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Eliot T. Tracz

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## The Inscrutable Bisexual: An Essay on Bisexuality and Immutability

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Eliot T. Tracz

### I. INTRODUCTION

In 1993, Professor Ruth Colker published a courageous piece titled *A Bisexual Jurisprudence*, paving the way for bisexual legal scholars to address legal issues related to the bisexual community.<sup>1</sup> Since then, there is a growing body of scholarship addressing the absence, or even outright erasure, of bisexual individuals from LGBTQ-focused litigation.<sup>2</sup> Lesbian and gay communities have seen significant growth in social acceptance and legal protection—though there is still much work to be done—through a series of legal victories.<sup>3</sup> At the same time, the bisexual community has yet to see the same level of attention or success in the courtroom as other queer communities.<sup>4</sup>

As Professor Colker argued, “We are socialized into believing that we must fit into a pigeonhole of heterosexual or homosexual.”<sup>5</sup> Bisexuality throws a wrench into this binary view, forcing us to look at sexual

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<sup>1</sup> See Ruth Colker, *A Bisexual Jurisprudence*, 3 L. & SEXUALITY 127 (1993).

<sup>2</sup> See, e.g., Nancy Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291 (2015) [hereinafter Marcus, *Bridging Bisexual Erasure*]; Nancy Marcus, *Bostock v. Clayton and the Problem of Bisexual Erasure*, 115 NW. L. REV. ONLINE 223 (2020) [hereinafter Marcus, *Bostock v. Clayton*]; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

<sup>3</sup> See *Romer v. Evans*, 517 U.S. 620 (1996) (finding that an amendment to the Colorado Constitution which prevented protection for individuals based on their homosexual or bisexual status violated the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding most state sodomy laws to be unconstitutional); *United States v. Windsor*, 570 U.S. 744 (2013) (finding §3 of the Defense of Marriage Act to be unconstitutional); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (striking down state same-sex marriage bans).

<sup>4</sup> See, e.g., Marcus, *Bostock v. Clayton*, *supra* note 2.

<sup>5</sup> Colker, *supra* note 1, at 128.

orientation as something more than a simple “gay or straight” dichotomy. Coincidentally, as more and more cases have come down from the United States Supreme Court, bisexuality has faded from the conversation, omitted by both litigants and the bench.<sup>6</sup>

Why the disappearance of bisexuals from the LGBTQ rights discourse? Professor Kenji Yoshino offered a theory that there is an epistemic contract—“not a conscious agreement between individuals, but rather a social norm that arises unconsciously”<sup>7</sup>—between the gay and lesbian community and the straight community in which there is no room for bisexuals. There are several reasons for this, including: (1) stabilization of sexual orientation;<sup>8</sup> (2) stabilizing the primacy of sex;<sup>9</sup> and (3) stabilizing norms of monogamy.<sup>10</sup>

This essay addresses one specific aspect of Professor Yoshino’s argument: the monosexual<sup>11</sup> investment in the stabilization of sexual orientation.<sup>12</sup> It further narrows this argument down to the question of whether bisexuality threatens the concept of sex as an immutable characteristic.<sup>13</sup> The final conclusion is that bisexuality does not, in fact, threaten the concept of immutability because (1) bisexuality, like monosexuality, is itself immutable under any definition of the term, and (2) immutability is a weak argument for equal protection.

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<sup>6</sup> See Marcus, *Bridging Bisexual Erasure*, *supra* note 2.

<sup>7</sup> Yoshino, *supra* note 2, 391–92.

<sup>8</sup> *Id.* at 400.

<sup>9</sup> *Id.* at 411.

<sup>10</sup> *Id.* at 421.

<sup>11</sup> Defined as “being or relating to a male or a female rather than a bisexual” Merriam-Webster, monosexual, Merriam-Webster Medical Dictionary, <https://www.merriam-webster.com/medical/monosexual> [<https://perma.cc/YV9A-JTK5>]. While relevant to this essay, the author notes that this definition encourages a definition of sexuality adherent to a gender binary, which is a form of erasure.

<sup>12</sup> See *infra* Section III.

