Bisexual Jurisprudence: A Tripolar Approach to Law and Society

Rachel Haynes
City University of New York School of Law

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Current law and society are based on bipolar categories: black or white; gay or straight; male or female; able or disabled. These bipolar categories force individuals to choose one category and thereby create a seemingly either/or based identity: you are either black or white; gay or straight; male or female; able or disabled. Bipolar categories underscore the reality of the varied compositions that create an individual’s identity. Critics of bipolar categories have called for their restructuring in the hopes of creating more inclusive categories that reflect people’s true identities.

One such critic of bipolar categories is Ruth Colker. Colker’s latest book, Hybrid: Bisexuals, Multiracial, and Other Misfits Under American Law, calls for changing current legal categories. Central to Colker’s book is the term “hybrid,” which Colker uses as a description of people who lie between bipolar legal categories—such as bisexuals, transsexuals, and people with multiracial backgrounds. Colker seeks to incorporate human hybrids into the legal world by improving and adding to existing legal categories.

While Colker’s book begins a critique of bipolar categories and their legal and social implications, it falls short of positing a transformative reconstruction of existing bipolar categories. Colker’s suggestion of adding new and improved legal categories ignores the ramifications

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2. “Human hybrids, however, are not produced by artificial technology or genetic mixing, but by law and society. When the law creates such bipolar categories as homosexual and heterosexual, white and black, able-bodied and disabled, it leaves a gap between categories. These hybrids befuddle courts, because the existing categories do not fit them. The time has come to incorporate human hybrids into the legal world.” Colker, supra note 1, at xii.
of adding new categories to a fundamentally flawed system. The addition of a third category could potentially create a tripolar system that is no more representative or liberating than the present bipolar system.

Part I of this Review will briefly assess the principal arguments in Colker’s book. In Part II, Colker’s book will be situated within the larger currents of the discussion concerning bisexuality and the arguments for a bisexual jurisprudence. Part III critiques Colker’s concept of a bisexual jurisprudence as applied to sexual hybrids from the standpoint of an identity, as well as a legal, skeptic. Part IV will sketch out some important implications for the advancement of a bisexual jurisprudence as well as question the need for a bisexual jurisprudence. This review concludes that the addition of a bisexual jurisprudence, like the one Colker has fashioned in her book, is neither transformative nor liberating for individuals with varied identities. Instead, the idea of a pansensual jurisprudence that seeks to deconstruct existing identity categories, as opposed to adding new categories, is a more radical and potentially transformative vision of our current legal and social system.

I. An Overview of Hybrid

The defining feature of Hybrid is Colker’s repeated argument that legal categories are indispensable, and that we should consider how such categories can be improved and not destroyed. Colker argues that improved categories would help marginalized individuals overcome subordination through the development of positive self-identities as well as through ameliorative programs, like affirmative action, that are more representative of multiple identities. Her agenda is twofold: Colker aims to critique existing categorization schemes while offering constructive categorization schemes for the future. Colker advances her critique through seven chapters treating bi jurisprudence, sexual orientation, gender, race, disability, bipolar injustice, and the United States Census, respectively. Colker’s categorical critique of various hybrid legal categories demonstrates how law based on a bipolar

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3. I use the term “identity skeptic” to refer to thinkers who are critical of conventional identity categories and adopt legal approaches to remedy discrimination based on those categories. “Legal skeptics” favor cultural remedies and are skeptical of the efficacy of solutions which are grounded in legal rather than cultural change.

4. See Colker, supra note 1, at 6.
framework denigrates hybrids and renders them invisible. Colker’s categorical critique does not extend to critical reflection on the amendments she proposes.

Colker’s attempts to reform are informed by a belief that categories have value as a form of self-identity. Colker argues that living in a society which subordinates people based on their minority status makes it imperative to have labels that are part of a positive self-identity. Colker also believes categories are crucial for political and instrumental purposes because they can be refined to aid ameliorative programs in creating social equality. However, by focusing on improving existing categorical systems, Colker sacrifices the liberatory agenda of freeing current legal notions of identity and instead perpetuates the current legal system.

Colker’s chapters on the legal status of bisexuals establish her claim that a bi perspective is necessary. In chapter two of Hybrid, Colker argues that general ignorance surrounding bisexuality allows society to perpetuate the stereotype of sexuality as rigidly dichotomous rather than existing along a fluid spectrum. Bisexuality, in theory and in practice, could go beyond focusing on an individual’s sexual conduct toward an attempt to understand the feelings motivating such conduct. Since conduct is outwardly visible, people would need to verbalize their feelings regarding sexuality so that society would be able to move beyond a “narrow, noncontextual, and rigid understanding of sexuality.” In addition to breaking dichotomous sexuality conceptions through the verbalization of feelings, a bi perspective would also afford an opportunity for individuals, and society, to find an organizing principle other than biological sex to define sexual attractiveness. Bisexuality, in Colker’s assessment, disconnects gender and sexual preference, thereby freeing sexual desire of gender.

