

Bisexuality and Binaries as Legal Shibboleths

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I. INTRODUCTION

Can a person be more than one thing? The answer, of course, is yes. A person could be both a child and a parent, a student and a teacher, a lawyer and a scholar, all at the same time.¹ Despite the knowledge that a person can be many things, we live in a society that insists on creating binary classifications: male or female, gay or straight, white or non-white, left-handed or right-handed. At the same time, many people fall somewhere between the ends of these binaries. Bisexual individuals are among those who fall within the gap.

Discussing bisexuality and the law within the framework of binary identities is not new. Nearly thirty years ago Professor Ruth Colker tackled the issue in her book *Hybrid: Bisexuals, Multiracial, and Other Misfits Under American Law*. She argued that people who “live in the gap” between either end of a category are often stigmatized by the very communities who might benefit most from their inclusion.² This has proved to be true for bisexuality.

Now, as then, we are at a time where our society is increasingly aware of those individuals who exist outside of our neatly ordered social boxes. In the midst of the 2024 presidential election, nonsensical attacks were leveled at a biracial major party candidate claiming that she has been misleading the public about her ethnic and racial background.³ Similarly, transgender individuals have been the target of huge numbers of legislative attempts to limit or erase their existence.⁴

This article argues that understanding binaries, explained here through the lens of bisexuality, can improve the law by helping judges, advocates, and policymakers find better address the complexity and nuance of people’s lives and the unique experiences. Part II discusses bisexuality on a conceptual level. It begins by exploring how to define bisexuality and the related challenges.⁵ After settling on a definition, it then provides demographics to provide a clearer picture of the bisexual population.⁶ Finally, it describes how bisexual identity is often shared with other identities and the role of intersectionality in bisexual jurisprudence.⁷ Part III explores the relationship

¹ These are just a few of the ways in which the author identifies.

² See generally RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (N.Y. Univ. Press 1996) (discussing how people who live in the gap, such as bisexuals, are often ostracized by the very communities to which they might belong).

³ See Robert Farley, *Harris Has Always Identified as Indian American and Black*, FACTCHECK.ORG (Aug. 1, 2024), <https://www.factcheck.org/2024/08/harris-has-always-identified-as-indian-american-and-black> [<https://perma.cc/3KDB-TEH4>].

⁴ 2024 *Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER (2025), <https://translegislation.com/bills/2024> [<https://perma.cc/8ELA-PK3Q>].

⁵ See discussion *infra* Part II.

⁶ *Id.*

⁷ *Id.*

between binaries and bisexual erasure (bi erasure). It begins by defining bi erasure and offering some examples of how bi erasure happens.⁸ It then takes a look at how our society classifies queer individuals through a number of bipolar categories including sexual orientation, relationship status, and gender identity.⁹ This is followed by a discussion of how bisexuality fits within a world of binaries.¹⁰ Finally, it discusses internal queer politics and the erasure of bisexual individuals within the queer community.¹¹

Part IV builds on the previous section by shifting the discussion from bi erasure generally into the narrower realm of the law. It begins by discussing bi erasure in the opinions of the courts either through omission or an uninformed judiciary.¹² It then discusses bi erasure by lawyers advocating on behalf of queer rights.¹³ It closes by discussing bi erasure in legislation.¹⁴ Part V argues that bisexuality has the ability to be a subversive force in the law. First, it argues that bisexuality's inherent rejection of binaries demonstrates the hollowness of immutability as a legal concept.¹⁵ It does so in two ways: first it challenges the question of whether someone can be immutably queer, and second, it raises the question of whether or not immutability as a concept is still relevant.¹⁶ Finally, it argues that bisexuality is yet another instance in which the law is improved by rejecting reliance on simple binary ideas.¹⁷

II. BISEXUALITY, BINARIES, AND BI ERASURE

A. Bisexuality

1. Definition

How exactly should “bisexuality” be defined? Defining someone's sexuality is always a difficult task because sexual orientation is deeply personal

⁸ See discussion *infra* Part III.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See discussion *infra* Part IV.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See discussion *infra* Part V.

¹⁶ *Id.*

¹⁷ *Id.*

and is often considered to be fluid.¹⁸ A number of methods exist, including behavior, attraction, biogenetic status, and self-identification. Each is flawed in its own way, and—with the exception of self-identification—each fails to take into account the fluid nature of sexuality.

Defining based on a person's sexual behavior is one such possibility.¹⁹ In this setting “sexual behavior” refers to the sex of a person's sexual partners.²⁰ A person could be described as bisexual if their sexual history includes partners of more than one gender. Like all reductive definitions, however, this definition has its flaws. Not all bisexual people have had sexual partners of more than one gender. Some never will. Similarly, some heterosexual people may have had a same-sex experience, but do not consider themselves bisexual or have any interest or need to repeat that experience.

Sexual or romantic attraction is another possibility. Here, attraction means the “sex or gender to which someone feels attraction.”²¹ But again, not every bisexual person has met some of the same, or of a different, sex to whom they feel sexual or romantic attraction. A person may be aromantic or asexual but still engage in sexual conduct. On its own, attraction is an ineffective tool for measurement.

At times researchers have attempted to quantify what it means to be bisexual by combining both behavior and attraction. Alfred Kinsey famously interviewed thousands of individuals about their sexual behavior and developed a system now called the Kinsey Scale which rates an individual's behavior from 0 (completely heterosexual) to 6 (completely homosexual).²² It is noteworthy that scores of 1–5 on the Kinsey scale all indicate some degree of bisexuality. Later on, the Klein Grid was introduced by Fritz Klein in his book *The Bisexual Option*.²³ The Klein Grid was designed to help psychologists and their patients discuss sexual identity.²⁴ Both are flawed, however, in that they rely on self-reporting.

Biogenetic status has been suggested as a way to determine an individual's sexual orientation. Here a person might say that they are “born this way.” Essentialists support the argument that individuals are born queer,

¹⁸ Sabra L. Katz-Wise, *Sexual Fluidity and the Diversity of Sexual Orientation*, HARV. HEALTH PUBL'G (Mar. 31, 2022), <https://www.health.harvard.edu/blog/sexual-fluidity-and-the-diversity-of-sexual-orientation-202203312717> [<https://perma.cc/CAM4-9L9Q>].

¹⁹ CARLOS A. BALL ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW 12 (7th ed. 2022).

²⁰ *Id.*

²¹ *Id.*

²² JULIA SHAW, BI: THE HIDDEN CULTURE, HISTORY, AND SCIENCE OF BISEXUALITY 6–10 (Abrams Press 2022).

²³ See FRITZ KLEIN, THE BISEXUAL OPTION 19 (The Haworth Press 2d ed. 1993).

²⁴ SHAW, *supra* note 22, at 11.

while social constructionists argue that our sexuality is something we create through interaction with the world around us.²⁵ Scientific data supporting this hypothesis is sparse, and the possibility of biogenetic causes of sexual orientation raises the risk that we return to an era where people attempt to turn queer sexualities into a pathology.²⁶

Self-identification, which can be defined as “the way a person self-identifies with a given sexual orientation,”²⁷ seems to be the most common method of identifying who is bisexual. A major benefit of self-identification is that it allows for the nuances of individual expression, which can at times be quite complicated.²⁸ Self-identification creates room for less common or new terms to more accurately describe a person’s orientation. The downside is that people evolve over time, and fluid self-identification makes it more difficult to obtain reliable data.

There are many ways that a person may describe their own bisexuality, all of which are valid. Because it is necessary to have a consistent definition of bisexuality to work with, this article adopts the description offered by activist Robyn Ochs:

I call myself bisexual because I acknowledge 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.²⁹

This definition is the most inclusive of the broad spectrum of attraction and desire that bisexuals experience, the various levels of experience of those same individuals, and the different gender identities with which people may identify.

²⁵ *Id.* at 44–45.

²⁶ See Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCIS. 565, 566 (2015).

²⁷ BALL ET AL., *supra* note 19, at 12.

²⁸ The author for example identifies as a heteroromantic bisexual queer person.

²⁹ ROBYN OCHS & SARAH E. ROWLEY, GETTING BI: VOICES OF BISEXUALS AROUND THE WORLD 8 (2005).

