Washington and Lee Journal of Civil Rights and Social Justice

Volume 15 | Issue 1 Article 7

Fall 9-1-2008

Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law

Diane S. Meier

Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law

Diane S. Meier*

Table of Contents

I. Introduction 148

II. Basic Understandings: What Is a Binary? 150

III. Binaries Used in Legal Rhetoric: Status/Conduct, Sex/Gender, and Immutable/Mutable 152
A. Immutable Status/Mutable Conduct 152
B. Sex/Gender 160
C. Immutable/Mutable 162

IV. Should/Can Courts Decide What Constitutes Personal Identity? 163
A. Categorizing Homosexuality as Mere Conduct Counters Conventional Thought, Modern Scientific Evidence, Legal Thought, and Philosophy 164
1. Conventional Thought 164
2. Modern Scientific Evidence 165
3. Legal Thought 167
4. Philosophy 168
a. Judith Butler and the Destruction of Binaries 169
b. The Consequences for Sexual Orientation After Sex and Gender Get Collapsed and the Emergence of a New Binary 173
c. The Consequences for Binaries After Queer Theory Reveals There Is No Real Difference Between Status and Conduct 176
B. "Standpoint Theory"—Courts Cannot Objectively Distinguish Between Traits and Actions That Constitute Status and Those That Constitute Conduct 177
1. Foundations for the Heteronormative Bias 178
2. The Existence of Bias 181

C. Problems for the Immutable/Mutable Binary: Immutable Dispositions? Is Conduct Really Mutable? 182
1. Problems That Bisexuality Raises for the Immutable/Mutable Binary by Showing That Desire Can Be an Immutable Disposition 182
a. Defining Sexuality In Terms of Desire 182
b. The Bisexual Person's Choice May be Mutable, but the Desire That Underlies the Ability to Make the Mutable Choice Is Immutable Status. 184
2. Problems That Philosophy Raises for the Immutable/ Mutable Binary and the Theory that Conduct Is Mutable 185
V. Conclusion: Alternatives to Using Binaries 187

"All I *know* is that I *know nothing*."[1]

I. Introduction

Modern American culture is entrenched in the darkness of heteronormativity. Heteronormativity posits that two discrete categories of gender and sexual orientation exist: male and female, and gay and straight, respectively. Popular belief in these categories coupled with heteronormativity's self-sustaining social impression—that "straight" is connected with notions of truth and morality, and "gay" with the conceptual leftovers of falsity and deviance—transcends the mere bifurcation of sexual orientation. Heteronormativity brands itself on the social consciousness' notions of morality and truth which subsequently affects various social spheres. The law, an area that ideally should be just and unbiased, is far from an exception.

Critical inspection of various fields of sexual orientation law reveals the use of binaries—legal constructs that courts use to categorize, then grant or deny sexual minorities legal rights. This Note's main goal is to critically inspect the conceptual and philosophical foundations of binary-driven

---

* J.D., Washington and Lee University School of Law, May 2008; B.A., University of California, Los Angeles, 2005. My special thanks to Professor T.P. Gallanis for his feedback on this Note, and to Professors Neville Cox and Courtney Cahill for giving me the jurisprudential foundations for writing on this topic.

1. *See* DIOGENES LAERTIUS, THE LIVES AND OPINIONS OF EMINENT PHILOSOPHERS, (C.D. Yonge trans., George Bell & Sons 1891) (attributing the quote to Socrates).

reasoning and to determine how courts use it as a basis for granting or denying sexual minorities civil rights in various areas of law, such as in due process and equal protection jurisprudence.[2] Part II of this Note will briefly describe binaries, then discuss their philosophical foundations and their effect on how concepts are defined. Part III will briefly discuss three particular but interrelated binaries—status/conduct, sex/gender, and immutable/mutable—and their impact on legal outcomes. Part IV will set forth various considerations as to why binary-fueled reasoning is inappropriate in legal theory.

More specifically, Part IV first focuses on arguments stemming from conventional thought, modern scientific evidence, legal analysis, and philosophy that rebut the notion that sexual orientation is mutable conduct. The philosophy concentrated on within this section will be Judith Butler's feminist critique of the sex/gender binary. Ultimately, I will conclude that there is no true answer to the question of whether sexual orientation is immutable status or mutable conduct. Second, and in connection with the first part, I will argue that any answer to the classification of sexual orientation, because of its unanswerable nature, must have been decided from premises created by a subjective standpoint. The premises that underpin and shape binaries formed from a subjective judgment are fueled by heteronormative bias that shape and determine how sexual orientation will be classified. Finally, Part IV will argue that conduct itself can never truly be deemed mutable or immutable. Arguments stemming from critical inspection of bisexual desire and Humean ethics both show the possibility of classifying conduct as immutable.

In conclusion, this Note does not seek to characterize sexual orientation as status in order, for example, to garner sexual minorities the same protections as other statuses, such as race. This Note is not even an argument that sexual minorities should receive any additional rights or judicial protections. Rather, this Note is a refutation of the justifications and methods used to deny sexual minorities rights by highlighting arguments against current classifications of sexual orientation as conduct and dismantling the discrete categories these binaries purport to represent. These arguments then lend themselves to showing that subsequent use of binaries is epistemically incoherent and ultimately reflects heteronormative bias. Judges should not be in the practice of imposing their personal views on whether some of the most intimate aspects of a person's life are a

2. *See* U.S. CONST. amend. XIV (containing the due process and equal protection guarantees of the Constitution).

constituent part of personal identity. Rather, courts should recognize that the line between status and conduct is fundamentally unknowable and adopt neutral methods for deciding whether sexual minorities, as citizens, should be granted or denied the same constitutional rights as other groups of people.

II. Basic Understandings: What Is a Binary?

Binaries are categorization schemes made up of two opposing elements. Truth/falsity, right/wrong, and just/unjust are examples of binaries that seem to stem from a human tendency to bifurcate concepts into positive and negative terms. This tendency can be seen prominently and, as this Note argues, stems from Socratic and Platonic philosophy.

Socrates' dialogues are generally described as an attempt to characterize some concept. The definition of a concept is discussed in positive and negative terms. For example, in *Crito*,[3] Socrates distinguishes between the just and the unjust. In *Euthyphro*,[4] Socrates attempts to define piety and impiety. In *Charmides*,[5] Socrates seeks to define temperance and its negative. In *The Republic*,[6] Plato contemplates the definition of justice, beauty, courage, and other concepts, as well as their negatives.

A key corollary to each attempt to define a concept is the Socratic understanding that "Forms" exist. Forms symbolize the truth or the true definition of something.[7] Plato espoused that Forms existed in another world, beyond human reach, and that objects and concepts in the human world were imitations of these Forms that could only strive to be the perfect representation of their respective Form.[8] For example, a table can only

---

3. PLATO, CRITO (G.P. Goold trans., Harvard University Press 1977).

4. PLATO, EUTHYPRO (G.P. Goold trans., Harvard University Press 1977).

5. PLATO, CHARMIDES (G.P. Goold trans., Harvard University Press 1977).

6. PLATO, THE REPUBLIC (S. Halliwell trans., Avis & Phillips Ltd. 1993) [hereinafter REPUBLIC].

7. *See id.* at BOOK VI ("And there is an absolute beauty and an absolute good, and of other things to which the term 'many' is applied there is an absolute; for they may be brought under a single idea, which is called the essence of each."); *see also* PLATO, PHAEDO (G.P. Goold trans., Harvard University Press 1977) [hereinafter PHAEDO] ("But what would you say of equal portions of wood and stone, or other material equals? And what is the impression produced by them? Are they equals in the same sense as *absolute* equality? Or do they fall short of this in a measure?" (emphasis added)); *id.* (describing forms as "that idea or essence, which in the dialectical process we define as essence of true existence")

8. *See* REPUBLIC, *supra* note 6, at BOOK VI, VII (relating the Allegory of the Cave, in which the author clarifies his theory of knowledge and Forms). The allegory relates the

strive to be the true Form of "Table" through imitation of the Form, and in whatever way it is deficient, it lacks some truth. From this philosophy stems a division between truth and falsity and the belief that the positive side of some concept is a virtue, a good insofar as it strives to mimic the truth, while the other negative side is a lacking of the truth, or true Form of the object/concept.

The impact that Socrates' dialogues have had on the history of philosophy, particularly metaphysics and epistemology, and the history of human understanding is indisputable.[9] However, the implication from these early philosophic dialogues goes beyond the belief that concepts can be

---

story of a man trapped in a cave, forced to stare at a wall filled with shadows and form knowledge of the world by interpreting the shadows. *Id.* "The many, as we say, are seen but not known, and the ideas are known but not seen." *Id.* Eventually the man is taken out of the cave and sees the sun and the things creating the shadows; from his ascent he understands the "true" Form of things, and that the shadows in the darkness of the cave were mere impressions created from those truths:

> [S]uppose once more, that [the man trapped in the cave] is reluctantly dragged up a steep and rugged ascent, and held fast until he's forced into the presence of the sun himself . . . he will be able to see the sun, and not mere reflections of him in the water, but he will see him in his own proper place, and not in another; and he will contemplate him as he is.

Id.

See also PLATO, TIMAEUS (G.P. Goold trans., Harvard University Press 1977) (describing Plato's theory of the creation of the universe). In Timaeus, Plato states:

> What is that which always is and has no becoming; and what is that which is always becoming and never is? The work of the creator, whenever he looks to the unchangeable and fashions the form and nature of his work after an unchangeable pattern, must necessarily be made fair and perfect; but when he looks to the created only, and uses a created pattern, it is not fair or perfect . . . .[I]n speaking of the copy and the original we may assume that words are akin to the matter which they describe; when they relate to the lasting and permanent and intelligible, they ought to be lasting and unalterable, and, as far as their nature allows, irrefutable and immovable—nothing less. But when they express only the copy or likeness and not the eternal things themselves, they need only be likely and analogous to the real words.

Id.; PHAEDO, *supra* note 7 (affirming "that there is such a thing as equality, not of wood with wood, or of stone with stone, but that, over and above this, there is equality in the abstract" and that "there are two sorts of existences, one seen, the other unseen").

9. *See, e.g.*, PETER WARNEK, DESCENT OF SOCRATES 3 (2005) ("There is no disputing that Socrates marks a decisive turning point in Greek philosophy, and thus in Western philosophy as a whole."); MARIO MONTUORI, SOCRATES: PHYSIOLOGY OF A MYTH 6 (1981) ("Every period of history, every culture . . . has made up its own Socrates, seeing in him every time an ideal or a symbol as variable as are the possible interpretations."); ALBAN D. WINSPEAR & TOM SILVERBERG, WHO WAS SOCRATES? v (1960) ("Socrates is regarded as a thoroughly subversive influence . . . . Socrates has come to occupy a position in the veneration of the ages second only, perhaps, to that of Jesus.").

polarized into positive and negative—these works fundamentally reject sliding scales in terms of thinking about truths; for example, the true Form of something cannot be both just and unjust, beautiful and ugly, table and not table. This type of philosophy is exclusive in the sense that to *be* the true "Form" of something means the ability to be categorized discretely.

III. Binaries Used in Legal Rhetoric: Status/Conduct, Sex/Gender, and Immutable/Mutable

Keeping the philosophical roots of positive and negative binary reasoning in mind, I now endeavor to narrow the scope of this Note by focusing on three binaries that impact gender and sexual orientation law: status/conduct, sex/gender, and immutable/mutable.

In brief summary, courts use the status/conduct and sex/gender binaries coupled with the immutable/mutable binary to justify granting or withholding legal rights from lesbian, gay, bisexual, and transsexual (LGBT) citizens.[10] The binaries, their associations with the immutable/mutable binary, and how they work in different legal areas will be discussed in detail below.

A. Immutable Status/Mutable Conduct

Beginning with a definition of the status/conduct binary, status is simply that which is integral to personal identity—some characteristic or action that people cannot change or prevent. Conduct is the performative aspect of human identity—the things that people do. The status/conduct binary is the most general binary of the three and separates who someone is from what they do.

Under the theory that courts can regulate conduct, courts use the status/conduct binary to characterize human traits and actions stemming from those traits as either protected status or proscribable conduct.[11] Early use of the status/conduct binary in such a way can be found in

---

10. *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (denying homosexuals suspect class status under the reasoning that homosexuality is *mutable* conduct and does not parallel race, gender or alienage).

11. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963) (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs."). Conduct associated with such beliefs, however, is not beyond proscription by courts. *Id.* at 403.

early Free Exercise cases, where the Supreme Court distinguished between religious belief and religious conduct. For example, in *Reynolds v. United States*,[12] the Court proscribed the Mormon practice of polygamy by reasoning that, while the law could not control a person's beliefs, laws could proscribe conduct: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions . . . ."[13] These first traces of the status/conduct distinction foreshadow contemporary use of the binary. Moreover, courts have coupled the immutable/mutable binary with the status/conduct binary, making status correspond to immutability and conduct correspond to mutability.[14] For example, race is considered an immutable status, thus racial minorities receive certain legal protections, such as heightened scrutiny in equal protection jurisprudence.[15] Being gay, however, is considered mutable conduct, and thus sexual minorities receive far less legal protection.[16] Thus, the interplay of the two binaries sets up the justification for why courts can regulate conduct, but not status.

---

12. *See* Reynolds v. United States, 98 U.S. 145 (1878) (finding constitutional a federal law that declared bigamy committed in the territories or within the exclusive jurisdiction of the United States to be a crime against the United States). In *Reynolds*, the Supreme Court considered whether a statute criminalizing bigamy violated the First Amendment right to free exercise of religion. *Id.* at 161. The plaintiff was a member of the Mormon Church and argued as a defense to the statute that bigamy was an accepted doctrine within the Mormon church. *Id.* The Court went through the history of legislation as applied to religion. *Id.* at 162–64. It also stated that polygamy has always been rejected in western society and by common law. *Id.* at 164. The Court found the statute to be within the legislative power of Congress and that to except individuals who practice polygamy as part of a religious belief would be to add a "new element into criminal law." *Id.* at 166. The Court stated that "while [laws] cannot interfere with mere religious belief and opinions, they may with practices." *Id.*

13. *Id.* at 164; *see also* Davis v. Beason, 133 U.S. 333, 342–43 (1890), *overruled by* Romer v. Evans, 517 U.S. 620, 634 (1996) (distinguishing between religious belief and conduct to justify laws that prevented bigamists and polygamists from voting).

14. The binaries are coupled as follows: Status →Immutable, and Conduct →Mutable. Otherwise:

Status	Conduct
Immutable	Mutable

15. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (finding that racial bias was an impermissible consideration for depriving a natural mother of custody of her child).

16. *Compare id.* at 429 ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother."), *with* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (1995) (finding that sexual orientation was an appropriate consideration in depriving a natural mother custody over her child). *Compare* Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding that state laws that employed racial

Modern courts use the status/conduct binary in various areas of law concerning LGBT rights, including equal protection, substantive due process, military, and immigration jurisprudence. First, in equal protection cases, courts characterize homosexuality as mutable conduct, which prevents homosexuals from consideration as a suspect class.[17] Legal recognition as a suspect class would result in a heightened standard of review of laws that discriminate on the basis of sexual orientation.[18] If heightened scrutiny were applied, the government would have to prove more than just a rational connection between its interest and the law's discriminatory application to survive.[19] However, granting suspect classification rests on the recognition that a group has endured a history of discrimination based on immutable characteristics.[20] Due to courts' repeated characterization of homosexuality as conduct that is a mutable choice, sexual minorities fail to receive heightened scrutiny.[21] For

---

classifications to restrict the right to marriage violated Fourteenth Amendment due process and equal protection rights), *with* Baker v. Nelson, 191 N.W.2d 185, 187 (1971) (holding that state laws that restricted marriage on the basis of sex/homosexuality did not violate Fourteenth Amendment due process and equal protection rights).

17. *See* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) ("Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."). The Court has generally focused on several factors to define suspect classifications: (1) immutable characteristics, (2) the visibility of the characteristic, (3) the ability of the group to protect itself through the political process, and (4) the history of discrimination against the group. *Id.; see also* Lyng v. Castillo, 477 U.S. 635, 638 (1986) ("have . . . been subjected to discrimination."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) ("experienced a 'history of purposeful unequal treatment.'"); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (discussing factors to be considered when determining whether gender should constitute a suspect class).

18. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (reiterating that equal protection analysis requires strict scrutiny review only when the classification impermissibly interferes with the exercise of a fundamental right or disadvantages a suspect class).

19. *See* U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (discussing the application of heightened judicial scrutiny in certain cases). Two types of heightened scrutiny exist: strict scrutiny and intermediate scrutiny. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (describing "strict scrutiny" as a two-tier test requiring a compelling state interest and narrow tailoring); Craig v. Boren, 429 U.S. 190 (1976) (describing "intermediate scrutiny" as a two-tier test requiring discriminatory treatment based on "gender [to] serve important governmental objectives and . . . be substantially related to those objectives").

20. *See* High Tech Gays v. Defense Ind. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (stating that to be suspect, homosexuals must "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" and that "homosexuality is not an immutable characteristic").

21. *See* Lawrence v. Tex., 539 U.S. 558, 578 (2003) (applying rational basis review).

example, in *Lawrence v. Texas*,[22] the Court applied rational basis review to denounce Texas's anti-sodomy statute, indicating that homosexuals still did not constitute a class eligible for heightened scrutiny.[23] Furthermore, in *Romer v. Evans*,[24] the Court employed rational basis review to strike down a Colorado state constitutional amendment that invidiously targeted homosexuals.[25]

Second, courts use the status/conduct binary in substantive due process jurisprudence to define (and narrow the scope of) fundamental rights. Generally, substantive due process protects against laws that limit a group's ability to exercise a fundamental right.[26] Fundamental rights are defined as "those fundamental liberties that are implicit in the concept of ordered liberty . . . [and] those liberties that are deeply rooted in this Nation's history and tradition."[27]

---

22. 539 U.S. 558 (2003). In *Lawrence*, the Court considered the validity of a Texas statute making it a crime for two persons of the same-sex "to engage in certain intimate sexual conduct." *Id.* at 562. Police officers, responding to a reported weapons disturbance, entered an apartment where the petitioner and another man were engaging in a sexual act. *Id.* at 563. The two men were arrested and charged under the Texas statute for having engaged in "deviate sexual intercourse." *Id.* The Court analyzed the petitioners' claims under the Equal Protection clause of the Fourteenth Amendment and reasoned that the statutes touched on a "personal relationship" that "is within the liberty of persons to choose without being punished as criminals." *Id.* at 564, 567. The Court stated that the statute treated homosexuals and heterosexuals differently, and also that it imposed a stigma on individuals who violated the statute. *Id.* at 574–75. The Court found that the Texas statute furthered no legitimate state interest that could justify its intrusion into the personal and private life of the individual. *Id.* at 578.

23. *See id.* (Texas' anti-sodomy statute unconstitutional).

24. 517 U.S. 620 (1996). In *Romer*, the Court considered the validity of an amendment to Colorado's constitution that prohibited all state and local government action designed to protect homosexuals from discrimination. *Id.* at 624. Homosexuals claimed that the amendment would subject them to immediate and substantial risk of discrimination based on their sexual orientation. *Id.* at 625. The State argued that the amendment put homosexuals in the same position as other individuals because it did no more than deny them special rights. *Id.* at 626. The Court reasoned that the amendment placed a "broad and undifferentiated disability" on a single group, and that its breadth did not fit the reasons offered for the amendment. *Id.* at 632. Thus, the Court found the amendment lacked a rational relationship to legitimate state interests. *Id.*

25. *See id.* at 630–33 (concluding that an amendment that prohibited all legislative, executive, and judicial action protecting homosexuals from discrimination in Colorado violated the Equal Protection clause).

26. *See* Hatheway v. Secretary of Army, 641 F.2d 1376, 1382 n.6 (9th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.").

27. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (citing Palko v. Connecticut, 302 U.S. 319 (1937) and Moore v. East

Bowers v. Hardwick[28] involved a substantive due process claim in which the Court upheld a Georgia anti-sodomy statute by narrowly framing the right at issue as the "right to engage in homosexual sodomy."[29] In narrowly defining the right as the right to homosexual sodomy (i.e. conduct), the Court found that the right did not fall into the definition of "fundamental right" as set out by the Court.[30] Status/conduct can thus be used even when framing rights, to define what is at stake as proscribable conduct. Had the Court framed the right differently, for example as the right to engage in intimate relations, *Bowers'* outcome would likely have been completely different.[31]

Cleveland, 431 U.S. 494 (1977)). In *Bowers*, the Court considered the validity of a Georgia statute criminalizing sodomy. *Id.* at 188 n.1. More specifically, the court framed the issue as whether the Federal Constitution "confer[ed] a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. Hardwick, the respondent, was charged with violating the statute by committing sodomy with another adult male in his bedroom. *Id.* at 188. The Court reasoned that criminal sodomy laws had been in effect for several hundred years and that the Court would not take an expansive view in order to discover a new fundamental right under the Due Process Clause. *Id.* at 194 n.5. It also rejected the argument that homosexual conduct is protected when it occurs in the privacy of the home and stated that not all conduct in the home is immunized from criminal liability. *Id.* at 195. The Court found that there was a rational basis for the statute and that there was no fundamental right to engage in sodomy. *Id.* at 196.

28. *See Bowers*, 478 U.S. at 197 (upholding Georgia's statute criminalizing sodomy), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

29. *Id.* at 191.

30. *Id.* Although *Bowers v. Hardwick* was overturned in *Lawrence v. Texas*, the Court continued to frame the right at issue as the right of two consenting adults to engage in intimate private *conduct*. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same-sex to engage in certain intimate sexual conduct."). More importantly, the Court overturned *Bowers* under rational basis review and failed to hold that homosexual conduct was a fundamental right worthy of elevated scrutiny. *Id.*

31. *See* Zablocki v. Redhail, 434 U.S. 374, 381, 383 (1978) (framing the issue as the right to marry and thus striking down a law that would have required prisoners with child support obligations to acquire court permission before being allowed to get married). In discussing the right to marry, the Court referred to *Loving v. Virginia*, the decision that deemed anti-miscegenation laws unconstitutional and generally discussed the right to marry and have intimate relations: "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals." *Id.* at 384 (emphasis added). The right to marry is referred to as "the most important relation in life," and is a "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Id.* at 384 (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888) and citing Griswold v. Connecticut, 382 U.S. 479, 486 (1965)). The Court goes on to state that "[w]hile the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . [and] family relationships." *Id.* at 385 (quoting Carey v. Population Services International, 431 U.S. 678, 684–85 (1977)).

Moreover, had the *Bowers* Court defined homosexuality as an orientation (i.e. a status) specific to a group of people, ample grounds would exist to find that homosexuals constitute a class of people that meet the prerequisites for utilization of heightened scrutiny: namely, that homosexuals are a class subject to pervasive social discrimination and without ability to protect themselves through the political process.[32] Heightened scrutiny would likely give homosexual litigants enough leverage to defeat laws withholding equal rights to homosexuals under the Equal Protection and Due Process clauses. For example, in *Wilson v. Ake*,[33] a Florida district court refused to recognize the Massachusetts union between two women under the Federal Defense of Marriage Act (DOMA).[34] Under rational basis review, the court noted that the United States offered two reasons for denying the recognition of same-sex marriage under the DOMA: first, the law promotes and "fosters the development of relationships that are optimal for procreation"; and second, it encourages stable relationships between biological parents optimal for rearing children.[35] These reasons probably would not have survived intermediate scrutiny and certainly would not survive strict scrutiny. In fact, if a court wanted to follow the steps of the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*,[36] it need not have held that those two justifications survived even rational basis review.

---

32. For an example of that social discrimination and its implications, *see* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (discussing the Department of Defense's policy of engaging in expanded investigation into gay and lesbian applicants for secret or top secret security clearance in order to protect national secrets).

