

STUDENT WORK

GETTING BACK TO SEX: THE NEED TO REFINE CURRENT ANTI-DISCRIMINATION STATUTES TO INCLUDE *ALL* SEXUAL MINORITIES

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I. INTRODUCTION

As one of the most, if not the most, progressive and inclusive anti-discrimination acts for non-heterosexual¹ people in the United States, the District of Columbia Human Rights Act² can still be improved. The Act already protects individuals on the basis of “sexual orientation,”³ but it would be more inclusive if its language were changed to protect individuals on the basis of their “lawful sexual conduct.” There is an important difference in the meanings of these two phrases. “Sexual orientation,” a product of the identity theory of sexuality,⁴ refers to sexuality as an inborn trait or identity. “Lawful sexual conduct,” rather, recognizes that it is not only an individual’s identity that causes some to be discriminated against; an individual’s conduct and actions are also equally relevant to anti-discrimination analysis.

Basing anti-discrimination protections for non-heterosexuals on the identity theory of sexuality tacitly assumes that all non-

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1. The Author uses the term “non-heterosexual” to refer to any person who does not experience his or her sexuality as solely and completely desire for—and sexual conduct with—persons of a different sex.

2. D.C. Code § 2-1401 (West 2007).

3. *Id.* at § 2-1401.01.

4. For a definition and more in-depth look at the identity theory of sexuality, consult *infra* Part II(C)(2).

heterosexual individuals experience their sexuality in the same way. Certainly, it is possible that not all heterosexuals experience their sexuality in the same way, yet somehow they all fit into that category. Some non-heterosexuals experience their sexuality as an integral part of their identity. They may view their desires as innate and act according to them. Other non-heterosexuals may say that they “choose” to have relationships or sex with same-sex partners. This “choice” does not necessarily mean that such desire can be turned on and off; rather, it can mean that those individuals experience their sexuality as a fluid concept rather than as a rigid structure.

Why does it matter in the law that people experience sexuality differently? If “sexual orientation” is protected, is not everyone protected? Yes and no. The argument goes like this: If bisexuals have relationships with different-sex and same-sex partners, then they are sometimes heterosexual and sometimes homosexual. Therefore, if “sexual orientation” is a protected class, then bisexuals are covered no matter whom they are dating. The reality of bisexuality, or any non-heterosexuality, however, does not fit so neatly into that paradigm. That argument assumes that an individual is either wholly homosexual or wholly heterosexual, which gives rise to the secondary binary: monosexuals versus bisexuals.⁵ Even in the wake of more sweeping protections on the basis of “sexual orientation,” the inevitable consequence of this binary is that society will further marginalize bisexuals as sexual deviants.

Shifting statutory language to protection of “lawful sexual conduct” would more adequately protect bisexuals by broadening the protected class. “Sexual orientation” requires one to have a *defined* sexual orientation to be protected by the statute. Since bisexuals do not fit into either the hetero- or homosexual categories, they have the possibility of getting lost and not being adequately protected. For example, prohibiting the firing of indi-

5. The Author uses the term “bisexual” to mean the opposite of monosexual, while recognizing that “bisexual” falsely assumes that there are only two sexes. The term “pansexual” “encompasses all kinds of sexuality . . . includ[ing] heterosexuality, homosexuality, bisexuality, and sexual behavior that does not necessarily involve a coupling . . . [such as] masturbation, celibacy, fetishism, and fantasy.” Jennifer Ann Drobac, *Pansexuality and the Law*, 5 Wm. & Mary J. Women L. 297, 300–301 (1999). “Pansexuality serves to deconstruct the stereotypical interrelation between biological sex and behavior in legal reasoning, as well as in the ordering of more banal human relations and activities.” *Id.* at 304.

viduals based on their engagement in “lawful sexual conduct” instead of their identity would reduce possible pretextual⁶ excuses for firing them.

This Article will discuss the language and interpretation of anti-discrimination laws that include “sexual orientation” as a protected class, specifically the District of Columbia Human Rights Act and its interpretation in the case of *Parents & Friends of Ex-Gays, Inc. v. District of Columbia Office of Human Rights*.⁷ Part II of this Article will discuss the current state of the law relating to gay rights. It will also explore the identity theory of sexuality, the immutability defense, and bisexuality in the context of anti-discrimination law. Part III of this Article will address bisexual erasure, the problem created by focusing solely on immutability as the basis of discrimination protections. Part IV of this Article proposes a solution to the problem of bisexual erasure that broadens protections for non-heterosexuals, especially in the context of employment and housing. Replacing the language “sexual orientation” in anti-discrimination statutes with the language “lawful sexual conduct” will bypass the secondary binary system of monosexuals versus bisexuals⁸ and thus provide more adequate protections to all non-heterosexual individuals.

II. LAW & SOCIETY: THE CURRENT STATE OF THE LAW AND IDENTITY THEORY'S IMPACT

Since the United States Supreme Court's opinion in *Bowers v. Hardwick*,⁹ which allowed states to criminalize homosexual con-

6. See generally *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (explaining pretextual arguments in the context of the burden shifting analysis applied in employment discrimination cases that was originally articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

7. Civ. Action No. 0003662-08 (D.C. Super. June 26, 2009) (available at http://pfox.org/Judge_Ross_Memorandum_Opinion.pdf).

8. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *Stan. L. Rev.* 353, 390–391 (2000) [hereinafter Yoshino, *Erasure*] (explaining that, although it may be human cognition that has a tendency to binarize, the reason that the homosexual versus heterosexual binary prevailed over the bisexual versus monosexual binary is political). “Bisexuality is invisible not because we are innately blind to intermediate categories, but because agonistic politics have bifurcated the continuum we would otherwise see.” *Id.* at 391.

9. 478 U.S. 186 (1986); but see *infra* nn. 67–74 and accompanying text (discussing the Supreme Court's later overturning of the *Bowers* ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

duct, the gay-rights movement has abandoned reliance on a fundamental right to privacy.¹⁰ Instead, gay-rights activists¹¹ have relied on the Equal Protection Clause of the Fourteenth Amendment.¹² They assert that sexual orientation is an immutable characteristic and, as such, is a suspect class for purposes of Equal Protection analysis.¹³ This shift away from privacy and due process in the wake of the *Bowers* decision, which conflated homosexuality and sodomy, reflects gay-rights activists' strategic move in political strategy from framing the issue as one about homosexual conduct to one focusing on sexual orientation as one's identity,¹⁴ which should be protected.¹⁵ In order to legitimize the homosexual conduct that was criminalized in *Bowers*,¹⁶ gay-rights activists now urge that sexual orientation is part of a person's identity.

Identity theory claims that sexual orientation is an immutable characteristic with which one is born, rather than a choice, as pro-family activists advocate.¹⁷ While the Religious Right¹⁸ frames

10. See Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 Berkeley Women's L.J. 103, 103 n. 2 (1994) (explaining how privacy was used to gain equal rights for gays).

11. This Article will use the terms "gay-rights activist" and "pro-gay activist" interchangeably. The Article will primarily use "pro-gay activist" to emphasize support of non-heterosexuals.

12. U.S. Const. amend. XIV, § 1 (stating, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Arriola, *supra* n. 10, at 104 (observing that the gay and lesbian communities are focusing their arguments for rights under the Equal Protection Clause of the United States Constitution).

13. See generally Arriola, *supra* n. 10, at 114–117 (discussing the difficulty of proving sexual orientation as immutable in the context of a cultural belief in "sexual preference" and the need, regardless, to protect non-heterosexuals from prejudicial acts).

14. See generally *id.* (analyzing legal discrimination models in terms of feminist legal theory in the wake of the *Bowers* decision).

15. Pro-gay litigation has a number of goals including, first, foremost, and the subject of this Article, to seek remedies for victims of anti-gay discrimination. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 Stan. L. Rev. 503, 528 (1994). Other goals include, but are not limited to: seeking "symbolic attributes of justice" by restoring victims to some level of dignity and civil engagement; seeking to establish rules of law to stop discrimination against gay men, lesbians, and bisexuals; and seeking to replace the negative meanings contained within anti-gay discrimination with positive meanings in the protection of such individuals through courts, which have authority to produce social meaning. *Id.*

16. See *Bowers*, 478 U.S. at 191 (reasoning, "[n]o connection between family, marriage, or procreation on one hand and homosexual activity on the other ha[d] been demonstrated").

17. For a definition and more in-depth look at the identity theory of sexuality, consult *infra* Part II(C)(2).

homosexuality as a freely chosen sexual behavior,¹⁹ identity theory responds by bifurcating conduct and status, focusing solely on status.²⁰ Framing the debate in terms of an individual's status or identity sets up the Equal Protection argument that sexual minorities are part of a "discrete and insular minorit[y]" that constitutes a suspect class because of the immutability of the characteristic.²¹ Identity theory seeks to establish the equivalence of sexual minorities and other minorities such that the statement "I'm gay" would be functionally equivalent to—and no more controversial than—the statement "I'm Lithuanian."²²

Identity theory also responds to claims that non-heterosexuals should not enjoy the same civil rights as heterosexuals. The theory combats the argument that practicing non-heterosexuality is immoral, wrong, and not worthy of protection. Instead, identity theory treats practicing non-heterosexuals as a "blameless minority" that deserves equal protection from discrimination.²³ For example, if it is out of a woman's control that she is attracted to women—if she is not consciously making a choice to have sex with other women—then she cannot be punished for her status as a lesbian. Thus, the theory aims to prove that sexual orientation is an involuntarily inherited status.