2. Demographics

The demographics of the LGBTQ+ community paint an interesting picture. In the United States, roughly 5.5% of adults identify as LGBTQ+.³⁰ That equates to approximately 13.9 million adults.³¹ Unsurprisingly, the percentage of people identifying as LGBTQ+ is inversely related to age bracket, with people 65 and older least likely to identify as queer (1.8%); followed by people aged 50–64 (2.7%); people aged 35–49 (4.1%); people aged 25–34 (9.1%); and finally people age 18–24 (15.2%).³² The largest percentage—35.9%—of LGBTQ+ individuals reside in the Southern region of the United States, with the West a distant second at 24.5%, the Midwest at 21.1%, and somewhat surprisingly (given that six of the ten states with the highest percentage of the population identifying as LGBTQ+ are located here) the East in dead last at 18.5%.³³

Within the LGBTQ+ community, bisexuals make up the largest distinct group, with roughly 57.3% of queer people identifying as bisexual.³⁴ Gay and Lesbian individuals, on the other hand, each represent about one-sixth of LGBTQ+ individuals.³⁵ Nearly a quarter (22.3%) of Gen Z identify as LGBTQ+, with bisexuality being the most common identification.³⁶ Indeed, Gallup estimates that about 15% of all Gen Z adults identify as bisexual.³⁷

Despite being the largest community under the LGBTQ+ umbrella, bisexuals enjoy a lower level of visibility. In part, this is due to a lack of willingness to be open about being bisexual. In the workplace, for example, about 75% of gay and lesbian workers are out to their supervisors, and about 50% are out to their coworkers.³⁸ Among bisexual employees, only about 36% are out to their supervisors, and only 19% are out to their coworkers.³⁹

³⁰ ANDREW R. FLORES & KERITH J. CONRON, UCLA SCH. OF L.: WILLIAMS INST., ADULT LGBTQ POPULATION IN THE UNITED STATES 1 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Dec-2023.pdf> [<https://perma.cc/9N6B-F99T>]; see Jeffrey M. Jones, *LGBTQ+ Identification in U.S. Now at 7.6%*, GALLUP (Mar. 13, 2024), <https://news.gallup.com/poll/611864/LGBTQ+-identification.aspx> [<https://perma.cc/MD57-L2J2>] (putting this number at closer to 7.6%).

³¹ FLORES & CONRON, *supra* note 30, at 1.

³² *Id.* at 5.

³³ *Id.* at 3–4.

³⁴ Jones, *supra* note 30.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ CHRISTY MALLORY ET AL., UCLA SCH. OF L.: WILLIAMS INST., THE ROLE OF SEXUAL ORIENTATION AND GENDER IN WORKPLACE EXPERIENCES OF CISGENDER LGB EMPLOYEES 1 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bisexual-Workplace-Discrimination-Sep-2022.pdf> [<https://perma.cc/W7YV-6Q3Z>].

³⁹ *Id.*

In their private lives, bisexual individuals are less likely than gay or lesbian individuals to be out to their family and friends.⁴⁰ As a result, public understanding of bisexuality is limited because many people may not know that they have bisexual acquaintances, which in turn removes the opportunity for people to unlearn harmful stereotypes.

3. Intersectional Bisexuality

Bisexuality does not exist in a vacuum, which is to say that people who are bisexual are not simply limited to a single identity. As in other areas of life, there is a high degree of intersectionality which may affect how bisexual people experience life. One is the intersection of bisexuality and race. Another is bisexuality and disability. The third kind of intersectionality that will be discussed is gender identity. In each of these identities, individuals who live outside of the power structure—i.e., are not white, male, cisgender, and heterosexual—experience multiple levels of discrimination.

A bisexual person's racial identity impacts their experience of the world. One example comes from the experience of bisexual black women. A common stereotype of bisexuality is that bisexuals are promiscuous or hypersexual.⁴¹ At the same time, hyper-sexualization of black women is a well-documented phenomenon.⁴² The overlap is particularly prevalent as one study has found the number of black women who identify as bisexual is increasing.⁴³

Disability is another identity that intersects with LGBTQ+, and particularly bisexual, identity.⁴⁴ LGBTQ+ people are more likely than non-

⁴⁰ *Understanding Bisexuality*, AM. PSYCH. ASS'N (2017), <https://www.apa.org/pi/lgbt/resources/bisexual#:~:text=Here%20are%20a%20few%20more%20research%20findings%3A%201,Relationships%22%20Sexual%20and%20Relationship%20Therapy%2C%20February%202018%20> [https://perma.cc/J7GS-5LWM].

⁴¹ KATE HARRAD, CLAIMING THE B IN LGBT: ILLUMINATING THE BISEXUAL NARRATIVE 48–50 (Thorntree Press 2018).

⁴² See, e.g., NPR News & Notes, *Sex Stereotypes of African Americans Have Long History*, NPR (May 7, 2007, 9:00 AM), <https://www.npr.org/2007/05/07/10057104/sex-stereotypes-of-african-americans-have-long-history> [https://perma.cc/7SRK-4CWA]; ANNALYCIA D. MATTHEWS, HYPER-SEXUALIZATION OF BLACK WOMEN IN THE MEDIA 2–4 (2018).

⁴³ Tristan Bridges & Mignon R. Moore, *23% of Young Black Women Now Identify as Bisexual*, THE CONVERSATION (June 11, 2019, 8:10 AM), <https://theconversation.com/23-of-young-black-women-now-identify-as-bisexual-116116#:~:text=As%20sociologists%20who%20study%20sexuality,it%20was%20a%20decade%20ago> [https://perma.cc/FSH4-223T].

⁴⁴ See generally Kate Caldwell, *We Exist: Intersectional In/Visibility in Bisexuality & Disability*, 30 DISABILITY STUD. Q. 7 (2010) (“The intersection of theories of disability and bisexuality is unexplored, yet both are identities rendered in/visible by paternalistic environments where

LGBTQ+ people to experience a disability.⁴⁵ Over one-third of LGBTQ+ people self-report having a disability.⁴⁶ For transgender individuals, that number rises to roughly 52%.⁴⁷ Much like people may be hypersexualized based on their race, people with disabilities may experience a denial of their sexuality.⁴⁸

Gender identity is a third area in which bisexuality intersects with another identity. Transgender and non-binary individuals may both identify as bisexual or another orientation involving attraction to more than one gender. These individuals may see their sexuality tied more closely to their gender rather than their orientation in the way that they are perceived by society. Similarly, they may face discrimination based on their gender and have their orientation erased altogether.

Each of these intersectional identities presents different ways in which a person can be seen by the world, including by courts and policymakers. Each presents its own challenges for those living with multiple identities. But each also offer opportunities for the law to grow into a more flexible and just regime.

B. Binaries and Bi erasure

1. What is Bi erasure?

What is bi erasure and how does it manifest? Lois Shearing describes bi erasure by arguing that it “is pretty much what it sounds like: the intentional or incidental erasure of bisexuality, bi experiences, lives, history, and community.”⁴⁹ She further breaks it down to both structural and interpersonal levels.⁵⁰ Structural bi erasure may be something like the lack of bisexuality—based health care due to the assumption that bisexual needs will be met by health care directed towards gay/lesbian people.⁵¹ Interpersonal bi erasure may occur in situations such as when a friend calls a bisexual person gay or straight based on the sex of the bisexual person’s romantic partner.⁵²

individual and political identities are defined by oppositional binaries and vulnerable to compulsory citizenship.”).

⁴⁵ *Understanding Disability in the LGBTQ+ Community*, HUM. RTS. CAMPAIGN (Aug. 12, 2022), <https://www.hrc.org/resources/understanding-disabled-lgbtq-people> [https://perma.cc/V45S-2RE4].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Obasanjo Afolabi Bolarinwa et al., *Leaving No One Behind: Addressing the Sexuality of People with Disabilities*, 23 INT’L J. FOR EQUITY HEALTH, no. 129, June 28, 2024, at 1.

⁴⁹ LOIS SHEARING, *BI THE WAY: THE BISEXUAL GUIDE TO LIFE* 150 (2021).

⁵⁰ *Id.* at 161.

⁵¹ *Id.* at 161–62.

⁵² *Id.* at 162.

2. Orientations and Behaviors

Bisexual people share a common experience with the sexual orientation binary- they exist somewhere in the middle. This existence of being somewhere in the middle leads to a type of individual erasure in which a person's bisexuality is questioned based on the genders of their partners and the ratio of male/female identities of those partners. Anything other than a fifty-fifty split is considered "not bisexual."⁵³ One person who has shared their experience with this type of erasure writes that:

I was once told by a lesbian friend that I wasn't a proper bisexual because I had slept with more men than I had women. I then told her that she couldn't be a proper lesbian because I'd slept with more women than she had. Not entirely fair, I know, but saying something that stupid deserves an equally stupid answer.⁵⁴

While this type of erasure is harmful to cisgender bisexual people and their partners, it all but erases the possibility of having relationships with non-binary partners as well.⁵⁵

This sort of classification of bisexual people, relying on acts rather than identities, relates to a long-running issue in the history of queer identities.⁵⁶ While same-sex behavior has been documented for millennia, many commentators argue that sexuality as an identity is a modern invention.⁵⁷ In addition, the fluidity of bisexuality can also cause challenges when it comes to orientation and behavior. A person's sexuality may change during the course of their lifetime, maybe over the course of a year, maybe more frequently.⁵⁸ Perhaps this is one of the reasons why bisexuality is sometimes dismissed as simply a "phase." At the same time, misunderstanding of fluidity may also be a reason why many bisexual individuals experience a form of erasure in which they are pressured to simply "pick a side."

⁵³ HARRAD, *supra* note 41, at 46.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ SHAW, *supra* note 22, at 27.

⁵⁷ *Id.* at 25–27; *see generally* David M. Halperin, *Is There a History of Sexuality?*, 28 HIST. & THEORY 257 (1989) (arguing that sexuality is a recent cultural production); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 75–80 (Vintage Books ed. 1990).