5. See Colker, supra note 1, at 7.
6. See Colker, supra note 1, at 7.
7. See Colker, supra note 1, at 30.
8. See Colker, supra note 1, at 30 (quoting Martin S. Weinberg et al., Dual Attraction: Understanding Bisexuality 27–29 (1994)). In the passage to which Colker refers, Weinberg reports, “instead of organizing their sexuality in terms of the traditional gender schema, bisexuals do so in terms of an ‘open gender schema,’ a perspective that disconnects gender and sexual preference, making the direction of sexual desire (toward the same or opposite sex) independent of a person’s own gender (whether a man or a woman)."
Choosing a bi perspective would enable people to “choose not to choose” instead of being forced into choosing an existing static and bipolar category. Colker cautions, however, that “choosing not to choose” still embraces the category of bisexuality, which may not fully reflect the content of an individual’s sexuality. To render an individual’s sexuality fully visible, Colker suggests storytelling, which would reflect an individual’s changing life experiences in ways that static categories cannot. Where it is possible, in addition to or instead of categorization, Colker emphasizes the importance of storytelling.\(^\text{10}\)

The inclusion of a bi perspective serves the two purposes of Colker’s constructive categorical schemes. The naming of bisexuality serves her first purpose of positive self-identity. A bi perspective would broaden people’s understanding of human sexual experiences through the acknowledgment of the existence of a fluid spectrum rather than rigid bipolar categories. The bi perspective, when applied to the second purpose of improving ameliorative programs, may encourage the intracategorical investigation of identity categories and the construction of bipolar injustice in society.\(^\text{11}\) Colker cautions, however, that

\(^{10}\text{Colker suggests that storytelling would make individuals who lie between sexual categories more visible and could reflect an individual’s changing life experiences in ways that a category could not. However, because Colker finds categories useful for constructive purposes, storytelling should be used to supplement, not replace, categories. See Colker, supra note 1, at 19–20.}\)

\(^{11}\text{Colker has stated:}\)

In applying a bi perspective to race, I have asked myself why critical race theorists have not tended to ask the intrasection questions that are central to my perspective as a bisexual. The answer, I believe, depends upon the difference between the constructions of our sexual orientation and our race. One of the first components of our identity is race: are we African-American? Caucasian? Asian-American? We consider it to be a given, an immutable fact. The significance of that racial identity may differ but it is something we ‘know’ like most of us ‘know’ our gender. Our sexual orientation is something that we discover as we grow older. In particular, people who have come to identify with a minority sexual identity have had to grapple with the recognition that they have moved away from the expected category, heterosexuality, to another category such as homosexuality or bisexuality. Intracategorical movement is therefore a typical experience for people who are members of a minority sexual-orientation category but is not a typical experience for people who are members of a minority racial category.

Colker, supra note 1, at 37–38.

Colker goes on to discuss how a bi perspective may enhance our understanding of race through the application of an intracategorical investigation, which would look at whether or not individuals of certain races belong in a monoracial category or a
the implications of a bi perspective on distinctly different categories, like race and disability, will vary from one to the other. Because of the varied implications of an applied bi perspective, the need to be attentive to context is crucial.  

Having raised the argument that a bi perspective is necessary, Colker explores the implications of such a perspective in the varied contexts of sexual orientation, gender, race, disability, bipolar injustice, and United States Census policies. The chapters discussing transsexuality and the current controversy involving the United States Census present a window into the theory behind applying a bi perspective to hybrid categories. Although the categories of transsexuality and the United States Census are not wholly representative of the contents of Colker’s book, they do present provocative and compelling applications of a bisexual theory.

In her third chapter, Colker considers a bi perspective on transsexuality and gender hybrids. Gender hybrids challenge the belief that biology is destiny by playing with “mother nature” or by questioning gender roles assigned to each biological sex. Although society represses gender hybrids, they exist in the forms of lesbians, gay men, bisexuals, transsexuals, and transvestites. The price for being a gender hybrid can be the loss of child custody, discharge from employment, and even imprisonment.

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1. Colker emphasizes attention to context because the implications of a bi perspective are not “monolithic.” “A bi perspective on sexual orientation and gender may be very different from a bi perspective on race or disability.” Individuals identifying as bisexual will generally be making statements about their feelings or actions towards another individual. Rarely will a bisexual identity reflect a statement about his or her discernible physical appearance or family history. Similarly, applying a bi perspective to gender will usually reflect a statement about feelings, attitudes, or actions. In contrast, applying a bi perspective to race can be about identity or about one’s ancestry.

