, not necessarily in the same way, and not necessarily to the same degree."[22] Her definition raises larger issues of pluralism and cross-categorization: bi- and multi-racialism, transsexuality and gender queer, polyamory and pansexuality. Ruth Colker calls people who are legally hard to define "hybrids."23 She struggles with "naming" bisexuality as such and argues that categorization can cause harms such as invisibility and the reinforcement of pejorative values.[24] 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.[25]

I realize, as Yoshino does,[26] 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 desire for both sexes" 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.

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22 ROBYN OCHS, SELECTED QUOTES BY ROBYN OCHS, http://www.robynochs.com/writing/quotes.html.
23 RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 15 (1996).
24 *Id* at 21.
25 *Id.* at 26, 32, 36.
26 "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.

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.[27] 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." Identity bisexuals are treated differently by courts depending on the court's perception of their sexual or romantic activities.

Identity Bisexuality

In general, speech or expressive conduct (conduct that carries an important message) is protected by the First Amendment.[28] This includes speech about one's sexual orientation, or "coming out speech."[29] Federal courts have been conflicted about the level of protection that

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27 N.B. 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 very far down the list.

28 U.S. Const. amend I.

29 *See*, *e.g.*, Gay Students Organization of the University of New Hampshire v. Bonner, 5019 F.2d 652 (First Cir. 1974) (holding that the Gay Students Organization had a right to association) and Gay Law Students Ass'n v. Pacific Telephone, 24 Cal.3d 458 (Cal. Sup. Ct. 1979) (finding that coming out as homosexual constituted political speech and was this protected). Sex itself is expressive conduct. 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 & Sex. 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*. In *Boy Scouts of America v. Dale*, the Boy Scouts argued that they had a right to hire only scout masters whose sexual conduct expressed heterosexuality. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). But the men who have sex with men also have a right to express love and acceptance of homosexuality through their sexual conduct as well. Garland at 227-42.

declarations of sexuality by school teachers should receive. In *Weaver v. Nebo School District*,[30] a federal district court said that a lesbian volley-ball coach's sexuality became a matter of public 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 property considered viewpoint restrictions. Such a one-sided approach to sexual orientation is classic viewpoint discrimination and is 'presumptively invalid.'"[31]

Nebo contrasts sharply, however, with *Rowland v. Mad River Local School District*,[32] 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. 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*,[33] which held that teachers cannot be fired solely on the basis of their speech on issues of public importance. The Sixth Circuit reversed upon the school district's appeal,[34] finding the Supreme Court's ruling in *Connick v. Myers*[35] more applicable than *Pickering*. *Connick* holds that issues not of public concern are not protected by the First Amendment.[36] The Supreme Court denied cert.[37] In an impassioned dissent, Justice Brennan and Justice Marshall bemoan the application of *Connick* and say that this case provides the Court with the opportunity to find that sexuality,

30 Weaver v. Nebo School District, 29 F.Supp.2d 1279 (D. Utah 1998).
31 *Id*. at 1286 (citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992)).
32 Rowland v. Mad River Local School District, 470 U.S. 1009 (1985) (cert. denied).
33 Pickering v. Board of Education, 391 U.S. 563 (1968).
34 Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984).
35 Connick v. Myers, 461 U.S. 138 (1983).
36 *Id*. at 147.
37 *Rowland*, 470 U.S. 1009.

and one's own sexuality, is indeed a matter of public concern. "I think it is impossible," Brennan says, "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."[38]

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 placed before it. In *Schowengerdt v. US*,[39] the Naval Reserve Board of Officers made a legal finding that Schowengerdt was a bisexual, despite his protest.[40] They made this finding based on photographs and correspondence found an envelope that the plaintiff had asked to be destroyed, showing him in "heterosexual and homosexual" situations.[41] 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.[42] 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."[43]

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38 *Rowland* at 1012.
39 Schowengerdt v. US, 944 F.2d 483 (Ninth Cir. 1991).
40 *Schowengerdt* at 486.
41 *Schowengerdt* at 485.
42 *Schowengerdt* at 489.
43 *Schowengerdt* at 490 (citing Secretary of the Navy Instructions (SECNAVINST) 1900.9D).

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 equated with "pure bisexuality": the even distribution of sexual desire and behavior between both sexes. If a party can only show that an individual has had sexual desire and relations with one gender, I believe that a court would find it difficult to call the individual bisexual; they would want to call the individual heterosexual or homosexual.