<sup>13</sup> *Id.*

## II. THE INSCRUTABLE BISEXUAL

Bisexual individuals are an enigma. Often portrayed as greedy, confused, promiscuous, or untrustworthy, bisexuals are misunderstood both inside and outside of the LGBTQ community.<sup>14</sup> Further compounding matters, bisexuality can be difficult to identify because it is experienced differently by different people, who in turn may use different terminology.<sup>15</sup>

So what does it mean to be bisexual? For the purposes of this essay, it is necessary to define the term “bisexual,” but this is no simple task. It would be easy to simply say that a bisexual person is someone who is attracted to both genders. But this myopic definition erases those human beings who do not identify as part of the gender binary.<sup>16</sup> A better definition comes from activist Robyn Ochs, who stated, “I call myself bisexual because I acknowledge that I have in myself the potential to be attracted—romantically and/or sexually—to people of more than one sex and/or gender, not necessarily at the same time, not necessarily in the same way, and not necessarily to the same degree.”<sup>17</sup> As valuable—and complete—as this description is, it is equally important in drawing attention to several of those issues that make bisexuality so difficult to pin down.

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<sup>14</sup> See *Mental Health in the Bisexual Community: Biphobia, Bi Erasure, & Getting Help*, BISEXUAL RES. CTR. (2016), [https://biresource.org/wp-content/uploads/2016/11/Mental\\_Health\\_Biphobia\\_Brochure.pdf](https://biresource.org/wp-content/uploads/2016/11/Mental_Health_Biphobia_Brochure.pdf) [<https://perma.cc/X5XX-HC2K>].

<sup>15</sup> *What is Bisexuality?*, BISEXUAL RES. CTR., <https://biresource.org/what-is-bisexuality/> [<https://perma.cc/AES6-ESWY>].

<sup>16</sup> Gender is a social construct, and while most of us are familiar with a traditional Western gender binary—male and female—this is by no means the full extent of gender identity. Some have found that, beyond male and female, there may be as many as seventy-two other genders. See Shaziya Allarakha, *What are the 72 Other Genders?*, MEDICINET (Feb. 2, 2022), [https://www.medicinenet.com/what\\_are\\_the\\_72\\_other\\_genders/article.htm](https://www.medicinenet.com/what_are_the_72_other_genders/article.htm) [<https://perma.cc/NV62-GW9Y>].

<sup>17</sup> ROBYN OCHS & SARAH ROWLEY, *GETTING BI: VOICES OF BISEXUALS AROUND THE WORLD*, 7–9 (2d ed. 2009).

Many of these issues can be summed up in a single word: attraction. Bisexuality is not so simple as fifty-fifty attraction to different genders.<sup>18</sup> For some, there is a distinct “preference” for one gender over others.<sup>19</sup> For others, things can be even more complicated as some individuals may identify as sexually attracted to multiple genders but romantically attracted to one, or vice versa.<sup>20</sup>

There are many stereotypes attributed to bisexuals, ranging from the benign (an affinity for finger guns, cuffed jeans, bob haircuts, and an inability to sit properly in chairs)<sup>21</sup> to the extremely biphobic (promiscuity, greed, untrustworthiness),<sup>22</sup> but one of the most pervasive is the alleged existence of so called “straight passing privilege.”<sup>23</sup> Passing privilege is a phenomenon in which bisexuals in heterosexual relationships are accused of “passing as straight,” thereby becoming oppressors of gay and lesbian individuals.<sup>24</sup> In reality, many bisexuals speak of ostracism within the LGBTQ community relating to the validity of their sexuality.<sup>25</sup> This includes demands that people prove their bisexuality,<sup>26</sup> suggestions that

<sup>18</sup> See, e.g., KATE HARRAD, CLAIMING THE B IN LGBT 46–47 (2018).

<sup>19</sup> See LOIS SHEARING, BI THE WAY: THE BISEXUAL GUIDE TO LIFE 34–51 (2021) (discussing dating preference in bisexual individuals).

<sup>20</sup> The author, for example, identifies as bisexual/hetero-romantic. See also, JULIA SHAW, BI: THE HIDDEN CULTURE, HISTORY, AND SCIENCE OF BISEXUALITY 15 (2022) (using “behaviorally bisexual” to describe people who have sexual or romantic attraction to people of various genders but do not identify as bisexual).

<sup>21</sup> See *Bi Culture Beyond the Clichés and Stereotypes*, LGBTQ NATION (Jan. 14, 2022), <https://www.lgbtqnation.com/2022/01/bi-culture-beyond-cliches-stereotypes/> [<https://perma.cc/YXC9-NB5A>].

<sup>22</sup> HARRAD, *supra* note 18, at 37–55.