2. Colker, supra note 1, at 38.

3. See Colker, supra note 1, at 91.

4. See Colker, supra note 1, at 87.

5. Colker uses the recent Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995), to illustrate how the hybridization of gender can result in gay and lesbian parents losing their children. In Bottoms, the Virginia Supreme Court ruled that Sharon Bottoms was not fit to mother her son because of her identity, and status, as a lesbian. Colker states the decision was a form of “gender policing” where the Court did not approve of Sharon Bottoms teaching her son to call her female lover, April Wade, “da da.” Colker
Colker uses the case of Karen Frances Ulane to illustrate the difficulty of existing as a gender hybrid in a bipolar society. Ulane, a pilot for Eastern Airlines, took a leave of absence to undergo sex reassignment surgery. Eastern Airlines, unaware of her transsexuality until after her surgery, discharged Ulane who subsequently brought suit under Title VII of the Civil Rights Act of 1964. Although the trial court found in favor of Ulane, the Sixth Circuit Court of Appeals reversed, finding that Eastern Airlines discriminated against Ulane because she was a transsexual, and not because she was a female.

Courts have refused to protect individuals who fail to dress in accordance with socially correct notions of how “men” and “women” dress. Colker argues that Title VII should recognize discrimination on the basis of appearance and clothing as covered by the statute. Rules that require women to wear skirts and men to wear pants force individuals to conform to rigid gendered standards. Forbidding individuals to cross-dress serves in two ways to gender police socially constructed rules regarding appearance for men and women. First, gender policing promotes a bipolar understanding of what is appropriate attire for men and women. Women look “appropriate” when they wear a skirt, pantyhose, and makeup. Men look “appropriate” when they wear pants, a tie, and no makeup. Second,
gender policing of appearance perpetuates sexual harassment of women at work by requiring women to display themselves in ways which facilitate their objectification.\textsuperscript{21}

Unfortunately, courts have held that the mere fact that an employer imposes different rules for men's and women's appearances is not enough to constitute liability under Title VII. One must show that the rules for women are demeaning or constitute sexual harassment to prevail under Title VII.\textsuperscript{22} Colker argues that courts do not often use Title VII to rid workplaces of gender differentiation because they are not comfortable challenging rules that differentiate based on gender.\textsuperscript{23}

Rules promoting gender differentiation permeate society. Gender hybrids, such as transsexuals, provide good information about gender policing because they have lived in both gendered worlds. For the gender police to be less effective, Colker asks her readers to be more attentive to the gender differentiation in their own lives.\textsuperscript{24} Colker also insists that courts strip Title VII of its moral code and let it reach out to protect men and women from workplace sex discrimination or sex differentiation, as well as to protect gender hybrids, like transsexuals, who face explicit sex discrimination.\textsuperscript{25} Applying a bi perspective would undercut the assumption that biology is destiny and it would allow

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\item[(S.D.N.Y. 1974).] Colker claims the Court's acceptance of traditional gendered dress for weddings reinforces the heterosexual institution of marriage. See Colker, supra note 1, at 110.
\item[21.] See EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981). Plaintiff, Margaret Hasselman, was a required to wear sexually revealing outfits as a lobby attendant. As a result of her sexually revealing attire, Hasselman was subject to sexual propositions as well as lewd comments and gestures. Hasselman ultimately prevailed on a sexual harassment theory by showing a connection between mandated appearance rules and sexual discrimination. See Colker, supra note 1, at 110–111.
\item[22.] See Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979) (holding that it is demeaning for women to be required to wear uniforms while men are only required to wear customary business attire); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263 (S.D. Ohio 1987) (holding that it is demeaning for female sales clerks to be required to wear a "smock" and for male sales clerks to be required to wear business attire consisting of pants, shirt, and a tie).
\item[23.] See Colker, supra note 1, at 111.
\item[24.] See Colker, supra note 1, at 118.
\item[25.] Protection for gender hybrids under Title VII would help provide ameliorative treatment, including the end of coercion to maintain an abandoned gender identity. See Colker, supra note 1, at 115.
\end{itemize}
individuals to play with "mother nature," or at least question societal gender roles assigned by biological sex.\textsuperscript{26}

