

STUDENT WORKS

ALLOWING FOR CULTURAL DISCUSSION OF QUEERNESS AND PANSEXUALITY: SEX/GENDER/SEXUAL BELIEF SYSTEMS, THE RELIGION CLAUSES, AND THE IDEAL OF PLURALISM

Gretchen Adel Myers*

*Do we have the legal or moral right to decide and assign
our own genders? Or does that right belong to the state,
the church, and the medical profession?*

—Kate Bornstein¹

* © 2009, Gretchen Adel Myers. All rights reserved. Notes & Comments Editor, *Stetson Law Review*. B.A., Florida Atlantic University, 2005; J.D. forthcoming, Stetson University College of Law, 2009. I would like to thank: Professor Wairimu Njambi, whose coursework and ideas continue to inspire me; Professor Robert Batey and Graham Shaffer, whose suggestions on drafts and outlines of this Article helped me throughout the writing process; Theresa Payne Lazar and the *Stetson Law Review* members, who together prepared this Article for publication; and my family and Meghan, who have been incredibly supportive.

1. Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* 23–24 (Vintage 1994).

Kate Bornstein calls herself a gender outlaw.² Ze was born Al Bornstein and lived for decades as a man, but ze never felt like a man: “I know I’m not a man—about that much I’m very clear,” ze says.³ Al took hormones and ultimately underwent sex reassignment surgery to become Kate, assuming that hir certainty that ze was not a man must mean that ze was a woman.⁴ So ze tried being a woman, but ze did not feel like a woman either. “I’ve no idea what ‘a woman’ feels like. I never did feel like a girl or a woman,” ze confesses.⁵

Aware that people instantaneously label others according to gender and that the label they choose affects how they interact with each other, Bornstein made an effort to pass as a woman regardless of hir doubts.⁶ Ze studied the way gender is suggested by cues such as physical appearance, behavior, legal documents, and power dynamics in order to learn those cues that could be learned and divert attention from those that could not be changed.⁷ In part by learning these cues, Bornstein now “live[s] [hir] life as a woman in [hir] day-to-day walking around, but [ze] is not under any illusion that [ze] [is] a woman.”⁸

2. *Id.* Bornstein uses the pronouns “hir” and “ze” to describe herself because traditional, gender-specific pronouns do not appropriately describe hir:

Many trannies today use non-gendered pronouns to honor the notion that there are more than simply two genders and/or to take some pride in being neither/nor Do I think that non-gendered pronouns are going to be enthusiastically embraced by the world at large? Hardly. . . . It’s gonna be a long time, I think, before people are willing to let go of the need to know if a person is a man or a woman; let alone accept the notion that someone can be neither! . . . It’s difficult to refer to neither/nor, isn’t it? Well, I think that’s a shortcoming of our culture that we have no easy way to refer to liminality. But, practically speaking, the safest thing would be to refer to the person’s preferred gender and leave it at that. . . . [I]t is a matter of personal taste.

Interview by Point of View (POV) of the Public Broadcasting Service (PBS) with Kate Bornstein, POV (June 20, 2003) (available at http://www.pbs.org/pov/pov2003/georgiegirl/special_quiz_kate.html#hir). These pronouns avoid the word “It” . . . the word that stings, the third category, dehumanized and dehumanizing.” Marjorie Garber, *Vested Interests: Cross-Dressing & Cultural Anxiety* 148 (HarperPerennial 1993).

3. Bornstein, *supra* n. 1, at 8.

4. *Id.* at 24. Bornstein points out that “[t]he trouble is, we’re living in a world that insists we be one or the other—a world that doesn’t bother to tell us exactly what one or the other *is*.” *Id.* at 8 (emphasis in original).

5. *Id.* at 24.

6. *Id.* at 26–27.

7. *Id.* at 27. Bornstein mentions various cues, from name changes and driver’s license changes to avoiding eye contact and learning “feminine manners.” *Id.*

8. *Id.* at 243 (emphasis in original).

Another cue that genders an individual, Bornstein realized, is sexual orientation—sexual orientation is, by definition, about a person’s sex/gender.⁹ In the dominant heteronormative culture, an ambiguously gendered person is more likely to be labeled a woman while holding hands with a clearly gendered man because heterosexuality tends to be assumed.¹⁰ In a lesbian or gay context, however, the opposite is true—an ambiguously gendered person holding hands with a clearly gendered man is likely to be labeled a man.¹¹ As a “man,” Bornstein had been heterosexual.¹² As a “woman,” Bornstein became a lesbian,¹³ but ze was “not under the illusion that [ze] [is] a lesbian” even though ze was “living [hir] life *as* a lesbian.”¹⁴ At one point, ze was involved in a lesbian relationship with Catherine Harrison, who, three years into their relationship, began transitioning from female to male.¹⁵ The two stayed together for several more years after becoming an appar-

9. *Id.* at 29–30. Bornstein argues that there are several culturally accepted models of sexual orientation, all dependent on gender. *Id.* at 32–33. These models include:

- *Heterosexual Model*: in which a culturally-defined male is in a relationship with a culturally-defined female.
- *Gay Male Model*: two culturally-defined men involved with each other.
- *Lesbian Model*: two culturally-defined women involved with each other.
- *Bisexual Model*: culturally-defined men and women who could be involved with either culturally-defined men or women.

Id.

10. *Id.* at 29.

11. *Id.* at 30.

12. *Id.* at 41. In Bornstein’s experience, there was a distinct difference between heterosexual interactions and lesbian interactions: in heterosexual interactions, there were “patterns of relating” based on gender roles that would be “silly to try” in a lesbian context. *Id.*

13. *Id.*; Susan Bridle, *Gender Outlaw: An Interview with Kate Bornstein*, 16 *What is Enlightenment?* Mag. 1 (Fall–Winter 1999) (available at <http://www.wie.org/j16/kate.asp?page=1>).

14. Bornstein, *supra* n. 1, at 243 (emphasis in original).

15. Bridle, *supra* n. 13, at *Introduction*. As Harrison describes the relationship and his sex/gender/sexuality change:

It was during my four-and-a-half-year relationship with none other than the lovely Kate Bornstein, who years earlier had undergone her own gender change, that I transitioned [from female to male]. Kate made it safe for me to face my gender issues which had been chasing me for so long. It was the relationship I had wanted all my life and now, almost as a cruel joke, it too was changing. I was starting to be attracted to men.

David Harrison, *The Personals*, in *PoMoSexuals: Challenging Assumptions about Gender and Sexuality* 129, 129 (Carol Queen & Lawrence Schimel eds., Cleis Press 1997).

ently heterosexual couple.¹⁶ Ultimately, Catherine (now David) realized that as a man he preferred being a gay man.¹⁷ Bornstein's story illustrates how the categories of sex, gender, and sexuality are intertwining, fluid, and dynamic.

I. INTRODUCTION

Bornstein's story shows how the categories of sex, gender,¹⁸ and sexuality intertwine because ze was born male and, for this reason, consciously had to learn to send gender cues to signal hir femininity. As a male, hir attraction to women made hir heterosexual, but as a woman hir attraction for women made hir a lesbian. Bornstein's story shows how sex, gender, and sexuality are fluid and dynamic as well—ze physically changed hir sex once, changed hir gender expression/identity various times in hir life (from male, to female, to neither), and continues to change hir gender expression depending on where ze is at any given moment.¹⁹ Hir sexual orientation changed from heterosexual (with hir as the male partner), to lesbian, to heterosexual (with hir as the female partner), and back to lesbian.

The terms “queer” and “pansexual” capture the intertwining, fluid, and dynamic characteristics of sex, gender, and sexuality that Bornstein's story reveals. Both of these terms are defined by their lack of definition. “Queer” is an umbrella term that encompasses various sex/gender/sexual identities and emphasizes that these identities are overlapping and fluid by refusing to confine

16. Bridle, *supra* n. 13, at *Introduction*.

17. *Id.* Bornstein recounts that

[o]n the personal side of things, my lesbian lover of over three years decided to become a man. We lived together for a few more years as a heterosexual couple, then we stopped being lovers. He found his gay male side, and I found my slave grrrl side. What a wacky world, huh?

Id.

18. The differences between “sex” and “gender” are described *infra* at parts II(A)–(B). The separation of discrimination/stigma against sex/gender nonconformity and sexual preference is misleading, however, because there is no clear-cut distinction among these categories, and the discrimination/stigma against them all is rooted in both sexism and homophobia. *See infra* pt. II. (explaining how sex, gender, and sexuality interact).

19. Bridle, *supra* n. 13, at *Introduction*. During this interview, Bornstein shifted from one gendered persona to another, playing with those different personas throughout the interview. *Id.* As the interviewer observed, “Bornstein was intentionally, even rebelliously, chameleonlike, with a palette of personas she would shift into and out of unexpectedly, sometimes in mid-sentence.” *Id.*

them to clear-cut categories.²⁰ “Pansexual” is much like “queer” in that it resists definition but is defined by its elasticity. It suggests that there are more than three categories of sexuality (that is, heterosexual, homosexual, bisexual) and detaches physical sex from sexual acts.²¹ Both “queer” and “pansexual” are so broad and all-encompassing that they could and do—technically—encompass all of humanity.

The concepts of queerness and pansexuality could radically alter human interactions and the order of society by: destabilizing the categories of sex, gender, and sexuality; revealing that the binary sex/gender/sexuality system is unneeded; and allowing for the acceptance of difference.²² However, acceptance of these concepts depends on cultural shifts in the understanding of sex, gender, and sexuality.²³ Such cultural shifts may happen as queer and pansexual visibility increases: “New, self-defined representations of individuals’ sexuality will make it possible for new ideas to take root amidst the dominant culture’s representations of sexuality. . . . [D]oubt needs to exist as to the universality of defining sexuality as either heterosexual or homosexual.”²⁴ The same holds true for the increased visibility and acceptance of varying sex/gender identities. Such cultural shifts also depend on open discourse about sex, gender, and sexuality, in which various points of view are heard, including those that support the status quo or suggest that today’s culture is too accepting of varying sex, gender, and sexual identities.²⁵

20. Annamarie Jagose, *Queer Theory: An Introduction* 3 (Melbourne U. Press 1996, N.Y.U. Press 1996).

21. Jennifer Ann Drobac, *Pansexuality and the Law*, 5 Wm. & Mary J. Women L. 297, 298 (1999).

22. *Id.* at 302–303. The concepts of queerness and pansexuality have “the ability to change radically the way we perceive human relations and the way we order society by deconstructing the stereotypical interrelation between biological sex and behavior.” *Id.* at 303.

23. See Rachel Haynes, Student Author, *Bisexual Jurisprudence: A Tripolar Approach to Law and Society*, 5 Mich. J. Gender & L. 229, 247–248 (1999) (arguing that queer advocates, while seeking legal reform, should also focus on changing dominant cultural understandings of sex, gender, and sexuality).

24. *Id.* at 250.

25. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 Brook. L. Rev. 61, 123 (2006). Feldblum argues that there are three main views on gay sex, as follows: (1) it is morally wrong and harmful to both the individual and the community at large, and therefore it must be discouraged; (2) it is unfortunate, but it is not inherently harmful; and (3) it is morally the same as heterosexual sex. *Id.* at 69–70. The same can be

Currently, the law is hampering such a cultural discussion—much less a drastic cultural shift—by taking sides in the discourse about sex, gender, and sexuality when it should be impartial.²⁶ For example, laws dealing with sexual orientation are necessarily based on the idea that sexual orientation may and should be regulated. As Chai Feldman has stated:

The government *is* taking a position on the moral question [of sexual orientation] when it fails to extend access to civil marriage to same-sex couples. It is precisely because some people hold the view that homosexuality is immoral that gay people have been *denied* equal protection under the law up until this point. Government has not simply been sitting on the sidelines of these moral questions during all the time it has failed to pass laws protecting the liberty of LGBT people. Government has quite clearly been taking a side—and it has not been taking the side that helps gay people.²⁷

The same may be said for laws dealing with sex and gender. The very existence of these laws reveals the government's position on what sex and gender should be, how they matter in society, and, ultimately, which sex/gender/sexual beliefs are morally proper.

At the same time, those who argue for legal equality for people who transgress sex/gender/sexual boundaries want the government to take sides in the discourse as well, as the following indicates:

said for much sex/gender/sexual variance—generally, a person will either feel the identity or behavior is just plain wrong, merely unfortunate but not wrong, or completely legitimate. *Id.* at 70–72. All three of these view points should have an adequate chance to be heard and evaluated. The government should not favor one over the others.

26. *Id.* Feldblum's three views of gay sex, see *supra* note 25, correspond to the following three policy considerations behind many current laws and laws of the recent past: (1) homosexual activity is criminal, and homosexual people should not be parents; (2) homosexual people should not be discriminated against in the workplace but at the same time should not be able to marry; and (3) homosexual people should be treated completely the same as heterosexual people under the law. *Id.* at 74. The second view holds sway today, both socially and legally. *Id.* Again, these policy considerations are much like those behind laws dealing with other types of sex/gender variance, as discussed *supra* note 25.

27. *Id.* at 89 (emphasis in original). The acronym "LGBT" stands for lesbian, gay, bisexual, and transgender. Sometimes the letters are ordered differently but mean the same thing, as in "GLBT." This Comment uses "LGBT" throughout.