<sup>23</sup> Brittney White, *The Myth of Straight Passing Privilege*, BI.ORG (Oct. 7, 2017), <https://bi.org/en/articles/the-myth-of-straight-passing-privilege> [<https://perma.cc/E3VX-PSYT>].

<sup>24</sup> HARRAD, *supra* note 18, at 53.

<sup>25</sup> Ellen D.B. Riggle, *Ostracism as a Framework for Understanding LGBT Well-Being and Risk* 6 (Univ. of Ky., Working Paper, Jan. 7, 2017), [https://www.researchgate.net/publication/324827136\\_Ostracism\\_as\\_a\\_framework\\_for\\_understanding\\_LGBT\\_well-being\\_and\\_risk](https://www.researchgate.net/publication/324827136_Ostracism_as_a_framework_for_understanding_LGBT_well-being_and_risk) [<https://perma.cc/H4B8-JE8A>].

<sup>26</sup> HARRAD, *supra* note 18, at 42 (quoting Jennifer Moore, *Three Levels of Bi Erasure*, UNCHARTED WORLDS (Oct. 7, 2014) [SEATTLE JOURNAL FOR SOCIAL JUSTICE](https://www.uncharted-</a></p>
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bisexuality is really a stop on the way to coming out as gay or lesbian,<sup>27</sup> or outright rejection of the existence of bisexuality.<sup>28</sup> This is coupled with scientific evidence of higher rates of depression and suicidal ideology in bisexuals than in either heterosexual or homosexual communities.<sup>29</sup> It's hard to call the personal and social costs of bisexuality a "privilege."

It is this notion of privilege, coupled with the idea that bisexuals have a choice of partner (more on this later), that leads to the idea that bisexuals destabilize the concept of sexual orientation. Adding further fuel to the fire is the fact that numerous polls and studies have found that bisexuals are the largest distinct group under the LGBTQ umbrella.<sup>30</sup> If the largest LGBTQ group has a choice in partners, is sexual orientation truly immutable and deserving of higher levels of protection?

### III. IMMUTABILITY

Answering that question requires a discussion of what "immutability" is. The concept of immutability arises from a passage in the case of *Frontiero*

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worlds.org/blog/2014/10/three-levels-of-bi-erasure/ [https://perma.cc/9X52-KFAE]. A form of individual erasure includes "the idea that you have to 'prove' your bisexuality by having some particular sexual history—e.g., people nosily questioning 'so have you ever been with a woman?', and/or talking as though it's up to them to decide whether your history 'counts'.").

<sup>27</sup> *Id.* at 39.

<sup>28</sup> *Id.* at 38 (relaying an experience from a contributor named HESSIE, who wrote: "I went to a Lesbigan meeting in Fresher's Week and got told by a pair of stereotypical short-haired lesbians that they were fed up of 'obviously straight' long-haired women turning up and claiming to be bisexual, because everyone knew bisexuals didn't really exist.").

<sup>29</sup> See, e.g., Maurizio Pompili et al., *Bisexuality and Suicide: A Systematic Review of the Current Literature*, 11 J. SEX. MED. 1903 (2014) (finding that individuals reporting a bisexual orientation had an increased risk of suicide attempts and ideation compared with their homosexual and heterosexual peers).

<sup>30</sup> See, e.g., Gary Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INST. 3–5 (Apr. 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-People-LGBT-Apr-2011.pdf> [https://perma.cc/FS2Q-Y3KM]; see also Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx> [https://perma.cc/F3CV-EZB8].

*v. Richardson*.<sup>31</sup> In that case, a plurality of the court found that benefits for members of the United States military could not be apportioned differently based on a soldier's sex.<sup>32</sup> In reaching this conclusion, the Court wrote that:

[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 . . ."<sup>33</sup>

With these words, the Supreme Court introduced the idea of immutability into federal equal protection analysis.

But before we get to immutability, a little background is helpful. Equal protection claims universally pose the same question: is the government's classification of a group of individuals justified by a sufficient purpose?<sup>34</sup> Answering this question requires a three-part analysis. First, it must be determined what the classification is.<sup>35</sup> For example, a law stating that only individuals who have reached the age of twenty-one may purchase alcohol creates a clear age classification. Another example, borrowed from

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<sup>31</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>32</sup> *Id.* at 690.

<sup>33</sup> *Id.* at 686 (quoting *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.")).