⁵⁸ *See* SHAW, *supra* note 22, at 132.

a. Relationship Structures

One of the ways in which individual bi erasure happens is by making assumptions about a person's orientation based upon their romantic partner's gender. Many bisexual people are in long-term relationships with people of a different gender and may be mistaken or mislabeled as straight.⁵⁹ Bisexual people in opposite-sex relationships may also be the target of accusations of "passing privilege," or the ability to portray themselves as either straight or gay/lesbian as suits their needs.⁶⁰ Writing on the experience of being accused of exercising "passing privilege," Emily Wright says:

I find "passing privilege" really difficult to talk about. On one hand, it does give me access to privileges and acceptance that non-passing people do not get, but on the other hand, those privileges are conditional on keeping myself closeted.

There is a gulf between "passing" and being accepted. Passing is explicitly being accepted on false pretenses. I have a male partner, I look pretty heteronormative and people read me as straight. My alleged straightness is not a lie I am telling. It is people's stupid assumptions that bisexuals don't exist, that a woman partnered with a man must be straight and there is a queer "look" that can be easily identified. . . .

. . . .

Passing as straight gives some conditional privileges in straight, mainstream society (even if it is not true acceptance), but it can lead to rejection and harassment in LG [lesbian and gay] communities unless I choose to "pass" as lesbian, closeting myself again. The assumption is that because I pass in straight communities, I do not need queer community and I am greedy for expecting the community to include me.⁶¹

Accusations of passing privilege perpetuate stereotypes of bisexual individuals as dishonest and untrustworthy, making it a particularly pernicious form of erasure.

Similarly, many bisexual people are in committed, long-term same-sex relationships.⁶² These people may be assumed to be gay or lesbian. For bisexual people in either hetero or homosexual relationships, there may be

⁵⁹ HARRAD, *supra* note 41, at 48.

⁶⁰ 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/2GE6-XLLH>].

⁶¹ HARRAD, *supra* note 41, at 25–26.

⁶² *Id.* at 48.

the feeling that they are “not bi enough” because their relationship experience does not meet unreasonable societal expectations of how a bisexual person should live.⁶³

Another way in which bisexual people may face discrimination or animosity based on relationship structure relates to polyamory. Polyamory has been described as “intimacy with more than one person with the consent and knowledge of all parties.”⁶⁴ Perhaps unsurprisingly, queer-identifying people are more likely to have experience with polyamory (and other forms of consensual non-monogamy), with bisexual people being more likely to have such experiences than gay or lesbian people.⁶⁵ This in turn can play further into stereotypes of bisexual greed or indecisiveness.

b. Gender Identities

Another way in which bisexual people experience the world is at the intersection of sexual orientation and gender identity.⁶⁶ This is an area of particular interest, as men, women, and transgender or non-binary people may all experience their bisexuality differently. Each of these identities deserves a look. It has been fairly well documented that cisgender men and cisgender women experience bisexuality differently. One bisexual woman has observed, “Men are more likely to be perceived as being ‘secretly gay’ and women as hypersexual or indecisive. Bi women are more visible in the media but only certain versions: white, thin, non-disabled, cisgender, attractive. Other bi women remain invisible. Men tend to be mocked and doubted a bit more.”⁶⁷ For cisgender men in particular, openness about bisexual identity can be particularly difficult.

Part of the problem with biphobia directed at men is due to concepts of masculinity. J.R. Yussuf wrote:

⁶³ *Id.* at 53.

⁶⁴ Note, *Three's Company, Too: The Emergence of Polyamorous Partnership Ordinances*, 135 HARV. L. REV. 1441, 1444 (2022) (citing Neel Burton, *Polyamory: A New Way of Loving?*, PSYCH. TODAY (Mar. 19, 2020), <https://www.psychologytoday.com/us/blog/hidden-and-seeking/201704/polyamory-new-way-loving> [<https://perma.cc/25NU-W23Z>]).

⁶⁵ See generally Richard A. Sprott & Heath Schechinger, *Consensual Non-monogamy: A Brief Summary of Key Findings and Recent Advancements*, FAM. PSYCH., Apr. 2019, <https://www.apa.org/divisions/division-43/publications/newsletters/2019/04/non-monogamy> [<https://perma.cc/L7T2-DZAG>] (“Lesbian/gay/bisexual adults were more likely to have experience of [consensual non-monogamy (CNM)], with bisexually-identified people having significantly higher levels of CNM than gay/lesbian identified adults in the 2013 study.”).

⁶⁶ HARRAD, *supra* note 41, at 57.

⁶⁷ *Id.* at 58.

[W]hat it means to be a man, and to be masculine, is based on arbitrary identifiers like preferring blue over pink (though originally it was the other way around), not wearing high heels (originally only worn by white men of a certain social status), stoicism, athleticism, the access we have to women, the dominance we can assert over them, and how attracted they are to us. In this society, what we call feminine is devalued, often represented as fallible and corruptible. What we understand masculinity and manhood to be has been forged by patriarchy.⁶⁸

Perceived femininity in bisexual men and boys results in a level of mistrust not directed at more masculine men and boys.⁶⁹

Cisgender women, on the other hand, may experience bisexuality in a more publicly acceptable, although highly fetishized sort of way.⁷⁰ Psychologist Julia Shaw argues that in countries like the United States, the United Kingdom, Canada, and Germany, society has a tendency to normalize sexually playful behaviors in young women.⁷¹ This is so, she argues, because female experimentation, such as the kind contemplated in Katy Perry's hit song "I Kissed a Girl" does not need to threaten heterosexuality.⁷²

At the same time, the fetishizing of female bisexuality can manifest itself in ways bordering on harassment. Some bisexual women report being treated as "unicorns"⁷³ by heterosexual couples seeking to expand their sexual horizons, regardless of whether or not the bisexual person has shown any indication of interest. One British writer describes her unicorn hunting experience by saying:

Over the weekend, I was helping a friend sell merchandise on her company stall at a large trade show up in Manchester. I had a great time, as I always enjoy meeting new people and chatting with them—even if they don't end up buying anything! . . .

Around midday on the second day, I chatted to a couple who I would guess were about 20 years older than me,

⁶⁸ J.R. YUSSUF, DEAR BI MEN: A BLACK MAN'S PERSPECTIVE ON POWER, CONSENT, BREAKING DOWN BINARIES, AND COMBATING ERASURE 61 (2024).

⁶⁹ *Id.* at 63.

⁷⁰ HARRAD, *supra* note 41, at 58.

⁷¹ SHAW, *supra* note 22, at 158.

⁷² *Id.*

⁷³ "Unicorn" is a term which means "[a] queer person, often a bisexual woman, who is open to having a threesome and/or relationship with a heterosexual couple." CHLOE O. DAVIS, THE QUEENS' ENGLISH: THE LGBTQIA+ DICTIONARY OF LINGO AND COLLOQUIAL PHRASES 307 (1st ed. 2021).

possibly even double my age. They were very nice and lived in the East Midlands too and we were talking for about five minutes before they carried on looking round the event.

By the time I had arrived home that evening they had already messaged me to tell me that they were seeking a “suitable and enthusiastic submissive female,” and wondered whether I would consider having a relationship with them. From the way they described it in the message, this relationship would seemingly take the form of meeting up for sex a few times a month.

Needless to say I was a bit stunned. I had only spoken to them for a few minutes . . . I didn’t know their names, nor could I even remember what they looked like. I gave them my username for networking purposes . . .⁷⁴

Sadly, this experience is not uncommon, and cisgender bisexual women are often treated as sexual objects for the pleasure of others.

c. Bisexual Presence in a World of Queer Binaries

What is hopefully clear is that bisexuality is an identity that does not stand alone in the world. An individual’s bisexuality plays an important role in their choice of partner(s) and their selection of relationship structure with those partners. At the same time, a person’s gender identity may directly impact their experience of bisexuality—whether as an object of fetishized desirability (unicorns) or an object of derision or suspicion.

None of this, of course, deals with other binaries which affect the daily lives of bisexual people. J.R. Yussuf has written about the intersection of bisexuality and race through his personal experiences as a black man.⁷⁵ For many bisexual people of color, the white/non-white binary is of particular significance. In addition, many bisexual people also find their lives affected by the abled/disabled binary and the fact that people living with a disability often face challenges in having their sexuality acknowledged.⁷⁶ These are just two examples, although other binaries exist as well, which affect the lives and experiences of people of all sexual orientations.

⁷⁴ HARRAD *supra* note 41, at 49–50.

⁷⁵ See YUSSUF, *supra* note 68, at 1–10.

⁷⁶ Bolarinwa et al., *supra* note 48, at 1.