Immutability, the fundamental base of identity theory, combats the Religious Right's accusation that anything other than

18. The Religious Right is also referred to as the "Christian Right" and aspires to "mobiliz[e] religious traditionalists from all backgrounds." John C. Green, *Antigay: Varieties of Opposition to Gay Rights*, in *The Politics of Gay Rights* 121, 136 n. 3 (Craig A. Rimmerman, Kenneth D. Wald & Clyde Wilcox eds., U. Chi. Press 2000). "The Christian Right is a social movement concentrated among Evangelical Protestants and dedicated to restoring 'traditional values' in public policy." *Id.* at 124. Such anti-gay supporters generally view homosexuality as engaging in sinful behavior, but often express sympathy for homosexuals and want to help them change their "lifestyles." *Id.*

19. See Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 *L. & Sexuality* 1, 61–64 (2003) (recounting the case of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the United States Supreme Court found that requiring the Boy Scouts to reinstate an openly homosexual assistant scout master would force the Boy Scouts to send the message that homosexuality is a legitimate form of human conduct).

20. *Id.* at 64.

21. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938) (raising the possibility that statutes directed at members of certain "discrete and insular minorities" may be subject to higher judicial scrutiny).

22. Knauer, *supra* n. 19, at pt. IV (discussing the legal arguments centering on "identity and equivalence.").

23. *Id.* at 6.

exclusive heterosexuality is unnatural.²⁴ Identity theory directly opposes such arguments by stating that biology, or nature, is *exactly* what determines one's sexuality.²⁵ Additionally, immutability falls directly in line with the principle that one should not be punished for his or her status or for something over which he or she has no control.²⁶ If sexual orientation is immutable, then the individual has no control over it, converting his or her sexual orientation into merely a status instead of controllable conduct, as it was framed in *Bowers*. Thus, homosexual conduct is not immoral and should not be punished because it is natural, uncontrollable, and immutable. Indeed, if people are born this way, then they deserve the same rights as everyone else. Despite its seemingly perfect fit into the landscape of the individual-rights doctrine, however, the identity theory of sexuality does have its problems.

While gays and lesbians have been gaining ground using identity politics,²⁷ bisexuals have become increasingly visible. Bisexuals complicated gay and lesbian communities as well as the political narrative surrounding anti-discrimination law by drawing attention to the inadequacy of the convenient, but practically

24. For an example of such a belief, see Focus on the Family, *Pure Intimacy, The Value of Male and Female*, <http://www.pureintimacy.org/piArticles/A000000665.cfm> (accessed July 28, 2010). "Living out God's design for sexuality in our own lives and families builds healthy communities. More than merely denouncing sin, we must be motivated to proclaim God's divine plan for sexuality while at the same time holding fast to the rules He has clearly spelled out in the Bible for the protection of our well-being and the well-ordering of society." *Id.* The essence of the Religious Right/pro-family's arguments is that homosexuality is immoral. For a more thorough discussion of the Religious Right and the morality issue, see Knauer, *supra* n. 19, at 46–48, 83–86 (summarizing the Religious Right's view of homosexuality and explaining that until the pro-gay side engages in questions of morality, the impasse between pro-gay forces and the Religious Right will continue).

25. For a discussion of the scientific basis for identity theory, see Knauer, *supra* n. 19, at 27–32.

26. See *Robinson v. Ca.*, 370 U.S. 660, 666–667 (1962) (holding that laws criminalizing a "status" are unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment and under the Fourteenth Amendment). Robinson was convicted of being addicted to illegal narcotics. *Id.* at 662–663. The Supreme Court reversed his conviction, analogizing status to an illness. *Id.* at 667–668. Since an illness can be innocently and involuntarily acquired, it is cruel and unusual to punish an individual for that status. *Id.* at 666–667. Therefore, immutability of one's sexuality functions as the non-heterosexual's status, for which he cannot be denied Due Process or be criminally punished.

27. "Identity politics" refers to the use of the identity theory of sexuality in pro-gay activism and politics. For a discussion of identity theory as a basis for legal recognition of the civil rights of sexual minorities, consult *infra* Part II(C)(2).

untenable, identity theory.²⁸ The argument for inclusion of “sexual orientation” in anti-discrimination law based on the immutability²⁹ of that characteristic creates a false dichotomy between heterosexuals and homosexuals.³⁰ In reality, same-sex desire lies on a continuum for each biological sex, leading some to be exclusively heterosexual, some to be exclusively homosexual, and the bisexuals to be in the middle.³¹ By including “sexual orientation” in anti-discrimination law, it is inevitable that legislatures, and more likely courts, will find themselves engaging in a political struggle to define that term.³²

A. Bisexuality

Ascertaining a group of individuals who comprise the bisexual label is difficult because the definition of “bisexual” differs widely among scholars, theories, and even bisexuals themselves.³³ Conventionally, sexual orientation is defined along three axes: desire, conduct, and self-identification.³⁴ Definitions may involve any, all, or a combination of these axes, creating a wide divergence in the group of people labeled as “bisexual.”³⁵ The importance of using desire as an axis to define sexual orientation is that desire is a major factor³⁶—if not the only factor in some cases—that informs an individual’s conduct with respect to his or

28. Halley, *supra* n. 15, at 505.

29. For a discussion of immutability and the secondary binary, consult *infra* Part II(C).

30. For a discussion of the false dichotomy created by immutability, consult *infra* nn. 131–133 and accompanying text.

31. For a further discussion of the sexual orientation continuum, see Yoshino, *Erasure*, *supra* n. 8, at 380–381 (evaluating the influential “Kinsey scale,” which gauges sexuality based on a spectrum of “no homosexual contacts” to “no heterosexual contacts,” with varying degrees of bisexual desire in between). Sexuality labels also do not stop with these three categories, but for purposes of this Article, the Author will highlight problems with immutability for bisexuals, or generally, without labeling, those who do not fit within the false dichotomy.

32. Halley, *supra* n. 15, at 542 (discussing various sexuality studies to arrive at a definition of sexual orientation that would satisfy political interests in the subject).

33. See Marjorie Garber, *Vice Versa: Bisexuality and the Eroticism of Everyday Life* 28–34 (Touchstone 1996) (introducing various concepts of bisexuality).

34. Yoshino, *Erasure*, *supra* n. 8, at 371.

35. *Id.* For an extensive discussion of different groups that result after manipulations of these axes, see *id.* at 371–375.

36. While important, desire is beyond the scope of this Article.

her sexuality.³⁷ In contrast to desire, self-identification directly corresponds to identity theory,³⁸ as it is the outward expression of one's identity.

Bisexuals experience same-sex desire on various levels.³⁹ Some bisexuals claim they are sex-blind. They fall in love with, or desire, the *individual*, effectively looking beyond that individual's sex or gender. Alternatively, some bisexuals are attracted to males and females equally or at varying degrees of desire. Still, others have their own preferences that favor or disfavor certain groups.⁴⁰

While bisexuality may be difficult to define precisely, it is certain that bisexuality is *not* simply the free movement between homo- and heterosexuality within the homosexual versus heterosexual dichotomy.⁴¹

Bisexuality means that your sexual identity may not be fixed in the womb, or at age two, or five. Bisexuality means you may not know all about yourself at any given time. "How does one reify fluidity? How does one make a category of the potential to have either kind of relationship?"⁴²

Actual performance of one's sexuality or conduct is a tangible measure of sexuality, while desire and identity, whether ascribed or self-proclaimed, are not accurate measures.⁴³ After a bisexual comes out, there is pressure for that individual to present him or herself as straight.⁴⁴ By some definitions, the conduct model of sexual anti-discrimination law embraces bisexuals who engage in

37. At this point, Professor Yoshino chooses a narrow view of bisexuality that uses only the desire model. *Id.* at 374–375. He restricts desire to mean only "sexual appetite or lust" that is more than incidental. *Id.* at 375. For purposes of this Article, the Author argues that since desire informs conduct, conduct should be the basis by which "sexual orientation" is judicially interpreted. Replacing that term with "lawful sexual conduct" would eradicate the need to argue for certain fact-specific interpretations.

38. For a more in-depth discussion of identity theory and immutability, consult *infra* Part II(C).

39. Yoshino, *Erasure*, *supra* n. 8, at 373–375 (discussing the various levels of same-sex desire that bisexual individuals experience).

40. *Id.*

41. *Id.* at 430 (discussing the difficulty bisexuals face in developing an identity).

42. Garber, *supra* n. 33, at 86.

43. *See id.* at 58–59 (discussing the mystery of the "true bisexual").

44. Yoshino, *Erasure*, *supra* n. 8, at 430.

sexual and nonsexual conduct with both same-sex and different-sex partners.