In *In the Matter of the Appeal in Pima County Juvenile Action B-10489*,44 the appellant was denied his petition for adoption. He sued, claiming that he was 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 member of both sexes . . . ." 45The Court of Appeals affirmed, holding that despite their finding that "[t]he fact that the appellate is bisexual is not unlawful, nor standing alone, does it render him unfit to be a parent. It is homosexual conduct which is proscribed."46 So despite the petitioner's declarations otherwise, the court affirmed his denial 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. The dissent was vehement: "It is clear from the record that both the trial judge an the majority of this department have no intention of ever letting a bisexual adopt a child. I refuse to participate in such a decision."47

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44 In the Matter of the Appeal in Pima County Juvenile Action B-10489, 151 Ariz. 335 (Ct. App. Ariz. 1986).
45 151 Ariz. at 337.
46 151 Ariz. at 340..
47 151 Ariz. at 340.

The dissenting opinion makes it clear that the majority was obsessed with the petitioner's sexual past, with his sexual interaction with men and women, with his "pure bisexuality," his "conduct bisexuality." If the petitioner had never had sexual relationships with men, had only fantasized, 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.*,48 in which a wife asserted that her husband should not be granted custody of their children because he was a bisexual. The trial court found that the husband was indeed bisexual, because of his "attachment to the more feminine-type articles [of furniture],"49 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.50 They relied 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.51 I wonder if Yoshino or I would have found the husband to be bisexual.

In conclusion, bisexuality is largely *de facto* invisible in the legal world. When it is acknowledged, it must either be through the self-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." 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

48 D.L. v. R.B.L., 741 So. 2D 417 (Ct. Civ. App. Ala. 1999).
49 *D.L.* at 419.
50 *D.L.* at 420.
51 *D.L.* at 420.

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.

Complication of legal arguments

Of Yoshino's three investments that monosexuals share in erasing bisexuality, the most important is the investment in the stabilization of sexual orientation.[52] 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- or opposite-sex desire to the exclusion of the other. "[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."[53] Erasing bisexuality "relieves" monosexuals "of the anxious work of identity interrogation."[54] Straight people also have their own distinct investment in the stabilization of sexual orientation, Yoshino says, as the privileged orientation class.[55] 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."[56] "Immutability has exonerative force because of the widely held belief that it is abhorrent to penalize individuals for matters beyond

52 Yoshino, *supra* note 2 at 400.
53 *Id*. at 400-01.
54 *Id*. at 402.
55 *Id*. at 402.
56 *Id*. at 405.

their control."[57] Yoshino delicately addresses the possibility that bisexuality may threaten immutability. He is careful to establish that bisexuality itself may be immutable,[58] but establishes two ways in which bisexuality can be perceived to up-turn immutability. First, the acknowledgement of bisexuality may make it impossible for a homosexual person to "prove" that she is homosexual.[59] Second, and more importantly, despite a bisexual arguing that he is immutably bisexual, he will always be perceived as having a "choice."[60] "This is because immutability offers absolution by implying a lack of choice."[61]

Equal Protection

The Equal Protection clause of the Fourteenth Amendment prohibits the federal government and state governments from discrimination.[62] In order to determine whether a government action is discriminatory and a violation of the fourteenth amendment, a court must first know whether the group of people claiming to suffer from discrimination are worthy of constitutional protection, and if the are worthy of protection, which level of scrutiny 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."[63]

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57 *Id*. at 405.
58 *Id*. at 405.
59 *Id*.at 405.
60 *Id*. at 406.
61 *Id*. at 406.
62 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.*") (emphasis added).
63 U.S. v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

Over the past century, the Supreme Court developed an understanding that classification based on race, religion, and national origin was immediately suspect and subject to the highest level of scrutiny. For other classifications, the Court has developed a three-variable test. There are three elements in the test for suspect classification under Equal Protection analysis. In order to gain suspect classification, a group must be historically disadvantaged, politically powerless, and have a common immutable characteristic. The court has used this test to find *quasi-suspect* classification for sex.[64]

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.[65] But rather than determining whether sexual orientation deserved suspect classification, Justice Kennedy said that the amendment would not even pass the lowest level of constitutional scrutiny, rational basis.[66] In his dissent, Justice Scalia argued that "homosexuals" should not afforded any suspect classification; he pointed to the political success of the LGBT rights movement as evidence of the group's political power.[67] There was no discussion in any of the opinions, however, about the relative historical disadvantage or immutability of sexuality.