<sup>34</sup> Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 339–40 (2014) ("in order to uphold those individual rights guaranteed by the Constitution, courts take a much less deferential stance, and require the government to demonstrate that its conduct is justified . . . The judiciary's duty in enforcing the Equal Protection Clause is to review legislative classifications of people for constitutional justification.").

<sup>35</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 686 (4th ed. 2011).

Professor Erwin Chemerinsky, suggests another neutral seeming statute, one requiring police officers be at least 5'10" tall and 150 pounds.<sup>36</sup> While the height and weight classifications seem neutral on its face, few women meet this requirement; as a result, such a law would have a discriminatory impact on the hiring of women.<sup>37</sup> In this particular example, when a law is facially neutral, there must be a showing of discriminatory purpose behind the law.<sup>38</sup> Such a showing is unnecessary if the discrimination is overt.<sup>39</sup>

The second step in the equal protection analysis requires determining the appropriate level of scrutiny to apply. Levels of scrutiny trace their origin to a footnote in *United States v. Carolene Products Co.*<sup>40</sup> In that case, the Supreme Court, seeking to emphasize the importance of deference to Congress, included a well-known footnote indicating that, although statutes are presumed constitutional, there may be a narrower scope to that presumption in the event that a statute "appears on its face to be within a specific prohibition of the Constitution."<sup>41</sup> Put another way, courts should presume that a law is constitutional, but deeper inquiry may be appropriate when the law in question limits the ability of the political process to repeal undesirable legislation or the law discriminates against a "discrete or insular minority."<sup>42</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 686–87.

<sup>39</sup> *Id.* at 687.

<sup>40</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>41</sup> *Id.*

<sup>42</sup> Some examples of such legislation include: restrictions upon the right to vote, *see* *Nixon v. Herndon*, 273 U.S. 536 (1927); *see also* *Nixon v. Condon*, 286 U.S. 73 (1932); restraints upon the dissemination of information, *see* *Near v. Minnesota*, 283 U.S. 697, 713–14, 718–20, 722 (1931); interferences with political organizations, *see* *Fiske v. Kansas*, 274 U.S. 380 (1927); and prohibition of peaceable assembly, *see* *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).



The Supreme Court developed levels of scrutiny as a means of determining a law's constitutionality.<sup>43</sup> The different levels of review—rational basis, intermediate scrutiny, and strict scrutiny—are well known to lawyers and scholars, but each still merits a quick description.

In order to survive rational basis review, a law will be upheld if it is rationally related to a legitimate government interest.<sup>44</sup> If the goal of a law is a goal that is a legitimate government purpose, then it doesn't matter whether the goal is even related to the litigation challenging the law.<sup>45</sup> This is the most deferential standard of review.

Intermediate scrutiny requires that a law be substantially related to an important government interest.<sup>46</sup> In other words, the means by which the government has chosen to achieve its goals must be more than a reasonable way of achieving those goals, and must be substantially related to achieving those goals. Typical cases where intermediate scrutiny is applied include gender discrimination,<sup>47</sup> discrimination against non-marital children,<sup>48</sup> and commercial speech.<sup>49</sup>

Finally, in certain cases, the Court applies strict scrutiny. Under strict scrutiny, a law will be upheld if it is necessary to uphold a compelling government purpose.<sup>50</sup> This means that the law must be narrowly tailored,

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<sup>43</sup> R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227 (2002) ("Whenever the Supreme Court reviews legislation, whether under the Equal Protection Clause, the Due Process Clause, or the First Amendment, the Court considers whether the legislation represents a good enough fit to pass constitutional review.").

<sup>44</sup> See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 2 (1988); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

<sup>45</sup> See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980).

<sup>46</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

<sup>47</sup> See *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>48</sup> See *Lehr*, 463 U.S. 248.

<sup>49</sup> See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>50</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

as well as the least restrictive or least discriminatory alternative to achieving the government's goal.<sup>51</sup> Strict scrutiny is used in cases based on race or national origin discrimination, as well as for interference with fundamental rights.<sup>52</sup>

The third question in the equal protection analysis is whether the government action meets the level of scrutiny. This often means determining whether a class is over-inclusive (a class which includes all similarly situated people) or under-inclusive (a class which leaves out some persons who should be included).<sup>53</sup> Depending on the appropriate level of scrutiny, leeway may be given with over-inclusive or under-inclusive classes.