33. 354 F. Supp. 2d 1298 (M.D. Fla. 2005). In *Wilson*, the court considered the validity of a statute declaring that the state of Florida was not required to recognize and honor a Massachusetts marriage license issued to a lesbian couple. *Id.* at 1301. The plaintiffs argued that the Federal Defense of Marriage Act (DOMA) and the Florida statute violated the Full Faith and Credit clause, Due Process clause, and Equal Protection clause, among other provisions of the Constitution. *Id.* at 1303. The court reasoned that the Full Faith and Credit clause does not require a state to apply another state's law in violation of its own legitimate public policy. *Id.* Moreover, the court stated that, while the Supreme Court has recognized that the right to marry is a fundamental right, it has not recognized the right to marry someone of the same-sex as fundamental. *Id.* at 1306. It also stated that homosexuals are not a suspect class, and thus, rational basis review, not strict scrutiny, is appropriate. *Id.* at 1307–08. The court upheld the Florida statute and DOMA. *Id.* at 1309.

34. *See id.* at 1303 (finding a Florida statute withholding recognition of same-sex marriages constitutional).

35. *Id.* at 1308.

36. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (finding the prohibition on same-sex civil marriages unconstitutional under the Massachusetts constitution). In *Goodridge*, the court considered the Massachusetts Department of Public

Third, under current military policy, the law that governs homosexuals' ability to serve explicitly distinguishes between status and conduct.[37] Under the Don't Ask Don't Tell (DADT) policy, military servicemen are not punished for *being* homosexual as long as they do not engage in homosexual *conduct*. The statute itself, however, states:

> A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made . . . : (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual *act* . . . (2) That the member has stated that he or she *is* a homosexual or bisexual . . . .[38]

DADT continues by stating that servicemen who *are* homosexual can continue to serve even if the above situations are found as long as they demonstrate "that he or she is not a person who engages in, attempts to engage in, *has a propensity to engage in*, or intends to engage in homosexual acts."[39] However, homosexuality is a class defined by the sexual attraction its members have, and it seems logically incommensurate to argue that one does not have a "propensity to engage in" conduct when one has admitted the very foundation for engaging in that type of conduct—same-sex attraction.

For instance, in *Watson v. Cohen*,[40] a Navy serviceman stated "I have a homosexual orientation." In order to rebut the presumption that membership in the class amounts to homosexual propensity/conduct,

---

Health's practice of denying same-sex couples marriage licenses. *Id.* at 948. The plaintiffs, homosexual couples, attempted to obtain marriage licenses, but were denied. *Id.* at 960. The court reasoned that marriage confers many benefits, which touch every aspect of "life and death." *Id.* at 955. The court also stated that to deny one the right to marry is to deprive one of the full protection of the law. *Id.* at 957. Moreover, it stated that the Massachusetts state constitution often affords individuals more rights than the Federal Constitution, including more protection from unwarranted government intrusion and more opportunity to partake in benefits. *Id.* at 959. The court found the prohibition violated the Massachusetts constitution and rejected the following reasons for disallowing same-sex marriage: "(1) providing a favorable setting for procreation; (2) ensuring a two-parent family with one parent of each sex for child rearing; and (3) preserving state and private financial resources." *Id.* at 961, 969.

37. *See infra* notes 38–44 and accompanying text.

38. 10 U.S.C. § 654(b) (1993) (emphasis added).

39. *Id.* (emphasis added); *see also*, Richenberg v. Perry, 73 F.3d 172, 174 (1995) ("The current military policy appears to recognize, because it purports to create a presumption, based on nothing more than honest statements, that status or desire equals propensity to act.").

40. 124 F.3d 1126, 1136 (9th Cir. 1997) (upholding DADT under rational basis review because homosexuals do not constitute a suspect class).

Watson submitted statements to a Navy board of review stating: "I expressly deny that I have any intent or propensity to engage in any [homosexual] conduct . . . ."[41] The Navy board of review still discharged Watson, and the Ninth Circuit held that DADT did not violate equal protection.[42] In essence, DADT purports to exclude solely on the basis of conduct, but it effectively creates a nearly irrefutable connection between homosexual status and homosexual conduct.[43] DADT truly operates under a collapse in the status/conduct binary and regulates both status and conduct by forcing homosexuals to renounce their membership in the class completely.[44]

Finally, immigration cases pose the opposite situation to those described above because immigration courts use the status/conduct binary to grant refugees the right of asylum, rather than to strip away a right.[45] In stark contrast with Article III courts' categorization of homosexuality as mutable conduct, immigration courts recognize homosexuality as an immutable status worthy of protection.[46] This switch poses jurisprudential

---

41. *Id.* at 1130.

42. *See id.* at 1136 (finding that the DADT policy fulfilled the "legitimate state interest" and "rational relation" requirements of rational basis review).

43. *See* Able v. U.S., 880 F. Supp. 968, 976 (1995) (stating the difference between status and conduct is mere "semantic gymnastics"). The court here points out that very few cases exist in which a declaration of homosexuality did not result in discharge; three cases that successfully rebutted the presumption involved "aberrations stemming from a dysfunctional application of the policy" where a member stated "she thought she might be gay" or "I'm kind of confused about my sexual preference . . . ." *Id. See also* Thorne v. U.S. Dep't of Defense, 945 F. Supp. 924, 930 (E.D. Va. 1996) (upholding the Navy's decision to discharge Thorne because he stated he was homosexual, an identity that indicates a propensity to engage in homosexual conduct). The court held that declarations are rebuttable, however, and the plaintiff's failure to rebut his statement caused his as-applied challenge to fail. *Id.* at 929.

44. *See Able*, 880 F. Supp. at 975 (explaining such forced renouncement). The court stated:

> Although the Act and the Directives are written in such a manner as to give the impression that there is a principled distinction between the [status and conduct], only a brief critique will demonstrate that in practice no such distinction exists . . . . [T]estimony at the Senate hearing shows that a member who admits to a homosexual orientation has only a 'hypothetical' chance to escape discharge.

Id.

45. It should be noted that immigration courts are administrative courts formed under Article I of the U.S. Constitution and are, therefore, distinct from Article III courts.

46. *See* Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (1990), *available at* http://www.usdoj.gov/eoir/vll/intdec/vol20/3222.pdf (describing the immigration judge's holding recognizing homosexuality as an immutable status).

and epistemic problems: Namely, can a legal system honestly be coherent or logical if it defines homosexuality as status in one context and conduct in another? In terms of epistemics, is it coherent to have inconsistent axioms? In Part III, this Note argues that this inconsistency indicates the inability to objectively categorize sexual orientation as status or conduct discretely.

B. Sex/Gender

The sex/gender binary distinguishes between "sex" as one's physical sexual attributes and "gender" as one's performance in society in accordance with those sexual attributes.[47] The sex/gender binary falls under the status/conduct binary insofar as status is linked to the notion of one's physical sexual attributes, and gender is linked with conduct, the performative aspect of one's sex. Because of its connection with status/conduct, the immutable/mutable binary also attaches to the sex/gender binary insofar as one's sex as a status corresponds to immutability while one's gender performance corresponds to mutability.[48] However, unlike the status/conduct binary, courts collapsed the original binary by equating the terms "sex" and "gender" to create a new sex and gender/sexual orientation binary. This has prominently occurred in Title VII cases, several of which are described below.

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin.[49] Courts have interpreted Title VII's prohibition of sex discrimination to include gender discrimination, thus collapsing the concepts of sex and gender (and thereby status/conduct).[50] For example, in *Price Waterhouse v. Hopkins*,[51] the plaintiff was a woman who was harassed for being aggressive in the workplace.[52] Her male colleagues called her "macho" and suggested that she attend "charm school."[53] Ultimately, the plaintiff argued that her employer did not promote her to partner because she was not ladylike

47. It must be noted that different societies have different gender performances or expressions of gender.

48. *See supra* note 14 and accompanying text.

49. Civil Rights Act of 1964, Pub. L. No. 88-352, §703(a)(1), 78 Stat. 241, 255 (1964).

50. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (referring to sex discrimination and gender discrimination as if they were the same term).

51. *Id.*

52. *Id.* at 235.

53. *Id.*

enough.[54] The United States Supreme Court ruled that Title VII protected against discrimination on the basis of gender, namely how feminine the plaintiff employee *acted*, as part of its protection against sex discrimination.[55]

To be precise, however, a difference between sex and gender does exist. Sex typically denotes one's anatomic/chromosomal sex or one's reproductive organs; gender denotes the social attributes that constitute a sexual identity and is culture-specific.[56] Some feminist theorists would characterize sex as status and gender as performative conduct.[57]

Why the collapse of these two terms? First, in the vernacular, sex and gender are used interchangeably. However, this cultural phenomenon, in itself, indicates something important: Namely, the common interchangeable use of sex and gender indicates the conceptual difficulty in separating discrimination based on one's sex from how one performs it. In other words, it is the difficulty in separating who someone is (status) from the things that they do (conduct). Anatomic sex alone is not generally dispositive as to whether someone is *socially* deemed a man or a woman; rather, people make that determination on the basis of outward appearance and personality traits corresponding to gender norms. Second, in describing the reach and legislative purpose of Title VII, the Court in *Price Waterhouse v. Hopkins* stated that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from gender stereotypes."[58] Thus, if the statute's purpose is to stop discrimination on the basis of gender—in other words, when the discrimination arises from belonging to or deviating from a gender stereotype—to ignore gender would clearly be incommensurate with the purpose of the statute.

If gender performance, which is conduct, is protected under Title VII, what about sexual orientation, which is also regarded as conduct? Sexual

---

54. *Id.*

55. *Id.* at 258.

56. *See* STEDMAN'S MEDICAL DICTIONARY 735 (27th ed. 2000) (defining gender as the "[c]ategory to which an individual is assigned by self or others, on the basis of sex. Cf. sex, gender *role*" (emphasis added)); MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY 299 (1996) (stating that gender is "the behavioral, cultural or psychological traits typically associated with one sex").

57. *See* JUDITH BUTLER, GENDER TROUBLES: FEMINISM AND THE SUBVERSION OF IDENTITY 12, 26 (1990) (stating that "sex [has] come to take the place of the person, the self-determining *cogito*" and that *cogito* becomes gendered through performance of gender norms).

58. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

orientation simply does not reap the benefits of the collapse of the sex/gender binary, and thus, neither does it reap the legal protections of being considered status under the status/conduct binary. Courts have repeatedly held that sexual orientation falls outside the realm of gender, and, therefore, the legislature must amend Title VII to include sexual orientation under its protection. For instance, in *Dawson v. Bumble & Bumble*,[59] the defendant-employer told the openly lesbian plaintiff to "act . . . less like a man and more like a woman" and told her that she "needed to have sex with a man."[60] Although these statements look seemingly identical to those made to the plaintiff in *Price Waterhouse*, the Second Circuit denied the plaintiff relief, holding that these were instances of sexual orientation discrimination and that claims of gender stereotyping should not be used to "bootstrap protection for sexual orientation into Title VII."[61] The only fact that truly distinguishes *Bumble & Bumble* from *Price Waterhouse*, however, is the plaintiff's lesbian orientation.

Moreover, nothing seems more inseparable from the stereotypical concept of being female than sexual attraction to men. If courts truly desire to protect against discrimination based on deviations from gender stereotypes,[62] surely they are excluding one of the main elements of gender performance: sexual orientation. Thus, courts have effectively created a status and non-sexual conduct/sexual conduct binary—in other words, sex and gender/sexual orientation.

C. Immutable/Mutable

As discussed above, the immutable/mutable binary corresponds to status/conduct and the new binary of sex and gender/sexual orientation. The immutable/mutable binary seems to be the "justifying" binary insofar as courts use it to conceptually justify why a characteristic or an action is eligible or ineligible for legal protection. For example, in *Robinson v. California*,[63] the Court struck down a law that made addiction to narcotics illegal. The Court reasoned that the law violated the Fourteenth

59. 398 F.3d 211 (2d Cir. 2005).

60. *Id.* at 215.

61. *Id.* at 218.

62. *See Price Waterhouse*, 490 U.S. at 251 (using Title VII to protect an aggressive business woman from discrimination where aggression is considered a deviation from female gender norms).

63. 370 U.S. 660 (1962).