Colker's last chapter in \textit{Hybrid} discusses the current controversy concerning the United States Census, which illuminates the central themes of her book.\textsuperscript{27} She examines the development of the Census and how it artificially constructs objective measurements of complex racial identities. The first United States Census, taken in 1780, inquired whether individuals were free white males over sixteen, free white males under sixteen, free white females, all other free persons, or slaves.\textsuperscript{28} Beginning in 1870, the Census tried to gather information about free men of color by adding racial categories.\textsuperscript{29} Gradually, the Census changed and added different racial categories, culminating in Directive No. 15, issued in 1977, which provided for racial categories used on all government recordkeeping.\textsuperscript{30}

Fifteen racial options were used in the 1980 and 1990 Census.\textsuperscript{31} If individuals responding to the Census did not check one of the fifteen categories they could check the category of "other" and write in their own racial classification.\textsuperscript{32} However, the category of "other" has never been a separate category because, when individuals write in their

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\item \textsuperscript{26} See Colker, supra note 1, at 91.
\item \textsuperscript{27} "The point of this book is not that we should abandon categories. A legal system without categories is impossible, and a society without a legal system invites anarchy. If one thing is clear about American society, it is that it always will be dependent upon a legal system that relies heavily on categories." Colker, supra note 1, at 233. The United States Census, Colker argues, illustrates the main tenets of her book because of its necessary reliance on categories and the move to change some of those categories to make them more representative of individuals.
\item The Constitution requires an enumeration of all "free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. 2, § 1.
\item See Colker, supra note 1, at 235 (quoting Hyman Alterman, \textit{Counting People: The Census History in History} 276 (1969)). The 1870 racial categories included "black" (for people of more than three-fourths African descent), "quadroon" (one-quarter to three-eighths African descent), and "octoroon" (one-eighth or less of any African descent). These determinations were made solely on the basis of personal observation; no questions were asked to the respondents concerning their race.
\item See Colker, supra note 1, at 237.
\end{itemize}
own racial category under "other," their response is reassigned to one of the listed racial classifications so that the Census respondents are still classified as monoracial.33 Before 1980, a mixed-race person was assigned the father's race; however since 1980, a mixed-race person is assigned the mother's race.34

A variety of rules governs how people who identify as multiracial are classified under existing Census categories.35 The current proposal to improve Directive No. 15 is to add a separate category of "multiracial."36 The controversial proposition to add a "multiracial" category has been debated within African-American communities. Some African-American organizations argue that since many blacks who have been in the United States for several generations have some white ancestry, a multiracial category could eradicate the monolithic Census category of "black."37 Other African-American organizations that represent parents in multiracial marriages favor a multiracial category.38 They base their multiracial identity not on a lineage of slave masters' rape of black women but on consensual interracial marriages. Parents in multiracial marriages may feel that they can better construct their children's identities by identifying them as multiracial instead of forcing them to choose one parent over the other in a monoracial designation.39

33. See Colker, supra note 1, at 237.
34. See Colker, supra note 1, at 83.
35. People who identify as biracial or multiracial are left in the "other" racial classification. People who identify as "black-white" are designated as "black," while people who identify as "white-black" are designated as "white". Lee, supra note 31, at 83-84.
36. See Colker, supra note 1, at 238–39.
37. See Colker, supra note 1, at 241–42 (quoting Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 Stan. L. Rev. 957 (1995)). Ramirez wrote:

Creating a multiracial category would dilute the statistical strength of established minority groups. As the number of people claiming multiracial identity increases, membership in existing minority groups would necessarily decrease. The statistical change would have an enormous impact on matters immensely important to minority communities: electoral representation, the allocation of government benefits, affirmative action, and federal contracting rules.

Ramirez, supra at 968.
38. See Colker, supra note 1, at 243.
39. See Colker, supra note 1, at 243 (citing Carlos Fernandez, President, Association of MultiEthnic Americans, Congressional Hearing 127 (June 30, 1993)).
Notwithstanding the debate within African-American communities over a “multiracial” category, Colker points out that the problem inherent in adding another racial category to the Census is that it still may not accurately reflect an individual’s racial identity. To overcome this and other problems, Colker proposes asking three questions: “1) What is your self-identity?; 2) If your self-identity is different than your community identity, what is your community identity?; 3) What are your countries of origin of your parents, to the extent that you are aware of them?”

Colker argues that these three questions, which call for a separation of self-identity, community identity, and ancestry, may allow for a recognition of people’s multiracial backgrounds while respecting self-identity and understanding the history of oppression. These types of questions would allow for a movement towards a multiracial society.

Colker concludes *Hybrid* by arguing that separating out questions of self-identity, community identity, and ancestry, can provide insights not only for the United States Census, but also for other categorization systems utilized for gender, sexual orientation, and disability. Her proposal challenges current legal standards, while still supporting the idea of legal categories. Colker invites her readers to support the transformation of existing legal categories while keeping the concept of legal categorizations intact, because a legal system without categories would invite anarchy.