3. The Politics of Bi erasure

Bi erasure is not merely an external phenomenon; it also has deep roots with the queer community itself. Professor Kenji Yoshino has written in depth about the reasons for bi erasure, within and without the LGBTQ+ community, arguing that bisexual individuals are caught in a political struggle with the two ends of the sexuality spectrum, heterosexuals and homosexuals.⁷⁷ Yoshino argues that straight and gay/lesbian communities share a political interest in bi erasure, and have therefore entered into what he calls an “epistemic contract.”⁷⁸ In support of this argument, Professor Yoshino has identified three strategies of bisexual erasure: (1) class erasure, (2) individual erasure, and (3) delegitimization.⁷⁹ These strategies are employed by both heterosexuals and gay/lesbian individuals in order to erasure bisexual identities.⁸⁰

Class erasure is described as occurring when a group denies “the existence of the entire bisexual category.”⁸¹ Explicit denial includes claims such as the claim that bisexuality is not real or that “there is no such thing as bisexuality.”⁸² Implicit denial, on the other hand, occurs when people use the gay/straight binary to represent all individuals.⁸³ This may include describing bisexuality as a phase,⁸⁴ or the deliberate misrepresentation of bisexual people as gay or lesbian.⁸⁵

Kate Harrad provides an example of bisexual class erasure through the story of a person identified as Hessie, who wrote, “I went to a Lesbigay meeting in Freshers’ 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.”⁸⁶

⁷⁷ Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 391 (2000).

⁷⁸ *Id.*

⁷⁹ *Id.* at 395.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Yoshino, *supra* note 77, at 395; *see, e.g.*, *Romer v. Evans* 517 U.S. 620, 624 (1996) (referring to parties as “a class we shall refer to as homosexual persons or gays and lesbians” even though the law at issue, Amendment 2, specifically included bisexual people).

⁸⁴ Yoshino, *supra* note 77, at 396.

⁸⁵ *Id.* at 397 (citing MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 49–50 (1995)).

⁸⁶ HARRAD, *supra* note 41, at 38.

Harrad writes that, under this belief, “the slightest drop of gayness makes you gay.”⁸⁷ Alternative versions of this belief include the idea that women can be bisexual but men cannot, or that people of certain races may not be bisexual.⁸⁸ Class erasure need not be so overt. Simply saying “gay marriage” rather than “same-sex” marriage erases the possibility that bisexual people may marry someone of the same sex.⁸⁹

Individual erasure occurs when people acknowledge that bisexuality and bisexuals exist, but that a particular person is not bisexual.⁹⁰ This can occur when a person who identifies as bisexual is told that they are actually homosexual and that bisexuality is, therefore an unstable identity.⁹¹ Professor Yoshino argues that the view that bisexuals are “protohomosexuals” is particularly common amongst the gay/lesbian community.⁹² This may be because some gay/lesbian people have gone through a period of identifying as bisexual before settling on a distinctly homosexual identity, resulting in suspicion in others who identify as bisexual.⁹³

Delegitimization occurs when people acknowledge the existence of bisexuality but attach some kind of stigma to it.⁹⁴ The function of delegitimization is to chill the expression of bisexuality through negative portrayal.⁹⁵ Straight people may characterize bisexuals as promiscuous, duplicitous, closeted, and as purveyors of disease.⁹⁶ Gay and lesbian individuals, on the other hand, may portray bisexuals as “fence-sitters, traitors, cop-outs, closet cases . . . [or] power-hungry seducers who use and discard their same-sex lovers.”⁹⁷ The effectiveness of delegitimization can be measured by the fact that cases exist where individuals have brought suit alleging defamation per se due to having been called bisexual.⁹⁸

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 40.

⁹⁰ Yoshino, *supra* note 77, at 396.

⁹¹ *Id.*

⁹² *Id.* at 398.

⁹³ *Id.*

⁹⁴ *Id.* at 396.

⁹⁵ *Id.*

⁹⁶ Yoshino, *supra* note 77, at 396.

⁹⁷ *Id.* at 399 (citing Lisa Orlando, *Loving Whom We Choose*, in *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT* 223, 224 (Loraine Hutchins & Lani Kaahumanu eds., 1991)).

⁹⁸ *See, e.g., Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 776 (N.Y. App. Div. 2012).

But what interest convergence exists to drive these types of erasure by both the straight and gay/lesbian communities? Professor Yoshino provides several answers to this question as well. First, he argues that both straight and gay/lesbian individuals share an interest in stabilizing the idea of sexual orientation.⁹⁹ This happens, he argues, because the existence of bisexuality makes it impossible to prove a monosexual identity.¹⁰⁰ If one were to live in a world in which bisexuality does not exist, “the presence of cross-sex desire ipso facto negates the presence of same-sex desire, and vice versa. Thus, demonstrating cross-sex desire is sufficient to prove that one is heterosexual and not homosexual.”¹⁰¹

Where bisexuality exists, a person must instead show that they are both not homosexual and not bisexual (or not heterosexual and not bisexual).¹⁰² For the first, a person must show desire in either the opposite sex (if straight) or the same sex (if homosexual).¹⁰³ That person would then also need to show an absence of either homosexual desire (if straight) or opposite-sex desire (if homosexual).¹⁰⁴ The existence of bisexuality can have the effect of rooming a person’s sense of having roots in a community.¹⁰⁵

Another reason that Professor Yoshino argues results in the erasure of bisexuality is that bisexuality can be perceived as destabilizing the norms of monogamy.¹⁰⁶ This is due to what Professor Yoshino describes as “deep issues of sexual jealousy that may ultimately require” either the denigration or disavowal of bisexuality.¹⁰⁷ In basic terms, some individuals may feel threatened by a partner’s bisexuality because they may feel that they must compete with members of not one, but two sexes.¹⁰⁸ Additionally, Professor Yoshino argues that both straight individuals and gay/lesbian individuals may view bisexuality as a means of spreading disease—particularly HIV—into otherwise less affected communities.¹⁰⁹ This can be tied to stereotypes of bisexual promiscuity.¹¹⁰

⁹⁹ Yoshino, *supra* note 77, at 400.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 401.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Yoshino, *supra* note 77, at 402.

¹⁰⁶ *Id.* at 420.

¹⁰⁷ *Id.* at 421.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 424–26.

¹¹⁰ *Id.* at 425.

Regardless of whether one agrees with Professor Yoshino on the causes of bi erasure, the fact remains that there is an internal struggle within the community over the acceptance of bisexual individuals. Where this internal political struggle becomes particularly damaging is when we look at how the legal struggle for LGBTQ+ equality has often proceeded without explicit mention of the bisexual community. This is true in the courts, in legal advocacy, and even in the legal academy. The next section examines this reality in more depth.

4. Bi erasure as a Legal Reality

a. Bi erasure by Queer Advocates

The courts are not alone in engaging in bi erasure. One of the most disappointing facts of bi erasure in the legal sphere is when parties ostensibly argue on behalf of queer people and make the intentional decision to omit bisexuality. Again, it begins with *Romer*.

Professor Marcus has argued that the omission of bisexuality has occurred with the blessing of gay and lesbian advocates.¹¹¹ It began with the attorneys in *Romer* sending the signal to SCOTUS that bisexual people could be classified under “homosexual” or gay/lesbian labels by arguing that “Amendment 2 prevents gay people - *and only gay people* - from bringing ‘any . . . claim of discrimination’ under § 24-34-402.5 for relief from discrimination based on ‘homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.’”¹¹² Even as recently as *Obergefell*, party briefs failed to recognize bisexual individuals.¹¹³

But the problem of bi erasure is not limited just to the courts and the lawyers; indeed, other advocates have failed to be bi-inclusive as well. Professor Ruth Colker relates the story of a symposium in which representatives of the ACLU presented Rowland as an important “gay rights” victory.¹¹⁴ In doing so, the ACLU’s then director of its Lesbian and Gay Rights Project, mislabeled Marjorie Rowland as lesbian, even though she was fired for being bisexual.¹¹⁵

¹¹¹ Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291, 306 (2015).

¹¹² *Id.* at 307.

¹¹³ *Id.* at 311.

¹¹⁴ Ruth Colker, *A Bisexual Jurisprudence*, 3 L. & SEXUALITY 127, 134 (1993).

¹¹⁵ *Id.*

The point here is not to disparage LGBTQ+ allies, but rather to demonstrate that even though bisexual people make up the largest demographic under the LGBTQ+ umbrella, advocates have continued to erase them from the conversation. Whatever the reasons for doing so—fears of bisexuality complicating the concept of immutability, beliefs that bisexual people are only affected when they are in same-sex (and thus gay or lesbian appearing) relationships, etc.—the whole movement suffers when one group is consciously excluded. More so when the excluded groups account for the largest part of your coalition.

b. Bi erasure in the Courts

I. ERASURES BY JUDICIAL OMISSION

The United States Supreme Court is as guilty as many other institutions in engaging in bisexual class erasure. Professor Nancy Marcus has published comprehensive research on the language of SCOTUS opinions—current through 2015—involving LGBTQ+ rights, and particularly acknowledgment of bisexual interests.¹¹⁶ The results are disappointing.

Romer v. Evans,¹¹⁷ one of the most important LGBTQ+ rights cases, is a good place to start. *Romer* dealt with a statewide referendum, dubbed Amendment 2, adopted by Colorado voters in response to a number of municipalities enacting ordinances prohibiting discrimination in employment, education, housing, health and welfare services, and other areas on the basis of sexual orientation.¹¹⁸ Article 2 stated:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.¹¹⁹

¹¹⁶ Marcus, *supra* note 111, at 311–15.

¹¹⁷ *Romer v. Evans*, 517 U.S. 620 (1996).

¹¹⁸ *Id.* at 620.

¹¹⁹ *Id.* at 625 (quoting COLO. CONST. art. II, § 30b, *invalidated by* *Romer v. Evans*, 517 U.S. 620 (1996)).