[W]hen government decides, through the enactment of its laws, that a certain way of life does not harm those living that life and does not harm others exposed to such individuals, the government is necessarily staking out a position of moral neutrality *with regard to that way of living*. And that position of moral neutrality may stand in stark contrast to those who believe that the particular way of living at issue is morally laden and problematic.²⁸

Regardless of which side the government chooses to take, its stance is an extremely influential force, not only in the overall debate about sex, gender, and sexuality, but also in the development of group and personal identity.²⁹ The law gives at least one ideological framework that people are forced to conform to in legal contexts and can choose—or learn—to conform to in other contexts. For example,

The legal system is an overarching, organizing principle that oozes into every aspect of life, functioning as a governing discourse. [And it] carries serious implications for the individual. It functions as a constitutive force in people's identities and capabilities; a legal determination of identity has concrete ramifications.³⁰

Instead of taking sides in this cultural debate, the government should take a position much like it has on religion—that there are various legitimate viewpoints on and expressions of sex, gender, and sexuality. Religious pluralism and benign variation in religion have been ideals in the United States since its founding and are supported by the Religion Clauses of the Constitution.³¹ Pluralism is “not just another word for diversity”—it is

28. *Id.* at 85 (original emphasis omitted, emphasis added). Government neutrality regarding a particular *way* of life should be distinguished from government neutrality regarding a particular *area* of *everyone's* life within which there may be many different ways of living. For example, the government could be neutral in regards to same-sex relationships or marriages while still regulating adult relationships through marriage law. Similarly, arguing for gay marriage is quite different than arguing for the de-regulation or privatization of marriage generally.

29. Megan Bell, Student Author, *Transsexuals and the Law*, 98 Nw. U. L. Rev. 1709, 1709 (2004).

30. *Id.*

31. *Infra* pt. V(A).

“meaningful diversity.”³² A pluralist nation is more than just tolerant of difference—it “welcomes, encourages, defends, and celebrates difference.”³³ Moreover, a pluralist society fosters cultural discussion by “valuing respect, dialogue, and appreciation for the other.”³⁴ As William Eskridge, Jr., argues, “America has internalized the idea of *benign religious variation*, that there are a number of equally good religions, and one’s religion says little or nothing about one’s moral or personal worth. The opposite is true of sexual orientation,” as well as sex/gender identity and expression.³⁵ Both sex/gender/sexuality and religion, as belief systems and organizing principles fundamental to United States’ society, should be understood in terms of pluralism and benign variation.³⁶

One way to make sex/gender/sexual pluralism a national ideal—needed for the cultural acceptance of sex/gender/sexuality

32. Wade Clark Roof, *Introduction*, in *Religious Pluralism and Civil Society*, 612 *Annals Am. Acad. Pol. & Soc. Sci.* 6, 7–8 (2007) (emphasis added).

33. Deborah Jones Merritt & Daniel C. Merritt, *The Future of Religious Pluralism: Justice O’Connor and the Establishment Clause*, 39 *Ariz. St. L.J.* 895, 896 (2007).

34. Roof, *supra* n. 32, at 9.

35. William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *Yale L.J.* 2411, 2412 (1997).

36. Pluralism and benign variation must be distinguished from forced acceptance or forced conformity. Acceptance of difference by all would be ideal, but it is also unrealistic—people must be free to be intolerant in their beliefs. At the same time, intolerant beliefs should not support forced conformity, especially forced conformity reified by the government. In the context of religion, this means that the government should not privilege a particular religion:

To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may even be audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.

Allegheny Co. v. ACLU, 492 U.S. 573, 611 (1989). In the context of sex/gender/sexuality, this means that the government should not enforce a particular sex/gender/sexual belief system. Privileging binary sex/gender and heterosexuality over transgression of binary sex/gender/sexual categories is as absurd as the reverse: “It is just as objectionable to insist that everyone should be lesbian, non-monogamous, or kinky, as to believe that everyone should be heterosexual, married, or vanilla—though the latter set of opinions are backed by considerably more coercive power than the former.” Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *The Lesbian and Gay Studies Reader* 3, 15 (Henry Abelove, Michele Aina Barale & David M. Halperin eds., Routledge 1993).

as intertwining and fluid categories in which there is benign variation—is by reference to the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution, either directly or by analogy.³⁷ This Comment suggests that the government should treat sex/gender/sexual beliefs like religious beliefs, complete with protections from establishment under the Establishment Clause and with protections of free exercise under the Free Exercise Clause.³⁸

Part II of this Comment discusses the ways that sex, gender, and sexuality are intertwining, fluid, and dynamic. Part III shows why the law is often at odds with these intertwining, fluid, and dynamic categories. Part IV outlines the various routes that advocates have used in efforts to gain constitutional protections for people who transgress sex/gender/sexual norms. Finally, Part V proposes that the Religion Clauses are a better route for gaining these protections because, either directly or by analogy, the Religion Clauses could support the disestablishment and free exercise of sex/gender/sexual belief systems and allow for pluralism in sex/gender/sexual beliefs.

II. THE CATEGORIES OF SEX, GENDER, AND SEXUALITY ARE INTERTWINING, FLUID, AND DYNAMIC

A. Sex

The binary system of sex is a product of culture.³⁹ There is no clear-cut biological division of the sexes.⁴⁰ Even though there are only two culturally accepted sexes, biological sex varies as follows:

37. See *infra* pt. V(C) (arguing that sex/gender/sexual beliefs could be analyzed directly under the Religion Clauses or could be protected by either a constitutional amendment or statute modeled on the Religion Clauses).

38. U.S. Const. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” *Id.*

39. Gilbert Herdt, *Third Genders, Third Sexes*, in *A Queer World: The Center for Lesbian and Gay Studies Reader* 100, 100 (Martin Duberman ed., N.Y.U. Press 1997). As Gilbert Herdt points out the following:

From a larger spectrum of possibilities around the world, we in Western culture arrived in the nineteenth century with a two-sex system This . . . was largely due to the intellectual, social, and morally defined strictures of sexual dimorphism as we inherited them in late Victorian anthropology Many scholars have . . . predicated their work on the assumption of dimorphism so prevalent in the literature since before Darwin According to the views of Darwin and late Victorian social

Although the genes that determine sex come in several combinations (not just two), and although the hormonal makeup and physical characteristics of human beings fall along a continuum defined as masculine at one end and feminine at the other, allowing for many combinations and permutations that define one's biological sex, the social contexts in which infants are assigned a gender do not allow for more than two categories.⁴¹

Indeed, infants whose physical sex cannot be labeled either male or female are often surgically altered to "correct" the "problem."⁴²

Similarly, sex can be changed through a person's lifetime with surgery and/or hormone treatment.⁴³ Tellingly, not all transsexual people endeavor to transition completely from one sex to the other with this medical treatment; rather, they can pick and choose which sort of physical alteration of their sex characteristics they want to pursue.⁴⁴

theorists, including Freud, there were but two categories of normal human nature, male and female, whose essences and anatomies placed them in opposition.

Id. at 101–103.

40. John Stoltenberg, *How Men Have (A) Sex*, in *Reconstructing Gender: A Multicultural Anthology* 253, 255 (Estelle Disch ed., 3rd ed., McGraw-Hill 2003). Stoltenberg argues that "[w]e live in a world divided absolutely into two sexes, even though nothing about human nature warrants that division We are sorted into one category or the another at birth based solely on a visual inspection of our groins, and the only question that's asked is whether . . . [there is] a long-enough penis." *Id.* at 256–257. In other words, humans are actually a "multisexed species." *Id.* at 255 (quoting Andrea Dworkin, *Woman Hating* 183 (Dutton 1974)).

41. Estelle Disch, *Gender Socialization*, in *Reconstructing Gender: A Multicultural Anthology* 91, 91 (Estelle Disch ed., 3rd ed., McGraw-Hill 2003).

42. Advocs. For Informed Choice, *What Is Intersex/DSD?*, <http://www.aiclegal.org/faq.html> (accessed Sept. 20, 2008) [hereinafter *What Is Intersex/DSD?*]; Sarah R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 *Cardozo J.L. & Gender* 31, 31 (2005); Peter A. Lee, Christopher P. Houk, S. Faisal Ahmed & Ieuan A. Hughes, *Consensus Statement on Management of Intersex Disorders*, 118:2 *Pediatrics*, 488, 491 (2006) (available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;118/2/e488.pdf>). Estimates of the number of intersex births range from 1 in 150 to 1 in 2,000, and "numbers approximately 65,000 intersex births worldwide every year." Hum. Rights Commn. of the City & Co. of S.F., *A Human Rights Investigation into the Medical "Normalization" of Intersex People* 8 (Apr. 28, 2005) (available at [http://www.ci.sf.ca.us/site/uploadedfiles/sfhumanrights/Committee_Meetings/Lesbian_Gay_Bisexual_Transgender/SFHRC%20Intersex%20Report\(1\).pdf](http://www.ci.sf.ca.us/site/uploadedfiles/sfhumanrights/Committee_Meetings/Lesbian_Gay_Bisexual_Transgender/SFHRC%20Intersex%20Report(1).pdf)) [hereinafter *A Human Rights Investigation*].

43. Bornstein, *supra* n. 1, at 15–19 (describing the hormone therapy and surgical methods used to transition from "male" to "female" and vice versa).

44. See Del LaGrace Volcano & Judith "Jack" Halberstam, *The Drag King Book* 127–128 (Serpent's Tail 1999) (stating that "[t]ransgender means you can actually change sec-

B. Gender

Like sex, gender is a social construct—one that is generally thought to follow from sex.⁴⁵ Because gender is thought to follow from sex, and sex is thought to be binary, gender is also thought to be binary.⁴⁶ Gender is a performance, created by the repeated behaviors that signal each person's gender, but, because it is being constantly and seamlessly created, it appears natural, a given; “[g]ender is so much the routine ground of everyday activities that questioning its taken-for-granted assumptions . . . is like thinking about whether the sun will come up.”⁴⁷ Indeed, it is precisely because “[g]ender is so pervasive that in our society we as-

secondary gender characteristics without fully changing from female to male”); Rachael St. Claire, *Culturally-Sensitive Transgender Healthcare, TransgenderSoul: The Psychology of Transgender and Transsexual Issues*, http://www.transgendersoul.com/info_for_your_physician.htm (last updated Feb. 2, 2008) (using the term “bi-gendered” to describe someone who identifies “with maleness and femaleness, . . . may live part-time as a man and part-time as a woman,” and may be interested in “cross-sex hormones and aesthetic cosmetic surgery,” but does not want to undergo genital reassignment surgery).

45. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 10–11 (10th anniversary ed., Routledge 1990) [hereinafter Butler, *Gender Trouble*].

46. Stoltenberg, *supra* n. 40, at 253. Stoltenberg points out that sex and gender are so intimately connected that at times it is almost impossible to tell one from the other:

Male sexual identity is the conviction or belief, held by most people born with penises, that they are male and not female, that they belong to the male sex. In a society predicated on the notion that there are two “opposite” and “complementary” sexes, this idea not only makes sense, it becomes sense; the very idea of male sexual identity produces sensation, produces the meaning of sensation, becomes the meaning of how one's body feels. The sense and the sensing of a male sexual identity is at once mental and physical, at once public and personal The idea gives the feelings social meaning; the idea determines which sensations shall be sought.

Id. at 257.

47. Judith Lorber, *The Social Construction of Gender*, in *Reconstructing Gender: A Multicultural Anthology*, *supra* n. 41, at 96; *see also* Butler, *Gender Trouble*, *supra* n. 45, at 10–11 (arguing that the seeming naturalness of sex is itself a cultural construct, created through repeated identity performance). Lorber points out that gender is so overarching that its production is generally only noticeable when gender cues, such as those described by Kate Bornstein, are unclear:

[I]t usually takes a deliberate disruption of our expectations of how women and men are supposed to act to pay attention to how it is produced. Gender . . . signals are so ubiquitous that we usually fail to note them—unless they are missing or ambiguous. Then we are uncomfortable until we have successfully placed the other person in a gender status; otherwise, we feel socially dislocated.

Lorber, *supra* n. 41, at 96; *see also* Judith Halberstam, *Female Masculinity* 27 (Duke U. Press 1998) (noting that, paradoxically, the flexibility of binary gender categories allows for their stability because most people can easily be categorized as male or female despite vast differences in personal presentation).

sume it is bred in our genes.”⁴⁸ However, gender is actually “a human production,” a constant performance that relies on almost everyone’s participation.⁴⁹

Yet, some people feel compelled or choose to present their gender in ways that clash with this binary system. For example, someone could present gender ambiguously, by playing with it—through clothing, behavior, even surgery—or trying to avoid it entirely.⁵⁰ Or someone could shift genders, as “[g]ender fluidity is the ability to freely and knowingly become one or many of a limitless number of genders, for any length of time, at any rate of change.”⁵¹ By presenting an ambiguous or fluid gender, a person could call attention to the way gender is performed and culturally constructed.⁵²

C. Sexuality

As gender is generally thought to follow from sex, sexuality is assumed to follow from both sex and gender, meaning that “[t]he expectation [is] . . . that feminine, heterosexual women and masculine, heterosexual men will have sex only with each other and by mutual agreement.”⁵³ Heterosexuality is defined in opposition

48. Lorber, *supra* n. 47, at 96.

49. *Id.* Lorber dubs this performance “doing gender.” *Id.* “Doing gender” involves many seemingly insignificant choices that each of us makes on a daily basis, such as what clothes to wear and how to style our hair. See Judith Butler, *Imitation and Gender Insubordination*, in *The Lesbian and Gay Studies Reader*, *supra* n. 36, at 307, 314–318 (demonstrating how gender performance makes sex appear natural).

50. Bornstein, *supra* n. 1, at 51. Bornstein’s experience testifies to the possibility of both ambiguity and fluidity of gender. Ze recounts:

[i]f [gender] ambiguity is a refusal to fall within a prescribed gender code, then fluidity is the refusal to remain one gender or another It was the discovery of my own ambiguity and fluidity of gender that led me to my gender change. It was figuring out these two concepts that allowed me to observe these factors—inhibited or in full bloom—in the culture, and in individuals.

Id. at 51–52.

51. *Id.* at 52.