Amendment, as cruel and unusual punishment, by punishing someone for his *status* as a drug addict.[64] The Court found the condition of being a drug addict a status: "To be addicted to the use of narcotics is said to be a status or condition and not an act . . . in the fact that [it] is chronic rather than acute."[65]

In terms of sex, gender, and sexual orientation, courts tie up notions of immutability with sex and gender performance and notions of mutability with sexual orientation. Notions of immutability and mutability provide a jurisprudential justification for withholding protection of sexual orientation and protecting sex and gender. Courts have never really explained why they associate immutability with status and mutability with conduct. It seems as if conceptually "conduct" denotes that which is willed and thus capable of change or proscription; "Status" denotes that which is innate and unacquired. Although, intuitively, the association seems correct, there are strong arguments that personal identity cannot truly be separated from one's actions. Those arguments will be taken up throughout Part IV.[66]

Another important consideration that stems from this discussion, and which will be taken up post haste, is that by defining some characteristics as immutable status and others as mutable conduct, these binaries should be understood as instruments used to define personal identity. When courts invoke binaries to justify legal outcomes, they are actually deciding which traits (or actions) are so integral to a person that they constitute an element of personal identity.

IV. Should/Can Courts Decide What Constitutes Personal Identity?

The legal and social implications of denying rights via binaries triggers a consideration of the propriety of allowing courts to decide what constitutes personal identity (status). Three main points suggest the impropriety of allowing courts to decide what constitutes status and what constitutes conduct: first, courts cannot *objectively* decide what constitutes status rather than conduct; second, various sources counter the view that homosexuality is status—this lends to the argument that courts are incapable of deciding what forms constitutive identity; and third, even if one believes that homosexuality is conduct, bisexuality and philosophy

64. *Id.* at 667.

65. *Id.* at 662.

66. *See* discussion *infra* Part IV.

provide theories that give reason to believe that some conduct is immutable—this lends to debunking the immutable/mutable binary.

A. Categorizing Homosexuality as Mere Conduct Counters Conventional Thought, Modern Scientific Evidence, Legal Thought, and Philosophy

1. Conventional Thought

Modern courts' assignment of homosexual conduct as mutable does not parallel conventional thought. Many people believe that sexual orientation cannot be changed[67] and that sexuality flows so innately from a person's character that it constitutes status. Religious orientation functions in a similar way and strongly parallels sexual orientation.[68] First, neither practicing a religion nor engaging in homosexual conduct can be deemed pure conduct because people do not just *do* them. For example, being Muslim is not just praying five times a day, or refraining from alcohol and pork consumption, it is something constitutive in the person who practices it. Followers of Islam, or any other sect for that matter, do not simply perform their religion; it constitutes a part of their identity. Sexual orientation functions in the same way; it is conduct that people partake in, and yet somehow that conduct defines the people who partake in it.

Moreover, both religion and sexual orientation can be characterized as mutable or voluntary conduct, but generally people cannot shed their religion or sexual orientation like a piece of clothing. Proof of this can be found throughout history in that people have held on to their religious convictions and sexual orientations in the face of exile, persecution, and genocide, including the Holocaust.[69] Similarly, sexual orientation is an integral part of identity and cannot easily, if ever, be shed. Electro-shock

---

67. *See* Ken Hausman, *Furor Erupts Over Study On Sexual Orientation*, 36 PSYCHIATRIC NEWS 13, 20 (2001), *available at* http://pn.psychiatryonline.org/cgi/content/full/36/13/20 (discussing the controversy ignited in 2001 when a major proponent of removing homosexuality from the APA's Diagnostic and Statistical Manual, Robert Spitzer, M.D., announced he had clinical proof that reparative psychotherapies have, in some cases, successfully changed homosexuals into heterosexuals).

68. *See* William Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2411 (1997) ("Like religion, sexual orientation marks both personal identity and social divisions. In this century . . . sexual orientation has steadily been replacing religion as the identity characteristic that is both physically invisible and morally polarizing.").

69. *See* Elizabeth Olson, *Gay Focus at Holocaust Museum*, N.Y. TIMES, Jan. 4, 2003, at B7 (discussing the persecution of homosexuals during the holocaust).

therapy, marginalization, persecution, and genocide have proven inept at eradicating homosexuality.[70] Suicide rates among those who are both religious and gay further show the impossibility, for some, of simply changing their religion or sexual orientation.[71]

2. Modern Scientific Evidence

Many scientists would agree that sexual orientation is immutable: "[W]e know that homosexuality is 'immutable' insofar as it is highly resistant to attempts to change it . . . ."[72] That is not to say that sexual orientation can never be changed. Some have been successful in changing their sexual orientation. In 2003, Robert Spitzer conducted a study in which 40% of 200 participants reported changing their sexual orientations.[73] The scientific community heavily criticized the study, however, for being skewed by "volunteer bias" insofar as many of the participants were highly religious (81%), members of anti-gay organizations aimed at converting homosexuals, or suffering from extreme depression or suicidal tendencies because of their sexual orientation (79%).[74] Those that were successful were motivated by the social stigma that accompanies homosexuality or by religious considerations. Not all people can change their sexual orientation, however, and the reparative treatments used to change sexual orientation can have damaging psychological effects.[75]

---

70. *See* Negar Azimi, *Prisoners of Sex*, N.Y. TIMES, Dec. 3, 2006, § 6, at 63 (discussing homosexuality in the Arab world and the various types of treatments people are forced to endure).

71. *See* Keren Skegg et al., *Sexual Orientation and Self-Harm in Men and Women*, 160 AM. JUR. PSYCHIATRY § 541 (2003) (discussing the link between self-harm and sexual orientation); Hugo Salinas, *A Witness Sealed with Blood: Gay Mormon Suicides and the Politics of Silence*, AFFIRMATION: GAY & LESBIAN MORMONS, Oct. 2001, http://www.affirmation.org/suicide_info/witness_sealed_with_blood.shtml (last visited Dec. 18, 2008) (discussing suicide among gay Mormons) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

72. GLENN WILSON & QAZI RAHMAN, BORN GAY 148 (2005). This discussion probes the tension between immutability on one hand and self-control on the other. It points out that some countries use the threat of the death penalty or special drugs to deter homosexual conduct but that "neither of these extreme measures actually alters sexual orientation—they merely suppress its manifestation." *Id.*

73. *Id.* at 40.

74. *Id.*

75. *See* Pitcherskaia v. INS, 118 F.3d 641, 648 (9th Cir. 1997) (reversing the denial of application for asylum, held that use of these therapies "torture mentally [and] physically"

In 1957, the British government formed a committee of psychiatrists, legal scholars, politicians, and religious figures to determine whether private homosexual conduct between consenting adults (over the age of twenty-one) should continue to be criminally punishable. The subsequent Report of the Departmental Committee on Homosexual Offences and Prostitution (a.k.a. the "Wolfenden Report") was released. In the report, the committee acknowledged the difficulty, and in some cases the impossibility, of changing homosexual identity, writing that "[o]ur evidence leads us to the conclusion that a total reorientation from complete homosexuality to complete heterosexuality is very unlikely indeed."[76] The report questions therapy aimed solely at complete readjustment of sexual orientation, but emphasizes that therapy might be useful to help homosexuals come to terms with their differences and to better adjust to society: "A homosexual . . . may be regarded as successfully treated if he is brought to a more nearly complete adjustment with . . . society . . . . The object of the treatment is to relieve mental stress . . . ."[77] The report also recognizes the psychological harm that may be done to homosexuals through such reparative therapy, and suggests that the only thing that needs to be corrected in homosexuals is their possible maladjustment to society: "[T]here may be good grounds, from the medical point of view, for not attempting any fundamental reorientation of the sexual propensity of a homosexual who is already well adjusted and is a useful member of society."[78]

---

and thus justified approving her application for asylum). In *Pitcherskaia*, a Russian lesbian applied for asylum after being subjected to various conversion therapies including electroshock therapy and sedative drugs. *Id.* at 644 n. 4. *See also* Am. Psychiatric Ass'n, Background to COPP Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies) Supp., May 2002, http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001a.aspx (last visited Dec. 18, 2008) ("[A]necdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm.") (on file with Washington and Lee Journal of Civil Rights and Social Justice).

76. Report of the Committee on Homosexual Offences and Prostitution (The Wolfenden Report) 66 (1957).

77. *Id.* at 66–67.

78. *Id.* at 67.

3. Legal Thought

In *Norris v. Attorney General*,[79] the Irish High Court recognized sexual orientation as immutable when it concluded that "[t]he exclusively homosexual orientation is congenital and not a matter of choice .... There is not any satisfactory method of treatment to alter this exclusively homosexual orientation, so the homosexual must live with it...."[80] Despite the recognition of immutability, the Irish court upheld the anti-sodomy statutes for reasons of public morality rather than by the status/conduct binary.[81] Unlike the American judiciary, the Irish court admitted that religion and morality propelled their decision.[82]

Moreover, in contrast with their counterpart Article III courts, United States immigration courts dealing with asylum cases acknowledge the immutability of sexual identity. In *Matter of Toboso-Alfonso*,[83] the court unequivocally stated: "[H]omosexuality is an 'immutable' characteristic." After *Toboso-Alfonso*, then United States Attorney General Janet Reno released Order 1895-94, making *Toboso-Alfonso* binding precedent *only* in the context of immigration and asylum cases: "[A]n individual who has been identified as homosexual and persecuted by his or her government *for*

---

79. [1984] I.R. 36 (Ir. S.C.), *available at* http://www.bailii.org/ie/cases/IESC/1983/3.html.

80. *Id.*

81. *See id.* (rejecting plaintiff's claims that the law cannot intrude into areas of "private morality" and finding homosexuality objectionable for various "moral" and "public safety" reasons including preventing the spread of disease and promoting heterosexual marriage).

82. *Compare id.* ("Freedom of expression and freedom of association are not guaranteed as absolute rights. They are protected by the Constitution subject to public order and morality .... Homosexuality has always been condemned in Christian teaching."), *with* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (denying that morality should play a role in deciding the issue before the court). The *Lawrence* Court stated:

> It must be acknowledged ... that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family .... These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'

Id. at 571 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

83. 20 I. & N. Dec. 819, 822 (B.I.A.1990).

that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group."[84] The contradicting characterization of homosexuality as mutable conduct in one legal context, and immutable status in another, makes apparent the malleability and indeterminacy surrounding the status/conduct binary. While it is true that different jurisdictions and courts often disagree about rules and procedure, given the gravity of rights at stake for an entire community of people, estimated at ten percent of the population, how can Article III courts seriously justify withholding people's rights based on premises inconsistent with other courts in the United States? If homosexuality as conduct is truly a reason to deny homosexual citizens equal rights, to psychologically impugn them, and to discriminate against them, it would seem a more solid foundation should exist.

4. Philosophy

The question of what constitutes personal identity has been strongly debated throughout the history of philosophy.[85] There are two major schools of thought on how to define identity: are people metaphysical beings that exist prior to conduct or are people identified by their acts (i.e. do people exist only because they act and are perceived)?[86] To use

---

84. Tracy J. Davis, *Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States*, 6 HUM. RTS. BR. 19 (1999).

85. Various philosophers over the span of millennia have taken up the question of who people are and what constitutes the soul. *See generally, e.g.*, ARISTOTLE, DE ANIMA (Hugh Lawson-Tancred trans., Penguin Classics 1987) (discussing the souls of different living things and their properties); ARISTOTLE, METAPHYSICS (Joe Sachs ed., Green Lion Press 2002) (investigating the nature of fundamental (primary) substances and of being); GEORGE BERKELEY, THREE DIALOGUES BETWEEN HYLAS AND PHILONOUS (Robert Merrihew Adams ed., 1979) (1713) (analyzing the nature of physical substance and perception); ST. AUGUSTINE OF HIPPO, CITY OF GOD XI (Henry Bettenson ed., Penguin Classics 2003) (stating, similar to Descartes' later assertion regarding mind/body dualism, that "[i]f I am mistaken, I am"); RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (1641) (separating the existence of the mind from the body, which can be summarized by the famous assertion: "I think, therefore I am"); CAMBRIDGE COMPANION TO ARABIC PHILOSOPHY 309–10 (Peter Adamson et al. eds., Cambridge University Press 2005) (discussing Avicenna's mind/body dualism through his 'floating man' experiment, which is very similar to Descartes's *cogito ergo sum* argument); JOHN LOCKE, *Of Identity and Diversity*, *in* AN ESSAY CONCERNING HUMAN UNDERSTANDING ch. XXVII (1689) (relating Locke's theory of personal identity and substance); SIMONE DE BEAUVOIR, THE SECOND SEX (1949) ("One is not born a woman, but becomes a woman.").