One issue facing bisexuals in the anti-discrimination arena is “the stereotype of the bisexual as swinger, the promiscuous, dangerous, nonmonogamous transgressor of boundaries.”⁴⁵ The promiscuous bisexual stereotype is especially relevant to the marginalization of bisexuals in anti-discrimination law in the wake of increased protection for sexual minorities because bisexuals are perceived as possessing a choice. They are seen as having a doubling of potential partners, which is assumed to lead to double conduct and, thus, promiscuity. This stereotype assumes a quantitative rather than a qualitative approach. Quantitatively, the bisexual has twice as many romantic prospects as any gay or straight monosexual.⁴⁶ Qualitatively, the bisexual has possible interests in either a trait or group of traits that transcends gender or sex, or alternatively, has interests in different people altogether.⁴⁷ Under the quantitative approach, the bisexual’s *ability* to form relationships with members of both sexes is treated as a *need* to form relationships with members of both sexes—either concurrently or consecutively.⁴⁸

The problem of conceptualizing bisexuality inside and outside of the law has deep roots in theories of sex, gender, and sexuality. “Bisexuality tends to be erased by the two monosexual orientations (heterosexual and homosexual) . . . because bisexuality threatens the stability of monosexuality by revealing that sexual orientation does not have to be fixed.”⁴⁹ If sexual orientation is not fixed, then how can it be immutable?⁵⁰

45. Garber, *supra* n. 33, at 86. Some wish to get rid of this stereotype to legitimize their desires and diminish their conduct because they feel it would help to insert them into the mainstream, which is governed by heterosexuality and monogamy. Yoshino, *supra* n. 8, at 426–428. The situs of the debate generally centers around marriage. *Id.* at 427. One side argues that gays must assimilate into heterosexist culture to be a legitimate minority while the other side argues against marriage as the establishment of heterosexist and sexist values. *Id.* Others are not interested in doing away with promiscuity because they view monogamy as part of the heterosexual establishment. *Id.* at 426.

46. See Yoshino, *supra* n. 8, at 421 (stating that bisexuality can raise issues of sexual jealousy). If a woman is bisexual, it is illogical to assume that her “chances of getting a date on Saturday night” have doubled. *Id.*

47. See *id.* at 420–421 (explaining how bisexuality destabilizes norms of monogamy).

48. See *id.* at 421–422 (describing Paula Rust’s theory about the qualitative concern of bisexuals’ ability to form relationships).

49. Gretchen Adel Myers, Student Author, *Allowing for Cultural Discussion of Queerness and Pansexuality: Sex/Gender/Sexual Belief Systems, the Religion Clauses, and the*

B. The Current Legal Landscape

Gay-rights activists have latched onto the identity theory of sexuality to secure civil rights for two main reasons. First, the Supreme Court conflated homosexuality with sodomy in *Bowers*, resulting in the coupling of homosexuality and certain sexual acts.⁵¹ Second, as a result of *Bowers*, many lower court decisions perpetuated this coupling, which pro-gay activists sought to separate.

The Supreme Court's decision in *Bowers* made it constitutionally permissible for states to criminalize sodomy,⁵² what some consider the sexual conduct associated with homosexuality. The Court reasoned that no case the parties cited supported the proposition that private sexual conduct between consenting adults is constitutionally protected from states' proscription, and refused to expand fundamental rights to include homosexual sodomy.⁵³ The Court described fundamental liberties as those "that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed,'"⁵⁴ or as those that are "deeply rooted in this Nation's history and tradition."⁵⁵ The Court found that neither definition extended to homosexual sodomy.⁵⁶

[O]therwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home [I]f respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other

Ideal of Pluralism, 38 Stetson L. Rev. 409, 421 (2009) (citing Yoshino, *Erasure*, *supra* n. 8, at 359–364).

50. For further discussion on bisexual erasure, consult *infra* Part III. For a more detailed analysis of the interplay among sex, gender, and sexuality, see Myers, *supra* n. 49, at 417–435 (discussing representations of sex, gender, and sexuality in the law and their theoretical roots).

51. Knauer, *supra* n. 19, at 52.

52. 478 U.S. at 191, 194.

53. *Id.*

54. *Id.* at 191–192 (quoting *Palko v. Conn.*, 302 U.S. 319, 325–326 (1937)).

55. *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

56. *Id.* (stating, "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.").

sexual crimes even though they are committed in the home.⁵⁷

The Supreme Court responded to Hardwick's argument in *Bowers* that morality is an irrational basis for the law under Due Process by retorting that "[t]he law . . . is constantly based on notions of morality, and[,] therefore, if laws based on such reasoning are always invalid, "the courts will be very busy indeed."⁵⁸

Pro-gay activists found the Supreme Court's conflation of homosexuality and sodomy in *Bowers* detrimental to their cause and immediately sought to decouple conduct and identity, focusing their strategy on Equal Protection cases that involved identity rather than conduct.⁵⁹ The litigants now framed their cases as ones of discrimination based on their *identities* as gay, lesbian, bisexual, or transgender individuals.⁶⁰ As the argument goes: Gay men and lesbians constitute a suspect class for purposes of Equal Protection under the Fourteenth Amendment because the trait by which they are classified, and that constitutes the basis for discrimination against them, is immutable.⁶¹

Gay-rights activists also pursued the immutability defense to combat the enormous momentum of negative jurisprudence that erupted in the wake of the *Bowers* decision. Three subsequent decisions, including one in the United States Supreme Court, mechanically followed in *Bowers'* footsteps. The courts in each case—*Ben-Shalom v. Marsh*,⁶² *Woodward v. United States*,⁶³ and *Padula v. Webster*⁶⁴—reasoned that because homosexual conduct can be criminalized, homosexuals are not a suspect class.⁶⁵ *Bowers* and its progeny all frame the issue in terms of conduct and all return negative answers for non-heterosexuals. Strategically, activists turned to a model of civil rights that was tried and true: identity. Bifurcating homosexual conduct and homosexual identity allowed pro-gay activists to sidestep the *Bowers* roadblock and

57. *Id.* at 195–196.

58. *Id.* at 196.

59. Halley, *supra* n. 15, at 507, 511.

60. *Id.* at 511.

61. *Id.* at 507.

62. 881 F.2d 454 (7th Cir. 1989).

63. 871 F.2d 1068 (Fed. Cir. 1989).

64. 822 F.2d 97 (D.C. Cir. 1987).

65. *Id.* at 103; *Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464–465.

to pursue Equal Protection claims for homosexuals—this time as an insular, historically disadvantaged, and politically powerless minority.⁶⁶

Seventeen years later, in *Lawrence v. Texas*,⁶⁷ the Supreme Court overruled *Bowers*,⁶⁸ holding criminal sodomy laws unconstitutional under the Due Process Clause of the Fourteenth Amendment.⁶⁹ The Supreme Court in *Lawrence* formally adopted the reasoning from Justice Stevens' dissent in *Bowers*.⁷⁰ In that dissent, Justice Stevens concluded that, although a state may have traditionally viewed a practice as immoral, immorality is an insufficient reason to criminalize or bar that practice.⁷¹ He also reasoned that the Fourteenth Amendment protects decisions married people make concerning the physical intimacies they share as a form of liberty and that this protection extends to unmarried persons.⁷²

The *Lawrence* Court recognized that the criminalization of particular kinds of sexual intimacy not only limits the autonomy of individuals to decide which kinds of sexual acts they want to engage in and with whom; it also, directly and necessarily, has an impact on the autonomy of individuals to build relationships that are based, in part, upon that sexual intimacy.⁷³

66. Knauer, *supra* n. 19, at 64. Tragically, the pro-gay activists overlooked important differences between sexual orientation and sex on one hand, and sexual orientation and race on the other—the two paradigmatic suspect classes based on individual identity—that would eventually exclude some of its own members.

67. 539 U.S. 558 (2003).

68. *Id.* at 578 (holding, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

69. *Id.* at 576–577. “[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Id.* at 579.

70. *Id.* at 578.

71. *Bowers*, 478 U.S. at 216 (Stevens, Brennan & Marshall, JJ., dissenting).

72. *Id.*

73. Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 Minn. L. Rev. 1184, 1212–1213 (2004). Interestingly, one commentator has criticized Justice Stevens' opinion for recognizing heterosexual privacy rights and then using an equality principle to apply those rights to homosexuals, rather than using a substantive equality analysis for homosexuals. Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas*:

In reaching its decision, the Court focused on the fact that such conduct was occurring between two consenting adults and that nothing unlawful, such as obscene public conduct or prostitution, was involved.⁷⁴

The seventeen-year road to *Lawrence* was paved with immutability arguments and identity theory. Indeed, such identity-based arguments were used in the National Lesbian and Gay Law Association's amicus brief in support of the petitioners in *Lawrence*.⁷⁵ The National Lesbian and Gay Law Association's brief argued for heightened scrutiny for homosexuals as a suspect class for purposes of Equal Protection analysis.⁷⁶

C. Immutability

Immutable characteristics are those that cannot easily be changed or those that form an integral part of one's identity.⁷⁷ For example, weight is not an immutable characteristic because it can be changed; conversely, race is a prime example of an immutable characteristic because it is incapable of being changed.⁷⁸ Immutable characteristics are immune from environmental influence.⁷⁹ One court has described an immutable characteristic as one that is *hard* to change, rather than one incapable of being changed or

Privacy, Dominance, and Substantive Equality Theory, 30 Women's Rights L. Rptr. 442, 451–452 (Spring/Summer 2009). While Gilreath recognizes the underlying equality push in *Lawrence*, she concludes that the opinion also “serve[s] to further entrench heteronormative dominance at the expense of real equality.” *Id.* at 443 (footnotes omitted).

74. *Lawrence*, 539 U.S. at 578.

75. Br. of Gay Law Assn., The Asian Am. Leg. Def. and Educ. Fund, Action Wisconsin, The Bay Area Law. for Individual Freedom, The Bay Area Transgender Lawyers' Assn., Gay and Lesbian Laws. of Phila., Gay and Lesbian Laws. Assn. of S. Fla., Gaylaw, The Lesbian and Gay Law Assn. of Greater N.Y., The Lesbian and Gay Laws. Assn. of L.A., The Lesbian and Gay Bar Assn. of Chi., The Mass. Lesbian and Gay Bar Assn., The Minn. Lavender Bar Assn., The N.W. Women's Law Ctr., The Oregon Gay and Lesbian Law Assn., The Stonewall Bar Assn., The Tom Homann Law Assn. of San Diego, and The Wash. Lesbian and Gay Legal Socy. as Amici Curiae in Support of Petrs., 2003 WL 152348 at *10, **22–25 (2003), *Lawrence v. Texas*, 539 U.S. 558 (2003).