52. See generally Garber, *supra* n. 2 (focusing on one sort of gender non-conforming behavior, cross-dressing). “[T]ransvestism,” Garber argues, “is a space of possibility structuring and confounding culture: the disruptive element that intervenes, not just a category crisis or male and female, but the crisis of category itself.” *Id.* at 17 (emphasis in original).

53. Estelle Disch, *Sexuality*, in *Reconstructing Gender: A Multicultural Anthology*, *supra* n. 41, at 246, 246. The current understanding of heterosexuality as normal and homosexuality as deviant has not always existed—our understanding of sexuality is culturally and historically specific and must be taken as such. David M. Halperin, *Is There a History of Sexuality?* in *The Lesbian and Gay Studies Reader*, *supra* n. 36, at 416, 420.

to homosexuality.⁵⁴ Bisexuality tends to be erased by the two monosexual orientations (heterosexual and homosexual), not because the number of bisexual people is smaller than either monosexual group, but because bisexuality threatens the stability of monosexuality by revealing that sexual orientation does not have to be fixed.⁵⁵

Bisexuality, homosexuality, and heterosexuality as concepts, however, all depend on the binary sex/gender system for their existence.⁵⁶ Heterosexuality is defined by sex/gender opposition; homosexuality is defined by sex/gender sameness; bisexuality is defined by attraction to both of the two oppositional sex/genders; and all three of these sexuality categories assume that gender will necessarily follow from sex.⁵⁷ Because all three of these sexual orientation categories depend on a rigid sex/gender system, they have limited subversive force. Even bisexuality, which has the potential to destabilize the categories of heterosexuality and ho-

54. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *Stan. L. Rev.* 353, 362 (2000); Ruth Colker, *Hybrid: Bisexuals, Multiracials, and Other Misfits under American Law* 15–17 (N.Y.U. Press 1996).

55. Yoshino, *supra* n. 54, at 359–364. People who identify as homosexual and heterosexual both have an interest in maintaining the strong categorical opposition between homosexuality and heterosexuality and erasing bisexuality as a legitimate third category. *Id.* at 362. As Yoshino argues, these interests are as follows: “(1) an interest in stabilizing sexual orientation; (2) an interest in retaining sex as a dominant metric of differentiation; and (3) an interest in defending the norms of monogamy.” *Id.*

56. *Id.* at 362–363. Yoshino suggests that:

Straights and gays have a shared [interest in retaining the importance of sex as a distinguishing trait in society] because to be straight or to be gay is to discriminate erotically on the basis of sex. Straights have a specific interest in preserving the importance of sex because sex norms are currently read through a heterosexual matrix: to be a man or a woman in contemporary American society is in part defined by one’s sexual attractiveness to the opposite sex. Gays also have a particular interest in sex distinctions, as homosexuality is often viewed as a way to engage in complete sex separatism—that is, as a means of creating single-sex communities that are bonded together erotically as well as socially and politically. Bisexuality endangers all of these interests because it posits a world in which sex need not (or should not) matter as much as monosexuals want it to matter.

Id. At the same time, the mere fact that bisexuality depends on the idea of binary sex/gender reveals that bisexuality is not an ideal tool for destabilizing binary sexual orientation categories or the binary sex/gender system that sexual orientation categories depend on.

57. *Id.* at 359–360. The concept of bisexuality leaves the binary sex/gender system intact because “[t]o possess bi-sexual desire implies the existence of two sexes—male and female [B]isexuality . . . reifies the premise that there are only two sexes . . . [and] suggests that these two sexes are defined biologically rather than culturally.” *Id.*

mosexuality with increased visibility, leaves the binary sex/gender system intact.⁵⁸

D. Intertwining, Fluid, and Dynamic Categories

Male bodies do not always correspond to masculine personalities, and female bodies do not always correspond to feminine personalities. Not all bodies are male or female, nor are all personalities either masculine or feminine. Not everyone is attracted to the “opposite sex”—there may be no such a thing as the “opposite” sex. These binary categories of sex (male/female), gender (masculinity/femininity), and sexuality (homosexual/heterosexual) are radically unstable. However, if someone appears to diverge from the norm in any of these three categories (sex, gender, sexuality), that divergence calls that person’s conformity to the other categories into question because the three categories are intimately tied together in our cultural psyche. To detach these categories from one another and to gain acceptance for a wide variety of sex/gender/sexual expression, a cultural shift must take place. We must recognize that “[t]he problem with any ascribed and adopted identity is not [necessarily] what it includes, but what it leaves out.”⁵⁹

The umbrella terms “queer” and “pansexual” capture the intertwining, fluid, and dynamic existence of sex, gender, and sexuality as categories, and for this reason, they may contribute to such a cultural shift. “Queer” encompasses various sex, gender, and sexual identities without confining these identities to clear-cut categories.⁶⁰ By using this umbrella term, instead of definitively trying to label individual identities like gay, lesbian, bisexual, or transgendered, a person can emphasize that these categories are not definitive, but overlapping and fluid.⁶¹ “Queer” has been described as follows:

58. *Id.*

59. Carol Queen & Lawrence Schimel, *Introduction*, in *PoMoSexuals: Challenging Assumptions about Gender and Sexuality*, *supra* n. 15, at 19, 21 (Carol Queen & Lawrence Schimel eds., Cleis Press 1997).

60. Jagose, *supra* n. 20, at 3. As Michael Warner explains, “[q]ueer people are a kind of social group fundamentally unlike others, a status group only insofar as they are not a class.” Michael Warner, *Introduction*, in *Fear of a Queer Planet: Queer Politics and Social Theory* vii, xxv (Michael Warner ed., U. Minn. Press 1993).

61. Jagose, *supra* n. 20, at 3.

While there is no critical consensus on the definitional limits of queer—indeterminacy being one of its widely promoted charms—its general outlines are frequently sketched and debated. Broadly speaking, queer describes those gestures or analytical models [that dramatize] incoherencies in the allegedly stable relations between chromosomal sex, gender[,] and sexual desire.⁶²

Similarly, “pansexual” resists definition, suggests that there are more than three categories of sexuality, and detaches physical sex from sexual acts.⁶³ “Pansexuality” has been described as follows:

Pansexuality encompasses all kinds of sexuality. It differs, however, from pansexualism, a perspective that declares “all desire and interest are derived from the sex instinct.” Pansexuality includes heterosexuality, homosexuality, bisexuality, and sexual behavior that does not necessarily involve a coupling. It includes, for example, masturbation, celibacy, fetishism, and fantasy[,] . . . [as well as,] heteroerotic and homoerotic play and sexual aggression⁶⁴

Because queerness and pansexuality are so broad and all-encompassing, their “constituency is almost unlimited [and] includes identificatory categories whose politics are less progressive than those of the lesbian and gay populations with which they are aligned.”⁶⁵ Ironically, then, even though the very term “queer” suggests oddness and difference from the norm, it ultimately

62. *Id.* More specifically, Jagose explains that:

Resisting that model of stability—which claims heterosexuality as its origin, when it is more properly its effect—queer focuses on mismatches [among] sex, gender, and desire. Institutionally, queer has been associated most prominently with lesbian and gay subjects, but its analytic framework also includes such topics as cross-dressing, hermaphroditism, gender ambiguity[,] and gender-corrective surgery. Whether as transvestite performance or academic deconstruction, queer locates and exploits the incoherencies in those three terms [that stabilize] heterosexuality. Demonstrating the impossibility of any “natural” sexuality, it calls into question even such apparently unproblematic terms as ‘man’ and ‘woman.’”

Id.

63. Drobac, *supra* n. 21, at 298. “Specifically, pansexuality demonstrates that biological sex does not correlate strictly with particular sexual behaviors. For example, ‘real’ men are not necessary heterosexual and may enjoy being pursued; some real women may pursue both men and women and enjoy sexually dominating them.” *Id.*

64. *Id.* at 300–301.

65. Jagose, *supra* n. 20, at 3–4.

could be used to refer to almost anyone.⁶⁶ Similarly, “we are all pansexual, individually, and as a collective.”⁶⁷

III. WHY THE LAW IS OFTEN AT ODDS WITH INTERTWINING, FLUID, AND DYNAMIC CATEGORIES OF SEX, GENDER, AND SEXUALITY

The law is often at odds with the fluid, dynamic, and intertwining categories of sex, gender, and sexuality because it relies on the social order provided by the constructed binary categories of sex, gender, and sexuality.⁶⁸ By reinforcing these categories as binary, the law takes sides in the cultural debate over the morality of sex/gender/sexual nonconformity. In doing so, the law provides a biased framework for the debate instead of allowing for pluralism.

A. Sex, Gender, and Sexuality as Organizing Principles

Socially constructed categories of sex, gender, and sexuality are organizing principles that support a certain social order;⁶⁹ they are “one of the major ways that human beings organize their lives.”⁷⁰ They help determine rights and responsibilities given to each person in society, help guide people on how to interact with each other “appropriately,”⁷¹ and help relieve anxiety over personal identity—both a person’s own identity and the identity of those around her/hir/him.⁷² Binary schemes of sex, gender, and sexuality hold sway precisely because they reinforce social order

66. Drobac, *supra* n. 21, at 301.

67. *Id.*

68. See Elaine Craig, *Trans-phobia and the Relation Production of Gender*, 18 *Hastings Women’s L.J.* 137, 139 (2007) (arguing that the law reinforces the binary sex/gender system even though binary categories of sex/gender are often unneeded for the law to serve its purpose).

69. *Id.* at 138; Lorber, *supra* n. 47, at 99.

70. *Id.* at 97 (referring to gender, which is inextricably tied up with sex and sexuality).

71. *Id.* Lorber argues the following:

One way of choosing people for the different tasks of society is on the basis of their talents, motivations, and competence—their demonstrated achievements. The other way is on the basis of gender, race, ethnicity—assigned membership in a category of people As a social institution, gender is a process of creating distinguishable social statuses for the assignment of rights and responsibilities.

Id. at 97–98.

72. Craig, *supra* n. 68, at 138–139.

by organizing people in these ways. Because everyone in society is invested in this social order to some extent, the disruption of sex/gender/sexual norms is often seen as problematic.⁷³ As Elaine Craig delineates:

Because gender is constructed in societies which strongly embrace static, binary conceptions of gender, and in which social, familial, occupational, and sexual interactions are heavily influenced by gendered social scripts, gender expressions which are ambiguous, or which have changed since a prior interaction, or which are strongly incongruent with normative understandings of the correlation between gender and biology, are typically experienced by others as at least uncomfortable, and often actually disruptive.⁷⁴

Nonconformity to binary sex and heteronormative (or at least monosexual) sexuality gives rise to the same discomfort. This discomfort generally evokes an attempt to reassert binary categories of sex, gender, and/or sexuality, depending on which categories are being called into question.⁷⁵

There are different strategies of re-inscription that people use to ease the anxiety of sex/gender/sexual nonconformity and to reinforce the stability of the social order to which these categories are tied. One strategy is attempted ideological erasure of the nonconforming identity.⁷⁶ Another, employed by people threatened by the nonconformity, as well as by people who want to gain acceptance for some forms of nonconformity, is the attempt to create a tripolar system by adding an additional category in the binary

73. *Id.*

74. *Id.*

75. *Id.* at 139.

76. *See generally* Yoshino, *supra* n. 54 (discussing bisexual erasure). For example, because in most contexts, heterosexuality is the assumed or default sexuality (a person is generally assumed to be heterosexual unless she signals otherwise), same-sex sexuality—both homosexuality and bisexuality—are generally downplayed or erased. *Id.* at 369. Additionally, monosexuality (either heterosexuality or homosexuality) often eclipses bisexuality, leading to an assumption that everyone can be categorized as either gay or straight, that bisexuality is a transitory identity, or that bisexuality is simply the product of confusion. *Id.* at 368–369. Same-sex desire generally and bisexuality specifically are downplayed and erased in this way because they threaten heterosexual and monosexual identities, respectively, by revealing their instability. *Id.* at 395. Nonconforming gender identities and sexed bodies are also downplayed or erased by the dominant tendency to try to reassert binary gender or sex by categorizing nonconformists as either/or instead of somewhere in between masculinity and femininity or male and female. Craig, *supra* n. 68, at 139.

system.⁷⁷ Both strategies seek to re-stabilize the social order and to erase the identities that do not fit into the two or three clear-cut categories.⁷⁸

Just as individual people often react to sex/gender/sexual nonconformity with an attempt to re-stabilize these categories, “[t]he law is frequently invoked in aid of [the] re-inscription of gender,” as well as sex and sexuality.⁷⁹ Simply by labeling an individual as one sex or the other, as one gender or the other, or as one sexual orientation or the other, the law supports the binary systems of sex, gender, and sexuality while erasing the identities that are left unlabeled.⁸⁰ Such labeling is evident throughout the law.

B. Sex/Gender

The law often defines sex, reifying the binary opposition of male and female. Because gender is typically thought to follow from sex, gender is often tied into this binary opposition of sex. When the law has the authority to define sex and gender, various identities are legally erased.

For example, intersexed children are generally assigned a sex on their birth certificates and surgically altered into sex conformity, even though some intersexed children grow up feeling conflicted with their assigned sex.⁸¹ Intersexed children “have no

77. See generally Colker, *supra* n. 54 (arguing for a bisexual jurisprudence in which a third category would be added to binary schemes). Colker argues that because categories are crucial for self-identity and can ultimately serve ameliorative purposes if used properly, simply doing away with legal categories such as homosexual and heterosexual, male and female, black and white, or disabled and able-bodied is not the best response to the subordination that these categories have historically perpetuated. *Id.* at 6.