86. *See, e.g.*, Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 402–08 (describing "Reductionist" and "Nonreductionist" theories of personal identity).

status/conduct binaries is to ignore the impossibility of answering this chicken-and-egg type question and truly defining personal identity. Jurists that impose their views regarding personal identity on an entire country by invoking status/conduct binaries lack not only objective neutrality, but also a substantive basis because there is no right answer—the binaries are simply applied in a malleable fashion in order to reach the desired outcome.[87] Application of an instrument that lacks objectivity and substantive truth to deprive a large minority of their constitutional rights calls into question the democratic principles of equality, fairness, and justice.[88] Queer theory's deconstruction of status/conduct and sex/gender lends strength to this argument.

a. Judith Butler and the Destruction of Binaries

Formulated from the standpoint of heteronormativity, the law utilizes a theory of sex, gender, and desire that goes something like this: People are born with a sex (male (xy)/female (xx)) which in turn determines their gender (masculinity/femininity, which is culturally defined) which further determines their object of desire (sexual orientation).[89] At first glance this looks simple: One's anatomical structure determines one's gender which in turn determines one's object of desire (sexual orientation). Most would equate this with some intuitive truth, like 2+2=4.[90] However, the equation's flaw lies in its determinist premise, and abundant deviations burn holes into the theory.[91] In this vein, queer theorist Judith Butler deconstructs these

---

87. Immigration courts recognize homosexuality as immutable status to protect gays seeking asylum. *See Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (finding that "homosexuality is an 'immutable' characteristic").

88. Professor Schacter invokes other democratic principles as bases for deciding cases and justifying legal outcomes. *See* Jane Schacter, *Vision and Revision: Exploring the History, Evolution, and the Future of the Fourteenth Amendment:* Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 734 (2004) (discussing the use of principles of democracy—i.e. equality, liberty, and citizenship—in deciding *Lawrence v. Texas*).

89. For the sake of simplicity: sex → gender → sexual orientation (desire).

90. *See* BUTLER, *supra* note 57, at 8 ("On some accounts, the notion that gender is constructed suggests a certain determinism of gender meanings inscribed on anatomically differentiated bodies, where those bodies are understood as passive recipients of an inexorable cultural law.").

91. *See id.* at 6 (discussing the sex/gender distinction as originally an argument against the "biology is destiny" formulation of sex and gender, which posits that "whatever biological intractability sex appears to have, gender is culturally constructed: hence, gender is neither the causal result of sex nor as seemingly fixed as sex").

notions of sex, gender, and desire to reveal the problems inherent in this binary system.[92]

Butler's argument consists of three main steps. First, sex does not cause gender; gender causes sex.[93] Butler calls into question the immutability of sex and argues that both gender and sex are socially constructed.[94] In "becoming" women, people are compelled by society, and not by pre-sexed bodies, to abide by cultural norms regarding how to act in accordance with some physical feature.[95] No *a priori* physical substance or body exists that forces people to assume a specific gender.[96] People "choose"—and I use the term "choose" loosely—a gender role and then perform/imitate societal norms to construct that gender.[97] The body never *is* anything prior to becoming gendered, and no sex exists until the agent *performs* its gender: "'[P]ersons' only become intelligible through becoming gendered."[98]

Second, Butler argues that gender is performative; in other words, she argues gender is conduct.[99] Philosophically speaking, Butler rejects

---

92. *See infra* note 93–118 (discussing Judith Butler's deconstruction of the sex/gender binary).

93. Gender → Sex. By flipping the arrow, identity/status takes form only after performance/conduct defines it. "There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results." BUTLER, *supra* note 57, at 25.

94. *See id.* at 8 (discussing Simone de Beauvoir's theory that a *cogito* or agent exists which "becomes" gendered through cultural compulsion). Butler posits the notion that if a sex-less body exists which takes on a gender, then for that body to construct its gender it must have always have been interpreted by cultural meanings, and by definition, that would be a social construct that is part of gender:

> Beauvoir is clear that one 'becomes' a woman, but always under a cultural compulsion . . . . And clearly, the compulsion does not come from 'sex.' If 'the body is a situation,' as [Beauvoir] claims, *there is no recourse to a body that has not always already been interpreted by cultural meanings*; hence, sex could not qualify as a prediscursive anatomical facility. Indeed, *sex, by definition, will be shown to have been gender all along.*

Id. at 8 (citations omitted) (emphasis added).

95. *See supra* note 94 and accompanying text.

96. *Id.*

97. *See* BUTLER, *supra* note 57, at 8 (discussing the meaning of "construction" and suggesting that it is not as simple as "choice").

98. *Id.* at 16. This parallels Standpoint B later discussed in Part III.B.1, i.e. the "fluid" standpoint.

99. *See id.* at 24–25 ("[G]*ender* is not a noun, but neither is it a set of free-floating attributes, for . . . the substantive effect of gender is performatively produced and compelled by the regulatory practices of gender coherence [sexual expression].").

Cartesian mind/body dualism.[100] In that vein, Butler makes her third move: "[S]ex, by definition, [is] nothing but gender all along."[101] By rejecting the mind/body distinction she rejects the idea of a "being" or a "substance" before conduct or performance. Identity becomes like a "'grin [that] hang[s] about without the cat.'"[102] Thus, gender performance creates or defines sexual identity, but in creating that identity, gender performance becomes that identity.[103] Because gender equals identity, sex drops out of the equation, and gender simply is all there is and ever was.

More generally, Butler theorizes that no identity exists before conduct:

> The masculine/feminine binary constitutes not only the exclusive framework in which that specificity can be recognized, but in every other way the 'specificity' of the feminine is . . . separated off analytically and politically from the constitution of class, race, ethnicity, and other axes of power relations that both constitute "identity" and make the singular notion of identity a misnomer.104

Identity equals the myriad ways in which people express themselves, for example, by what they eat (vegetarianism), by what they wear (suits vs. cowboy boots), with whom they sleep, etc.[105] Sexual orientation provides just another piece of constitutive performance.

The relevance of Butler's philosophy when transplanted into the law proves difficult to see at first. It seems unthinkable that the deterioration of the sex/gender binary, being so purely a philosophical theory, might work its way into the law, but indeed it has. Butler's model can be seen most prominently and successfully deployed in the area of Title VII litigation.[106]

---

100. *See id.* at 12 ("Despite my own previous efforts to argue the contrary, it appears that Beauvoir maintains the mind/body dualism . . . ."). Butler rejects mind/body dualism when she rejects the notion that there is some pre-sexed body that determines identity; Butler believes that performance creates one's identity. *See id.* at 136 ("[T]hat the gendered body is performative suggests that it has no ontological status apart from the various acts which constitute its reality.").

101. *Id.* at 8.

102. *Id.* at 32.

103. *See id.* at 141 ("If gender attributes, however, are not expressive but performative, then these attributes effectively constitute the identity they are said to express or reveal.").

104. *Id.* at 4.

105. *See id.* at 136 ("[A]cts and gestures, articulated and enacted desires, create the illusion of an interior and organizing gender core . . . .").

106. *See* Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (2006) (stating that employers may not discriminate on the basis of sex). Note that I am using "successful" to mean that the courts have deployed Butler's theory of sex and gender and collapsed the sex/gender binary.

In *Price Waterhouse v. Hopkins*,[107] Ann Hopkins brought a Title VII claim for sex discrimination after her employer refused to consider her candidacy for partner. She claimed her company denied her a promotion on the basis of sex, alleging that partners at her company told her she was too aggressive, called her "macho," and told her to go to "charm school."[108] The United States District Court for the District of Columbia ruled in favor of Hopkins stating that Price Waterhouse was "influenced by sex stereotyping" and had discriminated against her because of her sex.[109]

More importantly, and in support of Butler's theory, Ms. Hopkins won her case not because Price Waterhouse discriminated against her on account of being a woman, but for how she *performed* being a woman, that is, her gender.[110] The Court stated that Title VII makes the "momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[111] When speaking about Title VII, however, the Court completely collapses the sex/gender binary: "Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute."[112] Throughout the entire opinion the Court talks about the discrimination in terms of gender, using "sex" and "gender" interchangeably.[113] For example, the Court stated:

---

107. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (stating that, as a test for sex discrimination under Title VII, an employer may avoid liability by showing that the employer would have taken the same action had gender been ignored).

108. *Id.* at 235.

109. *See id.* at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

110. *See id.* at 272 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.C. Cir. 1985)) ("[H]er 'professional' problems would be solved if she would 'walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.'").

111. *Price Waterhouse*, 490 U.S at 239.

112. *Id.* (emphasis added).

113. The Author recognizes the interchangeability of "sex" and "gender" in colloquial English. As stated earlier, the Author takes the view that the careless collapse both in common language and by the Court indicates the reflexiveness of collapsing sex and gender, and that the two concepts really are so intertwined that they are nearly indistinguishable. A discussion of the difference between "sex" and "gender" and the need to keep the two terms separate in the language of the law, a movement advocated by Justice Scalia and Richard Epstein can be found in an article by Mary Anne C. Case. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995) (discussing the difference between "sex" and "gender" and the recognition by Justice Scalia of the need to keep the two terms separate).

> [W]hen a plaintiff in a Title VII case proves that her *gender* played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving . . . it would have made the same decision even if it had not taken the plaintiff's *gender* into account.[114]

International courts also recognize the inextricability of sex and gender, or more broadly, status and conduct. In *Attorney General v. Dow*,[115] the Court of Appeal of Botswana held that discrimination based on sex was proscribed by the Botswanean Constitution.[116] In *Kanane v. State of Botswana*,[117] the High Court of Botswana discussed the decision in *Attorney General v. Dow* in which "sex," although not included in the proscribed forms of discrimination listed in Section 15(3) of the Botswanean Constitution, was deemed a proscribed form of discrimination. In speaking about *Attorney General v. Dow*, the *Kanane* court used "sex" and "gender" interchangeably: "The [*Dow*] Court therefore held that discriminatory legislation on the basis of *gender*, even though not expressly mentioned in Section 15(3) [of the Constitution], would be in violation of Section 3 of the Constitution."[118] Thus even in Botswana, courts collapse sex (status) and gender (conduct) echoing Butler's theory.

b. The Consequences for Sexual Orientation After Sex and Gender Get Collapsed and the Emergence of a New Binary

Although American courts collapse sex and gender and extend legal protection to gender, they have not done the same for sexual orientation.[119]

---

114. *Price Waterhouse*, 490 U.S. at 258 (emphasis added).

115. *See* Att'y Gen. v. Dow, 1992 B.L.R. 119, 122 (C.A.) (holding that the Citizenship Act violated the Botswanean Constitution because it discriminated against women based on their sex). Respondent, a citizen of Botswana married to an American citizen, challenged two provisions of the Citizenship Act that prevented her children born in wedlock from becoming citizens of Bostwana. *Id.* at 121. Specifically, Respondent argued that the provisions violated Section 3 of the Constitution conferring fundamental rights and freedoms on the individual, Section 14 protecting freedom of movement, and Section 15 protecting citizens from discrimination. *Id.* at 122. In so holding, the court found that sex discrimination, although unenumerated, was a protected form of discrimination. *Id.* at 122.

116. *See id.* at 122 ("The omission of the word 'sex' from the word 'discriminatory' [in Section 15 of the Botswanean Constitution] was neither intentional nor made with the object of excluding sex-based discrimination.").

117. *See* Kanane v. Botswana, 1995 B.L.R. 94 (H. Ct.) (upholding laws that makes it illegal to engage in homosexual activity because they do not discriminate on the basis of sex).

118. *Id.* (quoting Attorney-General v. Dow, 1992 B.L.R. 119 (C.A.)) (emphasis added).