76. *See generally id.* (arguing for a finding of homosexuality as a suspect class and, therefore, receiving heightened scrutiny in the face of disparate treatment).

77. *See* Knauer, *supra* n. 19, at 33–34 (explaining that gays and lesbians are arguing for additional rights under the theory that homosexuality is an immutable characteristic).

78. Halley, *supra* n. 15, at 512–513. Though some may argue that Michael Jackson disproved this theory, Halley notes that skin color is not always the same as race, as there are many variations of skin tones within a race. *Id.* at 555.

79. *Id.* at 522.

as a characteristic that is part of one's identity.⁸⁰ In the context of sexual orientation, this definition means that one is born with a predisposition for being attracted to persons of one sex or another; heterosexual males are predisposed to be attracted to females, homosexual males are predisposed to be attracted to males, and so on.

At its most basic level, the immutability of a characteristic releases the person from all responsibility for that characteristic.⁸¹ Framing sexual orientation as an immutable and involuntarily acquired characteristic—much like being Italian or having dark skin—has gained popularity among sexual minorities and their advocates. Since identity theory “responds to a particularly contemptuous and dismissive form of anti-gay animus,”⁸² it is often the only resource sexual minorities have to combat discrimination from loved ones and others, and to persuade sexual minorities that they can have same-sex desire or relationships while remaining fully human.⁸³ For all intents and purposes, they would explain their sexual orientation as unchangeable.⁸⁴ However, immutability as justification for one's sexuality has consequences reaching much further than interpersonal relationships and has been adapted by pro-gay activists to garner support for conferring suspect class status on sexual minorities.

80. *Watkins v. United States Army*, 847 F.2d 1329, 1347 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989). “[T]he 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.” *Id.* Immutability is a core identity under this theory, not necessarily an unchangeable characteristic, but one that is difficult to change. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1819 (1996) [hereinafter Yoshino, *Suspect Symbols*].

81. *Supra* n. 26 (discussing the *Robinson* case in which the Supreme Court found laws that punish an individual for his or her unchangeable characteristics to be unconstitutional).

82. Halley, *supra* n. 15, at 567.

83. *Id.* “[I]mmutability can be a proxy for empathy failure, given that people who know they will never have a characteristic are less likely to empathize with those who do.” Yoshino, *Suspect Symbols*, *supra* n. 80, at 1817 (arguing that the case of homosexual mutability is a better proxy for empathy failure). The use of immutability on the interpersonal level, however, is not the focus of this Article.

84. For bisexuals, this argument may fall apart even on the general, societal level. Loved ones in particular may feel uncomfortable with the idea that the self-professed bisexual has same-sex and different-sex desires and experiences. One could explain, however, that the fact that he or she is attracted to both sexes (in whichever proportion) is an unchangeable fact about him or her.

1. Immutability and Equal Protection

Equal Protection analysis requires a determination of the level of scrutiny to be applied.⁸⁵ Gay-rights activists strive toward heightened judicial scrutiny for evaluating such issues. Courts use a four-factor analysis to determine whether a group constitutes a suspect class and, therefore, whether it should receive strict or heightened scrutiny. These factors are: (1) whether the group suffers from a history of purposeful discrimination; (2) whether the group is defined by a trait that has no relationship with one's ability to contribute to society; (3) whether the group is disadvantaged by prejudice or inaccurate stereotype; and (4) "whether the trait defining the [group] is immutable."⁸⁶ There have been no Supreme Court decisions that have accepted sexual orientation as an immutable characteristic. However, the question has been addressed in a series of cases by the Ninth Circuit Court of Appeals. In *Watkins v. United States Army*⁸⁷ (*Watkins I*), the court determined sexual orientation to be an immutable characteristic for purposes of evaluating whether sexual orientation constitutes a class for which heightened scrutiny under Equal Protection should be given.⁸⁸ The court stated, "[A]llowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws."⁸⁹ In the en banc opinion in *Watkins v. United States Army*⁹⁰ (*Watkins II*), the court concluded that sexual orientation "is immutable for the purposes of equal protection doctrine," treating it as a suspect class entitled to strict scrutiny.⁹¹

85. *Watkins*, 847 F.2d at 1335–1336.

86. *Id.* at 1346.

87. *Id.*

88. In this case, the court analyzed whether homosexuals were a suspect class for purposes of Equal Protection under the Fifth Amendment. *Id.* The court explained, however, "[t]he equal protection component of the Fifth Amendment imposes precisely the same constitutional requirements on the federal government as the Equal Protection Clause of the Fourteenth Amendment imposes on state governments." *Id.* at 1335, n. 9.

89. *Id.* at 1348.

90. 875 F.2d 699.

91. *Id.* at 726, 728.

The first mention of immutable characteristics for purposes of Equal Protection was Justice Brennan's opinion in *Frontiero v. Richardson*,⁹² where he stated,

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility"⁹³

While Justice Brennan did not extend this reasoning so far at the time, it does *imply* that disabilities imposed on a group because of traits determined to be "accidents of birth," or immutable traits, would not be tolerated. Whether the characteristic that separates a class is immutable is important for determining what level of judicial scrutiny will be applied.⁹⁴ Regulations that burden a suspect or quasi-suspect class are subject to some form of heightened scrutiny beyond rational basis review, which only requires a government interest to be rationally related to the classification.⁹⁵ One pro-gay activist goal is to obtain heightened scrutiny for sexual minorities using the immutability argument because heightened scrutiny means more protection for sexual minorities' interests.⁹⁶

It is in the context of Equal Protection under the Fourteenth Amendment⁹⁷ where the "nature versus nurture" debate arises and immutability becomes a significant factor.⁹⁸ Immutability is

92. 411 U.S. 677 (1973) (holding that federal statutes that required females to prove dependency of their spouses for increased quarters allowances violated due process).

93. *Id.* at 686 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)). For a discussion on legal responsibility for an individual's own status, consult *supra* n. 26 and accompanying text.

94. *Watkins*, 847 F.2d at 1345–1347.

95. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439–443 (1985) (refusing heightened scrutiny to the mentally retarded).

96. The Author uses the term "heightened scrutiny" to mean any judicial scrutiny that is higher than rational basis review. *Id.* at 443, 446.

97. The Fourteenth Amendment states, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

98. The factors courts consider when determining whether a class is suspect for purposes of Equal Protection are: (1) whether the group "has suffered a history of purposeful discrimination"; and (2) whether the discrimination is grossly unfair such that it is invidious. *Watkins*, 847 F.2d at 1345–1346. In determining whether discrimination is

one of the criteria courts use to determine whether a group of individuals that shares a common trait constitutes a suspect class; if so, any classification the government makes based on that trait would be subject to heightened scrutiny when evaluating the classification under the Equal Protection Clause of the Fourteenth Amendment.⁹⁹ “Suspect class analysis . . . asks whether the resources of the state are being used to enforce, confirm, and validate social hierarchies.”¹⁰⁰ In this case, that trait is sexual orientation, and the social hierarchy avoided is one in which non-heterosexuals are far below and not equal to heterosexuals.

2. Immutability Defense: The Evolution of the Identity Theory

The immutability defense depends on the empirical claim that one’s sexual orientation is determined at birth or shortly thereafter, such that it is unchangeable and, therefore, immutable.¹⁰¹ The defense is strictly based on the identity theory of sexuality, which posits that sexual orientation is not merely a label for conduct. Rather, it is a person’s innate identity that determines his or her sexual preference, whether or not he or she performs the actions commonly associated with that identity. Under this theory, a woman can identify as a lesbian but never have sex with another woman.

Identity theory morphs into the immutability *defense* when it is used to combat anti-gay animus from the state.¹⁰² In this context, pro-gay activists use the immutability argument or identity theory to defend a protected status for sexual minorities in anti-discrimination laws against attacks by the Religious Right and other conservatives.¹⁰³ “Pro-family” activists claim that sexual

invidious, courts consider: “(1) whether the disadvantaged class is defined by a trait that ‘frequently bears no relation to ability to perform or contribute to society’; (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; and (3) whether the trait defining the class is immutable.” *Id.* at 1346 (quoting *Frontiero*, 411 U.S. at 686 (plurality)).

99. *Id.* at 1347–1349.

100. Halley, *supra* n. 15, at 567.

101. *Id.* at 507.

102. As scientific experiments were published and the Human Genome Project evolved, biological explanations for sexuality were uncovered, which spurred the rise of the immutability defense. *See id.* at 512–513 (discussing the evolution of the immutability argument).