78. Haynes, *supra* n. 23, at 229–230.

79. Craig, *supra* n. 68, at 139.

80. *Id.* The simple act of labeling or naming is significant, particularly when backed by the authority of law, as illustrated by the following: “Those who wield the power to name possess the ability to include or exclude others and in doing so, the ability to create categories and to define themselves.” *Id.* at 157.

81. Cynthia was born with a Y chromosome and ambiguous genitalia, but she was raised as a girl after undergoing “corrective” surgery. Dennis Rodkin, *What Sex Am I?* Chi. Reader (Feb. 2, 2007) (available at <http://www.chicagoreader.com/features/stories/intersex/>). She grew up confused about her body, her gender identity, as well as her sexual orientation, even though her family did not talk to her about her medical history until she asked them. *Id.* Today, she has determined that she is attracted to women, but is still uncertain about her gender identity and is undergoing hormone therapy in hopes that it will make her more comfortable in her own body. *Id.* Intersex advocates argue that Cyn-

constitutional right to choose whether [they will] remain intersexed,” become male, or become female.⁸² However, because the social stigma would be so great, even the Intersex Society of North America recommends that parents pick a gender for their child, though without surgery.⁸³ Existing outside of or between the accepted sexes is not considered a viable option, either legally or socially.

Transsexuals, both pre/non- and post-operation, are also confronted with legal barriers to their sex and gender identities. Obtaining legal documentation that aligns with their physical sex may be difficult and, for those who have not yet transitioned or who have opted not to transition fully, nearly impossible.⁸⁴ Documentation that “matches” a person’s gender but does not “match” the person’s outward sex is not only an embarrassment for the holder, but it can evoke mistreatment, hostility, and even violence from people who are made aware of the documentation.⁸⁵

When confronted with the issue of transsexual marriage, most courts have defined “sex” as birth sex.⁸⁶ Some have defined

thia’s “confusion is largely the result of the decision made early in her life to equip her as a girl. If the decision had been left to her, . . . however hard growing up might have been, one day she could have chosen genitalia that matched the sexual identity she’d matured into.” *Id.*; see also Elizabeth Weil, *What If It’s (Sort of) a Boy and (Sort of) a Girl?* N.Y. Times (Sept. 24, 2006) (available at <http://www.nytimes.com/2006/09/24/magazine/24intersexkids.html>) (profiling intersex activist Cheryl Chase, who was raised as a boy for eighteen months before undergoing genital surgery).

82. Benson, *supra* n. 42, at 31. Cosmetic genital surgery where informed consent by the child is impossible to obtain arguably violates the rights of the intersexed child— “[l]eaders of the adult intersex community called for an end to unnecessary surgeries, and for children with . . . intersex conditions to have a voice in their own treatment.” *What Is Intersex/DSD?*, *supra* n. 42; see also *A Human Rights Investigation*, *supra* n. 42 (investigating whether “normalizing” surgery on intersexed children is driven by homophobia, transphobia, and heterosexism).

83. Intersex Socy. of N.A., *How Can You Assign a Gender (Boy or Girl) without Surgery?*, http://www.isna.org/faq/gender_assignment/ (accessed May 11, 2009). The Intersex Society of North America “advocate[s] assigning a boy or girl gender because intersex is not, and will never be, a discrete biological category any more than male or female is, and because assigning an ‘intersex’ gender would unnecessarily traumatize the child.” *Id.* (emphasis omitted).

84. Bell, *supra* n. 29, at 1709–1710; Elizabeth Reilly, *Radical Tweak: Relocating the Power to Assign Sex*, 12 *Cardozo J. L. & Gender* 297, 297–298 (2005). Legal documentation that transsexuals as well as intersexed people often seek to change includes driver’s licenses, passports, and birth certificates. *Id.* at 306–307.

85. See Bornstein, *supra* n. 1, at 28–29, 73–85 (describing Bornstein’s experience getting his name changed on his driver’s license and the negative reactions that many people have to gender transgression).

86. *E.g. Kantaras v. Kantaras*, 884 So. 2d 155, 155 (Fla. 2d Dist. App. 2004) (holding

“sex” in accordance with post-operative sex.⁸⁷ However, both approaches, in looking for a “truth” of sex, fail to note that there are many people who do not fit these either/or definitions.

In the context of employment discrimination, Title VII of the Civil Rights Act of 1964 proclaims that it is unlawful for “an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁸⁸ Title VII has been extended to discrimination based on “sex stereotyping.”⁸⁹ However, Title VII is not always extended to

that Florida law only allows for marriage of one man and one woman, as determined by the parties’ biological birth sex, and that therefore a marriage between a postoperative female to male transsexual and a female is legally invalid); *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002) (holding a marriage between a postoperative transwoman and a man void as against public policy); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Spec. Term 1971) (holding marriage between transwoman and male void); *In re Marriage License for Nash*, 2003 WL 23097095 at *9 (Ohio App. 11th Dist. Dec. 31, 2003) (holding that inquiry into the sexual designation of a transsexual for the purposes of granting a marriage license did not violate equal protection principles and that public policy supported denial of marriage license to postoperative transman and his female partner); *In re Ladrach*, 513 N.E.2d 828, 832 (Prob. Ct. Stark County, Ohio 1987) (finding that a postoperative transwoman cannot marry a man); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (granting summary judgment to doctor in malpractice action because postoperative transwoman wife of male victim did not have standing to bring action as surviving spouse under Wrongful Death and Survival Statute); *Corbett v. Corbett*, 1970 WL 29661 (Prob., Divorce & Admir. Div. Feb. 2, 1970) (holding marriage between transwoman and male void).

87. *E.g. M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. App. Div. 1976) (holding that a post-operative transwoman is legally a female under the New Jersey marriage statute); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. Monroe Co., N.Y. 1985) (holding transman husband responsible for child support because he had signed agreement with wife that the children, produced by artificial insemination and carried by the wife, were his own legitimate children). While the ruling in *M.T. v. J.T.* is preferable to the decisions that refuse to recognize transsexuals’ sex/gender identity at all, it is still based on stereotypical ideals of sex, gender, and sexuality. The court discussed transsexualism in terms of a medical disorder that must be treated with surgery, leaving no space for people who may feel most comfortable acting in ways associated with the “opposite” sex/gender but do not wish to alter their bodies surgically, or people who may wish to undergo some surgery or hormone treatment but not “complete” the process. *M.T.*, 355 A.2d at 205–206. The court also focused on the physical sex of the plaintiff, comparing her anatomy to the “natural” and “normal” female anatomy and finding it to be sufficiently similar. *Id.* at 206. The court noted that the plaintiff was able to perform sexually as a heterosexual wife. *Id.* Ultimately, the court concluded that a person’s “true” sex may be different than that person’s sex at birth, but the court based this decision on the idea that a person has a “true” sex, that that sex can be conflated with the person’s gender, and that sex identity depends, at least in part, on the ability to perform heterosexual intercourse. *Id.* at 210–211.

88. 42 U.S.C. § 2000e-2 (2000).

89. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–251 (1989) (holding that Title VII’s “because of . . . sex” requirement extends to sex stereotypes (defined as gender stereo-

cases of employment discrimination based on being transgendered or transsexual, even though the transgender/transsexual person is being discriminated against because of the seeming incongruence between his/hir/her sex and gender expression.⁹⁰ Similarly, sexual orientation discrimination is generally not considered discrimination “because of . . . sex” even though the very concept of sexual orientation depends on the sex of the people involved.⁹¹

C. Sexuality

The law reinforces the binary opposition of homosexuality and heterosexuality, as well as the binary oppositions of male/female and masculine/feminine, by refusing to recognize same-sex relationships in various contexts where opposite-sex couples are given recognition. Because separating relationships based on the sex of the partners only makes sense in terms of binary sex and gender, laws that distinguish same-sex and opposite-sex partnerships are founded on the binary categories of not

types) and depend on the individual’s biological sex); *City of L. A., Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707–708 (1978) (holding that sex stereotyping is prohibited under Title VII even when the sex stereotype is true and stating that “[i]t is now well-recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” because “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”) (internal quotation marks omitted).

90. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (using sex stereotyping theory to hold that discrimination against a transwoman was discrimination because of sex and also stating that “[w]hat makes [the] sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, really all federal courts have said is unprotected by Title VII”); Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 561–563 (2007) (arguing for a categorical rule that discrimination against a transgender person is sex discrimination *per se*). Before *Price Waterhouse*, courts did not interpret Title VII to protect transgender people from discrimination, noting the lack of legislative history and relying on the plain meaning of the word “sex.” *Id.* at 567. Only after *Price Waterhouse* did courts begin recognizing discrimination against transgender people as impermissible gender stereotyping. *Id.* at 562 (citing *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)). Even this development does not completely protect all gender nonconformists from discrimination in the workplace, however, because courts have found that sex-specific dress and appearance codes for employees may be acceptable under Title VII. *Id.* at 565 (citing *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)).

91. *Supra* n. 9; Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender Non-Conforming Homosexuals under Title VII*, 2004 U. Ill. L. Rev. 465, 467 (2004).

only sexuality, but also sex and gender. When the law has the authority to decide solely on the basis of sex/gender/sexuality which types of relationships are valid and which are not, various identities are legally erased.

One area where the law clearly differentiates between heterosexual and same-sex couples is marriage. Under the Federal Defense of Marriage Act of 1996 (DOMA), the word “marriage” as used in federal law is defined as “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”⁹² This definition precludes the federal government from recognizing same-sex marriages, even if they are valid under one state’s law.⁹³ Furthermore, under DOMA, states are not required to recognize same-sex unions or the rights attached to such unions even if they are valid under another state’s law.⁹⁴

Many state laws also limit marriage and the rights that come along with it to heterosexual couples.⁹⁵ As of 2009, twenty-six states have passed constitutional amendments and nineteen states have enacted laws that limit marriage to unions between one man and one woman.⁹⁶ As of 2009, only five states, Connecticut, Iowa, Maine, Massachusetts, and Vermont, allow same-sex

92. 1 U.S.C. § 7 (2000).

93. *Id.*

94. 28 U.S.C. § 1738(C) (2000).

95. Some of the basic rights and protections attached to marriage that same-sex couples are denied when they are not allowed to marry include the following: (1) the automatic right that married couples have to make medical decisions for each other in emergencies and visit each other in the hospital; (2) the right of American citizens who are married to petition for their spouses to immigrate to the United States; (3) the Social Security Survivor benefits that married people receive when their spouse dies; (4) the legal right that married couples have to live together in nursing home facilities; (5) the medical coverage that many employers provide for the spouses of their employees; (6) the automatic inheritance of a deceased spouse’s property without estate taxes; (7) the retirement savings that a married person gets by rolling a deceased spouse’s 401(k) into an IRA without needing to pay taxes or penalties; (8) the legal protection that elderly married couples have from being compelled to sell their homes in order to pay for nursing home bills; (9) the survivor benefits that many pension plans pay to a participant’s spouse; and (10) the legal entitlement that married people have to family leave to care for their spouse during an illness. Hum. Rights Campaign, *Questions about Same-Sex Marriage*, <http://www.hrc.org/issues/5517.htm> (accessed May 11, 2009).

96. Hum. Rights Campaign, *State Prohibitions on Marriage for Same-Sex Couple*, <http://www.hrc.org/documents/MarriageLawMaps20070118.pdf> (updated May 30, 2008) [hereinafter *Statewide Marriage Prohibitions*].

couples to wed legally.⁹⁷ Five states provide same-sex couples the same rights as married couples without using the word “marriage” to describe same-sex unions, and three more states along with Washington, D.C., provide some of the same rights as married couples, also without calling same-sex unions “marriages.”⁹⁸

D. The Law’s Influence on Identity and Discussion

There is a tension between the definitions of sex, gender, and sexuality that are used in the law and the definitions that people use to describe themselves. There is also a tension between the law’s attempt to separate the categories of sex, gender, and sexuality from each other when they overlap and influence each other. Because the law’s definitions have the weight of authority behind them, they provide the framework for personal definitions and public discussion of these identities. Instead of being neutral and supporting pluralism, this framework takes sides in the discussion and influences the shaping of personal identities.

IV. THE CONSTITUTIONAL ROUTES THAT HAVE BEEN USED IN EFFORTS TO GAIN PROTECTIONS FOR SEX/GENDER/SEXUAL NONCONFORMISTS DO NOT SUFFICIENTLY ALLOW FOR PUBLIC DISCOURSE OF QUEERNESS/PANSEXUALITY

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment is one constitutional route that has been used to advocate for legal protections of sex/gender/sexual nonconformists.⁹⁹ It commands that “[n]o State shall make or enforce any law which shall . . .

97. Hum. Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (updated May 8, 2009).

98. *Statewide Marriage Prohibitions*, *supra* n. 96.

99. See e.g. *Romer v. Evans*, 517 U.S. 620, 624 (1996) (holding a state constitutional amendment prohibiting “all legislative, executive[,] or judicial action . . . designed to protect . . . a class [referred to as] . . . gays and lesbians” invalid under the Equal Protection Clause); *Watkins v. U.S. Army*, 875 F.2d 699, 728 (9th Cir. 1989) (Norris, J., concurring) (finding that homosexuals are a suspect class under the Equal Protection Clause); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–1228 (10th Cir. 2007) (finding that transsexuals do not constitute a suspect class under the Equal Protection Clause).

deny to any person within its jurisdiction the equal protection of the laws,"¹⁰⁰ explicitly applying to the states and to the federal government through the Fifth Amendment's Due Process Clause.¹⁰¹ Courts will typically defer to the legislature and uphold most regulatory classifications that are challenged under the Equal Protection Clause if there is a rational basis for the legislature's classification, meaning that the legislature must have a valid purpose for the classification and the classification is rationally related to that purpose.¹⁰² However, if the legislature's classification is considered suspect or quasi-suspect, the regulation is subject to heightened scrutiny.¹⁰³ Race, for example, is the primary model suspect classification and is therefore subject to strict scrutiny under the Equal Protection Clause.¹⁰⁴ Sex is a quasi-suspect classification and is subject to intermediate scrutiny under the Equal Protection Clause.¹⁰⁵ To determine if a classification is suspect or quasi-suspect, a court must look at the following factors: (1) whether the class has faced a history of purposeful discrimination; (2) whether the class has the political power to redress the discrimination that it faces; and (3) whether the discrimination that the class has faced is grossly unfair/invidious or is warranted.¹⁰⁶ In determining whether the discrimination is grossly unfair/invidious or is warranted, a court

100. U.S. Const. amend. XIV § 1.

101. U.S. Const. amend. V, XIV; Josiah N. Drew, *Caught between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 *BYU J. Pub. L.* 287, 300–301 (2002).

102. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83–84 (2000); William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 165 (2nd ed., Found. Press 2004) [hereinafter *Sexuality*]; Drew, *supra* n. 101, at 301.

103. *Kimel*, 528 U.S. at 84; *Sexuality*, *supra* n. 102, at 227–228.

104. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–224 (1995); *Sexuality*, *supra* n. 102, at 227–228. Because race is the model suspect classification, "[t]he classical anti-discrimination argument on behalf of gays is the analogy with race: like Blacks, gays are an unfairly stigmatized minority." Andrew Koppelman, *Three Arguments for Gay Rights*, 95 *Mich. L. Rev.* 1636, 1652 (1997). National origin and alienage are also suspect classifications subject to strict scrutiny. Drew, *supra* n. 101, at 301. A law including one of these three classifications must be "[narrowly] tailored to serve a compelling state interest" to pass strict scrutiny. *Id.* (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)) (alteration in original).

105. *City of Cleburne*, 473 U.S. at 440–441. Illegitimacy is another quasi-suspect classification. *Id.* A law's gender or illegitimacy classification must have a substantial relationship to an important government interest for the law to pass intermediate scrutiny. *Id.*

106. *Watkins*, 875 F.2d at 724–728 (Norris, J., concurring).

must consider several more factors: (1) whether the class' defining characteristic generally does not relate to the class' ability to be a contributing member of society; (2) whether the class has been uniquely disabled by prejudice or inaccurate stereotypes; and (3) whether the class' defining characteristic is immutable.¹⁰⁷

There are several problems with using equal protection jurisprudence to gain acceptance of sex, gender, and sexuality as fluid, dynamic, and intertwining categories. The most basic problem is that to trigger strict or intermediate scrutiny under the Equal Protection Clause, a court must find an identifiable category or class of people who are being disadvantaged.¹⁰⁸ If the goal is to gain acceptance for sex/gender/sexual nonconformists (including those who do not fit into clear-cut and culturally accepted categories of sex, gender, and sexuality), then arguing that a discrete and identifiable class is being discriminated against seems disingenuous at best and counterproductive at worst.¹⁰⁹ If one discrete category is named a suspect or quasi-suspect class, there will always be people at the definitional edges of that category who may or may not be protected.¹¹⁰

Another problem with using equal protection analysis in this context is the "immutability" factor. "Immutability" includes more than just unchangeable physical characteristics; courts have also interpreted it to include traits that are very difficult to change or that require "a major physical change or a traumatic change of identity."¹¹¹ These characteristics must be "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that

107. *Id.* at 724–725; Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 *L. & Sexuality* 1, 65 (2003); Koppelman, *supra* n. 104, at 1654–1660.

108. Knauer, *supra* n. 107, at 36–39. In the context of gay civil rights litigation, "[t]he argument of shared identity attempts to establish an essence that is distinct from sexuality, a formidable task when the shared identity in question is sexual orientation." *Id.* at 9. A constructionist view that "recognize[s] that there is no universal 'gay experience' that accompanies a gay sexual orientation" would be preferable because it would allow for the acceptance of "the fluid nature of sexuality." Carmen M. Butler, Student Author, *Victimhood to Agency: A Constructionist Comparison of Sexual Orientation to Religious Orientation*, 4 *Seattle J. for Soc. Just.* 147, 151 (2005).

109. Knauer, *supra* n. 107, at 39–41.

110. *Id.*

111. *Watkins*, 875 F.2d at 726.

change might be physically.”¹¹² The claim that sex, gender, or sexuality is necessarily immutable casts sex/gender/sexual non-conformists as victims of their own nature.¹¹³ For example, when a “gay person claims that she cannot help her condition, she basically claims that she is helpless, a victim in her own skin.”¹¹⁴ “Immutability” is also problematic because sex/gender/sexual preference need not be central to a person’s identity, much less physically unchangeable, though they may be both for most people.¹¹⁵ Nancy J. Knauer has pointed out the following:

[The gay political narrative’s] insistence on immutability precludes it from encompassing the full range of individuals who experience same-sex desire. This observation leads to a troubling conclusion: If the civil rights protections gained through arguments of equivalence are premised on immutable identity, do those civil rights protections only extend to individuals who experience same-sex desire as an unavoidable outgrowth of an innate characteristic? Or would the identity model hold that all same-sex desire is inborn and individuals who report otherwise suffer from false consciousness? Neither result seems particularly conducive to group cohesion and both marginalize individuals who experience same-sex desire in ways that diverge from the dominant identity paradigm.¹¹⁶

If the standard of equal protection involves determining how central a characteristic is to one’s identity, there will always be peo-

112. *Id.*

113. Butler, *supra* n. 108, at 149.

114. *Id.* A similar argument can be made against using substantive due process analysis, addressed *infra* part IV(B), in the context of gay rights, as the following illustrates:

In defending homosexuality because of its supposedly self-definitive character, [the] personhood [position] reproduces the heterosexual view of homosexuality as a quality that, like some characterological virus, has invaded and fundamentally altered the nucleus of a person’s identity By conceiving of the conduct that it purports to protect as “essential to the individual’s identity,” [the] personhood [position] inadvertently reintroduces into privacy analysis the very premise of the invidious uses of state power that it seeks to overcome.

Jed Rubinfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 780–782 (1989).

115. Butler, *supra* n. 108, at 149. Butler argues that a constructionist model of sexuality that focuses on autonomy, conscience, and choice may serve gay rights advocates better than an essentialist model that casts gay men and lesbians as victims of their own nature. *Id.* at 148.

116. Knauer, *supra* n. 107, at 36–37.

ple at the definitional edges of that category who may or may not be protected because they are not sufficiently invested in the suspect classification as an identity.

B. Substantive Due Process

Another constitutional route that has been used to advocate for legal protections of sex/gender/sexual nonconformists is the Due Process Clause of the Fourteenth Amendment, which protects substantive personal rights, including rights to privacy and intimacy, from state interference.¹¹⁷ The United States Supreme Court noted the following in *Roe v. Wade*:¹¹⁸

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as . . . [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.¹¹⁹

If an interest within this zone of privacy is deemed “fundamental,” it is subject to strict scrutiny review and must be justified by a compelling state interest.¹²⁰ This constitutional substantive due

117. William A. Kaplin, *American Constitutional Law: An Overview, Analysis, and Integration* 304 (Carolina Academic Press 2004); see e.g. *Lawrence v. Tex.*, 539 U.S. 558, 578 (2003) (finding that statute criminalizing same-sex sodomy violated right to privacy under substantive due process principles); *Witt v. U.S. Dept. of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (finding that after *Lawrence*, the U.S. Military’s “Don’t Ask, Don’t Tell” policy must satisfy an intermediate level of scrutiny under substantive due process); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005) (rejecting the argument that same-sex marriage is a fundamental right under the Fourteenth Amendment’s Due Process Clause); *Conaway v. Deane*, 932 A.2d 571, 617, 625 (Md. 2007) (discussing *Lawrence* in holding the right to marry another person of the same sex is not a fundamental right protected by the due process provision of Maryland Declaration of Rights); *Lewis v. Harris*, 908 A.2d 196, 210–211 (N.J. 2006) (quoting *Lawrence* in holding that same-sex couples do not have a fundamental right to marry under New Jersey Constitution).

118. 410 U.S. 113 (1973).

119. *Id.* at 152–153 (internal citations omitted).

120. *Id.* at 155.

process right to privacy and intimate personal choice has been extended to the right to use contraceptives¹²¹ and the right to bear a child or terminate a pregnancy.¹²² In the 2003 case of *Lawrence v. Texas*,¹²³ the Supreme Court extended substantive due process protection to the intimate sexual activities that occur in the home between consenting adults of the same sex, but it did not go so far as to name same-sex sexual intimacy a fundamental right.¹²⁴ Even though the Court did not find a fundamental right, it determined that the State's interest in enforcing a moral code on its citizens was illegitimate.¹²⁵

Though substantive due process may be more promising than the Equal Protection Clause as a route for gaining acceptance for sex, gender, and sexuality as fluid, dynamic, and intertwining categories, there are several problems with using substantive due process. First, the line of cases described above does not question the government's regulation of sex, gender, consensual sexuality, and family structure; rather, it only moves various activities such as consensual same-sex sex into the "charmed circle" of morally acceptable sex, gender, sexual, and family practices that the government may not regulate.¹²⁶ In the 1965 case of *Griswold v. Con-*

121. *Carey v. Population Serv. Intl.*, 431 U.S. 678, 687–690 (1977) (holding that there is an individual privacy right to use contraceptives, regardless of marital status); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (invalidating a law that banned distributing contraceptives); *Griswold v. Conn.*, 381 U.S. 479, 485–486 (1965) (holding that married couples have a constitutional right to use contraceptives).

122. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 855–856 (1992) (reaffirming *Roe's* essential holding, including the right of women to choose whether to have an abortion before viability and to seek an abortion without undue interference from the state); *Roe*, 410 U.S. at 153 (invalidating state law that prohibited abortion).

123. 539 U.S. 558 (2003). In *Lawrence*, police who entered a private residence to investigate a reported weapons disturbance found John Lawrence and Tyron Garner having consensual sex with each other. *Id.* at 562. The two men were arrested, held overnight, and convicted of "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)" under a Texas criminal statute. *Id.* The Texas Court of Appeals affirmed the conviction, pointing to *Bowers v. Hardwick* as controlling precedent. 478 U.S. 186 (1986); *Lawrence*, 539 U.S. at 562. The U.S. Supreme Court granted certiorari to address Equal Protection and Due Process arguments, as well as to decide whether *Bowers* should be overruled. *Id.* at 564. The Court overruled *Bowers*, finding that private sexual activity between consenting adults should receive substantive Due Process protection. *Id.* at 578.

124. *Id.* at 564–565.

125. Kaplin, *supra* n. 117, at 313.

126. Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 *Widener L. Rev.* 309, 314 (2005) (borrowing the phrase "charmed circle of sexual practices" from author Gayle Rubin). As Rubin notes, "Virtually all erotic behavior is considered bad unless a specific reason to exempt it has been established. The most

necticut,¹²⁷ even as the Court extended constitutional protection to contraception within the marriage relationship, Justice Goldberg, in his concurring opinion, noted that “the Court’s holding today . . . in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct. ‘Adultery, homosexuality and the like are sexual intimacies which the State forbids.’”¹²⁸ Similarly, in *Lawrence*, the Court made sure to note that the State could still forbid same-sex marriage even as it found constitutional protection for same-sex intimacy under substantive due process, stating that the case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹²⁹ Yet the Court justified moving same-sex intimacy into the protected zone of privacy by highlighting its similarity to heterosexual intimacy, a practice already in the zone of privacy and already within the “charmed circle” of morally and legally acceptable behavior.¹³⁰ Therefore, “despite its celebration as a moment of progress towards sexual liberation, *Lawrence* actually serves as an occasion to reaffirm the rights and power of the government to employ coercive tactics for maintaining regulatory norms of gender, sexuality, and family structures.”¹³¹

acceptable excuses are marriage, reproduction, and love.” Rubin, *supra* n. 36, at 11. Such excuses place a certain expression of sexuality within the “charmed circle,” of good, normal, and natural sexuality. *Id.* at 13. Sexuality that has no such excuse may be relegated to the “outer limits,” the realm of bad, abnormal, and unnatural sexuality. *Id.* Regulation of sexual behavior involves determining where exactly the line should be drawn between these two types of sexuality and what behaviors should be allowed in the “charmed circle.” *Id.* at 14. “The line appears to stand between sexual order and chaos . . . [I]f anything is permitted to cross this erotic DMZ, the barrier against scary sex will crumble and something unspeakable with skitter across.” *Id.*

127. 381 U.S. 479 (1965).

128. *Id.* at 498–499 (Goldberg, J., Warren, C.J. & Brennan, J. concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

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

130. Willse & Spade, *supra* n. 126, at 314; see *supra* n. 126 and accompanying text (discussing the circle in more depth). The *Lawrence* Court emphasized the similarities between homosexual relationships and heterosexual marriages, treating homosexuality like heterosexuality—as an identity with the potential for coupled relationships and families. Willse & Spade, *supra* n. 126, at 314. This characterization was a clear departure from the Court’s previous treatment of same-sex intimacy as a “long-criminalized and reviled aberrant sexual practice.” *Id.* (referencing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

131. *Id.* at 316.

Second, this line of substantive due process cases leaves binary concepts of sex (male and female) intact and does not question the government's ability to define sex/gender/sexuality on its own terms.¹³² The Court's decision in *Lawrence* "does not end the state's ability to police the very definition of male and female"—without the ability to define male and female, laws distinguishing between heterosexual and same-sex intimacy would be meaningless.¹³³ There would be no need to extend constitutional protection to same-sex intimacy if the very definition of same-sex intimacy were unintelligible under the law.¹³⁴ *Lawrence* and other substantive due process cases do not question the regulation of gender itself and do not "end the state's role as a central defender of the ideological coherence of the boundaries between the categories of male and female."¹³⁵

The problems inherent in the Equal Protection Clause or substantive due process arguments can be avoided by instead using the Religion Clauses of the United States Constitution to support the cultural acceptance of queerness and pansexuality.