119. *See, e.g.*, *infra* notes 120–126 and accompanying text (discussing the Second

Sexual orientation, however, constitutes just another component of gender and identity. In *Dawson v. Bumble & Bumble*,[120] Dawson, a lesbian, brought a Title VII claim against her former employer for discriminating against her based on her sexual orientation.[121] Dawson referred to herself as a "dyke" and was openly gay.[122] Dawson alleged her coworkers and supervisors told her she "wore her sexuality like a costume,"[123] and claimed she was fired for having a "dyke attitude."[124] Dawson stated she was told to "act . . . less like a man and more like a woman" and that she "needed to have sex with a man."[125] The Second Circuit held that Dawson could not recover under Title VII because her claims "of sex stereotyping derive[d] not from *gender* stereotypes but rather from stereotypes based on sexual orientation."[126] Here the court again collapses the sex/gender distinction, but makes a further distinction on the basis of sexual orientation.

The Botswanean court in *Kanane v. State of Botswana* upheld a law that criminalized sodomy even though the court equated gender and sex discrimination.[127] Similarly, in *Banana v. State*,[128] a Zimbabwean court upheld a law that prohibited sodomy between men, but not between men and women.[129] The *Banana* Court held that the law prohibiting sodomy did

---

Circuit's refusal to extend protection from sex and gender discrimination to discrimination based on sexual orientation).

120. *See* Dawson v. Bumble & Bumble, 398 F.3d 211, 224 (2d Cir. 2005) (holding that sexual orientation discrimination falls outside the purview of Title VII's protection against sex and gender discrimination). Plaintiff brought a Title VII claim against her employer alleging discrimination based on her sexual orientation. *Id.* The court affirmed dismissal of the plaintiff's claims because there were no material issues of fact showing that the defendant discriminated against her based on gender stereotypes. *Id.*

121. *Id.* at 224.

122. *Id.*

123. *Id.* at 215.

124. *Id.*

125. *Id.*

126. *Id.* at 216 (emphasis added).

127. *See* Kanane v. Botswana, 1995 B.L.R. 94 (H. Ct.) (upholding laws that makes it illegal to engage in homosexual activity because the court found they did not discriminate on the basis of sex).

128. 4 L.R.C. 621 (S.C.) (2000). Appellant was convicted on two counts of sodomy and challenged the common law criminalizing sodomy for violating Section 23 of the Zimbabwean Constitution, guaranteeing protection against gender discrimination. *Id.* at 621–22. The Supreme Court of Zimbabwe held that Section 23 of the Constitution did not include an express prohibition against sexual orientation discrimination, but only a prohibition against gender discrimination. *Id.* at 622. As a result, the law criminalizing sodomy was not unconstitutional. *Id.*

129. *See id.* at 622 (upholding an anti-sodomy statute based on separate standards for

not discriminate on the basis of gender, which would have been unconstitutional, but discriminated on the constitutionally-permitted basis of sexual orientation.[130] Like American courts, these courts collapse sex and gender, but further prohibit homosexual conduct by differentiating between gender and sexual orientation. The differentiation between gender and sexual orientation gives rise to a new binary where non-sexual gender performance is elevated to the level of status and sexual orientation is left on the conduct side of the binary. This new binary may be represented as (status and non-sexual conduct)/sexual conduct.

Any real difference between sexual orientation discrimination and gender discrimination seems purely fictional, however.[131] People frowned upon Dawson's sexual relationships with women for the same reasons that they frowned upon Hopkins' aggressive character—both constitute deviations from the heterosexual hegemony's definition of "female." Sleeping with someone of the same sex is a paradigmatic example of deviation from gender stereotypes; after all, one of the most commonly thought of attributes of the female gender is attraction to males.[132] Discriminating against a person simply because they defy gender stereotypes and norms embodies the very definition of gender discrimination, regardless of whether the deviation is sleeping with someone of the same sex or being aggressive in the workplace.[133] The

---

gender and sexual orientation discrimination).

130. *See supra* note 128 and accompanying text.

131. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 59–60 (1993) (analyzing the Hawaii marriage statute under strict scrutiny because the application of Hawaii's marriage law, as a restriction on same-sex marriage, constituted sex discrimination under Hawaii's constitution). "What we *have* held is that, on its face and as applied, HRS §572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5." *Id.* at 67. *See also* HAW. CONST. art. I, sec. 5 (providing equal protection on the basis of sex); Amy Lovell, Comment, *"Other Students Always Used To Say, 'Look at the Dykes'": Protecting Students from Peer Sexual Orientation Harassment*, 86 CALIF. L. REV. 617, 639 (1998) (arguing "sexual orientation discrimination is sex discrimination because the perpetrator is treating identically situated individuals differently, solely based on the sex of the individuals and their beloveds"). *But see* Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U.J. GENDER SOC. POL'Y & L. 333, 366 (1998) (arguing that sexual orientation discrimination cannot be equated with sex discrimination and that Title VII must be amended before sexual minorities can receive protection).

132. *See* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 362 (2000) ("[T]o be a man or a woman in contemporary American society is in part defined by one's sexual attractiveness to the opposite sex.").

133. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman

United Nations Human Rights Committee recognized this in *Toonen v. Australia*,[134] where they held that: "The Committee confines itself to noting . . . [that] the reference to 'sex' in the International Covenant on Civil and Political Rights is to be taken as including sexual orientation."[135] Instead of recognizing that sexual orientation merely constitutes a part of gender performance, however, courts draw an ephemeral line between gender discrimination and sexual orientation discrimination and continue to deny sexual minorities protection in Title VII cases.[136]

c. The Consequences for Binaries After Queer Theory Reveals There Is No Real Difference Between Status and Conduct

The malleability of status/conduct exemplified in the breakdown of the sex/gender binary indicates the dilemma one confronts when trying to divorce status and conduct. It also indicates the impossibility of stamping one prong of the binary immutable and the other mutable and thereafter granting legal rights based on that determination. Due to malleability and subjectivity, courts cannot apply binaries and offer promises of equality and fairness with a straight face. Moreover, binaries can detrimentally affect one's notion of personal identity. Because of the impossibility of distinguishing between status and conduct, and the fundamental constitutional rights at stake, courts should stop using binaries to justify legal holdings in the sexual orientation context.

---

cannot be aggressive, or that she must not be, has acted on the basis of gender.").

134. *See* Toonen v. Australia (Human Rights Committee Communication No. 488/1992) (Mar. 31 1994) (finding that two provisions of the Tasmanian criminal code that criminalize consensual sex between adult males in private violate Article 17(1) of the International Covenant of Civil and Political Rights protecting individual privacy rights). Toonan argued that the law discriminated against homosexual men on the basis of their sexual orientation. *Id.* The Committee recommended that the law be repealed. *Id.*

135. *Id.*

136. *Cf.* Schroeder, *supra* note 131, at 335 (discussing the reasoning courts have employed to refuse to extend Title VII protection to sexual orientation). Schroeder concludes that the majority of the reasons are "unfounded and that only a facial interpretation of 'sex' remains as a viable reason for denying coverage under Title VII." *Id.* at 336.

B. "Standpoint Theory"—Courts Cannot Objectively Distinguish Between Traits and Actions That Constitute Status and Those That Constitute Conduct

Propriety carries with it connotations of objectivity. No reputable scientist or mathematician would ever say that a study was proper if it lacked objectivity. Moreover, no social science or history would be accepted as fact if theorized or issued from a biased perspective. Modern epistemology and notions of truth rest on foundations of objectivity. Legal theory is no different—justice is supposed to be blind. This section will apply "standpoint theory" to reveal hidden biases inherent in the legal system that explain why courts fail to recognize homosexuality as status.

Article III, Section 2 of the Constitution vests courts with the power to decide all cases arising under United States laws. The judicial power includes the power of judicial review and the power to interpret United States laws.[137] Courts do not have unlimited power in that they cannot choose to ignore and to decide cases independent of the Constitution or United States laws. Courts do, however, have wide discretion over interpretation and over the stringency of judicial scrutiny to be applied.[138]

Take for example the Fourteenth Amendment, which states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[139] Courts allow circumvention of equal protection when there is a rational government interest in passing such a law.[140] Within the power to interpret the laws, the Court can choose to apply higher levels of judicial scrutiny when the law in question discriminates on certain bases, such as race and gender. No law or statute prevents a court from elevating sexual minorities to suspect class status—this is completely within a court's discretion. The United States Supreme Court has, however, repeatedly applied rational basis review when analyzing cases dealing with sexual minority rights.[141] The failure to recognize sexual minorities as a suspect

---

137. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (announcing the principle of judicial review in holding that it is for the judiciary to say "what the law is").

138. U.S. v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (explaining that courts could apply a higher standard of judicial scrutiny).

139. U.S. CONST. amend. XIV, § 1.

140. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (stating that no legitimate state interest existed in passing Colorado's Amendment, which would have denied homosexuals the right to ever be protected from discrimination).

141. *See, e.g., id.* at 639–40 (employing rational basis review to conclude that an amendment that prohibited all legislative, executive, and judicial action protecting homosexuals from discrimination in Colorado violated the Equal Protection clause);

class rests on the reasoning that suspect groups should have immutable characteristics for which they have historically been discriminated against—homosexuality as mutable conduct fails that standard.

The conclusion that homosexuality is mutable conduct, however, has not been reached from an unbiased perspective. Before proceeding, I ask the reader now to recall the philosophical considerations in Part I regarding the foundations of binary-reasoning in Socratic and Platonic philosophies.

1. Foundations for the Heteronormative Bias.

Now, let us assume for a moment that two different standpoints exist: Standpoint A and Standpoint B. People who view the world from the perspective of Standpoint A believe that things have discrete definitions and objective truth exists—that some Form exists in another world which represents *the* immutable truth. This belief in objective truth leads the observer to believe that his definitions and truths enable him to place things into discrete categories. René Descartes articulates this standpoint in his philosophy of mind, when he separates mind and body, envisioning the two as discrete complexes with their own worlds of accessibility and function.[142] By separating mind and body, things can *be* regardless of whether they ever engaged in any conduct; in other words, a mind can exist independently of body[143] and 'Forms' exist in the heavenly sphere without actually being perceived in the world.[144] The modern use of the scientific method reflects this standpoint: Scientists separate the specimen from its natural environment, then isolate and study it in an artificial lab environment where objective fact is supposedly derived.[145]

Lawrence v. Tex., 539 U.S. 558, 574 (2003) (applying rational basis review to find Texas' anti-sodomy statute unconstitutional).

142. *See* RENÉ DESCARTES, *Meditation VI: Of the Existence of Material Things, and of the Real Distinction Between the Mind and Body of Man*, *in* THE MEDITATIONS AND SELECTIONS FROM THE PRINCIPLES OF RENÉ DESCARTES 84, 85–86 (John Veitch, LL.D. trans., The Open Court Publishing Company 1927) (characterizing mind and body as distinct entities).

143. *See id.* at 91 (stating that because man has "a clear and distinct idea" of himself as a thinking thing and possesses "a distinct idea of [his] body" as an *un*thinking thing, it is certain that the mind is distinct from the body and may exist independently).

144. *See* PLATO, *Phaedo*, *in* THE PORTABLE PLATO (Scott Buchanan ed., Benjamin Jowett trans., The Viking Press 1948) 191, 202–03 (stating that concepts such as absolute beauty and absolute good certainly exist, though they have never been perceived with the human senses).

145. This critique of the modern scientific method can be seen in the writings of

Standpoint B represents the opposite view: Truth is fluid, constantly shifting with the observer, time, and external factors. Mind and body are inseparable notions because they reflexively define each other.[146] Categories fail because fixed definitions and objective truth do not exist. Standpoint B can be seen in its most extreme form in George Berkeley's empirical philosophy, in which Berkeley states: "To be is to be perceived."[147] Things *become* actuated when they are perceived, when they engage in conduct—e.g. minds cannot exist independently of bodies.[148] Modern "standpoint theory"[149] reflects this theory, that there is no separation between mind and body, proposing that knowledge should be

---

modern feminist philosophers. *See generally*, Sondra Farganis, *Feminism and the Reconstruction of Social Science*, *in* GENDER/BODY/KNOWLEDGE, FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING (Alison M. Jaggar & Susan R. Bordo eds., 1989). Feminist philosophers identify the scientific method as the "Cartesian" model of science. *See id.* at 207 ("The scientific method has come to be regarded as the vehicle through which the mind, unencumbered by factors of class or status . . . can know or understand . . . objective reality. One must question the Cartesian ideal on which the contemporary notion of science is based."). Modern feminist philosophers reject the scientific method's idealistic assumption that objective reality exists, and instead seek knowledge with the understanding that knowledge (both in content and form) is a social construct, affected by one's environment, motivations for seeking knowledge, and gender. *See id.* at 208 ("[B]oth the content and the form of thought, or the ideas and the processes through which those ideas are generated and understood, are affected by concrete social factors of which gender is one."). Moreover, modern feminist standpoint theorists take the position that a theory of knowledge should take into account certain social constructs (e.g., who is the "knower," what knowledge is being sought, and why she wants to know this thing). By critically understanding the role certain social constructs play in shaping human "knowledge," that knowledge becomes more effective for the user. *Id.* This is called "standpoint theory." For a general overview of standpoint theory, see Feminist Standpoint Theory, http://plato.stanford.edu/entries/feminism-epistemology/#standpoint (last visited Dec. 18, 2008) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

146. *See, e.g.*, BUTLER, *supra* note 57, at 7 ("Gender ought not to be conceived merely as the cultural inscription of meaning on a pregiven sex . . . gender must also designate the very apparatus of production whereby the sexes themselves are established.").