103. *See id.* at 511 (explaining litigation strategy post-*Bowers*).

orientation should not be a constitutionally protected class because such protection would result in “special rights”¹⁰⁴ for gays and would impermissibly support the “gay agenda.”¹⁰⁵ Thus, identity theory forms the basis for legal recognition of civil rights for sexual minorities. Since the claim that sexual orientation is biologically determined has become mainstream, it has opened the door for its use in legal arguments to secure meaningful constitutional protection for sexual minorities.¹⁰⁶

III. ERASING BISEXUAL EXPERIENCE FROM THE ANTI-DISCRIMINATION PARADIGM

While the identity theory works to afford sexual minorities more civil rights, it is an imperfect theory that has important negative consequences for some members of the group. First, identity theory presumes that people experience only opposite-sex desire or only same-sex desire, making homosexuality and heterosexuality mutually exclusive.¹⁰⁷ This is patently untrue.¹⁰⁸ The mere fact that the label “bisexual” exists is a testament to the falsity of that assumption.¹⁰⁹ Second, identity theory excludes entire groups of people, including bisexuals, who do not fall neatly into the socially constructed heterosexual versus homosexual dichotomy. Gaining gay rights based on identity theory will create a

104. Knauer, *supra* n. 19, at 78–83 (explaining the origins of the anti-gay slogan “special rights” as coming from the 1992 Colorado Amendment 2 campaign that ultimately resulted in *Romer v. Evans*, 517 U.S. 620 (1996)); see *Romer*, 517 U.S. at 620–636 (holding that the amendment in question made homosexuals unequal to everyone else in violation of the Equal Protection Clause); Traditional Values Coalition, *Contribute to TVC*, http://www.traditionalvalues.org/donate_free_video.php (accessed July 28, 2010) (giving a free video titled *Gay Rights/Special Rights* with a donation to the organization).

105. See Traditional Values Coalition, *supra* n. 104 (describing the video as explaining the gay agenda).

106. Halley, *supra* n. 15, at 504.

107. “Difference defined [is] identity affirmed” Yoshino, *Suspect Symbols*, *supra* n. 80, at 1823.

108. For a discussion about identity theory’s impact on bisexuality, consult *supra* Part II(A). See also Yoshino, *Erasure*, *supra* n. 8 (providing three explanations for the relative invisibility of bisexuality when compared to homo- and heterosexuality).

109. Similarly, the mere fact that there are people who wish to have, and do have, operations to change their physical bodies to match up with their psychological gender, which society has labeled “transsexuals,” is also a testament to the falsity that sexuality falls neatly into the homosexual/heterosexual dichotomy. Transsexuality, however, is beyond the scope of this Article. For a letter from a transsexual woman to her parents describing her experience and struggles, see generally Astrid Elliott-Pascal, *Dear Mum and Dad*, 29 *J. Psychosomatic Obstetrics & Gynecology* 1, 5–7 (2008).

hole that leaves bisexuals unprotected because they do not identify as either homosexual or heterosexual. Without filling this hole, narrow interpretation of “sexual orientation” could create a sexual underclass of new deviants that would include bisexuals, among other groups. Lastly, identity theory leaves out the element of conduct that is especially relevant when debating whether sexual minorities should be considered a suspect class. Conduct is what makes each group—heterosexual, homosexual, bisexual, or otherwise—different.

A. Bisexual Erasure

Bisexual erasure is the marginalization and slow erasing of bisexuals from the benefits of gay-rights activism because of the political struggle between the polarities of the binary: heterosexuals and homosexuals.¹¹⁰ Based on the political model of bisexual erasure, both homosexuals’ and heterosexuals’ interests are served by erasing the existence of bisexuals.¹¹¹ As the intermediate between two polarized viewpoints in a political struggle for anti-discrimination protections, bisexuals are forced to “choose sides” in the debate, which, of course, only reinforces the notion that bisexuals have the freedom to choose.¹¹² The political model of bisexual erasure isolates identity theory and the immutability argument as the forces at work between the binaries.¹¹³ It calls on groups to pick a label with which to align themselves politically.¹¹⁴ Interestingly, those self-identified labels could be based on any of the three definitional axes of sexual orientation—heterosexual, homosexual, bisexual—or even something else unknown. The symbiotic relationship between homosexuals and heterosexuals in this political structure is known as “the epistemic contract of bisexual erasure.”¹¹⁵

110. Yoshino, *Erasure*, *supra* n. 8, at 391. Professor Yoshino posits three models of bisexual erasure: ontic, cognitive, and political, where the political, he believes, is the strongest. *Id.* at 389–390. Only the political model is referenced here.

111. *Id.* at 391.

112. *Id.* (observing that politics has divided the continuum, causing bisexuals to become politically invisible as they are forced to choose sides).

113. *Id.* (arguing that bisexuals’ invisibility continues because of the “overlapping political interests” of monosexuals from both sides).

114. *Id.*

115. *Id.*

B. The Epistemic Contract and the Formation of a Secondary Binary

The epistemic contract of bisexual erasure is a social contract between individuals that arises unconsciously and manifests itself as a social norm.¹¹⁶ Both heterosexuals and homosexuals—the monosexuals—have interests in bisexual erasure for the purpose of stabilizing sexual orientation:¹¹⁷ For heterosexuals, that interest is stabilizing heterosexuality, since that identity is privileged; for homosexuals, that interest is stabilizing homosexuality, “insofar as they view that stability as the predicate for the ‘immutability defense.’”¹¹⁸ Bisexuality threatens monosexuals “because it makes it impossible to prove a monosexual identity,”¹¹⁹ either as homosexual or heterosexual.

Homosexual interests and heterosexual interests converge, although they start in different places.¹²⁰ Heterosexuals erase bisexuals when they claim, for example, that bisexuality is just a phase rather than a legitimate orientation or that a bisexual individual is just a homosexual in denial.¹²¹ Homosexuals erase bisexuals categorically in the same ways as heterosexuals—they erase bisexuals as a class by making the assumption that bisexuals “prefer” one sex over the other and assign a binary label to that person based on that preference.¹²² Homosexuals erase bisexuals as individuals by describing bisexuality as a phase and are generally skeptical of persons who profess attraction to all sexes, equally or not.¹²³ Homosexuals erase bisexuals by delegitimizing them as “fence-sitters,” “closet cases,” or “traitors,” often accusing them of trying to retain “the best of both worlds,” also known as heterosexual privilege.¹²⁴

116. Yoshino, *Erasure*, *supra* n. 8, at 391–392.

117. *Id.* at 362.

118. *Id.* For more on the immutability defense, consult *supra* Part II(C)(2) (discussing how identity theory develops into the immutability defense in terms of anti-discrimination law and gay rights).

119. Yoshino, *Erasure*, *supra* n. 8, at 362.

120. *Id.*

121. *Id.* at 395–396. Heterosexuals, albeit irrationally, see bisexuals as the bridge for the HIV infection to cross over from homosexuals to heterosexual populations, especially because of their supposed promiscuity. *Id.* at 396.

122. *Id.* at 397–398.

123. *Id.* at 398.

124. *Id.* at 399.

Some individuals who experience anti-gay discrimination do not rely on the immutability argument, and these individuals are usually bisexuals.¹²⁵ They “understand themselves [as having] chosen the form of their desire or the ways in which it structures their lives.”¹²⁶ This creates a problem in anti-discrimination law because the immutability defense “offers no theoretical foundation for legal protection of those gay men and lesbians who experience their sexual orientation as contingent, mutable, chosen.”¹²⁷ Aside from the self-identified gay men and lesbians who experience their sexuality as mutable, regardless of bisexuals’ true experiences, gay and straight communities often perceive bisexuals as having a mutable orientation—a choice to be exclusively homosexual or exclusively heterosexual.¹²⁸ “This exclusion will only get worse as a distinctive movement of bisexuals takes shape”¹²⁹ Legal theories of anti-discrimination “should protect the entire social class on whose behalf it is articulated.”¹³⁰

The dichotomy between homosexuals and heterosexuals, which the immutability argument creates, excludes this middle group of bisexuals. But are they really the middle group? The answer depends on whether the dichotomy between heterosexual and homosexual is true.¹³¹ While the purpose of this Article is not to debate the reasons why this dichotomy is false, but simply to explain how this dichotomy hurts bisexuals in the political context of anti-discrimination law, nearly all pro-gay activism has centered on the identity theory and, thus, on the truth of the heterosexual versus homosexual binary.¹³² Moreover, whether this binary is true, false, or even useful, it is not the only binary at work. Cognitive theory says binary epistemology is incomplete, which puts bisexuals not on both sides of the homosexual versus

125. Halley, *supra* n. 15, at 519–520.

126. *Id.* at 526. Lesbians report experiencing their same-sex desire more out of choice than gay men. Yoshino, *Erasure*, *supra* n. 8, at 407. This phenomenon is thought to arise from a political choice growing out of feminism. *Id.*

127. Halley, *supra* n. 15, at 528.

128. *Id.*

129. *Id.*

130. *Id.*

131. See Yoshino, *Erasure*, *supra* n. 8, at 390 (discussing the various levels of same-sex desire that bisexual individuals experience).

132. For more information on this topic, consult *supra* Part II(C).

heterosexual dichotomy, but on one side of a different dichotomy: bisexual versus monosexual.¹³³

Once sexual orientation is a widely protected class in anti-discrimination law, the status of bisexuals may still be in limbo because the political narrative used to gain such rights—identity theory—marginalizes them in relation to sexual minorities as a group. In the gay-rights arena, identity theory perpetuates the heterosexual versus homosexual dichotomy. This dichotomy is a binary label growing out of constructivism and labeling theory. Labeling theory concerns the “ways in which individuals designated by others . . . come to occupy the meanings and institutions assigned to them”¹³⁴ and how they manage those identities.¹³⁵ Such labels are the product of constructivism, which is the concept that “human activities of perception, conceptualization, description, or work produce or maintain . . . some part of the world or the world itself.”¹³⁶ Labeling theory assumes that individuals are the sources of epistemic constructions, but little work has been done to explore how these social constructions reflect disparate power of the ruling class.¹³⁷ In this case, the ruling class can be either heterosexuals ruling non-heterosexuals or monosex-

133. Yoshino, *Erasure*, *supra* n. 8, at 390 (describing the same-sex desires that bisexual persons may feel). For more information on cognitive theory, see *id.* (explaining cognitive theory as an explanation for the widespread use of binaries). The Author uses the term “monosexual” to include individuals who experience only same-sex or only different-sex desire. Additionally, the Author avoids the use of the term “opposite sex” to reflect the reality that there are not just two sexes as biology has seemingly determined. Highlighted is the difference between sex, biology, and gender, a product of social construction that is fluid, changeable, experiential, and that greatly influences sexuality as it relates to this Article. For a more in-depth discussion of these topics, see generally Anne Fausto-Sterling, *Sexing the Body* (Basic Books 2000) (describing her theory of five, rather than two, sexes) and Suzanne J. Kessler & Wendy McKenna, *Gender: An Ethnomethodological Approach* (U. Chi. Press 1985) (using the ethnomethodological approach to deconstruct sex and gender). Kessler and McKenna’s position is that “gender is a social construction, that a world of two ‘sexes’ is a result of the socially shared, taken-for-granted methods [that] members use to construct reality.” *Id.* at vii. Their position is based on “the ethnomethodological perspective[,] . . . which asserts that the ‘irreducible facts’ in which members of a group believe are given their sense of objectivity and reality through the course of social interaction.” *Id.* If gender is socially constructed, then the desire for each sex is related to that construction, which means that it is not absolute and the outliers are determined by the power of other groups within the construction.