V. SEX/GENDER/SEXUAL BELIEF SYSTEMS, THE RELIGION CLAUSES, AND THE IDEAL OF PLURALISM

A. Constitutional Law and the Ideal of Religious Pluralism

The Religion Clauses of the Constitution—the Establishment Clause and the Free Exercise Clause—work together to ensure that the government remains neutral with respect to religion.¹³⁶ At the most basic level, the clauses together mean that "religious

132. Paisley Currah, *The Other Sex in Lawrence v. Texas*, 10 Cardozo Women's L.J. 321, 321–322 (2004).

133. *Id.* at 322.

134. *Id.* at 324. As Currah argues, "defining sexual orientation only in relation to sex or gender obscures the complexity of how gender is actually lived and organized in different historical contexts. In this way, the concept of sexual orientation depends for its very coherence on the stability of biological sex and social gender." *Id.*

135. *Id.* at 322.

136. U.S. Const. amend. I; Kaplin, *supra* n. 117, at 387. Though the Religious Clauses do work together, there is also an inherent tension between them. Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. Va. L. Rev. 343, 343 (2007) (stating that "[a]mong the most vexing questions in the law of the religion clauses is when a legal measure that might otherwise be justified as an accommodation to free exercise is instead a forbidden establishment of religion").

life in the United States is . . . unsupported and unregulated by government.”¹³⁷ This refusal to regulate religion allows for religious pluralism—an ideal that combines diversity, tolerance, and church/state separation. Pluralism is deeply rooted in United States history, even though it has not always been a reality.¹³⁸ This pluralism is what the Religion Clauses are meant to protect.¹³⁹

137. Ted G. Jelen, *The Constitutional Basis of Religious Pluralism in the United States: Causes and Consequences*, in *Religious Pluralism and Civil Society*, 612 *Annals Am. Acad. Pol. & Soc. Sci.* 26, 27 (2007). When the Religion Clauses were written, they were probably not meant as a general statement of religious freedom and the separation of church and state. Daniel O. Conkle, *Constitutional Law: The Religion Clauses* 18 (Found. Press 2003). Instead, they were intended to prohibit the federal government from establishing religion or burdening religion so the states would be free to make their own laws regarding religion. *Id.* at 20. This federalistic concern makes application of the Religion Clauses to the states, by incorporation through the Fourteenth Amendment, appear to be “logical nonsense.” *Id.* at 23. While the Supreme Court’s application of the Religion Clauses may not conform to this originalist understanding, it “taps values that are deeply embedded in our political and cultural history, tracks their development over time, and determines their significance for contemporary societal issues.” *Id.* at 29. Religious pluralism is one of those values. *Id.* at 30.

138. Merritt & Merritt, *supra* n. 33, at 897–898. Indeed, religious pluralism is an ideal, not necessarily a reality, as the following shows:

[R]eligious diversity, tolerance, and separation of church and state all emerged gradually in the United States. For much of its history [from the Colonial Period to the present], the United States has declared its commitment to religious liberty and led the world in achieving those ends. Yet, even with clearly articulated ideals and constitutional protections, the struggle has not been an easy one.

Id. at 925. The colonies were founded by religious dissenters who came to the New World to free themselves from religious persecution. *Id.* at 898. During the colonial period, religious tolerance was the ideal, but prejudice was widespread—religious dissenters were unwelcome in many colonies, eight of the thirteen colonies had established Protestant churches, and most colonies allowed only Protestants or Christians to vote. *Id.* at 901–904. In an effort to separate church and state, most states disestablished their official churches and repealed explicit restrictions on citizenship rights based on religion by the end of the 1700s, but Protestantism remained the semi-official religion through the 1860s. *Id.* at 904, 910–911. After the Civil War, religious pluralism remained a national goal, yet the federal government sought to convert Native Americans to Christianity and exclude Asians from the country. *Id.* at 914–916. In the 1960s, the country’s religious profile shifted, becoming more diverse and fostering respect for other religions, but even today intolerance for certain religious groups, such as Muslim Americans, Mormons, and Buddhists, is prevalent. *Id.* at 918–922. While most Americans “staunchly defend[] the right of individuals to worship as they please,” many Americans believe that courts have gone too far in separating church and state. *Id.* at 924.

139. Conkle, *supra* n. 137, at 42. The clauses protect the following values that all support religious pluralism: (1) freedom to make personal religious choices; (2) respect for religious self-identity; (3) religious equality and government neutrality; (4) promotion of a religiously inclusive political community; (5) prevention of improper religious involvement with the government; and (6) protection of religious institutions from government in-

1. *The Establishment Clause*

The Establishment Clause proclaims that “Congress shall make no law respecting an establishment of religion.”¹⁴⁰ It prevents both federal and state governments from establishing an official religion and benefiting some religions over others.¹⁴¹ It can be violated even if the government has not coerced any particular individual respecting her religious beliefs.¹⁴² This prohibition reflects the value of religious pluralism with its structural separation between the church and the state; this separation transcends individual religious beliefs by recognizing that sometimes government involvement with religion “damages us collectively rather than as particular individuals.”¹⁴³ If the government established an official religion, all Americans would be adversely affected by the loss of pluralistic values; thus, the diversity of the community would be threatened by incentives for people to conform their religious beliefs and by disincentives for people to reveal dissenting religious beliefs.¹⁴⁴

For the Establishment Clause to apply to a particular government action, the state or federal government must have entangled itself with a religious “activity, organization, or viewpoint,” crossing the metaphorical wall between church and state.¹⁴⁵ Establishment Clause cases generally involve one of two types of the following government entanglements with religion: (1) government sponsorship of religious groups or activities, where the primary inquiry is whether the government is remaining neutral in its sponsorship of religious and non-religious groups; and (2) government involvement with religious rituals or symbols, where the primary question is whether the government would appear to a reasonable observer to be supporting the viewpoint of the ritual or display.¹⁴⁶

volvement. *Id.* at 38–47.

140. U.S. Const. amend. I.

141. Conkle, *supra* n. 137, at 107; Kaplin, *supra* n. 117, at 387.

142. Kaplin, *supra* n. 117, at 389.

143. *Id.*

144. See Conkle, *supra* n. 137, at 108 (arguing that the government should not promote or assist a particular religion in any way because this would create an impermissible benefit).

145. Kaplin, *supra* n. 117, at 389.

146. *Id.* at 390–393.

There are various tests that courts apply to Establishment Clause cases, including the *Lemon* Test, the Endorsement Test, and the Coercion Test.¹⁴⁷ The *Lemon* Test, from *Lemon v. Kurtzman*,¹⁴⁸ is used most frequently and originally required the following of a state action for it to pass strict scrutiny: (1) a secular purpose; (2) a primary effect that does not advance or inhibit religion; and (3) a lack of excessive entanglement between church and state.¹⁴⁹ However, in the 1997 case *Agostini v. Felton*,¹⁵⁰ the Supreme Court combined the second and the third prongs of the *Lemon* Test, deciding that the two prongs dealt with the same issue—the effect of the law.¹⁵¹

The Endorsement Test, which first appeared in Justice O'Connor's *Lynch v. Donnelly*¹⁵² concurrence, can be used instead of (or along with) the *Lemon* Test and focuses on whether the government action, in either its purpose or effect, communicates government endorsement or disapproval of a particular religious viewpoint.¹⁵³ As Justice O'Connor pointed out in her concurrence,

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.¹⁵⁴

147. *Id.* at 395. There are several additional Establishment Clause tests that are beyond the scope of this Comment. *Id.* at 395, 397–400. These tests include the Denominational Preference Test, the Original History Test, and the Ceremonial Deism Test. *Id.*

148. 403 U.S. 602 (1971).

149. *Id.* at 612–613.

150. 521 U.S. 203 (1997).

151. *Id.* at 232.

152. 465 U.S. 668 (1984).

153. *Id.* at 687–688 (O'Connor, J., concurring); Kaplin, *supra* n. 117, at 396.

154. *Lynch*, 465 U.S. at 687–688 (O'Connor, J., concurring).

To determine whether the government is conveying a message of endorsement or disapproval, the Supreme Court has used a “reasonable observer” standard.¹⁵⁵ The Coercion Test, a (stricter version of the Endorsement Test) focuses on the potential coercion of government-backed religious belief or expression, since “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”¹⁵⁶

All three of these approaches reflect the value of religious pluralism by reinforcing the separation of church and state—because the government cannot advance or prohibit religion, endorse a particular religious viewpoint, or coerce people to conform to a particular religion, cultural forces are (or should ideally be) free to discuss religious issues without government interference.¹⁵⁷

2. *The Free Exercise Clause*

The Free Exercise Clause proclaims that “Congress shall make no law . . . prohibiting the free exercise [of religion].”¹⁵⁸ Whereas the Establishment Clause protects the people collectively, the Free Exercise Clause protects individuals from government infringement on their personal religious beliefs and practices—governmental coercion of a particular individual is a necessary element of a Free Exercise violation.¹⁵⁹ The Free Exercise Clause allows for religious pluralism and tolerance of benign religious variation by protecting individuals’ freedom to pursue personal religious beliefs, individuals’ religious identity, and reli-

155. *Allegheny Co.*, 492 U.S. at 620.

156. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

157. The Supreme Court has explicitly noted in Establishment Clause cases the underlying value of pluralism and the cultural discussion that it promotes. In *Lynch*, the Court evaluated the Establishment Clause as it affects “our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas.” 465 U.S. at 678. Similarly, in *Lee*, the Court stated that “[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.” 505 U.S. at 590.

158. U.S. Const. amend. I.

159. Kaplin, *supra* n. 117, at 401. Like the Establishment Clause, the Free Exercise Clause has been incorporated under the Fourteenth Amendment and therefore applies to the states as well as the federal government. Conkle, *supra* n. 137, at 72.

gious institutions' autonomy from "the contaminating effects of governmental authority."¹⁶⁰ With these protections, the Free Exercise Clause values religion generally as an important part of society and of personal life, but also values equality and cultural discussion by leaving people free to determine their own religion as well as discuss their religion with others.¹⁶¹

Governmental coercion of or interference with an individual's personal religious belief is nearly always unconstitutional, but the government has leeway to regulate religious practices as long as the regulation is of general applicability.¹⁶² Internal religious belief or unbelief, as well as speech that professes or denies either are absolutely protected from governmental interference.¹⁶³ As part of the protection of religious belief and expression, the government may not punish the expression of certain religious beliefs as false,¹⁶⁴ nor may it take sides in controversies over religious truth.¹⁶⁵ When religious belief is expressed through action, however, it is not absolutely protected by the Free Exercise Clause.¹⁶⁶ Before 1990, the Supreme Court held that any state law unduly burdening sincere free exercise of religion—such as religious conduct—without a compelling state interest was unconstitutional even if that law was "neutral on its face."¹⁶⁷ However, the Supreme Court narrowed this standard in the 1990 case *Employ-*

160. Conkle, *supra* n. 137, at 72–73.

161. *Id.*

162. Kaplin, *supra* n. 117, at 401.

163. *Torcaso v. Watkins*, 367 U.S. 488, 495–496 (1961) (invalidating the Maryland Constitution's requirement that state office holders profess a belief in God). Religious belief and speech are also protected under the First Amendment's free speech guarantee. U.S. Const. amend. I; Conkle, *supra* n. 137, at 74.

164. *Empl. Div. v. Smith*, 494 U.S. 872, 877 (1990) (citing *U.S. v. Ballard*, 322 U.S. 78, 86–88 (1944)).

165. *Id.* (citing *Serb. E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–725 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Meml. Presbyterian Church*, 393 U.S. 440, 445–452 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95–119 (1952)).

166. Conkle, *supra* n. 137, at 79. Conkle notes that "[u]nlike the protection of belief, this protection [of religious conduct] certainly could not be absolute; imagine, for example, the act of religiously motivated human sacrifice." *Id.*

167. J. Brady Brammer, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 BYU L. Rev. 995, 1005–1006 (2006) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)); see e.g. *Yoder*, 406 U.S. at 221 (exempting Amish parents from generally applicable state law compelling parents to send their children to formal high school); *Sherbert v. Verner*, 374 U.S. 398, 403–404 (1963) (invalidating state's application of general unemployment compensation statute to deny benefits to claimant who could not find work because she refused to work on her Sabbath).

*ment Division v. Smith*¹⁶⁸ by holding that valid, neutral laws of general applicability are constitutional, even if they force people to act in ways that are incompatible with their religious beliefs.¹⁶⁹ The Court in *Smith* explained, as follows:

Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment’s protection of religious liberty does not require this.¹⁷⁰

Each of these standards and conceptions of free exercise jurisprudence highlight the importance of religious pluralism and benign variation, as well as the cultural discussion that accompanies them, by protecting individuals’ religious freedom. Even as the Supreme Court narrowed its protection of religious free exercise, it made clear that such an interpretation of the clause was not only consistent with, but also necessary for, religious pluralism.¹⁷¹

The ideals of pluralism and benign variation that have been applied to religion through the Religion Clauses and throughout United States’ history should also apply to sex/gender/sexual beliefs because sex, gender, and sexuality are comparable to religion.

168. 494 U.S. 872 (1990) (holding that generally applicable state drug law could prohibit religious use of peyote without violating the Free Exercise Clause).

169. Brammer, *supra* n. 167, at 1006.

170. *Smith*, 494 U.S. at 888–889 (emphasis in original) (citations omitted) (footnote omitted).