II: THE CURRENT DISCUSSION REGARDING BISEXUALITY

Within the past decade, the movement for social and political recognition of bisexuality has grown and become increasingly visible. The current bisexual community and movement, which began in the mid-seventies, flourished in the early eighties with the organization of social, support, and educational groups for bisexuals in major cities and towns. Some of these groups included the Boston Bisexual...
Women's Network, founded in 1983, and the East Coast Bisexual Network, founded in 1985. With the social and political organization of bisexuals came a growing body of literature with bisexuality as its focus. Two important anthologies were Bi Any Other Name: Bisexual People Speak Out, and Closer to Home: Bisexuality and Feminism. In both anthologies, the writings rejected the notion that individuals had to choose one sexuality. Instead, the two books gave a voice and a forum to bisexuals attempting to redefine the world through their visions of sexuality and identity while demanding to be accepted on their own terms.

Like Colker, numerous writers in Bi Any Other Name and Closer to Home acknowledge that the current definition of sexuality is based on binary oppositions. In advocating a bisexual theory, writers in the two anthologies compare and contrast the current static definition of sexuality, where women loving women excludes loving men and men loving men excludes loving women, to a bisexually defined sexuality that does not strive for stasis or consistency. Bisexuality is a sexuality, arguably, that is not threatened by inclusion, but is inclusive in and of itself.

44. See Bi Any Other Name: Bisexual People Speak Out 359–67 (Loraine Hutchins and Lani Kaahumanu eds., 1991) [hereinafter Bi Any Other Name] (providing one of the first histories of the bisexual movement).


46. Bi Any Other Name, supra note 44; Closer to Home: Bisexuality and Feminism (Elizabeth Reba Weise ed., 1992) [hereinafter Closer to Home].

47. See Closer to Home, supra note 46, at xv.

48. See, e.g. Kathleen Bennett, Feminist Bisexuality: A Both/And Option for an Either/Or World, in Closer To Home, supra note 46, at 205; Brenda Marie Blasingame, The Roots of Biphobia, in Closer To Home, supra note 46, at 47; Margaret Mihee Choe, Our Selves, Growing Whole, in Closer To Home, supra note 46, at 22; Lucy Friedland and Liz A. Highleyman, The Fine Art of Labelling: The Convergence of Anarchism, Feminism, and Bisexuality, in Bi Any Other Name, supra note 44, at 285; Ruth Gibian, Refusing Certainty: Toward a Bisexuality of Wholeness, in Closer To Home, supra note 46, at 5; Lisa Orlando, Loving Whom We Choose, in Bi Any Other Name, supra note 44, at 223; Carol A. Queen, The Queer in Me, in Bi Any Other Name, supra, note 44, at 17; Amanda Udis-Kessler, Closer To Home: Bisexual Feminism and the Transformation of Hetero/Sexism, in Closer To Home, supra note 46, at 183; Dvora Zipkin, Why Bi?, in Closer To Home, supra note 46, at 55.

49. See e.g. Gibian, supra note 48, at 7. Ruth Gibian goes on to point out that bisexuality does not annihilate differences but encourages them, because it is a sexuality that is
Both books demonstrate the bisexual community’s struggle to conceptualize bisexuality and its ideological agenda. Part of the struggle is over whether the bisexual movement should adopt a liberationist ideology, like the black, women’s, and gay and lesbian movements, or if the bisexual movement should break with ideological and political traditions to advance a radical ideology regarding gender and sexuality. The difference in the two approaches can be likened to groups with a liberationist agenda accepting the “pie” that constitutes the current legal system and working towards acquiring a piece of that pie, while other groups promoting a radical agenda do not like the pie that is being offered and will work to transform that pie.

Colker’s proposal to change the existing legal system by including more categories is a decidedly liberationist approach through its acceptance of the status quo, contingent upon a few minor changes. Many other bisexual writers in the two anthologies, particularly those in Closer to Home who are writing from an explicitly feminist standpoint, reject the liberationist approach Colker’s book advocates. These writers do not want a piece of the pie; instead, they want to transform the pie that is being offered.

The political struggle mirrors the complexity of bisexuality and the multifaceted oppression of bisexuals. Before the bisexual community can advocate for a specific legal system, bisexuals need to decide who they are in order to describe the nature of their oppression. In looking towards a bisexual jurisprudence, it is important to understand the foundations and assumptions upon which a jurisprudence can be built. These foundations and assumptions strike at the heart of enigmatic identity questions facing bisexuals. Bisexuals can describe

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not threatened by inclusion but becomes larger because of inclusion. “Desire itself becomes multiplicitous. It does not try to stop the top; it is the top.” Gibian, supra at 7.