SCOTUS struck down Amendment 2, but not before engaging in some bi erasure of its own, with Justice Kennedy declaring that the class of injured persons would be referred to as “homosexual persons or gays and lesbians” notwithstanding the clear inclusion of bisexuals in the Amendment itself.¹²⁰ Professor Marcus found that apart from references to the text of Amendment 2, the word bisexual was absent from Justice Kennedy’s opinion.¹²¹ She further noted that the omission in *Romer* “marked a historic and disturbing shift in jurisprudential linguistics, the point at which bisexuals were erased from the face of Supreme Court litigation addressing sexual orientation.”¹²²

Not long after *Romer*, in *Lawrence v. Texas*,¹²³ which struck down a Texas sodomy law, Justice Kennedy once again engaged in bi erasure over the course of the opinion. Professor Marcus found that the *Lawrence* majority used the word “bisexual” once—while describing the language in *Romer*’s Amendment 2.¹²⁴ *Hollingsworth v. Perry*¹²⁵ and *United States v. Windsor*,¹²⁶ both decided in 2013, again completely omit “bisexual” from the text of the opinion.¹²⁷ Finally, *Obergefell v. Hodges*,¹²⁸ decided in 2015 and resulting in marriage equality for same-sex couples, again omitted any reference to bisexual people.¹²⁹ While it is worth noting that “same-sex” and “same sex”¹³⁰ can be considered more inclusive of bisexual people, they are terms that do not take into account the unique experiences of bisexual people.

II. ERASURES BY JUDICIAL IGNORANCE

Sometimes bi erasure in the courts stems from simple judicial ignorance about bisexuality itself. Just as members of the general population may misunderstand bisexuality, judges too may fail to understand—or do their

¹²⁰ *Romer*, 517 U.S. at 624.

¹²¹ Marcus, *supra* note 111, at 344.

¹²² *Id.* at 308.

¹²³ *Lawrence v. Texas*, 539 U.S. 558 (2003). Also a Kennedy opinion.

¹²⁴ Marcus, *supra* note 111, at 343.

¹²⁵ *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (challenging California’s Proposition 8, which banned same-sex marriage).

¹²⁶ *United States v. Windsor*, 570 U.S. 744 (2013) (challenging § 3 of the Defense of Marriage Act, which denied federal recognition of same-sex marriages). Another Kennedy opinion.

¹²⁷ Marcus, *supra* note 111, at 343.

¹²⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015). Yet another Kennedy opinion.

¹²⁹ Marcus, *supra* note 111, at 343.

¹³⁰ Used 75 times in *Obergefell* alone. *Id.*

due diligence—to understand the issues presented to them regarding bisexuality. Unfortunately, this judicial ignorance can have serious consequences.

One example is the case of Ray Fuller. Mr. Fuller was a Jamaican citizen who came to the United States in 1999 with a visa sponsored by his fiancé.¹³¹ He married his fiancé and together they had a daughter in 2001.¹³² Eventually Fuller received conditional permanent resident status, but when he and his then-spouse failed to attend a required interview with U.S. Citizen and Immigration Service, his status was revoked.¹³³

The same year that Fuller's status was revoked he pleaded guilty to an attempted sexual assault.¹³⁴ Later he violated the terms of his probation and was sentenced to four years in prison.¹³⁵ Upon his release, Mr. Fuller was detained by the Department of Homeland Security, who charged him with being removable for (1) being convicted of an aggravated felony, (2) being convicted of a crime involving moral turpitude, and (3) losing his conditional permanent resident status.¹³⁶

Fuller contested his removal, arguing in part that he was a bisexual man and that Jamaica was not a safe space for him due to its history of discrimination and the history of abuse directed towards lesbian, gay, bisexual, and transgender people there.¹³⁷ As the majority opinion, written by Judge Dianne Wood, pointed out:

Fuller asserted that he is bisexual, and he testified about his experiences as a bisexual man in Jamaica and the specific incidents of harm and harassment he endured. He grew up in Kingston and said that as a preteen he began exploring sexual relationships with both men and women. Since then, he has identified as bisexual and continued to have relationships with both sexes. One of his relationships with a woman produced two children, a son born in 1986 and a daughter born in 1987, both of whom now live in the United States and are U.S. citizens. While attending college in Kingston, Fuller was attacked and at times stoned by other students. A few years later, when walking home from work, he was taunted for being gay by a group of men who took a knife to his face and sliced him. Another time he was

¹³¹ *Fuller v. Lynch*, 833 F.3d 866, 867 (7th Cir. 2016).

¹³² *Id.*

¹³³ *Id.* at 867–68.

¹³⁴ *Id.* at 868.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Fuller*, 833 F.3d at 868.

robbed at gunpoint by a man who called him a “batty man,” a Jamaican slur for a gay man. On another occasion, while partying with his boyfriend in the gay-friendly resort town of Ocho Rios, Fuller was shot in the back and buttock by someone in an “anti-gay mob” that had barged into the party. His sisters, after hearing about the shooting, expressed their disapproval of his sexual orientation and “disowned” him, and one sister kicked him out of her house. In 1997 Fuller became romantically involved with Wood, a former high-school friend who was visiting Jamaica. They married in 1999, lived together in the United States, and two years later returned to Ocho Rios for a belated honeymoon. Fuller testified that he also had been hoping to reconnect with his family, but they refused to see him. He told the IJ [immigration judge] that while married to Wood he had multiple affairs with men and women.¹³⁸

Regardless, the immigration judge denied all relief on several grounds, including the severity of his crimes, but also on the basis of her disbelief in his bisexuality.¹³⁹ Among the immigration judge’s reasons for denial were “the fact that Fuller had been married to a woman, fathered children with two different women, and was convicted for sexual assault on a woman.”¹⁴⁰

Judge Wood and the majority knew that this reasoning was wrong. Indeed, they wrote that:

None of those actions is necessarily inconsistent with a bisexual orientation; after all, the very word “bisexual” indicates that the person is attracted to both women and men. But the IJ [immigration judge] relied on much more than a mistaken assumption that a bisexual man would not marry a woman, father children, or commit sexual assaults.¹⁴¹

However, despite knowing that the immigration judge was wrong, the majority did nothing to disturb the ruling.¹⁴²

¹³⁸ *Id.*

¹³⁹ *Id.* at 868–69.

¹⁴⁰ *Id.* at 869.

¹⁴¹ *Id.*

¹⁴² *Id.* at 870.

To be fair, there is a dissent in *Fuller*, authored by one of the most open-minded judges in the history of the Seventh Circuit: Richard Posner. Judge Posner criticized the majority, writing:

[T]he rejection of his claim to be bisexual is also unconvincing. The immigration judge emphasized such things as Fuller's lack of detailed recollection of events that go back as far as 1983 and a supposed lack of "proof" of bisexuality. Well, even members of this panel have forgotten a lot of 33-year-old details. And how exactly does one *prove* that he (or she) is bisexual? Persuade all one's male sex partners to testify, to write letters, etc.? No, because most Jamaican homosexuals are not going to go public with their homosexuality given the vicious Jamaican discrimination against lesbian, gay, bisexual, and transgender ("LGBT") persons, which is undeniable . . .¹⁴³

Posner then went on to discuss in detail discrimination against homosexual men, including in popular Jamaican music.¹⁴⁴ But even in his attempt to show the failure of the immigration judge, Posner's own ignorance of bisexuality is visible. For example, he slips into binary homosexual/heterosexual language as he makes his argument.¹⁴⁵ He also suggests that a psychologist could have been called upon to assess Fuller's claim of being bisexual,¹⁴⁶ yet this suggests that there is (1) some psychological aspect to bisexuality which a psychologist could diagnose; (2) and also suggests the possibility that if bisexuality could be diagnosed by a psychologist, that it may be treatable, which in turn reinforces stereotypes that sexualities other than heterosexuality are a form of mental illness.¹⁴⁷

The end result in *Fuller* is that both the majority and the dissent display a lack of understanding of bisexuality. For the majority, this takes the form of willingness to accept a lower court ruling full of stereotypes and misinformation. In the dissent it includes more stereotyping and systemic language of erasure. While there were legitimate reasons for Fuller's outcome—including his repeated criminal activity—the court, ultimately failed both Fuller and the bisexual community by engaging in stereotypes.

¹⁴³ *Fuller*, 833 F.3d at 872 (Posner, J., dissenting).

¹⁴⁴ *Id.* at 872–73.

¹⁴⁵ See, e.g., *id.* at 872 ("Persuade all one's *male* sex partners to testify, to write letters, etc.?" (emphasis added)).

¹⁴⁶ *Id.* at 873.

¹⁴⁷ See generally Drescher, *supra* note 26 (discussing the historical scientific theories and arguments that resulted in homosexuality being placed in the American Psychiatric Association's (APA) Diagnostic and Statistical Manual (DSM), a manual listing all conditions believed to be a mental disorder).