134. Halley, *supra* n. 15, at 550.

135. *Id.*

136. *Id.*

137. *Id.* at 551.

uals ruling bisexuals.¹³⁸ As Professor Yoshino puts it, “[I]t is not fencesitting, but the fence, that is the problem”¹³⁹ As one can see, this dichotomy springs forth from the marginalization of sexual minorities, so it is ironic that identity theory utilizes this dichotomy as a resource for seeking gay civil rights.

This definition gives rise to the counterargument that bisexuals do not need to be protected beyond adding “sexual orientation” to anti-discrimination statutes. The easy argument is that bisexuals are protected under heterosexuality or homosexuality: If a bisexual person is with a person of a different sex, he or she is considered a heterosexual for discrimination law purposes and is covered; if a bisexual person is with a person of the

138. Social power and marginalization in the sexuality minority context serve as cause and effect and show the progression of bisexuals as a marginalized minority within sexual minorities, becoming an underclass of sexual deviants over time as legal acceptance of homosexuality advances; one bisexual activist comments, “Anyone who can access heterosexuality at some point is living a more socially privileged life than a lesbian is” Jennifer Baumgardner, *Look Both Ways: Bisexual Politics* 195 (Farrar, Straus & Giroux 2007). While there is an obvious power struggle within the gay rights movement between those who wish to replicate the lives of their heterosexual counterparts with same-sex partners and those who have a “queer” outlook, for those who believe that sexuality is far more complex than socially constructed binaries and dichotomies, and outside of it between heterosexuals and non-heterosexuals, this statement does not necessarily ring true. See *id.* at 227 (describing how some people’s lives do not make sense to others who believe sexuality is simple). While it may be true that for heterosexual women, choosing to be with men puts them closer to the top of the patriarchy, it does not necessarily follow that bisexuals who choose to be with different-sex partners suddenly have access to privilege.

Bisexuality is more akin to the “one-drop rule” in racial discrimination; if you have just one drop of black blood, you are black. Similarly, if you have had one sexual encounter with a person of the same sex, you are no longer purely heterosexual. Bisexuality under various sexuality studies, including the Kinsey study, more closely follows this “one-drop rule” when it comes to homosexual encounters or experiences. See Garber, *supra* n. 33, at 58 (discussing the mystery of the “true bisexual” and how the Kinsey scale influenced the fame and falsehood of bisexuality); Yoshino, *Erasure*, *supra* n. 8, at 380–382 (summarizing Alfred Kinsey’s studies on sexual behavior of males and females and explaining cross-sex desire on his scale); see also Halley, *supra* n. 15, at 540–542 (discussing bisexuality and the Kinsey scale).

Once a person reports that he or she has had a homosexual experience, that person is immediately labeled as some degree of non-heterosexual, even though the rest of his or her sexual interactions for the rest of his or her life may be completely heterosexual. *Id.* The Kinsey scale has been criticized for enforcing the idea that heterosexuality and homosexuality are mutually exclusive, though Kinsey himself designed it to defeat the use of those labels as personal designations. *Id.* at 541 (critiquing one sexuality study for misappropriating the Kinsey scale and using it to further the use of “homosexual” and “heterosexual” as personal designations).

139. Yoshino, *Erasure*, *supra* n. 8, at 409. “[I]t is not bisexuality, but the line establishing binary categorization, that needs to be erased.” *Id.*

same sex, he or she is considered homosexual for discrimination law purposes and is covered. This argument is slippery, however, because it identifies the subject person only in relation to his or her counterparts. Does he or she not have his or her own identity? What shapes that identity? How does that identity translate into protection under anti-discrimination law?

Bisexuals are left out of current protection schemes because the theory on which such protection is based excludes them.¹⁴⁰ The argument that bisexuals are protected whether they “choose” to be “gay” or “straight” at a particular time and place, or are perceived in those ways, rests on a fundamental misunderstanding of bisexuality. To avoid the exclusion of bisexuals from the protections of anti-discrimination laws that include sexual orientation, sexuality in all forms, including bisexuality, should be defined based on conduct and not identity.

In terms of the secondary binary—bisexuals versus monosexuals—the existence of Yoshino’s epistemic contract of bisexual erasure threatens the monosexuals’ immutability defense.¹⁴¹ This defense is flawed because it is an implied apology that resists the conversion demand by saying “I cannot change” rather than by saying “I will not change.” It suggests that electroshock treatment for homosexuals is wrong because it does not work. But such treatment would be no less wrong if it did. “Such a defense also leaves bisexuals, who can choose to express only cross-sex desire, without a defense for any expression of same-sex desire.”¹⁴² The gay political narrative’s identity theory of proving one is homosexual or not is threatened by bisexuals because, even if one could say he is immutably bisexual, that statement takes away the exoneration previously available to homosexuals under the same theory.¹⁴³ Bisexuality, by definition, involves choice at its most basic level, which takes away the monosexual’s legitimacy gained by “being born that way.”¹⁴⁴

140. See generally Yoshino, *Erasure*, *supra* n. 8 (analyzing bisexuality and the immutability defense and concluding that bisexuality threatens the immutability defense).

141. *Id.* at 405–406.

142. Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 48 (Random House 2007) [hereinafter Yoshino, *Covering*].

143. Yoshino, *Erasure*, *supra* n. 8, at 405–406.

144. *Id.*

The immutability argument and identity theory alone fall short because they ignore that such an identity is characterized by certain voluntary conduct that constitutes practicing self-identification.¹⁴⁵ It also falls short because it only addresses whether homosexual orientation is changeable and not the argument that homosexuality is bad or harmful.¹⁴⁶ The defense automatically excludes those who do not assert their homosexuality as immutable.¹⁴⁷ In the gay community, opinions differ as to whether sexual orientation refers only to one's identity, which would support an immutability argument, or if it also pertains to conduct, which may imply that there is choice involved. Thus, the immutability argument alienates some members of the gay community by either forcing them to identify with an experience that they have not had or by overlooking the experiences of a significant portion of the gay community.

In a world where gays and straights are both protected and are equal in terms of the law, it would be more likely for a bisexual to get fired because of perceived sexual deviance in the form of promiscuity, non-monogamy, or simply "not making up his mind" than it would be for a homosexual to get fired for simply being gay. In the former case, the bisexual has no remedy because he or she was not fired because of any immutable status, but rather because of *conduct*.

C. Relying on Science to Afford Civil Rights to Sexual Minorities Is Risky Business

The claim that sexual orientation is "an immutable, unchosen, and benign characteristic"¹⁴⁸ necessarily relies on scientific research.¹⁴⁹ Though scientific inquiries about biological causes of homosexuality date back to the 1950s, experts thus far have been

145. Halley, *supra* n. 15, at 523 (discussing the criticisms of pro-gay essentialism).

146. *See id.* (providing additional explanation of pro-gay essentialism and its critiques).

147. Yoshino, *Suspect Symbols*, *supra* n. 80, at 1819.

148. Knauer, *supra* n. 19, at 6.

149. For a brief history of the science behind sexual orientation and immutability, see *id.* at 10–32 (explaining the various scientific explanations for the homosexual condition). The identity theory of sexuality for gaining civil rights "asserts a distinction between status and conduct that seems tailor-made for post-*Bowers v. Hardwick* jurisprudence where appeals to equality principles based on minority status may offer the greatest opportunity for legal reform." *Id.* at 33.

unable to come up with a sound biological theory of causation for homosexuality.¹⁵⁰ What little research has been done on the subject has focused primarily on gay men and has proved generally inconclusive among all groups.¹⁵¹ No “gay gene” has been discovered nor has any meaningful correlation between brain structure and sexuality been identified, despite pro-gay activists’ heavy reliance on such genetic markers.¹⁵² Thus, identity theory wholly depends on the unverified claim that sexual orientation is biologically determined at birth and cannot be altered.¹⁵³

It is risky for gay-rights activists to use this “science” to support their claim to civil rights because the pro-family activists can easily and truthfully counter that scientists have been unable to prove any biological or genetic relationship to sexual orientation.¹⁵⁴ While pro-gay activists cry “shared identity,” the pro-family activists cry “shared pathology” and “chosen lifestyle.” This dialogue—“I was born this way,” “you chose this lifestyle,” “no,” “yes,” “no,”—quickly dissolves into a juvenile argument instead of making some political or social headway in the fight for equal rights. Not to mention that, as science and technology advance, genetic traits may become more and more susceptible to human manipulation.¹⁵⁵ If the main opponents of civil rights for sexual minorities want to focus their strategy on choice and conduct, then it would be most productive for pro-gay activists to respond directly to that argument. After all, what is sexual orientation without the conduct that goes with it?