Now that the background is set, where does immutability come into play? The word "immutable" means "not capable of or susceptible to change."<sup>54</sup> The United States Supreme Court has described immutable traits as those which their "possessors are powerless to escape or set aside."<sup>55</sup> Thus, an immutable trait would be a trait not capable of or susceptible to change. Typically, immutable characteristics fall within *Frontiero's* "accident of birth" concept and include traits such as race, national origin, or status as a non-marital child.<sup>56</sup>

The importance of immutable characteristics, at least under the "accident of birth" concept, is that they bear no relationship to individual responsibility.<sup>57</sup> Generally, the law does not seek to deter private conduct

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<sup>51</sup> See *Simon & Schuster v. N.Y. Crime Comp. Bd.*, 502 U.S. 105, 121 (1991).

<sup>52</sup> CHEMERINSKY, *supra* note 35, at 554.

<sup>53</sup> *Over-inclusive*, USLEGAL.COM, <https://definitions.uslegal.com/o/over-inclusive/> [<https://perma.cc/9WTV-KJV7>].

<sup>54</sup> *Immutable*, MERRIAM-WEBSTER (Oct. 17, 2022), <https://www.merriam-webster.com/dictionary/immutable> [<https://perma.cc/GP38-TZW4>].

<sup>55</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (Brennan, J., concurring); *cf.* *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (holding that conscientious objectors lacked an "immutable characteristic determined solely by the accident of birth").

<sup>56</sup> It's important to note that immutability may refer to a social class (i.e., nonmarital child) as well as to a biological class (i.e., race).

<sup>57</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972).

by discriminating on the basis of “accidents of birth” because those individuals with such traits did not choose, or are powerless to change, them.<sup>58</sup> It is easy to see why gay/lesbian rights litigation would lean into “born-this-way” arguments as a means to seek the relative advantage of immutability.

Another strain of immutability jurisprudence—one more flexible and applicable to individuals whose sexuality is fluid—has quietly been gaining traction. This “revised immutability” is not really new so much as resurgent, having been brought to widespread attention by Judge William Norris in a concurring opinion in the case *Watkins v. U.S. Army*.<sup>59</sup> In that case, the Ninth Circuit found that the United States Army was equitably estopped from denying reenlistment to the plaintiff, Watkins, because he had always been candid about his sexual orientation and had been allowed to reenlist in the past.<sup>60</sup> Judge Norris, in his concurrence, argued that:

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

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<sup>58</sup> *Id.* at 175.

<sup>59</sup> *Watkins v. U.S. Army*, 875 F.2d 699, 711 (9th Cir. 1989) (Norris, J., concurring).

<sup>60</sup> *Id.* at 709–11.

easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment.

With these principles in mind, I have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine.<sup>61</sup>

Norris's reasoning that sexual orientation was immutable may be gaining traction, but it had little impact on the majority. Furthermore, at the time that *Watkins* was decided, *Bowers v. Hardwick*,<sup>62</sup> a case upholding a state statute which criminalized homosexual sex acts, was still good law. Norris's view, therefore, had no impact on rules prohibiting same-sex sodomy, marriage, or other personal conduct.

A central part of the "revised immutability" is the consideration of privacy and liberty.<sup>63</sup> These considerations—privacy and liberty—have become a theme of LGBTQ rights litigation, particularly following *Lawrence v. Texas*, yet many of these cases were decided on Due Process grounds.<sup>64</sup> Considering the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*<sup>65</sup> and the looming threat to substantive due process,<sup>66</sup> the older form of immutability is likely to resurface as the LGBTQ community turns back to equal protection arguments.

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<sup>61</sup> *Id.* at 726.

<sup>62</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>63</sup> Jessica A. Clarke, *Against Immutability*, 125 *YALE L. J.* 2, 26 (2015).

<sup>64</sup> *See* *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>65</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022).

<sup>66</sup> *See, e.g.*, Julie C. Suk, *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, 64 *WM. & MARY L. REV.* 443, 451 (2022) (referencing *Dobbs* as casting doubt on the application of substantive due process to connect a right to privacy to the Constitution).