Rowland v. Mad River Local School District,¹⁴⁸ a case involving an adverse employment decision based in part on the employee's bisexuality, is an even more stunning example of judicial ignorance facing bisexuality. Marjorie Rowland worked as a guidance counselor at a high school in Montgomery, Ohio.¹⁴⁹ Not long into Rowland's time at the school, she shared with a secretary that two students she was counseling were homosexual, and later told the secretary, assistant principal, and several friends who taught at the school that Rowland herself was bisexual.¹⁵⁰ Rowland later met with the principal of the school who suggested that she resign; and then met again with the principal, superintendent, and school district attorney where it was again suggested that she resign.¹⁵¹ Rowland refused both times.¹⁵²

After the second refusal, Rowland was suspended with pay for the remainder of her contract.¹⁵³ She subsequently filed a lawsuit, receiving a preliminary injunction against her suspension.¹⁵⁴ At that point, Rowland was transferred to a position involving the development of a career education curriculum.¹⁵⁵ In March, Rowland's contract was not recommended for renewal, and she filed suit against the school district, the principal, the president and members of the school board, and the superintendent of the district.¹⁵⁶ After a convoluted procedural history including a dismissal on the grounds that sexual preference is not constitutionally protected, and an order by the Sixth Circuit vacating the dismissal, the case ended up before a magistrate judge for trial.¹⁵⁷

The magistrate chose to submit a number of special verdicts to the jury for their determination of the case.¹⁵⁸ In the first three of the special verdicts, the jury found that:

[N]either plaintiff's disclosure to the secretary of her love for another woman, nor her statements to the assistant

¹⁴⁸ See *Rowland v. Mad River Loc. Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984).

¹⁴⁹ *Id.* at 446.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Rowland*, 730 F.2d at 446.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 446–47.

¹⁵⁸ *Id.* at 447.

principal and to other teachers concerning her bisexuality interfered with the proper performance of anyone's duties or with the operation of the school generally. In the same verdicts the jury found that the decision to suspend the plaintiff was motivated at least in part by these statements regarding her bisexuality.¹⁵⁹

The fourth special verdict found that the decision to transfer Rowland and ultimately not renew her contract was not motivated by her filing of a lawsuit.¹⁶⁰ In special verdict 5, the jury found that in deciding upon Rowland's transfer and the non-renewal of her contract, the defendants treated her differently than similarly situated employees because of her bisexuality, although the board did not treat her differently in voting not to renew her contract.¹⁶¹ This special verdict also found that Rowland did not perform her role as a vocational guidance counselor in a satisfactory manner due to the fact that "she revealed to Mrs. Monell [the secretary] the sexual orientation of two students when it was not necessary to do so."¹⁶²

The magistrate judge ended up finding in favor of Rowland against the school district on the basis that her suspension and transfer of the plaintiff violated her rights to equal protection of the law and free speech, and that the nonrenewal of her contract violated of her right to free speech.¹⁶³ On appeal, the Sixth Circuit characterized the magistrate judge's findings as resting on two theories:

- (1) That the school district violated plaintiff's Fourteenth Amendment right to equal protection of the law by suspending her because she is bisexual or homosexual; and
- (2) That the school district violated plaintiff's First Amendment right to freedom of speech by not renewing her one-year contract because she told Mrs. Monell, the secretary, Mr. Goheen, the assistant principal, and other teachers of her bisexuality.¹⁶⁴

The Sixth Circuit rejected both of those findings.¹⁶⁵

In rejecting the First Amendment claim, the court relied upon the (then) newly decided Supreme Court ruling that:

¹⁵⁹ *Id.*

¹⁶⁰ *Rowland*, 730 F.2d at 447.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 448.

¹⁶⁵ *Id.*

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.¹⁶⁶

Under this test, the majority found that Rowland's statements were not protected speech.¹⁶⁷ The court noted that on several occasions Rowland asked that her disclosure of her orientation be kept confidential, which it interpreted as indicative of her acknowledgment that the issues were not ones of public concern.¹⁶⁸ As a result, the majority felt that the defendants were entitled to win judgment as a matter of law.¹⁶⁹

On the Equal Protection claim, the majority argued that the magistrate judge's findings contained several ambiguities.¹⁷⁰ He found, for example, that the school board did not violate Rowland's right to equal protection in voting to not renew her contract.¹⁷¹ The majority also pointed out that the jury had found that Rowland's performance was unsatisfactory due to her outing of two students to a secretary.¹⁷²

The majority also noted that there was no evidence submitted on how other employees with "different sexual preferences" were treated.¹⁷³ Finally, the court noted that there was no school policy related to homosexuals or bisexuals and that when the magistrate judge made this ruling, Rowland did not object.¹⁷⁴ The majority argued that "[t]he district cannot be held liable for an action of an employee which was totally unrelated to any policy or custom of his public employer."¹⁷⁵

A well-meaning but equally misguided dissent took issue with the majority decisions, arguing that:

¹⁶⁶ *Rowland*, 730 F.2d at 449 (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

¹⁶⁷ *Rowland*, 730 F.2d at 449.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 450.

¹⁷³ *Rowland*, 730 F.2d at 450.

¹⁷⁴ *Id.* at 451.

¹⁷⁵ *Id.*

My colleague's opinion seems to me to treat this case, *sub silentio*, as if it involved only a single person and a sick one at that—in short, that plaintiff's admission of homosexual status was sufficient in itself to justify her termination. To the contrary, this record does not disclose that she is subject to mental illness; nor is she alone.¹⁷⁶

In the course of this dissent, the judge engaged in bi erasure by reassigning her as homosexual when that was not her identity at all.¹⁷⁷ This is similar to the majority referring to Rowland's "sexual preference" as if bisexuality were her choice rather than her reality. In terms of judicial ignorance regarding bisexuality, there is plenty of blame to go around on both sides of this case.

Rowland seems straight-forward in terms of the law and the facts of the case, and one could easily rest on the majority opinion. But in truth, there is much that was left out of the opinion. Professor Ann Tweedy has written in detail about *Rowland* and bisexual erasure, including the fact that the case has not received the attention it deserves.¹⁷⁸

When *Rowland* is referenced, it is often the United States Supreme Court's denial of certiorari, and more specifically, a dissent by Justice William Brennan.¹⁷⁹ In this dissent, Brennan, joined by Justice Marshall, decried the Sixth Circuit's "crabbed reading of our precedents and unexplained disregard of the jury and judge's factual findings."¹⁸⁰ He questioned whether that court's "maneuvers suggest[ed] only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone?"¹⁸¹

In addressing whether speech regarding a person's sexual orientation is a matter of public concern, Brennan argued that some issues, such as racial discrimination, are matters of public concern.¹⁸² He found it "impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate."¹⁸³ Because her speech was non-

¹⁷⁶ *Id.* at 454 (Edwards, Jr., J., dissenting).

¹⁷⁷ See, e.g., *id.* ("[T]hat plaintiff's admission of *homosexual* status was sufficient in itself to justify her termination.") (emphasis added).

¹⁷⁸ Ann E. Tweedy, *Bisexual Erasure, Marjorie Rowland, and the Evolution of LGBTQ Rights*, 46 HARV. J.L. & GENDER 265, 267 (2023).

¹⁷⁹ *Rowland v. Mad River Loc. Sch. Dist.*, 470 U.S. 1009, 1023 (1985) (Brennan, J., dissenting).

¹⁸⁰ *Id.* at 1011.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1012.

¹⁸³ *Id.*

disruptive, Brennan believed that it should be protected under the First Amendment.¹⁸⁴

Under the Equal Protection aspect of the case, Brennan suggested that the discrimination Rowland faced likely violated the Fourteenth Amendment because it targeted a member of a suspect class in the exercise of a fundamental right.¹⁸⁵ He went so far as to argue that the precedents of the Supreme Court required that discrimination against homosexuals should be subject to strict, or at least heightened scrutiny.¹⁸⁶

Despite Justice Brennan's forward-looking dissent, *Rowland* stands as a towering example of a court's decision to ignore the existence of an entire group of people. This failure occurred at multiple levels, including the majority decision and multiple dissents. So too with *Fuller*, demonstrating that ignorance of bisexuality existence is not an isolated problem in the judiciary.

III. SUBVERSIVE BISEXUALITY

A. Binaries as Social Constructs

Professor Katherine Franke has written that “[t]he authority to define particular categories or types of people and to decide to which category a particular person belongs is a profoundly powerful social function.”¹⁸⁷ The creation of binaries is one way in which society has chosen to categorize people. Today binaries are widely accepted as social constructs¹⁸⁸ and are thus defined and interpreted within cultural and historical contexts.¹⁸⁹

Binary systems result when the idea behind a binary is integrated into our culture.¹⁹⁰ Miliann Kang et al. have described the impact of creating binary systems, writing that it:

[R]esults in an exaggeration of differences between social groups until they seem to have nothing in common. An example of this is the phrase “men are from Mars, women

¹⁸⁴ *Id.* at 1013–14.

¹⁸⁵ *Rowland*, 470 U.S. at 1014–15.

¹⁸⁶ *Id.* at 1014.

¹⁸⁷ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

¹⁸⁸ MILLIANN KANG ET AL., INTRODUCTION TO WOMEN, GENDER, SEXUALITY STUDIES 27 (2017).

¹⁸⁹ *Id.* at 16.