As a legal strategy for gaining anti-discrimination protections for gays and lesbians, the immutability argument does not respond to legal arguments made on the other side, specifically, that non-heterosexual behavior is morally wrong.¹⁵⁶ Anti-gay public policy thrives even if the fact that the trait is immutable is

150. *Id.* at 27–29.

151. *Id.* at 28.

152. *Id.* at 28–29.

153. Halley, *supra* n. 15, at 507.

154. See Knauer, *supra* n. 19, at 27–32 (explaining the history behind the science of immutability).

155. Yoshino, *Covering*, *supra* n. 142 (pondering scientific research on homosexuality and noting the assumption that biological traits are immutable and cultural traits are mutable). “If scientists find a gay gene before gays have done the cultural work of securing the validity of homosexuality, gays will be more endangered than [they] are today.” *Id.*

156. Halley, *supra* n. 15, at 567.

taken at face value, which it usually is not.¹⁵⁷ For example, the Traditional Values Coalition Web site lists eighteen organizations that will help rid people of their same-sex desires and counsels that no one is born homosexual, but rather that homosexuality is a mental disorder that can be fixed.¹⁵⁸ The anti-gay political narrative focuses on the behavior associated with homosexuality, calling it immoral, freely chosen, and nonequivalent to heterosexuality.¹⁵⁹ As discussed, pro-gay forces have countered this attack with claims of nature, immutability, and equivalence, completely leaving out any reference to sexual conduct, which seemed to be the underlying point of contention in the first place.¹⁶⁰ Pro-gay activists continually rely only on identity theory, which avoids all discussion of overt sexuality and leaves only the pro-family, pro-religion, and anti-gay activists to address sex. Gay men, lesbians, and bisexuals have completely given up their right to openly discuss sex, conduct, and behavior, leaving the other side to do all the talking. This strategy is unwise because non-heterosexuals essentially “risk reinforcing . . . highly negative images and perpetuating a disempowering split of sexuality from identity.”¹⁶¹

*IV. CHANGING “SEXUAL ORIENTATION” TO “LAWFUL
SEXUAL CONDUCT” IN THE DISCTRICT OF COLUMBIA
HUMAN RIGHTS ACT WILL MORE ADEQUATELY PROTECT
BISEXUALS IN ALL ANTI-DISCRIMINATION CONTEXTS*

Problems with relying solely on the immutability defense are most easily seen in anti-discrimination law, although many other areas of law are affected by the false heterosexual/homosexual dichotomy. Because the outward-most sign of one’s sexuality is the conduct that accompanies the identity, it is crucial to include sexual conduct as the basis for protection against discrimination.

157. *Id.*; see Focus on the Family, *Do You Think Homosexuals Should Be Granted Special Rights?* http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=1216 (accessed July 28, 2010) (answering the title question with an affirmative “no”). “Being genetically inclined to do immoral things does not make immoral behavior right.” *Id.*

158. Traditional Values Coalition, *Causes and Cures of Homosexuality and Gender Identity Disorders*, <http://www.traditionalvalues.org/resources/index.php> (accessed July 28, 2010).

159. Knauer, *supra* n. 19, at 6.

160. *Id.* at 46–50 (deconstructing the pro-family counter-narrative).

161. *Id.* at 60.

Identity by itself does not protect all sexual minorities, but rather only those who identify as strictly homosexual.¹⁶² The desired outcome is for all sexual minorities to be statutorily or constitutionally protected against discrimination in all contexts, including but not limited to: housing, employment, and benefits. Simply adding “sexual orientation” to an anti-discrimination statute is not enough. To protect *all* sexual minorities, a change in the language of statutes currently protecting “sexual orientation” is needed. Legislatures should be encouraged to revise “sexual orientation,” as it appears in anti-discrimination statutes, to include a person’s “lawful sexual conduct” so they may better protect citizens.¹⁶³ This broader language will fill the gap created by the immutability defense and identity theory of sexuality because it will include bisexuals as well as other disfavored groups, thus avoiding the creation of a new underclass of sexual deviants.

A. Benefits to Bisexuals

If “sexual orientation” were expanded to encompass discrimination based on any “lawful sexual conduct,” bisexuals would be adequately protected by the District of Columbia Human Rights Act and similar statutes that protect sexual orientation. This interpretation is positive for the whole community for three reasons.

First, bisexuals would no longer be forced to assimilate to the false dichotomy of heterosexual versus homosexual. They would be adequately protected from discrimination no matter their choice of partners or the conduct in which they engage throughout their lives. This conduct includes sexual and nonsexual conduct.

Interpreting “sexual orientation” as inclusive of all “lawful sexual conduct” also bypasses the need to label or categorize individuals. Labeling takes power away from bisexuals in the political sphere with respect to their sexuality and is the undergirding of the immutability argument. This change in language is a first step in removing socially constructed labels from legal matters by removing the need to ascribe a label of homosexual or heterosex-

162. For a thorough discussion of the problems with identity theory, consult *supra* Part II(C).

163. See *Lawrence*, 539 U.S. at 579 (concluding that “every generation can invoke [the Constitution’s] principles in their own search for greater freedom”).

ual to all conduct and identity. The result of eliminating these labels is full inclusion of all sexual minorities under one phrase, “lawful sexual conduct,” without having to make any large-scale doctrinal advances beforehand.¹⁶⁴ It is both inclusive and efficient.

Second, in response to the Religious Right, which argues that such protections are “special rights” for those who engage in immoral conduct that leads to illegal conduct such as bestiality, incest, rape, and polygamy, this broader language solves the problem by tackling those arguments head-on. The slippery slope argument that protecting sexual orientation in any way opens the floodgates for protection of other “immoral” behaviors such as bestiality, prostitution, and polygamy would no longer hold water because the language allows only for protection of *lawful* sexual conduct. As the conduct, sexual or otherwise, must be *lawful* under the laws of the state and federal governments to be protected, and the aforementioned “abominations” are not lawful, they would not be protected. Thus, since polygamy, for example, is *illegal*, discrimination based on such conduct would not be protected. *Lawful* sexual conduct is a reasonable compromise with conservatives and the Religious Right while still ensuring equality for all citizens.

Finally, the interpretation comports with the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment¹⁶⁵ because it is within the zone of privacy of the home.¹⁶⁶ As did the *Lawrence* opinion, the change in language to “lawful sexual conduct” will help remove the prejudice against all sexual minorities.

164. Though not the subject of this Article, this would also include transsexuals. Conduct in which transsexuals engage, whether sexual or otherwise, would be protected under “lawful sexual conduct,” whereas there is some potential for them to fall through the cracks of “sexual orientation.” *Supra* nn. 2–3 and accompanying text (discussing the limitations of the current District of Columbia statute that protects individuals solely on the basis of “sexual orientation”).

165. U.S. Const. amend. XIV, § 1 (stating, “No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law”).

166. *See Lawrence*, 539 U.S. at 578 (declaring that protection of the private sexual behavior of married persons “extends to intimate choices by unmarried [persons] as well”) (quoting *Bowers*, 478 U.S. at 216) (Stevens, J., dissenting).

B. Improving the District of Columbia Human Rights Act

The District of Columbia Human Rights Act includes sexual orientation among the classes it protects from discrimination.¹⁶⁷ Section 2–1401.01 includes the following criteria for protection: “race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.”¹⁶⁸ Section 2–1402.01 of the Act provides that “[e]very individual shall have an equal opportunity . . . to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.”¹⁶⁹ This Act is one of the most progressive and inclusive pieces of anti-discrimination legislation in the nation in terms of breadth of aspects of discrimination as well as the diversity of groups it protects.¹⁷⁰ Especially in the context of employment, the District of Columbia Human Rights Act is substantially more inclusive than the federal employment statute, Title VII of the 1964 Civil Rights Act,¹⁷¹ which protects only race, color, religion, sex, and national origin.¹⁷²

The District of Columbia Human Rights Act is especially relevant in the context of the critique of the immutability argument. In 2008, the District of Columbia Superior Court heard a case against the District of Columbia Office of Human Rights.¹⁷³ Parents & Friends of Ex-Gays, Inc. (PFOX) filed a complaint under the Act for being denied public space because of “sexual orientation.”¹⁷⁴ While the facts of this case are not particularly

167. D.C. Code § 2-1401.01.

168. *Id.*

169. *Id.* at § 2–1402.01.

170. For a list of other anti-discrimination statutes within the context of employment discrimination cases, see Mary Beth Heinzlmann, *The “Reasonable Lesbian” Standard: A Potential Deterrent Against Bias in Hostile Work Environment Cases*, 12 L. & Sexuality 337, 338 n. 2 (2003).

171. 42 U.S.C. § 2000e–2 (2006).

172. *Id.*; D.C. Code § 2–1402.01.

173. *Parents & Friends of Ex-Gays, Inc.*, Civ. Action No. 003662–08.

174. *Id.* at 3.

significant, the court's reasoning is telling. In its reasoning, the court broke new ground in anti-discrimination law by sweepingly characterizing all of the protected classes in the District of Columbia Human Rights Act, including sexual orientation, as immutable, without any specific reasoning as to how the court reached that conclusion.¹⁷⁵

The identity theory of sexual orientation that has permeated the interpretation of the District of Columbia Human Rights Act excludes bisexuals because it does not properly theorize conduct that arises from same-sex desire, that is, same-sex sex. This piece of legislation is not only important for its sociological value, but also for its guidance in interpreting existing laws, formulating new legislation, and trying cases that will form the precedents upon which pro-gay activists will bring their claims.