#### IV. THE BISEXUAL (NON)THREAT TO THE IMMUTABILITY OF SEXUAL ORIENTATION

So, how does bisexuality threaten immutability? Professor Yoshino's theory of the epistemic contract between the gay/lesbian community and the straight community includes the idea that bisexual erasure helps stabilize the meaning of sexual orientation.<sup>67</sup> In Professor Yoshino's words:

Bisexuality destabilizes sexual orientation by making it logically impossible to prove that one has a monosexual identity. Both straights and gays have shared investments in stabilizing their identities, as members of all groups are likely to draw some comfort from rigid social orderings. Straights and gays, however, also have distinctive investments in stabilizing orientation categories. For straights, it is an investment in the retention of heterosexual privilege; for gays, it is an investment in the retention of the immutability defense and one in the ability to form an effective political movement.<sup>68</sup>

Before addressing the relationship between bisexuality and immutability, it is necessary to look a little closer at Professor Yoshino's argument.

Professor Yoshino's arguments include three levels of investment: shared, straight, and gay. The shared investment breaks down to the idea that straights and gays share an interest because identity stabilization "roots them in a community and relieves them of the anxious work of identity interrogation."<sup>69</sup> Many people take comfort in knowing their place in the social order—even if that place is disfavored.<sup>70</sup>

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<sup>67</sup> Yoshino, *supra* note 2, at 400.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 402.

<sup>70</sup> *Id.* at 401–02 (quoting Mary McIntosh, *The Homosexual Role*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY*, 25, 28 (Edward Stein ed., 1990) (rigid categorization even to those stigmatized by it because "it appears to foreclose on the possibility of back into normality and thus removes the element of anxious choice.")).

The straight investment in stabilizing sexual orientation rests in an interest in preserving the status as the privileged sexual orientation.<sup>71</sup> In order to have a distinct identity as straight in a binary system, it is necessary to have a foil—in this case, individuals who identify as gay or lesbian.<sup>72</sup> However, while straights need gays and lesbians to establish their identity, bisexuals throw a shade of gray into the orientation binary.

On the other hand, the gay/lesbian investment in stabilizing sexual orientation is two-fold: first, there is an interest in maintaining the argument that sexuality is immutable; second, there is an interest in defending the ability to form an effective political movement.<sup>73</sup> The second interest is not relevant to this essay, so the focus will be on the first.

The understanding that sexual orientation is an immutable trait has long been a staple of gay/lesbian rights litigation.<sup>74</sup> This “born-this-way” argument both mitigates the stigma associated with homosexuality<sup>75</sup> and exonerates homosexuals because, as the Court in *Frontiero* noted, it is abhorrent to penalize people for traits over which they have no control.<sup>76</sup>

As Professor Yoshino points out, if the world recognizes that bisexuals exist, “a would-be heterosexual must show that (1) he is not gay and (2) that he is not bisexual.”<sup>77</sup> The first can be proved by simply showing desire in someone of the other sex.<sup>78</sup> The second can only be proved by showing that the individual harbors no same-sex desires.<sup>79</sup> Because it is impossible to prove a negative, this cannot be done. Even if one can demonstrate a completely heterosexual romantic and sexual history, there is no means to

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<sup>71</sup> *Id.* at 402.

<sup>72</sup> *Id.* at 403.

<sup>73</sup> *Id.* at 400.

<sup>74</sup> *Id.* at 405; see also Janet F. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507 (1994).

<sup>75</sup> Halley, *supra* note 74, at 567.

<sup>76</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>77</sup> Yoshino, *supra* note 2, at 401.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

demonstrate a lifelong absence of same-sex desire. As a result, the existence of bisexuality necessarily calls into question the existence of heterosexuality.

At first glance, it seems that bisexuality should not conflict with an argument based on immutability. Indeed, bisexuality itself could be argued to be one of several immutable sexual orientations.<sup>80</sup> So, how can an arguably immutable trait threaten the immutability of homosexuality? Professor Yoshino describes a two-part process.<sup>81</sup>

First, bisexuality poses the same problem for gays and lesbians as it does for straight individuals: it is impossible for an individual to prove that they are homosexual.<sup>82</sup> This problem occurs in exactly the same way for gays and lesbians as it does for straights. Even if an individual could prove a lifelong sexual and romantic interest in other individuals of the same sex, they could never prove that they had never experienced desire for someone of a different sex or gender. This situation is further exacerbated by anecdotal evidence<sup>83</sup> of individuals who have experienced a lifelong attraction to people of the same sex only to discover later in life that they are, in fact, capable of attraction to someone of another sex or gender.