¹⁹⁰ *Id.* at 27.

are from Venus.” Ideas of men and women being complete opposites invite simplistic comparisons that rely on stereotypes: men are practical, women are emotional; men are strong, women are weak; men lead, women support.¹⁹¹

As a result, much of the variety and complexity that make reality are lost, while simultaneously the existence of either do not identify with one of the identities in the binary or those who identify with both are erased.¹⁹²

Binaries are among the most enduring, and damaging, shibboleths of our legal and social structure. We use them because they are simple, and because they are simple, we see them as safe. Too often, however, binaries have been used to determine who has the privilege and who is left behind in our society. Obvious examples include the privileging of white persons over non-white persons, male over female, and abled over disabled. And yet, despite their capacity for social harm, they are open to subversion. Bisexuality does this in two ways which will be developed below.

B. Bisexuality and the Subversion of Binaries

1. Bisexual Subversion of the Gay/Straight Dichotomy

The most obvious instance of the subversive nature of bisexuality lies in its relation to the heterosexual-homosexual binary. This binary is particularly interesting due to its relatively modern origins. The term “heterosexual” did not exist until 1892, when it was coined by Dr. James Kiernan.¹⁹³ When it was first introduced, “heterosexual” did not refer to people attracted to the opposite sex, but rather to those whose inclinations ran towards both sexes.¹⁹⁴ Thus, at the time of its invention, heterosexuality implied sexual deviancy.¹⁹⁵ Only recently did heterosexuality obtain its current meaning, and become the cultural assumption of normative behavior.¹⁹⁶

“Homosexual” on the other hand, is a term which appears to predate “heterosexual.” Philosopher and early queer theorist Michel Foucault dates the evolution of “homosexuality” from a type of act into an identity involving someone romantically or sexually attracted to members of the same sex as occurring sometime around 1870.¹⁹⁷ Foucault attributed the creation of the homosexual identity to the medicalization of sexuality, writing:

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 16.

¹⁹⁴ KANG ET AL., *supra* note 188, at 16.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ FOUCAULT, *supra* note 57, at 43.

We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized—Westphal’s famous article of 1870 on “contrary sexual sensations” can stand as its date of birth—less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.¹⁹⁸

Foucault draws a connection to a prior understanding of same-sex intimacy as a type of behavior rather than an aspect of identity.

We understand the invention of heterosexual and homosexual identities as originating in the late nineteenth century. But what about bisexuality? Dr. Julia Shaw claims that prior to its adoption to describe a type of human sexuality, “bisexual” was typically used to describe creatures and plants which have both male and female reproductive parts.¹⁹⁹ Roses are an example of a plant which might fit this description. The word “bisexual” is thought to have evolved into its current usage sometime around 1892.²⁰⁰ What is clear is that sexuality and identity were not closely linked until the late nineteenth century. As Dr. Shaw wrote, “There were words to describe the kinds of sexual behavior people engaged in, but sex was mostly something that people did, not part of who they were.”²⁰¹

Bisexuality subverts the idea of the heterosexual-homosexual binary in several ways. First, as Professor Yoshino has noted, it calls into question the foundations of both heterosexual and homosexual identities.²⁰² Professor Yoshino argues that, in a world without bisexuality, proving heterosexuality or homosexuality is less difficult because one does not need to prove that one is not also bisexual.²⁰³ Further, he argues, both straight and gay/lesbian

¹⁹⁸ *Id.* (footnote omitted).

¹⁹⁹ SHAW, *supra* note 22, at 3.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 4.

²⁰² Yoshino, *supra* note 77, at 401.

²⁰³ *Id.*

people “take comfort in knowing their place in the social order,”²⁰⁴ and thus have an interest in maintaining that order.

Second, it calls into question the validity of immutability as a basis for protection. Equal protection cases often take immutability into consideration in determining whether a class or group has been subject to discrimination.²⁰⁵ Technically, “immutable” means “not capable of or susceptible to change.”²⁰⁶ In *Frontiero v. Richardson*, the United States Supreme Court elaborated on the concept of immutability and its relation to suspect classes, writing:

[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”²⁰⁷

Under this “accident of birth” theory, immutable characteristics bear no relation to individual responsibility.²⁰⁸ It is for this reason that “born-this-way” arguments have long been appealing to gay/lesbian rights advocates.²⁰⁹

As Professor Yoshino has discussed, there is a shared gay/lesbian-straight interest in stabilizing the meaning of sexual orientation, which stems from the stability of being rooted in a community.²¹⁰ Straight people have an interest in preserving their sexual identity because of the privileged place given to straight people in American society.²¹¹ Gay/lesbian people, on the other hand, have an interest in maintaining the immutability argument, as well as in forming an effective political movement.²¹²

The existence of bisexuality and its destabilizing effect on the homosexual-heterosexual dichotomy stems in part from the fact that

²⁰⁴ *Id.*

²⁰⁵ See Eliot T. Tracz, *The Inscrutable Bisexual: An Essay on Bisexuality and Immutability*, 21 SEATTLE J. FOR SOC. JUST. 917, 921–25 (2023).

²⁰⁶ *Immutable*, MERRIAM-WEBSTER (2025), <https://www.merriamwebster.com/dictionary/immutable> [<https://perma.cc/GP38-TZW4>]; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (describing immutable traits as those that “possessors are powerless to escape or set aside”).

²⁰⁷ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

²⁰⁸ Tracz, *supra* note 205, at 925.

²⁰⁹ *Id.* at 926.

²¹⁰ Yoshino, *supra* note 77, at 400–02.

²¹¹ *Id.* at 402.

²¹² *Id.* at 400.

bisexuality shatters the exonerating effect of immutability.²¹³ Immutability implies the lack of choice in a person's sexual or romantic attractions, bisexuals on the other hand are often portrayed as having a choice.²¹⁴ Given that, as Professor Yoshino has pointed out, it is impossible for a person to disprove an interest in partners of the same or a different sex, bisexuality has the potential to render immutability moot.²¹⁵ In this instance, the heterosexual-homosexual dichotomy is no longer useful, due to the existence of bisexuality.

2. Bisexuality and the Subversion of Male/Female Gender Dichotomy

Bisexuality also subverts the male/female gender dichotomy. We live in a society in which people are assigned to one of two sexes: male or female. A small smattering of people are born intersex,²¹⁶ but many of those people are themselves assigned either male or female at birth. With these assignments come a set of social assumptions including "assumptions about how others should act in social life, and to whom they should be attracted, based on their perceptions of outward bodily appearance, which is assumed to represent biological sex characteristics."²¹⁷

In our society, heteronormative traits assigned to masculinity might include things such as masculine attire,²¹⁸ aggressiveness,²¹⁹ interest in sports,²²⁰ and interest in competition.²²¹ Finally, one of the key masculine traits is sexual and romantic attraction to women.²²² Where some or all of

²¹³ *Id.* at 405–06; Tracz, *supra* note 205, at 930.

²¹⁴ Tracz, *supra* note 205, at 930.

²¹⁵ For an in-depth discussion, *see* Tracz, *supra* note 205, at 930–31.

²¹⁶ "Intersex" is a term used to describe people "born with variations on sex characteristics that would traditionally assign a child male or female. Variations may involve genital ambiguity and/or combinations of the chromosomal genotype and sexual phenotypes other than XY-male and XX-female." DAVIS, *supra* note 73, at 174.

²¹⁷ KANG ET AL., *supra* note 188, at 28.

²¹⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

²¹⁹ *Id.* at 234.

²²⁰ *Goulart v. Goulart*, No. KNO-FA-16-6101967-S, 2021 WL 12148611, at *3 (Conn. Super. Ct. Dec. 15, 2021).

²²¹ *Id.*

²²² KANG ET AL., *supra* note 188, at 28.

these traits are not present in a male or male-identifying person, they are likely to be perceived, if not also treated, as feminine.²²³

Feminine traits, on the other hand, include things such as being “yielding, loyal, cheerful, compassionate, shy, sympathetic, sensitive to others’ needs, flatterable, understanding.”²²⁴ Sexual and romantic attraction to men is considered another normative feminine trait.²²⁵ As with men who fail to conform to normative “masculine” traits, women who do not conform to normative “feminine” traits may experience discrimination.²²⁶

The most obvious way in which bisexuality subverts the male/female gender dichotomy is through the experience of romantic or sexual attraction to more than one sex or gender, rather than the normative attraction experienced by other people of the bisexual person’s gender. When a person can be attracted to people of more than one sex or gender, one of the defining characteristics of masculinity or femininity—attraction to people of the opposite sex—is no longer present and that person’s place on the sex/gender binary is called into question.

Bisexuality also calls into question the validity of gender stereotypes of any kind. For example, as noted above, normative masculine characteristics such as dominance are often assumed to be absent from men who have sex with men, with submissiveness or other feminine characteristics in place. The same is true for women who have sex with women, and who might present as dominant rather than submissive. Bisexual individuals, however, may assume different roles in different relationships, while still maintaining the character traits normatively associated with their assigned sex/gender.

Non-binary people who identify as bisexual further complicate the relationship between bisexuality by rejecting not just the gay/lesbian-straight binary, but also the male-female binary. These bisexuals prove that one need not fit neatly within any category in order to successfully participate in healthy relationships or any other social activities.