171. *Id.*

B. Organizing Principles and Belief Systems: Sex/Gender/Sexuality Compared to Religion

Sex, gender, and sexuality are comparable to religion¹⁷² because, like religion, they support a certain social order by fostering certain types of beliefs that, in turn, dictate how people treat one another and define themselves.¹⁷³ These beliefs in sex/gender/sexuality and religion are so deeply held and personal that they often implicate each other, overlapping and together contributing to individuals' most fundamental and basic understandings of life itself.¹⁷⁴

Historically, beliefs about religious groups have served as the basis for discrimination against unpopular religious minorities.¹⁷⁵

172. In the context of the Religion Clauses, "religion" is broadly defined by the Supreme Court to include belief systems "which do not teach what would generally be considered a belief in the existence of God [such as] Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Torcaso*, 367 U.S. at 495 n. 11; accord Benjamin M. Eidelson, Student Author, *A Penumbra Overlooked: The Free Exercise Clause and Lawrence v. Texas*, 30 Harv. J. L. & Gender 203, 228 (2007) (citing this language from the *Torcaso* decision). Additionally, Eidelson notes that:

[T]he Court has interpreted the Selective Service Act's requirement for conscientious objector status—opposition to all war on account of "religious training and belief"—extraordinarily expansively . . . [T]he court held that this provision would apply to any individual who: "deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, [because] those beliefs certainly occupy in the life of that individual a place parallel to that filled by . . . God in traditional religious persons."

Id. (quoting *Welsh v. United States*, 398 U.S. 333, 336 (1970)).

173. David B. Cruz, *Disestablishing Sex and Gender*, 90 Cal. L. Rev. 997, 1005–1006 (2002) (suggesting that sex and gender are comparable to religion). As Cruz argues:

The sex/gender system is that set of arrangements by which human, social intervention shapes the biological raw material of human sex and procreation . . . creat[ing] . . . two genders . . . and the social regulation of sexuality Of course, this description of the sex/gender system is an oversimplification. Throughout the world, in various times, gender has operated differently Thus, it might be better to regard gender as a class of organizing principles, which we might call gender beliefs. The particular set of gender beliefs that hold sway in a specific population (an organization, a society) may be considered a gender ideology.

Id. at 1007. (footnotes omitted).

174. Cruz, *supra* n. 173, at 1006; Lorber, *supra* n. 47, at 97 (discussing how an individual's gender affects how he or she is treated, and treats others, from birth).

175. See generally Eskridge, *supra* n. 35, at 2421–2422 (briefly delineating the history of social prejudice against religious minorities and accompanying governmental enforcement of such prejudice); William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (Yale U. Press 2003) (addressing the complicated history and development of religious pluralism in the United States); Merritt & Merritt,

A person's religious views have been considered a proxy for that person's moral worth.¹⁷⁶ Today, sex/gender/sexual (non)conformity is used as a proxy for morality in much the same way—sex/gender/sexual nonconformists are considered morally questionable simply because of their sex/gender/sexual nonconformity.¹⁷⁷ These judgments, whether about minority religious beliefs or minority sex/gender/sexual beliefs, are rooted in “attitudes of intellectual orthodoxy and coerced conformity.”¹⁷⁸

Because people tend to use sex, gender, sexual, and religious (non)conformity, at best, as a significant social factor that influences human interaction or, at worst, as a proxy for a person's moral worth, the social impact of being outside the norm is great.¹⁷⁹ This great social impact is one factor that leads a person's beliefs about sex, gender, sexuality, and religion—particularly his or her own—to become a key part of that person's identity and sense of who he or she is.¹⁸⁰ By identifying personally with a particular sex, gender, sexual, or religious category, a person might feel or seek membership in a cultural group defined by that category.¹⁸¹ In turn, being a part of such a cultural group may solidify identification with the category. However, with these group and personal identities often comes a divisiveness or “us versus them” mentality, particularly when the identity category is

supra n. 33, at 925–928 (discussing the history of religious establishment and intolerance as well as the gradual emergence of religious pluralism in the United States); Richard E. Wentz, *The Culture of Religious Pluralism* (Westview Press 1998) (discussing the history of religious pluralism and tolerance in the United States, from colonial times to the twentieth century); John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 *Cap. U. L. Rev.* 499, 505–513 (2004) (outlining the history of religious tolerance and discrimination in the United States).

176. Eskridge, *supra* n. 35, at 2412.

177. *Id.* Eskridge noted that “[j]ust as most Americans in 1900 viewed significant religious deviation as strange, shameful, perverse, or even wicked, so most in 2000 will view significant sexual deviation as strange, shameful, perverse, or even wicked.” *Id.* Once a deviation is labeled as perverse, it becomes an indicator of immorality in and of itself. Rubin, *supra* n. 36, at 14. Rubin suggested in the context of sexual judgment that, between “good” and “bad” sex, “[o]nly sex acts on the good side of the line are accorded moral complexity.” *Id.*

178. Eskridge, *supra* n. 35, at 2420.

179. *Id.* at 2418–2419; Cruz, *supra* n. 173, at 1016–1020.

180. Cruz, *supra* n. 173, at 1016–1020.

181. *Id.*

both invisible (as is often the case with sexual preference, transgender, or religious belief) and morally disputed.¹⁸²

The divisiveness of these identity categories is heightened because people often distance themselves from their judgments about the moral significance of these identity categories by invoking extra-human authority—either God or Nature.¹⁸³ Judgments about sex/gender/sexual (non)conformity are often couched in terms of either what is natural (in accordance with Nature) or moral (in accordance with God).¹⁸⁴ Similarly, discrimination based on religious beliefs is supported by the authority of the person's or group's particular version of Nature or God.¹⁸⁵ By using these extra-human sources of authority, people relieve themselves of the

182. *Id.* at 1018.

183. *Id.* at 1010.

184. *Id.* For example, some argue that homosexuality and transsexualism are “unnatural.” *Id.* at 1012.

185. Interestingly, the divisiveness of religion and sex/gender/sexuality tends to pit the same groups against each other—those with a fundamentalist worldview against those with a “quest” worldview. John Stratton Hawley, *Fundamentalism*, in *Religious Fundamentalisms and the Human Rights of Women* 3–4 (Courtney W. Howland ed., MacMillan Press 1999); Merritt & Merritt, *supra* n. 33, at 926 (using the term “quest” religious orientation”). In the religious context, “fundamentalists,” regardless of their creed, believe that their religion is the one fundamentally correct truth. *Id.* People with a “quest” view of religion have a more flexible approach that acknowledges the validity of religions other than their own. *Id.* at 926–927. In the context of sex/gender/sexuality, fundamentalists (often also religious fundamentalists, but certainly not always) believe that there is one fundamentally correct sex/gender/sexual system and that all contrary sex/gender/sexual beliefs are inherently wrong. Hawley, *supra* n. 185, at 4. People with a “quest” worldview, on the other hand, might acknowledge that other sex/gender/sexual systems and values as also valid. This correlation between religious and sex/gender/sexual beliefs illustrates one way that they overlap, but it is not the only way. See generally *Religious Fundamentalisms and the Human Rights of Women* (Courtney W. Howland ed., MacMillan 1999) (discussing the relationships between sex/gender and religion in various cultural contexts); Serena Nanda, *Hijras as Neither Man Nor Woman*, in *The Lesbian and Gay Studies Reader* 542–543, *supra* n. 36 at 542, 543 (discussing the hijras of India, a caste of people who are neither men nor women, who “identify[] their alternative gender role with deities and mythic figures of the Great Tradition of Hinduism”); *Women: A Cultural, Philosophical, and Spiritual Exploration*, 37 What Is Enlightenment? Mag. 1 (July–Sept. 2007) (available at <http://www.wie.org/j37/>) (exploring the history of feminism and spirituality); *Men's Liberation? Women's Liberation? Gay Liberation? How Free Do We Really Want to Be?* 16 What Is Enlightenment? Mag. 1 (Fall–Winter 1999) (available at <http://www.wie.org/j16/>) (discussing the relationship between spirituality and sex/gender/sexuality and featuring an interview with gender outlaw Kate Bornstein); *What Is the Relationship Between Sex and Spirituality?* 13 What Is Enlightenment? Mag. 1 (Spring–Summer 1998) (available at <http://www.wie.org/j13/>) (addressing whether sexuality can be a path to enlightenment); *Women, Enlightenment, and the Divine Mother: Do Women Have the Inside Track on Spirituality?* 10 What Is Enlightenment? Mag. 1 (Fall–Winter 1996) (available at <http://www.wie.org/j10/>) (discussing women's spirituality).

responsibility of rationally supporting a particular viewpoint and moot any counterarguments.¹⁸⁶

The moral significance that sex, gender, sexuality, and religious beliefs evoke is not just important as an organizing principle or as a point of argument. It is also significant in a deeply personal way that implicates each person's own conceptions of what is moral and what is important in life. Because these beliefs are so fundamental to human existence, diverse understandings should be accepted. In the religious context,

[W]hile we [cannot] agree on who God is, we [can] and should agree on who we are. That we share a thirst for the true and the good, and a conscience that drives our quest to find them and then insists that we embrace and express publicly what we believe we've found. That if we can agree on this much, then we share a profound truth: The truth about man is that man is born to seek freely the truth about God.¹⁸⁷

Similarly, in the context of sexuality, which also implicates sex and gender,

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence . . ." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.¹⁸⁸

Taken together, the acceptance of diverse sex/gender/sexual and religious beliefs are a part of a broader freedom to define one's own morality, to follow one's own conscience, and to interact with

186. Cruz, *supra* n. 173, at 1015.

187. Brammer, *supra* n. 167, at 1031 (alterations in original) (quoting Seamus Hasson of the Beckett Fund for Religious Liberty).

188. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (emphasis in original), *overruled*, *Lawrence v. Tex.*, 539 U.S. 558 (2003) (addressing the constitutionality of criminal sodomy laws).

other people in whatever way is mutually enriching. As the Supreme Court of the United States has acknowledged,

At the heart of [human] liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁸⁹

C. Freedom of Sex/Gender/Sexuality Analogized to Religion under the Religious Clauses

Given that sex/gender/sexuality and religion are not only comparable as organizing principles and belief systems but also are also overlapping and inevitably connected to each other, they should be treated similarly under the law. The ideals of pluralism and benign variation that the United States strives for in the context of religion should also be the ideals in the context of sex/gender/sexuality.¹⁹⁰ There are various ways that these values of pluralism and benign variation of sex/gender/sexuality could be found in or achieved through our nation's law.

One possibility is that sex/gender/sexual beliefs could be analyzed directly under the Religion Clauses. Benjamin M. Eidelson argues that "religion," in the context of the Free Exercise Clause, includes not only belief in a deity, but also in a much broader right of personal conscience.¹⁹¹ If so, the Religion Clauses may not

189. *Casey*, 505 U.S. at 851. *Casey* was a substantive due process case, but "[r]eading this ode to freedom of conscience out of context, we would assume that it valorized not the Due Process Clause, but the Free Exercise Clause." Eidelson, *supra* n. 172, at 206.

190. One might argue that sex/gender/sexuality should not be treated like religion precisely because religious pluralism has been an ideal in the United States since the founding, whereas pluralism in sex/gender/sexual has not. Perhaps the historical disapproval of unpopular sex/gender/sexual beliefs should be the historical value that supports government policy. Disapproval of religious minorities is also a part of United States history, however, and the Supreme Court has recognized that "[t]he history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically [B]ut this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny Co.*, 492 U.S. at 604–605. Similarly, the Court has rejected the argument that historical condemnation of same-sex conduct is enough to justify modern criminal sodomy laws. *Bowers*, 478 U.S. at 196.

191. Eidelson, *supra* n. 172, at 207. Eidelson argues that the essence of the right to freedom of religion is not only in the founders' notion of the right, but also in the Reconstruction-era re-conception of the right as it is incorporated in the Fourteenth Amendment.

only protect religions in the traditional sense of the word, but they may also protect the right to define one's own morality in certain very personal areas of life and to "engage in certain normatively charged, status-defining conduct."¹⁹² Because sex/gender/sexuality beliefs are organizing principles that determine social status, they should qualify as exactly the type of normatively charged, status-defining conduct covered by the Religion Clauses.¹⁹³

A constitutional amendment or statute modeled on the Religion Clauses could also address the disestablishment and free exercise of sex/gender/sexuality.¹⁹⁴ Such an amendment or statute might proclaim that "neither the Congress nor the States shall make any law respecting an establishment of sex, gender, or sexual ideology, or prohibiting the free exercise thereof." Having either an amendment or statute explicitly protecting sex/gender/sexual beliefs would be consistent with the ideal of pluralism enshrined in the Constitution, but an amendment would nevertheless be very unlikely to pass. Simply because it is more realistic, legislation might be a preferable option, even though a constitutional amendment would have greater force.

Id. at 217. The incorporated conception of religious freedom includes not only the freedom to worship a deity, but also the freedom to act in accordance with one's own conscience. *Id.* These "rights of conscience were repeatedly linked with such activities as assisting runaway slaves, teaching literacy, and engaging in religiously motivated political discourse." *Id.* at 218 (quoting Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1152–1153 (1994)). Indeed, "in the aftermath of slavery, the Republican effort to protect religious exercise was undertaken with a special sensitivity to the plight of the dissenter from a tyrannical and misguided moral majority," and, therefore, "after Reconstruction, we might well view religious freedom as paradigmatic of a right of metaprivacy—a privilege to confront normatively charged questions of unusual personal weight in a private sphere." *Id.* The essence of the right is the protection of faith "however it manifests itself for the individual [F]reedom of religion flows from a very general freedom of conscience, or the freedom to hold different beliefs from the majority as to what is right and wrong." *Id.* at 208.

192. *Id.* at 206.