The second step in bisexual destabilization of sexual orientation is that, if an individual is immutably bisexual, immutability will not have the same exonerating effect.<sup>84</sup> Immutability exonerates individuals by suggesting a lack of choice.<sup>85</sup> Bisexuals, however, are often seen as having a choice—and this goes back to the earlier discussion of “passing privilege”—in that

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<sup>80</sup> *Id.* at 404–05 (listing four possible immutable categories of sexual orientation: immutable heterosexuality, immutable homosexuality, immutable bisexuality, and immutable asexuality).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Pepper Schwartz, *Can Sexual Preference Change with Age?*, AARP, <https://www.aarp.org/home-family/sex-intimacy/info-2014/gay-lesbian-sexual-preference-schwartz.html> [<https://perma.cc/GRQ7-5YJ6>].

<sup>84</sup> Yoshino, *supra* note 2, at 405–06.

<sup>85</sup> *Id.* at 405

they can choose to fit into a heterosexual-dominated culture by choosing a partner of the opposite sex.<sup>86</sup>

Given the “threat” that bisexuality poses to monosexuality and the ability of some bisexual people to live comfortably in heterosexual relationships, is there any merit to the fear that bisexuality threatens immutability of sexual orientation? When viewed through Professor Yoshino’s lens of bisexuality destabilizing the concept of sexual orientation, it may seem at first blush that there is some doubt as to whether bisexuality, and the perceived ability of bisexuals to choose same-sex relationships, renders the fundamental purpose of protection of immutable traits—that is, the inability to choose a trait, or the powerlessness to change it—moot. This view coupled with the idea that the existence of bisexuality makes it impossible for an individual to prove that they are straight or gay/lesbian, brings the idea that sexual orientation is immutable into doubt.

What makes this particularly frightening is that if the Supreme Court were to revisit and overturn prior substantive due process cases such as *Lawrence*, it could pave the way for states to begin re-enacting—or simply reviving—“acts based” anti-sodomy laws. If *Lawrence* were overturned, it is not hard to believe that someone would take Professor Yoshino’s argument and use it to suggest that if monosexuality is impossible to prove then we all have the choice to act in a heterosexual manner. From there, it is easy to revive one of the oldest arguments that has dogged the LGBTQ community as it has fought for equality: that sexual orientation is a choice and that people choose whether or not to engage in same-sex acts.

One problem with this argument lies with the concept of immutability itself. Homosexuality is difficult, if not impossible, to prove. There is some argument in the legal academy that immutability is a poor argument to begin with.<sup>87</sup> Professor Janet Halley argues that “the argument from

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<sup>86</sup> *Id.* at 406.

<sup>87</sup> See Clarke, *supra* note 63; Halley, *supra* note 74.



immutability responds to a particularly contemptuous and dismissive form of anti-gay animus with elegant simplicity and plangent appeal.”<sup>88</sup> However, once the argument from immutability is applied as a legal strategy, it becomes ineffective. The reasons for this, in Professor Halley’s estimation, are that:

First, anti-gay public policy is complex and flexible, and finds ways to justify itself even on the assumption that homosexual orientation in many, most, or all its bearers is immutable. Second, the reasons why the *state* should not discriminate against gay men, lesbians, and bisexuals are different in important ways from the reasons why parents should not think ill of their gay children. Suspect class analysis (when given its best reading) asks whether the resources of the state are being used to enforce, confirm, and validate social hierarchies. The argument from immutability has never attained the preeminence in suspect class analysis that some pro-gay advocates attribute to it because it carries so little water in that analysis. And third, the argument from immutability, when advanced on behalf of a complex movement, many of whose members *can* change some aspect of their sexuality that is targeted by anti-gay policy, is less directly responsive to the problem we face.<sup>89</sup>

This argument certainly gives reason to question the usefulness of immutability as a basis for legal action.<sup>90</sup>

Another problem lies with the difference between same-sex sexual behavior and sexual orientation. As Dr. Julia Shaw describes, “[s]exual behavior is a biological fact, and people have been getting it on in as many

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<sup>88</sup> Halley, *supra* note 74, at 567.

<sup>89</sup> *Id.* at 567 (emphasis in original).