50. See Paula Rust, Who Are We and Where Do We Go From Here? Conceptualizing Bisexuality, in Closer to Home, supra note 46, at 281.

51. See Closer to Home, supra note 46, at xi-xii.

52. See Rust, supra note 50, at 282.

53. See Rust, supra note 50, at 282.

54. “In short, our goals depend upon who we conceive ourselves to be. For bisexuals, defining who we are is particularly problematic because according to current sexual ideology we do not even exist, much less have an identity. By the same token, however, starting without a predetermined identity seems to allow us unlimited possibilities for defining who we are and what we are about.” Rust, supra note 50, at 282.
their identity in a variety of ways. Some describe it as dichotomous. This conceptualization of bisexuality, however, only serves to reinforce the hegemonic heterosexual/homosexual split, ultimately denying an independent and legitimate category of bisexuality.

Others conceive of bisexuality, and sexuality in general, as a "continuum, spectrum, or continuous scale of sexuality" where the lines are blurred between gay/lesbian, straight, and bisexual. This approach to bisexuality, although more fluid, is still predicated upon a binary approach to sexuality which places heterosexuality and homosexuality at opposite ends of a continuum. These "poles" serve as a constant reminder of the framework within which an individual's sexuality is being evaluated.

A third approach to sexuality conceptualizes bisexuality as "qualitatively different from heterosexuality and homosexuality," defining bisexuality as a third and distinct category of sexuality. This trichotomous approach to bisexuality validates all three categories as legitimate and independent forms of sexual orientation. A trichotomous approach, however, still depends upon the dominant heterosexual/homosexual paradigm through its acceptance of sexuality as characterizable by categories through its addition of the category of bisexuality.

Colker can be considered a "trichotomist" in her conceptualization of bisexuality insofar as she adds bisexuality as a third component of the already existing legal categories of sexual identity. What Colker fails to recognize in her conceptualization of bisexuality is the influence her conceptualization has on the jurisprudence she is attempting

55. See Rust, supra note 50, at 289-90. Rust explains that a dichotomous conceptualization of bisexuality can be described in two different ways. The first conceptualization views sexuality as a dichotomy where "heterosexuality and homosexuality are clearly distinct and exhaustive categories and bisexuality is nonexistent." The second conceptualization also views sexuality as dichotomous, recognizing that bisexuality exists but defining it as "a combination of heterosexuality and homosexuality."

56. Rust, supra note 50, at 293.

57. Rust, supra note 50, at 290. People "who endorse this model typically ... draw lines somewhere between straight, bisexual, and lesbian/gay ... The location of these lines varies: some ... define everyone as a bisexual except those who fall at the extreme endpoints of the continuum, whereas others would call bisexual only those who fall at the exact midpoint."

58. Rust, supra note 50, at 290.

59. People who view sexuality as trichotomous generally think of bisexuality as a third form of sexuality. People define it this way by saying "I do believe that this category exists legitimately" or "It's a valid orientation." Rust, supra note 50, at 291.
to advance. Although Colker advocates for the existence of an independent conceptualization of bisexuality, she still uses the heterosexual/homosexual paradigm as the building tools for her jurisprudence. Her trichotomist approach to sexuality will always be situated within the dominant paradigm of heterosexuality and homosexuality. Colker does not attempt to change the language surrounding the discussion about sexuality because she is not asking for systemic change, just systemic modification. Under Colker’s approach, it would be impossible to describe a bisexual experience without referencing either heterosexuality or homosexuality.60

III: CRITIQUING COLKER

Colker’s suggested jurisprudence relies too heavily on an identity skepticism of the law, thereby failing to acknowledge the influence that cultural transformation can have on the law. In addition, absent from Colker’s book is a legal skepticism regarding her bisexual jurisprudence. Colker ignores nonlegal alternatives that could provide liberation and cultural transformation where a tripolar approach to legal identity categories cannot.

A. Identity Skepticism

Identity skeptics, while adopting legal approaches to remedy discrimination, are critical of conventional identity categories, fearing that the categories may undermine equality and create negative cultural consequences for groups attempting to seek protection under those laws. There are two major strands of identity skepticism: liberal and critical. Liberal identity skeptics believe that universal principles should guide equality theory. Universalism places the individual at the center of social analysis. It recognizes a variety of individual differences but rejects group-based differences in favor of a universal concept of humanity where group characteristics are unimportant.61

60. Although Colker does conceptualize bisexuality as a form of sexuality distinct from heterosexuality and homosexuality, she does not give a different cultural meaning to the word or its context (which is the current legal system). Without these changes, bisexuality will have to be referenced as one of the three “valid” forms of sexuality.
Critical identity skeptics, however, view traditional identity categories as insufficient in their ability to reflect the numerous group-based identity characteristics. Critical identity skeptics reject liberal universalism, favoring an approach which emphasizes the influence group-based differences have on individuals’ lives and on society. “Critical identity skeptics . . . make two principal claims: that identity categories are born from inequality and . . . reinforce inequality,” and that identity categories further reinforce inequality by their fixation on a particularly categorized identity.