193. Eidelson focuses on same-sex sexuality and the Free Exercise Clause. Eidelson, *supra* n. 172, at 229. However, sex and gender should be grouped together with same-sex sexuality, because sex, gender, and sexuality are inevitably connected, as examined *supra* part II. Similarly, the Establishment Clause should be considered much like the Free Exercise Clause in terms of its applicability to sex/gender/sexuality because the two clauses are inevitably linked to one another, as noted *supra* part V(A).

194. Cruz notes that no Gender Disestablishment Clause exists. Cruz, *supra* n. 173, at 1021. Similarly, Drew notes that an amendment modeled on the Religious Clauses meant to protect sexual orientation would almost certainly never pass. Drew, *supra* n. 101, at 313.

Regardless of the method that produced it, the disestablishment and free exercise of sex/gender/sexuality would support the ideals of pluralism and benign variation in the context of sex/gender/sexual beliefs.¹⁹⁵ Working together, the two principles would deregulate sex/gender/sexuality and allow for cultural discussion of concepts like pansexuality and queerness by valuing diversity, tolerance, and a separation between the state and sex/gender/sexuality belief systems.¹⁹⁶ Drawing from the history of religious disestablishment, free exercise, and pluralism in the United States, the following sections will hypothesize what disestablishment, free exercise, and pluralism might look like in the context of sex/gender/sexuality.

1. The Disestablishment of Sex/Gender/Sexual Beliefs

The disestablishment of sex/gender/sexuality would prohibit the government from establishing an official sex/gender/sexuality belief system and favoring certain sex/gender/sexuality belief systems over others.¹⁹⁷ Acknowledging that government support for a particular sex/gender/sexual belief system is collectively damaging to the people of the country, it would create a structural separation between sex/gender/sexual belief systems and the state. It would commit sex/gender/sexual belief systems “to the private sphere and, therefore eliminate[] the need for public agreement: Each side [could] go its own way.”¹⁹⁸ Without incentives to conform to the state-sanctioned sex/gender/sexuality system, diver-

195. Cruz has explored constitutional arguments for the disestablishment and free exercise of sex/gender—also potentially applicable to sexuality—that are not based on the Religion Clauses. Cruz, *supra* n. 173, at 1020–1037.

196. Mirroring the Religion Clauses, the twin principles of sex/gender/sexual disestablishment and free exercise would protect the following values that all support sex/gender/sexual pluralism: (1) freedom to make personal choices regarding sex/gender/sexuality; (2) respect for sex/gender/sexual self-identity; (3) equality and government neutrality regarding different sex/gender/sexual belief systems; (4) promotion of a sex/gender/sexual-belief-inclusive political community while preventing improper involvement with the government; and (5) protection of communities of people with particular sex/gender/sexual beliefs from government involvement. For a discussion of the corresponding values in the context of religion, see *supra* note 137.

197. The principles applied to sex/gender/sexuality in part V(C)(1) are discussed in the context of religion *supra* part V(A)(1).

198. Drew, *supra* n. 101, at 314.

sity could flourish, and a cultural discussion of varying sex/gender/sexual viewpoints would be possible.

As David Cruz argues, this disestablishment would be desirable because the

[D]isestablishment of religion is . . . consistent in important [in the following] ways with religious equality: government may act to promote freedom and equality of religion in the public realm, although it cannot take positions on the relative theological correctness or superiority of various religious sects. By analogy, then, the de-institutionalization of sex and gender, and thus respectful indifference to sex difference, would be the constitutionally proper attitude for government to maintain. As with religious beliefs under the disestablishment of religion, under the disestablishment of sex and gender government would neither endorse nor disapprove gender beliefs.¹⁹⁹

Government would also no longer regulate sexual preference—at least not by regulating the sex or gender of partners—because without a government definition of male and female, the definitions of heterosexual, homosexual, and bisexual would be meaningless.

If the disestablishment of sex/gender/sexuality were achieved, the government would generally be prohibited from crossing the metaphorical wall between sex/gender/sexual beliefs and the state; it would be prohibited from entangling itself with activities, actions, or viewpoints that support a particular sex/gender/sexual belief system. The government would not be able to sponsor groups or activities with particular sex/gender/sexual viewpoints unless its sponsorship was neutral in relation to groups with various sex/gender/sexual viewpoints. The government would also generally be prohibited from involving itself in activities or displaying symbols that convey a message that would appear to a reasonable observer to support a particular sex/gender/sexual viewpoint.

Courts could subject state actions that differentiate on the basis of sex, gender, or sexuality to a modified *Lemon* Test, where the state action would need to have the following to pass strict

199. Cruz, *supra* n. 173, at 1009.

scrutiny: (1) a purpose that does not support a particular sex/gender/sexual belief system; and (2) a primary effect that does not advance or inhibit a particular sex/gender/sexual belief system.²⁰⁰ Courts could also model their inquiry on the Endorsement Test, focusing on whether the government action in either its purpose or effect communicates government endorsement or disapproval of a particular sex/gender/sexual viewpoint.²⁰¹ This inquiry would prevent the government from sending the political message that a person's views about sex/gender/sexuality or expression of sex/gender/sexuality might make that person either an insider or an outsider in the political community. Courts could also model their inquiry on the Coercion Test, focusing on the physically as well as psychologically coercive potential of a government action relating to sex/gender/sexuality.²⁰² All three of these tests would reflect the value of sex/gender/sexual pluralism by reinforcing a separation between sex/gender/sexual belief systems and the state. Because the government would not be able to advance or prohibit particular sex/gender/sexual beliefs, endorse particular sex/gender/sexual viewpoints, or coerce people to conform to a particular sex/gender/sexual belief system, cultural forces would be free to discuss issues involving sex, gender, and sexuality without government interference.

2. *The Free Exercise of Sex/Gender/Sexual Beliefs*

Complementing the disestablishment of sex/gender/sexuality, which would protect the people collectively, the free exercise of sex/gender/sexuality would protect individuals from government coercion or infringement of their personal sex/gender/sexual beliefs and practices.²⁰³ Free exercise of sex/gender/sexuality would allow for pluralism and tolerance of benign variation by protecting individuals' freedom to pursue their personal sex/gender/sexual beliefs and identities. It would also protect the autonomy of communities based on particular sex/gender/sexual beliefs from

200. For a discussion of the *Lemon* test, see notes 145–149 and accompanying text.

201. For a discussion of the Endorsement Test, see notes 150–153 and accompanying text.

202. For a discussion of the Coercion Test, see notes 153–154 and accompanying text.

203. The principles applied to sex/gender/sexuality in part V(C)(2) are discussed in the context of religion *supra* part V(A)(2).

government interference. With these protections, the free exercise of sex/gender/sexuality would value sex/gender/sexual beliefs generally as an important part of society and of personal life. Simultaneously, it would value equality and cultural discussion by leaving people free to determine their own sex/gender/sexual beliefs as well as discuss their beliefs with others.

Free exercise of sex/gender/sexuality would prohibit governmental coercion of or interference with an individual's personal sex/gender/sexuality beliefs, but the government would still have leeway to regulate sex/gender/sexual practices under generally applicable laws. Internal sex/gender/sexual beliefs and identifications, as well as speech about those beliefs and identifications, would be absolutely protected from governmental interference—the government would be prohibited from punishing the expression of certain sex/gender/sexual beliefs and taking a stand in controversies over conflicting sex/gender/sexual belief systems. Expression of sex/gender/sexual beliefs through actions, however, would not be absolutely protected if those actions violated a valid, neutral law of general applicability. Neutral laws of general applicability would still be acceptable even if they forced people to act in ways that were incompatible with their sex/gender/sexual beliefs.²⁰⁴ Rather than the law “constantly trying to classify individuals within a gender category contrary to their understanding of self,” such a constitutional interpretation would allow the law to “defer to the individual's gender categorization because [t]he most accurate way to define . . . gender is to allow [the individual]

204. Brammer, *supra* n. 167, at 1006. Because the government would still have this leeway to regulate sex/gender/sexual actions with laws of general applicability, the fear that the disestablishment and free exercise of sex/gender/sexuality would allow for the legalization of a “parade of horrors” such as bestiality and pedophilia is unwarranted. The most basic of such generally applicable laws that would regulate sex, gender, and sexual preference would be laws punishing rape. Requiring legal neutrality in regard to sex, gender, and sexual preference certainly would not prevent the government from regulating harmful behaviors that happen to involve sex, gender, or sexuality. As the Supreme Court has stated in the context of religious freedom,

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

Smith, 494 U.S. at 879 (quoting *Minersville Sch. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594–595 (1940)).

to assert it.”²⁰⁵ Similarly, individuals would be allowed to assert their sex and sexual identities without the fear of legal repercussions. The free exercise of sex/gender/sexuality would, along with structural protections of disestablishment, highlight the ideals of pluralism, diversity, tolerance, and benign variation, as well as the cultural discussion that accompanies them by protecting individuals’ religious freedom.

3. Possible Effects of Disestablishment/Free Exercise of Sex/Gender/Sexual Beliefs

If disestablishment and free exercise of sex/gender/sexual beliefs were achieved, “questions of what is normatively proper gendered conduct for men as distinguished from women, how many sexes there are, or how to distinguish the sexes, would be beyond the authority of the state . . . [and] left instead to the diverse resolution by individuals and groups in the private realm.”²⁰⁶

Legal documentation would no longer be able to categorize people based on their sex or gender. Children would not be assigned a sex on their birth certificate, allowing children—including but not only intersexed children—the possibility of choosing their own sex/gender.²⁰⁷ Simply removing this categorization would not automatically change the social norms that label children boys and girls, but it would allow for that change. Transsexuals would no longer face difficulties when trying to change their legal documentation to match their physical sex.²⁰⁸ For example, “even if the government believes . . . that a transgender woman (say, Karen), who was a designated male at birth, is really still a man perhaps despite sex reassignment surgery, it ought not be able to make Karen affirm that she is male” with legal documentation such as her driver’s license and passport.²⁰⁹

Marriage laws, including DOMA and state constitutions, could no longer validly distinguish between heterosexual and

205. Benson, *supra* n. 42, at 59 (alteration in original).

206. Cruz, *supra* n. 173, at 1050.

207. See *supra* pt. III(B) (discussing the legal rights of intersexed children).

208. See *supra* pt. III(B) (discussing the difficulty that transsexuals have changing their legal documentation to match their self-identity).

209. Cruz, *supra* n. 173, at 1056.

same-sex couples.²¹⁰ Indeed, “it seems plain that with the mixed-sex requirement [for civil marriage], government is taking sides in the debate about the necessity of certain gendered aspects of human relationships for personal happiness and social stability.”²¹¹ The very definitions of opposite-sex and same-sex marriage, because they are based on the concepts of binary sex/gender, would no longer make sense under the law.²¹² Without laws against same-sex marriage, transsexual marriage would no longer be legally problematic because distinguishing between people simply on the basis of their sex, gender, or sexuality would be impermissible.

Under Title VII, “sex” would cover sex/gender/sexual belief systems generally as it covers religion generally—the government would not legitimately be able to single out particular sex/gender/sexual beliefs and choose whether to protect them from discrimination.²¹³ Distinguishing discrimination based on transsexualism or sexual orientation from “sex” discrimination would no longer be valid because sex, gender, and sexuality would be understood as overlapping categories that all warrant protection as sex/gender/sexual beliefs.

With changes like these, the tension between personal and legal definitions of sex, gender, and sexuality—as well as the tension between the actual overlap and the legal separation of sex, gender, and sexuality—would dissipate. The weight of the law’s authority would be lifted from personal definitions and public discussions of sex, gender, and sexuality. People would have the freedom to identify their sex/gender/sexual beliefs without the government’s interference. Pluralism would be the ideal, if not the reality.

210. *See supra* pt. III(B)–(C) (discussing transsexual and same-sex marriage). Even without sex-specific marriage laws, private citizens such as clerics could refrain from recognizing marriages that they disagreed with—heterosexual, same-sex, or otherwise. Cruz, *supra* n. 173, at 1084.

211. *Id.* at 1081.

212. *See supra* n. 9 (describing the necessity of a binary gender model for the concepts of heterosexuality, homosexuality, and bisexuality).

213. *See supra* pt. III(B) (discussing sex discrimination jurisprudence under Title VII). Under Title VII, “religion” is defined generally and “includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j).

VI. CONCLUSION

If pluralism in sex/gender/sexuality were the ideal in the United States—like religious pluralism has been since the nation's founding—stories like Kate Bornstein's would have a better chance of being heard and understood.²¹⁴ The potent concepts of queerness and pansexuality might gain acceptance for sex/gender/sexual nonconformists. Stories like Bornstein's are already being heard, but within the biased framework that the authority of the law has created. If sex/gender/sexual beliefs were treated like religion is treated under the Religious Clauses of the Constitution, that biased framework would be removed, and a more open cultural discussion could begin to take place.

Ultimately, sex/gender/sexual nonconformists and those who are opposed to sex/gender/sexual nonconformity for religious reasons should join together to oppose government interference in this cultural discussion because of the similarities between sex/gender/sexual belief systems and religion.²¹⁵ As the history of discrimination and prejudice against religious minorities suggests, reality will not always be consistent with the ideal of pluralism, no matter how deeply valued. To be sure, allowing for the disestablishment and free exercise of sex/gender/sexuality would not create acceptance of all sex/gender/sexual belief systems instantly, if ever—the nation is still struggling with religious pluralism and acceptance of minority religions. But, if pluralism of sex/gender/sexual belief systems were the ideal, people on both sides of the discussion could push for cultural change by educating others. Then, when cultural shifts take place, they would be the product of people's changing attitudes, not government coercion.²¹⁶

214. See *supra* nn. 1–17 and accompanying text (detailing Bornstein's story of his life as a self-proclaimed "gender outlaw").

215. Drew, *supra* n. 101, at 313–314.

216. *Id.*