<sup>90</sup> To the extent that the argument implies that certain individuals, such as bisexuals, can change aspects of their sexual orientation, I disagree. For bisexuals, choosing a partner of a different sex is not *changing* an aspect of their sexual orientation—it is *living* their sexual orientation. Similarly for transgender individuals, the fact that gender identity may change merely changes the term used to describe that individual’s sexual orientation, not the orientation itself.

ways as you can imagine since forever.”<sup>91</sup> Same-sex sexual behavior is well documented by researchers. Alfred Kinsey, in his famous report “Sexual Behavior in the Human Male,” wrote that almost half of the men in his sample reported having some same-sex desires or experiences.<sup>92</sup> Later, in the follow up, “Sexual Behavior in the Human Female,” he found that 11–20% of the unmarried women and 8–10% of the married women in his study reported having had some same-sex desires or experiences in each of the years between the ages of twenty to thirty-five.<sup>93</sup> These self-reported numbers, especially during the 1940s and 1950s, are astounding. They are also supported by additional studies finding that same-sex behavior is not as unusual as we might think, and that it is also not limited to humans.<sup>94</sup> Furthermore, historian and classicist Eva Cantarella has documented bisexual behavior as far back as Ancient Rome and Greece.<sup>95</sup> It is clear that, insofar as bisexuality can be reduced to behavior versus orientation, bisexual behavior has a long history.

On the other hand, while same-sex desires and experiences are natural, sexual orientation exists solely as a construct. Many queer theorists and historians have argued that the concept of sexual orientation is itself uniquely modern.<sup>96</sup> Lachlan MacDowell traces the first use of the word “bisexuality” to 1859 by the anatomist Robert Bentley Todd.<sup>97</sup> In its modern context, MacDowell finds that the modern concept of “bisexuality” traces its roots to three different sources: (1) the 19th century use of

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<sup>91</sup> SHAW, *supra* note 20, at 25.

<sup>92</sup> Kinsey et al., *Sexual Behavior in the Human Male*, 93 AM. J. PUB. HEALTH 894, 623–31 (1948).

<sup>93</sup> See Kinsey et al., *Sexual Behavior in the Human Female*, 60 AM. J. SOCIO. 409, 336–501 (1955).

<sup>94</sup> See generally Nathan Bailey & Marlene Zuk, *Same-sex Sexual Behavior and Evolution*, 24 TRENDS IN ECOLOGY & EVOLUTION 439 (2009).

<sup>95</sup> See EVA CANTARELLA, *BISEXUALITY IN THE ANCIENT WORLD* (Cormac Ó Cuilleainán trans., Editori Reuniti 1988) (1992).

<sup>96</sup> SHAW, *supra* note 20, at 25.

<sup>97</sup> Lachlan MacDowell, *Historicizing Contemporary Bisexuality*, 9 J. BISEXUALITY 3, 9 (2009).

“bisexual” in the field of anatomy and physiology to refer to forms of life that are sexually undifferentiated; (2) the early 20th century use of “bisexual” to describe a combination of masculinity and femininity in an individual; and (3) the 20th century use to describe sexual attraction to individuals of both sexes.<sup>98</sup> In other words, it was not until the 20th century that “bisexual” became the label to fix a pre-existing set of behaviors.

Bisexuality as a set of natural behaviors reinforces the argument that bisexuality is itself immutable. As an orientation, bisexuality—like all constructs—is more malleable and more subject to doubt. It makes sense then that as a construct, bisexuality threatens the idea of immutability.

The final question is why any of this matters other than as a purely intellectual exercise. Even as LGBTQ rights cases have come before the United States Supreme Court and resulted in victories that in turn have expanded rights, those victories have been limited. When those cases have favored the LGBTQ community, as many recently have, those victories tend to be shared between L, G, & T. Bisexuality has been largely left out of the picture. This comes with real world consequences in settings such as asylum and employment.

## V. CONCLUSION

Much of the Supreme Court litigation involving LGBTQ rights has been based in substantive due process. The *Dobbs* decision has left the future of substantive due process in doubt. In the reasonably foreseeable event that future LGBTQ rights arguments fall back to theories of Equal Protection, immutability once again becomes an important issue.

As the largest demographic under the LGBTQ umbrella, the participation of bisexual individuals is important in the fight for equal treatment. Same-sex marriage, family composition, rejection of sodomy laws, employment and housing discrimination, and all other issues which affect the gay/lesbian

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<sup>98</sup> *Id.* at 4.

community also affect the bisexual community. As a result, it is imperative that LGBTQ activists, scholars, researchers, and legal counsel drop the idea that bisexuality threatens the immutability of sexual orientation and instead embrace the gift of having another group of eager and willing supporters and friends happy to share in the fight for equality.