C. How Law Benefits from Shades of Gray

Understanding bisexuality can benefit the law in several ways. First, it can help us question whether there is a legal necessity to try to fit people into legal boxes when it comes to the protections of certain rights. Second, it can

²²³ See, e.g., *Equal Emp. Opportunity Comm’n v. Boh Bros. Constr. Co.*, 731 F.3d 444, 449–50 (5th Cir. 2013) (discussing how plaintiff, an iron worker, was subjected to sexual harassment by a supervisor who felt that the plaintiff did not conform to how a man should act); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287–88 (3d Cir. 2009) (discussing how plaintiff was harassed by coworkers and ultimately terminated due in part to his perceived feminine traits).

²²⁴ Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 494 (1990).

²²⁵ KANG ET AL., *supra* note 188, at 28.

²²⁶ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

help us determine whether there is any real value in the law categorizing people to begin with. Each deserves a look.

First, bisexuality shows that people do not need to fit within specific boxes—“classes” in legal parlance—in order to merit legal protection. Our jurisprudence is filled with cases in which the courts are required to find whether discrete classes of individuals merit constitutional protection. Despite our courts’ history of finding discrete classes, and despite the many opportunities it has been presented with over the last thirty years (*Romer v. Evans*,²²⁷ *Lawrence v. Texas*,²²⁸ *United States v. Windsor*,²²⁹ *Obergefell v. Hodges*)²³⁰ the United States Supreme Court has never bothered to conduct the necessary analysis to determine whether laws discriminating on the basis of sexual orientation ought to be subjected to higher levels of scrutiny.²³¹

There are a number of factors involved in determining whether a classification is considered “suspect” and warrants heightened scrutiny. Those factors include determining whether the class (1) has been subjected to a history of purposeful unequal treatment, (2) possesses a characteristic that bears no relation to the ability to perform or contribute to society; (3) has an obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (4) is a minority or politically powerless.²³² An honest assessment of these factors shows that gay/lesbian individuals probably should qualify as a suspect class, in part because of the immutable, distinguishing characteristic of same-sex attraction. Bisexual people share this characteristic, yet also the capacity for opposite-sex attraction. Therein lies the fundamental challenge that bisexuality offers to the gay/lesbian-straight dichotomy: “Binaries are social constructs composed of two parts that are framed as absolute and unchanging opposites. Binary systems reflect the integration of these oppositional ideas into our culture. This results in an exaggeration of differences between social groups until they seem to have nothing in common.”²³³ Bisexuality has something in common with both groups, and so the binary no longer serves its purpose.

²²⁷ *Romer v. Evans*, 517 U.S. 620 (1996).

²²⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²²⁹ *United States v. Windsor*, 570 U.S. 744 (2013).

²³⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²³¹ In each of these cases, the Court has danced around the idea of heightened scrutiny, and yet, no majority has committed to adopting that level of scrutiny outright.

²³² *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).

²³³ KANG ET AL., *supra* note 188, at 27 (emphasis omitted).

One of the criticisms of bisexuality is that bisexual people may “pass” as either gay/lesbian or straight, depending upon the sex of their partner.²³⁴ While this argument is little more than bi-phobic nonsense—a bisexual person is bisexual regardless of the sex/gender of their partner—it is an idea which further underscores that the gay/lesbian-straight binary fails in its fundamental task of classifying individuals.

Second, binary identities have questionable value as a means of categorizing individuals for broader legal purposes. This is particularly true when it comes to sexual orientation. One might argue that binaries serve an important interest by allowing classification for administrative purposes, yet that argument has been repeatedly rejected by courts in the context of gender stereotyping.²³⁵ Bisexuality’s spurning of gender norms makes it difficult to fit neatly into a legal box.

Pushing back against this argument, Professor Ruth Colker has argued that there is legislative value to placing people in categories.²³⁶ She argues that in order to create nondiscrimination statutes, we must define terms such as “lesbian,” “gay,” or “bisexual.”²³⁷ But that isn’t necessarily true. An effective nondiscrimination statute could simply bar discrimination on the basis of sexual orientation, and then instead of defining different orientations—a futile task since sexual identities are self-defined—it could simply define “sexual orientation” as “including people who *identify* as bisexual, lesbian, gay, or other sexual identities.”

That sexual orientation’s value as a data point is certainly true. It helps us track the provision of health care services, lets us better understand the demographics—and therefore needs—of our communities, and helps shape our culture in a variety of ways. Yes, none of these things require legal classification on the basis of sexual orientation.

Bisexuality naturally resists a box. It is deeply personal, as each person’s journey is their own, and not all bisexual people experience romantic or sexual attraction in the same way. At the same time, its fluidity does not lend itself to an easy reduction down to a simple definition. Finally, when we consider that the majority of people who do not identify as straight also do not identify as either gay or lesbian, it is fair to question whether or not the gay/lesbian-straight binary can accurately capture the sexual diversity of our world.

²³⁴ “Passing” is different from Kenji Yoshino’s theory of “covering” in which individuals do not necessarily hide their identity, but downplay or minimize that identity. *See* Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 772, 924 (2002).

²³⁵ *See* Craig v. Boren, 429 U.S. 190, 198 (1976) (collecting cases).

²³⁶ COLKER, *supra* note 2, at 32.

²³⁷ *Id.*

IV. CONCLUSION

The law likes easy outcomes. The entire basis of the common law rests on the premise that similar cases should have similar outcomes, resulting in consistency and reasonable expectations for legal outcomes. It makes sense then that the law, which is often an outdated microcosm of our society, embraces binary systems. These binary systems—male-female, white-non-white, abled-disabled, gay/lesbian-straight—purport to capture the wide range of people who make up our society in simple, easily understandable kinds of ways. In doing so, the law has adopted a number of shibboleths²³⁸ intended to identify parts of our society.

These shibboleths guide judges, advocates, and policymakers in the formation of the rules and regulations which govern our society. Whether because of administrative purposes, traditional beliefs about normative behaviors or capabilities, or even outright animus towards certain groups, these outdated notions have been behind policies such as racial segregation and have driven systemic gender inequality. Today they play a central role in the culture wars involving sexuality and gender identity by setting the foundations for arguments about what appropriate sexual identities are, who is a “man” and who is a “woman,” and other related topics affecting the LGBTQ+ community.

The focus of this article, the gay/lesbian-straight binary system, suffers from the same problem that all binary systems experience: it is under-inclusive. Specifically, it excludes the existence of the largest LGBTQ+ group—bisexual people. While bisexuality may not always be discernable—some bisexual people will only ever have same-sex relationships, some will only have opposite-sex relationships, and some may not have any relationships at all for various reasons—the erasure of the largest LGBTQ+ group necessarily raises questions. Professor Yoshino has deftly explained numerous reasons why both the gay/lesbian and straight communities may engage in bi erasure, all of which ultimately lead to the goal of reinforcing the gay/lesbian-straight binary.²³⁹

Unfortunately, the law has accepted this binary system, further excluding bisexual people from legal recognition. As Professor Marcus has noted, since *Romer v. Evans*, bisexuality has been conspicuously absent from the opinions

²³⁸ Here “shibboleth” can be used to mean either “a word or saying used by adherents of a party, sect, or belief and usually regarded by others as empty of real meaning” or “a widely held belief.” See *Shibboleth*, MERRIAM-WEBSTER (2025), <https://www.merriam-webster.com/dictionary/shibboleth> [<https://perma.cc/NM9W-KHX9>].

²³⁹ Yoshino, *supra* note 77, at 391–99.

of the United States Supreme Court.²⁴⁰ While it is more likely to be recognized as an orientation by lower courts, even those courts tend to misrepresent or misunderstand bisexuality. This erasure—at all levels—can be attributed to several reasons: (1) judicial ignorance when judges simply do not know—or care to learn—about what bisexuality is; (2) judicial omission where the courts intentionally leave bisexuals out of court rulings as in *Romer*, *Lawrence*, and *Obergefell*;²⁴¹ (3) omission by advocates who instead of taking the opportunity to inform courts about bisexuality and its place in the LGBTQ+ community, instead often choose to ignore bisexuality rather than address the seemingly complicated issues that bisexuality raises in LGBTQ+ rights cases; and (4) academics who were late to the game in the creation of a bisexual jurisprudence, although Professors Yoshino, Marcus, Tweedy, and others have worked hard to build scholarship on bisexuality and the law.

Rectifying the wrongs that the law—courts, advocates, and academia—have done to the bisexual community offers a chance for the law to accept a simple truth—the depth of human existence cannot simply be reduced to a set of “either/or” options. An under-inclusive system only serves the interests of those looking to exclude others, but rarely, if ever, makes good on the Fourteenth Amendment’s promise of equal protection under the law. In calling the gay/lesbian-straight binary into question, bisexuality shows how groups who do fit in at either end of a binary suffer tangible harm. At the same time, it exposes the limitations of binary systems. The ultimate benefit of this exposure is that it has the ability to tip the scales of justice further towards equality by holding people accountable for their acts—good or bad—rather than those aspects of their identity which they cannot change.

²⁴⁰ Marcus, *supra* note 111, at 343–44.

²⁴¹ *Id.*