Critical identity skeptics are particularly concerned with equality laws reproducing the social hierarchies from which they were created. Identity categories are constructed by those in a position of dominance and, therefore, reflect the prevailing views of those in power, who are rarely individuals from oppressed groups attempting to gain anti-discrimination protection for themselves and others like themselves. Colker, while utilizing an identity-based categorical approach to legal reforms, does not address these criticisms throughout her book.

Colker also fails to address the irony of her criticism of the current bipolar legal categories and her adoption of tripolar legal categories. The addition of a third category of bisexuality to the current legal system is strikingly similar to current bipolar legal categories in that it approaches identity categories through group-based identity characteristics constructed from the same patriarchal legal system that created and perpetuated the bipolar categories.

Colker never challenges the existing power structure that created bipolar categories, which would be the same power structure creating and interpreting a third category. While Colker argues the advantages of some individuals, including bisexuals, being better represented by a third category, she does not address the inevitable essentialism that will flow from such a third category. Colker’s third category, though offering a new option, would still reduce individual differences to an unstated norm or paradigmatic type, therefore replicating the same injustices Colker is attempting to remedy.

62. See Schacter, supra note 61, at 700.
63. See Schacter, supra note 61, at 700.
64. See Schacter, supra note 61, at 705.
65. See Schacter, supra note 61, at 705.
66. See Schacter, supra note 61, at 705.
B. Legal Skepticism

Where identity skepticism focuses on the cultural consequences of anti-discrimination law, legal skepticism focuses on cultural alternatives to legal measures. There are liberal and critical strands of legal skepticism as well. A liberal approach promotes an individual's role and responsibility in changing the world and looks principally to culture and civil society, not the law, to change social injustices. Many liberal legal skeptics want to limit the government's reach into the private sphere, regardless of the extent of the injustice. Critical skeptics, particularly those arguing for gay civil rights, focus on the power of individual cultural assimilation by attempting to open up cultural institutions, such as marriage, to create equality for gay and lesbian people.

Critical legal skeptics share with liberal legal skeptics a distrust of the law to bring about significant social change. The two groups disagree, however, on the question of culture. Liberal legal skeptics advocate equality through individual assimilation into existing cultural institutions, while critical legal skeptics advocate a transformation of culture or the "de-centering" of the law.

Central to critical legal skeptics is the belief "that law cannot autonomously effect fundamental social change." Although many critical legal skeptics advocate the passage of anti-discrimination laws, they would supplement such laws by shifting the movement's focus to cultural transformation. Critical legal skeptics believe that "the proliferation of new and diverse representations of historically

67. See Schacter, supra note 61, at 709-11.
68. See Schacter, supra note 61, at 712.
69. See Schacter, supra note 61, at 713-14.
70. See Schacter, supra note 61, at 714-17; see also Carol Smart, Feminism and the Power of Law 5 (1989). Smart defines "de-centering" the law as:

By this I mean that it is important to think of non-legal strategies and to discourage a resort to law as if it holds the key to unlock women's oppression. I include in this 'resort to law' not only matters of direct policy proposals but also matters of scholarship.... I am not suggesting we can simply abolish law, but we can resist the move towards more law and the creeping hegemony of the legal order.

72. See Schacter, supra note 61, at 714.
marginalized groups." Critical legal skeptics look to this strategy because of their belief that current cultural representations shape societal views about subordinated groups, and therefore constitute and support inequality. Subordination suffered by marginalized groups stems from a variety of cultural sources, including, but not limited to, political, legal, economic, sexual, racial, and family systems. Changing cultural representations would change the roots of knowledge, thereby changing social knowledge. This is often called "oppositional cultural practice" which seeks to use self-defined representations and ideas about oppressed groups, instead of the dominant culture's representations and ideas about oppressed groups. Law cannot stand outside of culture and independently change it. Culture is the key to change because of the varied ways in which it shapes what people know and believe.