147. *See* GEORGE BERKELEY, *Three Dialogues Between Hylas and Philonous*, *in* A NEW THEORY OF VISION AND OTHER WRITINGS 113–14 (1969) (arguing that knowledge is gained via perception, and that perception, and the subjectivities that accompany human perception, create that knowledge and cause the object to *be*).

148. *See id.* at 114–15 (arguing that something cannot be described or understood in the abstract, that human beings gain knowledge by perceiving things, and thus the subjectivities of how the perception occurred forms that knowledge).

149. Feminist philosophy has established standpoint theory. *See generally* Sandra Harding, *Introduction: Standpoint Theory as a Site of Political, Philosophic, and Scientific Debate*, *in* THE FEMINIST STANDPOINT THEORY READER, INTELLECTUAL & POLITICAL CONTROVERSIES 1–3 (Sandra Harding ed., 2004) (describing feminist standpoint theory and its history).

formed by taking into account the social constructs that shape it, and also the subjectivities that arise between scientist and specimen.[150]

Standpoint B will be referred to as the "fluid" standpoint because it does not presuppose categories; rather, it fuses subjectivity with epistemics.[151] Judith Butler and George Berkeley's philosophy is prominently reflected in this theory insofar as status and conduct cannot be separated because conduct creates status; that is, conduct defines who one is in the real world.[152]

Standpoint A will be referred to as the "binary" standpoint because binaries display clear symptoms of Standpoint A. Standpoint A is predicated on a belief in the ability to categorize things as either status or conduct. Inherent in that ability is the ability to distinguish between status and conduct—that is, the ability to divorce personal identity from conduct. This reflects elements of Cartesian methodology in that status and conduct *can* be separated.[153] This standpoint also seems to derive its foundations from elements of Socratic and Platonic epistemology, in its belief in objective truth—e.g. *immutable* "Forms" that exist without actuation or conduct in the world.[154]

Ultimately, Standpoint A forms the foundation of modern heteronormativity. Heteronormativity can be defined as the assumption that heterosexuality is the *normal* or *natural* sexual orientation.[155] Heteronormativity posits the discrete categorization of individuals into male/female and gay/straight categories.[156] Moreover, and this is where

---

150. *See supra* note 145 (discussing feminist standpoint theory as an epistemology that takes into account the standpoint of the "knower" as opposed to modern scientific theory).

151. Feminist standpoint theory likewise fuses epistemics with socio-environmental subjectivities. *See supra* note 145 (discussing standpoint theory generally).

152. For Judith Butler, there is no line between status and conduct. *See supra* note 104 and accompanying text. Moreover for Berkeley, status is tied up with action; thus nothing *is* until it has been perceived. *See infra* note 147 and accompanying text.

153. *See supra* notes 142–145.

154. Plato's immutable forms, because they exist objectively in an abstract world and without regard to anything in the real world, support the notion that knowledge can be garnered without understanding the world and its social constructs. *See supra* note 144.

155. Cathy J. Cohen further defines heteronormativity as "both those localized practices and centralized institutions that legitimize and privilege heterosexuality and heterosexual relationships as fundamental and 'natural' in society." Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 443, 447 (1997).

156. The gay/straight distinction is a relatively new notion. *See* David Shneer & Caryn Aviv, *Bulldykes, Faggots, and Fairies, Oh My! Calling and Being Called Queer*, *in* AMERICAN QUEER, NOW AND THEN 1, 2–4 (2006) (discussing the emergence of the modern category of "homosexual" and the changes in common terms used to refer to homosexuals).

Socratic and Platonic philosophy play their largest roles, modern heteronormativity reinforces heterosexuality as the single and natural sexual orientation—i.e. the "Form" or true sexual orientation. As discussed in Part I, and in Socratic terms: Homosexuality is the negative or lack of the true Form of sexual orientation, heterosexuality. Homosexuality, as an absence of truth or the true Form of what sexuality is, is not what people are—their status; rather, it is mere conduct that deviates from what is right.

2. *The Existence of Bias*

If Standpoint A is the predominant view courts adopt, then jurisprudence based on the above-mentioned heteronormative norms is inherently biased because there is a predisposition to believe that status can be separated from conduct, that heterosexuality is the true sexual orientation, and that homosexuality reflects a deficiency and is *conduct* that deviates from heterosexuality. If Standpoint B is the predominant view, then courts would likely not invoke the status/conduct or sex and gender/sexual orientation binaries at all. There would simply be no way to divorce conduct from personal identity because conduct and status reflexively define each other.

Which Standpoint has dominated? A simple look at the above-mentioned case law and rationales points clearly to Standpoint A. The very use of binaries suggests that courts believe they can separate status and conduct. Moreover, the notion that homosexuality is deviant conduct has persisted for decades. It seems heteronormative bias fixed the outcome from the beginning.[157]

---

157. For further proof that Standpoint A lends to the use of binaries, take for example the case of religion. Religion, like sexual orientation, contains mixed components of status and conduct. An observer from the perspective of Standpoint A would be willing to say that a Muslim may believe in his religion, but he shall not pray five times a day; i.e. religious conduct could be defined as mere conduct and thus capable of proscription. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990) (proscribing the religious use of peyote); Braunfeld v. Brown, 366 U.S. 599, 605–07 (1961) (upholding a law that prevented a Jewish storeowner from opening his store on Sunday thus indirectly forcing him to choose between keeping his Sabbath or opening his store on Saturday to save his business); Reynolds v. United States, 98 U.S. 145, 166–67 (1879) (upholding a bigamy conviction despite the Mormon practice of polygamy). An observer from Standpoint B would see the impossibility of separating the conduct from the man's status; performing religious rituals is a component that defines one's religious status.

Religion is different than sexuality, though, and is much more protected than sexuality. Even from Standpoint A, religion does not have the weight of heteronormativity pushing against it; rather, it has the United States' strong tradition of upholding religious

C. Problems for the Immutable/Mutable Binary: Immutable Dispositions? Is Conduct Really Mutable?

Beyond the impossibility of objectively categorizing homosexuality as either status or conduct lies the problem of defining homosexuality as mutable conduct. Consider the problems that bisexuality and philosophy raise for the immutable/mutable binary.

1. Problems That Bisexuality Raises for the Immutable/Mutable Binary by Showing That Desire Can Be an Immutable Disposition

a. Defining Sexuality in Terms of Desire

An examination of bisexuality exposes the problems of using an immutability-based standard to grant groups legal rights. Bisexuality is an especially interesting example because bisexuals have a mutable choice in partner but an immutable bisexual orientation.

First, let us take a deeper look at bisexuality and suggest definitions. Along with the modern creation of the heterosexual/homosexual dichotomy came the creation of the intermediate category of bisexuality. Bisexuals are commonly thought of as immature homosexuals transitioning into full homosexuality, or as selfish individuals having their cake and eating it too.[158]

Sexuality can be defined in many different ways depending on the standpoint of the person doing the defining. In terms of optional definitions, one can define sexuality in terms of conduct, desire, or both conduct and desire.[159] For example, defining bisexuality based on conduct

---

freedom. These separate the case of the homosexual from the religious believer. The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (RLUIPA), is a perfect example of the legislature respecting religious conduct as non-divorceable from status. RLUIPA prohibits burdens on prisoners' free exercise of religion, enabling prisoners to, for example, abide by religious dietary restrictions, and to pray. 42 U.S.C. § 2000cc-1(a). *See also* Madison v. Virginia, 474 F.3d 118, 127 (4th Cir. 2006) (granting a Jewish prisoner ability to keep kosher diet).

158. RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 21 (1996) (discussing the nicknames the gay and straight communities use when talking about bisexuals such as "switch hitter" and "fence sitter"); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 388–430 (2000) (discussing the reasons behind the resistance of both the gay and straight communities in accepting bisexuality as a "true" sexual orientation like heterosexuality and homosexuality).

159. *See* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV.

alone would make anyone who engages in sexual *conduct* with persons of both the same and opposite sex bisexual. In this case, a man in prison who has sex with other men would be "bisexual" regardless of whether or not he actually desired other men or whether his circumstances temporarily made him engage in the conduct.

A definition of sexuality that takes into account conduct alone, as in the above example, would be both under-inclusive—because some people might cabin strong homosexual desires but choose not to, or never have the opportunity to, act on their same-sex attraction—and over-inclusive—because some people experiment with same-sex relationships or engage in homosexual conduct only because of their current situation or inability to engage in heterosexual conduct.[160] A definition that takes into account both conduct and desire would also be over and under-inclusive because it would include those who have engaged in homosexual acts, but do not generally desire same-sex partners, and exclude those that have the desire but never acted upon it.[161] For the sake of this Note, and to avoid under-inclusion, I will define bisexuality in terms of *desire* for both male and female genders. Although such a definition might be over-inclusive by including those who have never engaged in homosexual conduct, at least it will capture those with homosexual desire who are the focus of the remaining part of this section.[162]

353, 373–77 (2000) (discussing the various ways (desire, conduct, self-identification) one can use to define or conceptualize bisexuality).

160. *Id.*

161. *See id.* at 372 (explaining the over and under-inclusive effects of using each axis—desire, conduct, or self-identification—as a basis for categorizing people as bisexual).

162. *See id.* at 373 ("So which axis or combination of axes is best suited for our purposes? I believe that the answer is a pure desire-based definition."). I choose this definition of bisexuality for the same reasons as Professor Yoshino.

As Professor Yoshino explains, this desire-based definition may seem self-serving, but this Note discusses the mutability of bisexual choice in the context of an immutable orientation. Thus, those who have made the mutable choice of being with heterosexual partners are just as important for this Note as those who have chosen to be with homosexual partners. A desire-based definition of bisexuality best captures those two populations. *See id.* at 373 (explaining that although "[a desire-based definition of bisexuality] may seem self-serving as the desire-based definition is likely to yield more bisexuals than a conduct-based or self-identification-based definition," ultimately the desire-based definition captures those bisexuals who have been "erased," which was part of what the article aimed to show).

b. The Bisexual Person's Choice May be Mutable, but the Desire that Underlies the Ability to Make the Mutable Choice is Immutable Status.

The problem that bisexuality brings to the fore regarding immutability/mutability-based theories is that it shows the impossibility of defining even decisions, typically regarded as choices, as mutable.[163] Conventionally, bisexuality seems to present the bisexual with a mutable choice of picking a same-sex or cross-sex partner.[164] After the bisexual enters into a relationship, he or she is classified as heterosexual or homosexual, depending on the sex of the chosen partner.[165] In one sense, this view seems to support the idea that sexual orientation is mutable conduct.

Given a desire-based definition of bisexuality, however, even after one chooses to enter into a same-sex or cross-sex relationship, "either-sex" desire is not simply erased, and thus, the sexual orientation persists as immutable in this sense, despite protests to the contrary.[166] If a bisexual woman enters into a relationship with a man, she is not made straight by that one relationship if she still desires other women.[167] Regardless of the gender of a bisexual's current partner, bisexual desire and choice remain immutable characteristics of bisexual orientation.[168]

---

163. *See id.* at 405 (indicating that immutability and bisexuality are not necessarily inconsistent concepts).