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.[68] The court examined each facet of suspect classification analysis, finding 1) that "homosexuals have historically been the

64 *See*, *e.g.*, U.S. v. Virginia, 518 U.S. 515 (1996) (The Court held that the Virginia Military Institute had to admit women because there was no equivalently education facility available in the state. The Court applied intermediate scrutiny to the program) (citing *Craig v. Boren*, 429 U.S. 190 (1976)).
65 Romer v. Evans, 517 U.S. 620 (1996).
66 *Id*. at 632.
67 *Id*. at 646 (Scalia, dissenting).
68 Watkins v. U.S. Army, 847 F.2d 1329 (Ninth Cir. 1989).

object of pernicious and sustained hostility"[69] and 2) that even when gay and lesbian people do participate openly in politics, the lingering animosity towards homosexuality renders the participation ineffective.[70] The court then addressed immutability, acknowledging that while the Supreme Court has never rested suspect class analysis *solely* on immutability, it is an important factor of the analysis.[71] 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.[72] This analysis led the court to find that homosexuality deserved suspect classification.[73]

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

Solutions

There are two solutions through which bisexuality can successfully be introduced into Equal Protection analysis without endangering suspect classification. The first solution comes

69 *Id.* at 1345 (citing *Rowland v. Mad River Local School Dist.*, 470, U.S. 1009, 1014 (1985) (Brennan, dissenting)).
70 *Id*. at 1348.
71 *Id*. at 1347.
72 *Id*. at 1347-48.
73 *Id*. at 1349.

from Yoshino's discussion of monosexuals' shared investment in the stabilization of sexual orientation. 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."[74] He argues that emphasizing the immutability of an identity compromises its validity, and vice versa.[75] He recognizes that immutability is an important step of the process in gaining acceptance and understanding for homosexuality, but at the same time worries that the emphasis on immutability alienates those that do not experience their sexuality as immutable.[76]

Legally, moving towards an argument of validity instead of mutability would be difficult. But there are glimmers of hope. The court in *Watkins* even understood that immutability is not completely immutability – it is a "traumatic change in identity."[77]

> 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. *See* J. Griffin, Black Like Me (1977). 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

74 Yoshino, *supra* note 2 at 406.
75 *Id*.
76 *Id*. at 407.
77 *Watkins* at 1347.

> penalize a person for refusing to change them, regardless of how easy that change might be physically.[78]

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, mutability 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. 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. 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,[79] 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.[80] The case was one of employment discrimination, not Equal Protection, but the analogy is valid.

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78 *Id*. at 1347.
79 *Id*. at 74.
80 Schroer v. Billington, 577 F. Supp. 2D 293 (D.D.C. 2003).

> "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 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.[81]

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.[82] 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.[83] Ruth Colker pushes the use of anti-subordination theory as a more flexible framework by which courts can understand affirmative action policies.[84] 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%

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81 *Id*. at 306.

82 Reva Siegel & Jack Balkin, *Symposium: Fiss's Way: The Scholarship of Owen Fiss: I. Equality: The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

83 "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).

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

homosexual. If sexual orientation is understood to be "valid" and the court's determination is instead focussed on the relative subordination of the group in question, protection could be made available to those who truly need it.

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.[85] Some opponents of same-sex marriage argue the slippery-slope: if we allow gays to marry, next will be polygamy, polyamory, incest, bestiality, and who knows what else.[86] 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- and opposite-sex marriage do. Incest and bestiality involves parties that, for legitimate government reasons, we have decided do not have the capacity to consent to a sexual or marital relationship.

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85 BISEXUALITY AND SAME-SEX MARRIAGE (M. Paz Galupo, ed.) (2009).

86 *See*, *e.g.* 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.") and Dale Carpenter, *Symposium: State Marriage Amendments: Bad Arguments Against Gay Marriage,* 7 FL. 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.") (internal citations omitted).

Does it matter how many consenting adults are in the relationship as long as they all consented? The answer touches upon issues of chauvinism, feminism, the best interest 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 must recognize all the other dots as well.

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.*[87]

The trend of American civil rights is 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

87 June Jordan, *On Bisexuality and Cultural Pluralism*, in AFFIRMATIVE ACTS 137-38 (1998).

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, the Employment Non-Discrimination Act passed in the House of Representatives without protection for gender identity. The LGBT rose almost as one to protest this outrage and demand 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.

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.