Substituting "lawful sexual conduct" for "sexual orientation" would greatly improve non-heterosexual access to the District of Columbia Human Rights Act because the latter language takes into account the myriad of possible "reasons" discriminators use to disadvantage non-heterosexual individuals. The Due Process Clause of the Fourteenth Amendment protects private sexual conduct between consenting adults as a matter of liberty.¹⁷⁶ Specifically protecting "lawful sexual conduct" rather than the more nebulous "sexual orientation" harmonizes with the equality principles set forth in *Lawrence* because it focuses on issues of consent, privacy, legal sexual activity, and relationships. "Lawful sexual conduct" is therefore easier for judges to apply than "sexual orientation," which can force judges down a long road in defining that phrase before reaching the substantive issue in a case, because it broadly protects individuals from discrimination due to any sexual conduct in which they engage as long as that conduct is not unlawful.

C. Using the First Amendment to Bolster Support for New, More Inclusive Language

A shift from identity to conduct also opens other avenues for securing protection from discrimination for all sexual minorities,

175. *See generally id.* (finding that PFOX was not discriminated against because of sexual orientation).

176. *Lawrence*, 539 U.S. at 577–579.

such as the First Amendment. Conduct can be expressive and, thus, might fall under freedom of expression in the First Amendment.¹⁷⁷ Indeed, discrimination “has forced many sexual minorities to adjust culturally to hostility.”¹⁷⁸ As a result of these adjustments, “private and public verbal expression connected to intimate behavior” has decreased on the whole.¹⁷⁹ Large numbers of gay men and lesbians “engage in verbal censorship in a variety of settings” out of fear of discrimination.¹⁸⁰ For example, in the military, as its name suggests, the “Don’t Ask Don’t Tell” policy discourages homosexuals from being open about their sexuality.¹⁸¹ In theory, then, no one is permitted to inquire about a person’s sexual orientation, nor is any person to give any indication that a person is anything other than completely heterosexual.¹⁸²

Whether sex is protected under the First Amendment as expression is relevant to bisexual conduct. “Given the range of nonverbal communication that attends many sexual encounters[,] . . . it is entirely credible to believe that sex itself might be imbued with a particularized message, especially when connected to a larger belief about reasons for seeking sexual intimacy.”¹⁸³ Arguably, one portion of a bisexual identity—whether self-identified or ascribed—is sexual conduct between the bisexual person and the partner.¹⁸⁴ For example, if a woman is fired because her superior discovers she has had sex with both men and women, then she is not being fired because she is gay or straight but rather because of her sexual acts. Thus, if sex were a protected expression, then,

177. 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 L. & Sexuality 159, 173–174 (2003) (discussing one of the negative consequences of homophobia as being a chilling effect on verbalization of same-sex intimacy).

178. *Id.* at 175.

179. *Id.*

180. *Id.* at 174.

181. See David F. Burrelli, “Don’t Ask, Don’t Tell:” *The Law and Military Policy on Same-Sex Behavior*, 2009 Cong. Research Serv. 1–10 (available at: <http://fpc.state.gov/documents/organization/128821.pdf>) (analyzing for Congress the effects of the “Don’t Ask Don’t Tell” policy on military personnel).

182. See generally Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 Yale L.J. 485 (1998) (focusing on immutability and visibility to advocate for the application of heightened scrutiny to the military policy on homosexuals and homosexual conduct).

183. Garland, *supra* n. 177, at 183.

184. See generally Yoshino, *Erasure*, *supra* n. 8 (explaining theories of bisexuality and conduct).

arguably, it would be impermissible for her superior to fire her because to do so would violate her First Amendment right to freedom of expression.¹⁸⁵ Again, this would only pertain to *lawful* sexual acts and, thus, would not in any way make rape or sexual assault First Amendment issues.

While it is easy to presume that conduct in the context of a sexuality debate refers to sexual conduct, that is actually not the case for freedom of expression. Freedom of expression would help relieve the pressure on sexual minorities to censor their actions taken as a direct result of their status as sexual minorities.¹⁸⁶ For example, while it may be perfectly permissible for employees to put up personal pictures at their desks, an employee who is a sexual minority would be more likely to censor a relationship, no matter the depth of the relationship, to avoid discrimination by a supervisor. This is especially true if that employee is a bisexual person whom a supervisor perceives to be monosexual one way but who is actually in a relationship with the “other” sex. This argument is only bolstered in such a situation because it is unlikely to arise where the sex is happening in the present and the superior is viewing it.¹⁸⁷ History clearly demonstrates that the law understands sex to convey many meanings, such as assent to marriage.¹⁸⁸

Bowers provides an example of how courts have responded to First Amendment claims in the gay-rights context. When Hardwick analogized sexual activity to expression using *Stanley v. Georgia*¹⁸⁹ to further his privacy claim, the Court dismissed it.¹⁹⁰ In *Stanley*, the Supreme Court held that possession of obscene

185. Additionally, although not the subject of this Article, one could premise rights for non-heterosexuals based on the First Amendment right to freedom of association, as Justice Blackmun alluded to in his dissent in *Bowers*. See *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting) (stating, “[W]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”).

186. See generally Garland, *supra* n. 177 (arguing for First Amendment protection for sexual conduct).

187. Akin to *Bowers*, then, there would also be a privacy issue in this example, and after *Lawrence*, that argument would probably win the case for the woman before the First Amendment argument because it is precedent and courts do not generally decide constitutional issues needlessly.

188. Garland, *supra* n. 177, at 190 (explaining that historically, the initial sexual act between spouses signaled assent and evidenced complete formation of the marriage).

189. 394 U.S. 557, 559 (1969).

190. Garland, *supra* n. 177, at 195–196.

material in the privacy of one's home fell under the protection of the First Amendment.¹⁹¹ The Court reasoned that such private expression could not reach the public and, thus, the regulation of the expression on moral grounds was a thinly veiled attempt to impermissibly regulate private thoughts.¹⁹² Relying on *Stanley*, Hardwick made the same argument in *Bowers*; however, the Court distinguished the case as being "firmly grounded in the First Amendment," whereas Hardwick's conduct was not.¹⁹³ The Court "failed to see a comparison between sex and expression not only in Michael Hardwick's activity, but in a wide variety of sex."¹⁹⁴ The Court broadly reasoned, "[I]f *Stanley*'s principles were extended to protect other 'voluntary sexual conduct between consenting adults,' it would be difficult to prosecute 'adultery, incest, and other sexual crimes.'"¹⁹⁵

While the Supreme Court may have closed the gate on sex as expression in *Bowers*, it may have revived the argument that sex is expressive conduct in *Boy Scouts of America v. Dale*,¹⁹⁶ when it deferred to the Boy Scouts' "assertion of expression [that] derived specifically from a homosexual conduct policy and a scout leader's sexual activity."¹⁹⁷ This revival, coupled with data showing the expression of ideas and feelings through sexual conduct, leaves open a "claim for First Amendment protection for sex."¹⁹⁸

While First Amendment protection for sex is not the primary focus of this Article, it may be an important step toward developing the proposal for replacing "sexual orientation" with "lawful sexual conduct" in anti-discrimination statutes. Not only would recognizing sex as protected expression be a leap forward in terms of societal attitudes about so-called nontraditional sex, it would also give judges more leeway to interpret existing statutes to include conduct as the basis of an adverse employment action. In the same vein, this Article's proposal may be a step in the right direction for proponents of protecting sex under the First

191. *Stanley*, 394 U.S. at 559.

192. *Id.* at 564–566.

193. *Bowers*, 478 U.S. at 195.

194. Garland, *supra* n. 177, at 201 (arguing that the Court was improperly dismissive about Hardwick's First Amendment claim).

195. *Id.*

196. 530 U.S. at 653.

197. Garland, *supra* n. 177, at 202.

198. *Id.* at 202–203.

Amendment because interpreting anti-discrimination statutes as including any “lawful sexual conduct” is in line with the prospective right.

V. CONCLUSION

In the seventeen years between *Bowers* and *Lawrence*, it is undisputable that non-heterosexuals have gained many rights, such as inclusion of “sexual orientation” in some anti-discrimination statutes.¹⁹⁹ Of increasingly greater importance, however, is the long-term outlook on gay rights and the theories that underlie them.

As discussed above, the identity theory of sexuality reasons that non-heterosexuals deserve the same rights as heterosexuals because they are alike; they experience their sexualities as immutable characteristics and essential pieces of their identities. Basing anti-discrimination protection for non-heterosexuals on the identity theory of sexuality, however, assumes that all non-heterosexual people experience their sexuality the same way, which is not necessarily true.²⁰⁰

The inevitable consequence of limiting the theory upon which gay rights are based to identity theory is that society will further marginalize bisexuals as sexual deviants, even in the wake of more sweeping protection for “sexual orientation.” Changing protection for “sexual orientation” to protection of “lawful sexual conduct” would help adequately protect bisexuals by encompassing those individuals who do not neatly fit into the established categories of heterosexual and homosexual. This is the best path for reaching the ultimate goal of social and legal equality for non-heterosexuals.

199. *E.g.* D.C. Code § 2–1401.01 (including “sexual orientation” as a protected class).

200. “[I]nsistence on immutability precludes [the gay political narrative] from encompassing the full range of individuals who experience same-sex desire.” Knauer, *supra* n. 19, at 36–37.