164. *See id.* at 368–73 (discussing how the conventional view of bisexuality seems to indicate that heteronormativity is presently entrenched in our ideas of sexual orientation—many believe that people belong on one side of the heterosexual/homosexual dichotomy alone, which further perpetuates the heteronormative position that only two sexual orientations exist: heterosexual and homosexual).

165. *See* RUTH COLKER, BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 23 (1996) (discussing criticisms by the gay and lesbian community when a bisexual chooses a cross-sex partner)

166. *See id.* at 23 ("I was shocked and dismayed when a feminist activist referred to me as a 'hasbian' after I married a man, thereby *erasing* my feelings toward and experiences with women." (emphasis added)).

167. *See generally* COLKER, *supra* note 165, at 23–30 (refuting the erasure of bisexuality after a partner is chosen).

168. *See generally* ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 637–59 (1948) (pointing out that there are many graduations of sexuality and that it is not possible to categorize all people as exclusively heterosexual or homosexual as some are truly both); ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 468–69 (1953) (discussing the reality of the existence of people who identify themselves as neither exclusively heterosexual or homosexual).

True bisexuals have no more choice in the people they desire than a straight man in the women he desires.[169] Bisexuals cannot choose who they are attracted to, and thus cannot choose to be straight or gay; a true bisexual must live with genuinely desiring both genders.[170] This understanding of bisexuality challenges the immutable/mutable binary by showing that bisexual choice in the act of choosing is mutable, but the existence of the choice itself is immutable. Essentially, bisexuality highlights the idea that mutable choice itself can be categorized as immutable. Thus, this Note suggests that the decision to characterize sexual orientation as mutable or immutable becomes *objectively* incoherent.[171]

2. *Problems That Philosophy Raises for the Immutable/Mutable Binary and the Theory That Conduct Is Mutable*

Several philosophers would argue that no conduct is truly mutable. In *A Treatise of Human Nature*, David Hume sets forth a theory of the human will that argues that one's actions are a necessary product of one's disposition.[172] The motives and passions that cause us to act are a product of who one is: one's experiences, likes, dislikes, customs, and circumstances.[173] If actions *necessarily* flow from who one is (one's status), then Hume's theory really is a theory about the immutability of conduct.

---

169. *See generally* ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE, *supra* note 168, at 637–59 (discussing the reality of the existence of those who experience desire towards both sexes).

170. *Id.*

171. A simpler argument that can be made is that same-sex attraction is immutable disposition, but bisexuality has an interesting way of highlighting the issue by showing that bisexuals can have a choice in their conduct, which is thought of as mutable, but by definition of being bisexual, the mutability of their conduct is actually immutable; i.e. their mutability is immutable. For example, Mr. X, a bisexual insofar as he desires both males and females, can choose which gender he will take as a partner. This supports the view that sexual orientation is mutable conduct. But, that ability to choose, the foundation of that choice, is a part of who Mr. X is and is inalienable to his disposition. In this sense, Mr. X's sexuality, though conventionally thought of as mutable, is truly an immutable part of his disposition.

172. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 257–62 (David Norton ed., Oxford Philosophical Texts 2000) (1739) (comparing the natural cause and effect of physical occurrences and natural phenomena to the natural and inevitable cause and effect of our surroundings upon our personalities and hence our actions).

173. *Id.*

First, Hume notes that in natural law, certain bodies are predisposed to move in certain ways, "'[t]is universally acknowledg'd, that the operations of external bodies are necessary . . . in their attraction, and mutual cohesion, there are not the least traces of indifference of liberty."[174] Subsequently, Hume sets forth as axiomatic that "[l]ike causes produce like effects" and moreover that just as the "the cohesion of the parts of matter arises from natural and necessary principles . . . human society is founded on like principles . . . ."[175]

In a second move, Hume rejects the doctrine of liberty as the foundation of human action and instead argues that human action is a product of necessity: "[N]ecessity makes an essential part of causation; and consequently liberty, by removing necessity, removes also causes, and is the very same thing [as] chance."[176] In conjunction with his first move, these two amount to the idea that just as the movement of external bodies are determined by the way they are shaped, for example, people's actions

---

174. *Id.* at 257.

175. *Id.* at 258. Hume also states:

> There is a general course of nature in human actions, as well as in the operations of the sun and climate. There are also characters peculiar to different nations and particular persons, as well as common to mankind . . . . [T]his uniformity forms the very essence of necessity."

Id. at 259.

176. *Id.* at 261–62. Hume locates and addresses three reasons why people hold onto liberty as the grounding principle of human action. First, after one acts, it is difficult to persuade oneself that it was "utterly impossible for us to have acted otherwise." *Id.* at 262. Hume argues that people reject the idea that our actions were done of necessity because necessity implies force, which we do not feel when we act. *Id.* Hume distinguishes between two types of liberty in action: liberty of *spontaneity* and liberty of *indifference*. *Id.* (emphasis added). He argues that people confound the two, when what they really feel is the former. *Id.*

Second, and connected to the first, people experience the "false sensation . . . of the liberty of *indifference*." *Id.* (emphasis added). That is, when one experiments with this notion of liberty by acting in a different way than usual to refute the idea of necessity, one can easily produce that different action. *Id.* Hume however points out that this proves nothing because within the experiment, the new action is motivated by a different motive, namely the desire to prove that we are free. Because the experimenter changes his motive, he can act differently than if the original motive were in play. *Id.*

Third, people are scared to call conduct necessary because of the possible damage that might have on religion or morality. *Id.* at 263. Hume turns the objection on its head and argues that his theory about necessity and conduct is essential to religion and morality. Hume explains that a person is most responsible for actions that proceed from character and disposition, rather than chance or accident. *Id.* at 264. Without this idea of conduct that flows from something innate within a person, there would be no way to find men culpable for their actions: "'Tis only from the idea of necessity that a person acquires any merit or demerit from his actions . . . ." *Id.*

are determined in accordance with their inner dispositions (including character, temper, experience, and other qualities). Hume believes that all conduct flows *necessarily* from inner disposition; to remove necessity would make human action the product of chance and thus not blameworthy as action from inner disposition would be.[177]

In application, this Note acknowledges that the adoption of Hume's view that conduct is necessary and immutable would lead to absurd results in the legal setting: Courts would have to grant people legal protection on the theory that their conduct is immutable, flowing from an immutable disposition. No one would excuse a thief's conduct, however, on the basis that the theft was immutable conduct arising out of the thief's irresistible inner nature. Moreover, the argument that disposition is immutable and determines conduct can easily be turned on its head; one could easily argue that disposition itself is mutable.

My point is *not* that Hume's philosophy should be given place in U.S. jurisprudence but rather to underscore the fact that the characterization of conduct as mutable or as immutable is highly debatable and has in fact been debated for centuries. Choosing to define status or conduct as such requires an axiom, or accepted starting point, which in turn must be decided by a standpoint on the issue, which in turn leads to the aforementioned problems of bias and subjectivity.[178]

V. Conclusion: Alternatives to Using Binaries

Ultimately, classifying conduct under either side of the immutable/mutable binary creates unpleasant outcomes. First, philosophic

---

177. *See id.* at 257–62 (discussing the degree to which behavior is actually immutable). Philosophers have espoused views about immutable conduct and notions of predetermination. *See generally* ST. ANSELM OF CANTERBURY, *De Libertate Arbitrii*, in THREE PHILOSOPHICAL DIALOGUES: ON TRUTH, ON FREEDOM OF CHOICE, ON THE FALL OF THE DEVIL (Thomas Williams ed., Hackett Publishing Company 2000) (espousing the view that freedom is the limited power of keeping an upright will for its own sake, and that because the ability to sin is not a component of that freedom, the inability to sin (in god and angels) is not a lack of freedom); ST. ANSELM OF CANTERBURY, *De Casu Diaboli*, in THREE PHILOSOPHICAL DIALOGUES: ON TRUTH, ON FREEDOM OF CHOICE, ON THE FALL OF THE DEVIL (Thomas Williams ed., Hackett Publishing Company 2000) (describing the "fall" of humans from grace as a loss of the will to do justice for its own sake, and thus a loss of the ability to exercise freedom—insofar as Anselm's narrow definition of freedom is the ability to keep an upright will for its own sake); G.E.M. ANSCOMBE, INTENTION (1957) (investigating free will and akrasia—that is, acting "against one's better judgment").

178. *See supra* Part III.B.2.

and epistemic problems arise—for example, immigration and Article III courts take different views on the immutability of homosexuality—as do concerns about the motivations underlying application of binaries, such as using binaries selectively to justify desired outcomes.[179] Major issues of standpoint arise: Do the decisions about what is status and what is conduct simply reflect and reinforce the heteronormative hegemony and counterpart views?[180] Finally, problems regarding the incongruity between binaries as a legal instrument and the real world arise.[181] The disparity between the black and white nature of the binary does not square with the world. This breakdown is shown by conflicting conventional thought, science, philosophy, and other legal authorities, including United States immigration courts that accept status-based definitions of homosexuality.[182] These conflicting views bring to mind Socrates' famous announcement about knowledge: "All I *know* is that I *know nothing*."[183] If something cannot be known, then constitutionally protected rights should not be granted or withheld based on the pretense of knowledge or biased assumptions.[184]

This is not to say that courts should stop functioning until everything they base their decisions on are clear fact, just that courts would do better if they assessed problems dealing with discrimination, such as granting minorities suspect class treatment, based on the democratic notions that underlie our society: equality and fairness.[185] Truly assessing problems with these instruments of a "neutral social morality" would ultimately lead to the best choices for the polity.[186]

Regardless of what device courts choose, this Note suggests that the key is neutrality, because from a biased standpoint, the application of even

---

179. *See supra* Part II.A (discussing the difference between the treatment of homosexuality in Article III courts versus immigration courts).

180. *See supra* Part III.B (discussing hidden biases in the legal system which negatively affect the legal definitions of homosexuality).

181. *See supra* Part III.C (using a discussion of bisexuality to underscore the fallibility of the immutable/mutable conception in the legal system).

182. *See supra* notes 45–46 and accompanying text (explaining that United States immigration courts have recognized sexual orientation as immutable status in order to provide homosexual individuals with asylum protection).

183. *See* DIOGENES LAERTIUS, THE LIVES AND OPINIONS OF EMINENT PHILOSOPHERS (C.D. Yonge trans., George Bell & Sons 1891) (attributing the quote to Socrates).

184. *See supra* Part III.B (arguing that courts cannot objectively distinguish between traits and actions that constitute status and conduct).

185. *See* Schacter, *supra* note 88 (discussing the use of principles of democracy—i.e. equality, liberty, and citizenship—in deciding *Lawrence v. Texas*).

186. *Id.* at 767.

these neutral notions become skewed. Courts should not take partisan politics, private or religious morality, or majority morality into account. Courts should also not operate from a heteronormative standpoint and create better results for heterosexuals. The founding of this country was based on the idea of freedom from majoritarian control.[187] If courts allow their decisions to be made according to the biases of majoritarian standpoints, then that founding principle of freedom is utterly defeated.[188] Other courts have already abandoned the use of binaries to justify denying sexual minorities rights, preferring instead to balance the interests of the individual against the interests of the community.[189] In 2003, the European Court of Human Rights in *Van Kuck v. Germany*[190] held that courts should not impose "general assumptions as to male and female behaviour" or "substitute[] its views on [the] most intimate feelings and experiences for those of the applicant."[191] Perhaps it is time for the American judiciary to find a neutral means for granting or denying rights to American citizens as well.

187. *See, e.g., id.* at 740 ("The fact that the governing majority in a State has traditionally viewed a practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .").

188. *See supra* Part III.A.3 (questioning the correctness of a legal system which applies majoritarian concepts to the determination of minority rights).

189. *See* Case C-13/94, P. v. S. & Cornwall County Council, 1994 E.C.R. I-02143 (holding that the Council was not allowed to dismiss P because of his proposed sex-change operation because the Council directive 76/207/EEC forbade all discrimination on account of sex in the workplace).

190. 37 Eur. Ct. H.R. 51 (2003).

191. *Id.* at 81 (holding that a transsexual's healthcare insurance company was not allowed to deny reimbursement for her sex-reassignment surgery because the ability to define one's own sex is fundamental to the right of self-determination).