Colker ignores the importance of cultural change and does not attempt to explicitly advocate for nonlegal strategies. Instead, Colker accepts current legal categories and advocates the addition of more categories. She seems to assume that the addition of hybrid categories will help to alleviate both legal and societal discrimination by providing legal recognition, and therefore societal validation, of an individual's identity. Colker makes no attempt to challenge prevailing cultural representations of hybridized individuals apart from changes she advocates for the legal system. Throughout Hybrid, Colker simply seeks to remedy bipolar injustices with a tripolar approach, relying on the dominant power structure of the current legal system, rather than attempting to challenge cultural constructions of identity.

IV. GOING BEYOND A BISEXUAL JURISPRUDENCE

Both identity skepticism and legal skepticism, rooted in vastly different theoretical premises, offer provocative questions regarding how an identity-based jurisprudence, like a bisexual jurisprudence, should be constructed. Both skeptics, albeit for different reasons, regard

73. Schacter, supra, note 61, at 716.
74. See Schacter, supra note 61, at 716.
76. See Schacter, supra note 61, at 717.
77. See Colker, supra note 1, at 6–8.
identity categories as problematic, with arguments over cultural consequences grounding the debates. Both skeptics seek the same result: liberation and equality for oppressed groups. Colker shares this goal in her identity-based approach to solving inequality.

However, Colker cannot reach her goal without advocating for cultural change while simultaneously advocating for legal change. Without cultural change, Colker's new categories are likely to reproduce the patriarchal system from which they were created. Adding new categories simply masks the root of the inequality, which is a patriarchal system perpetuating the dominance of one group over another through binary approaches to group-based identity. The addition of a third category will not shift power from the dominant group, and equality efforts will be undermined unless cultural change occurs.

Some legal and cultural critics have attempted to create a jurisprudence known as Queer jurisprudence to achieve the goals of liberation and equality for oppressed groups. A Queer jurisprudence has several goals. The first goal is ensuring the survival, and success, of sexual minorities under the current rule of law. The second goal is to make sexual minorities visible to the law by weaving the experiences of


Queer,' as a reclaimed and reconceptualized term, therefore seems to best capture the past, present, and future of sexual minority identities, persons, and lives: that it reminds us of a past never to be repeated is a painful but salutary effect; that it brings to mind how women and people of color have been ignored (even) by white gay men is a needed reminder; that it evokes at once the progress we have made, and the progress we have yet to make, has an inspiring yet tempering effect; that it combines history with hopes creates a constructive tension that should charge Queer theorizing for some time to come. Ideally, Queer critiques can and should benefit from this mixture of horrible history and high hope.

Valdes, Queers, supra at 349.

Sexual minorities as sexual minorities into the law’s fabric. This is an attempt to make the law more responsible and accountable to sexual minorities as sexual minorities. A third goal of a Queer jurisprudence is to inform and reform a legal culture content to neglect and ignore the rights of sexual minorities.79

A Queer jurisprudence would attempt to reform the current legal culture through its deconstruction and subsequent reconstruction. Deconstruction would ask the legal culture as a whole to recognize the shortcomings and costs of the status quo, the benefits of legal reform, and the need to invest in effective reformatory efforts aimed at changing the current legal culture.80 However, a Queer jurisprudence does not necessarily call for, or depend on, the creation and enactment of new rules and laws. Instead, a Queer jurisprudence strives to recreate the status quo on existing doctrine.81 To distinguish itself from the status quo, a Queer jurisprudence insists on two types of analysis to be used during reconstruction. The first type of analysis insists on informed and principled applications of existing rules. The second type of analysis also insists on informed and principled applications of existing rules regarding established legal and cultural conceptions of sex, gender, and sexual orientation. The additional goal of this second type of analysis is to make the law conform with reality in ways that actually help to check the entire range of sex and gender discrimination.82

Although a Queer jurisprudence, as described above, would attempt to change the legal system in order to create more equality, and ultimately liberation, for oppressed groups, the jurisprudence does not attempt to do so outside of the current rule of law. Instead, much like Colker’s bisexual jurisprudence, Queer jurisprudence, which attempts to improve the status of oppressed groups within the current legal system, not only reinforces the current and oppressive system, but also reinforces the hegemony of the current legal order. Queer jurisprudence attempts not to move away from the law, but rather to embrace it. Cultural change for minority groups, particularly sexual minority groups, is seen as a benefit stemming from legal change, rather than as a goal in and of itself. Like Colker’s bisexual jurisprudence, Queer jurisprudence cannot meet its goals of equality

79. See Valdes, Queers, supra note 78, at 361.
80. See Valdes, Queers, supra note 78, at 203–04.
81. See Valdes, Queers, supra note 78, at 303.
82. See Valdes, Queers, supra note 78, at 304.
and liberation for oppressed groups without advocating for cultural change independent of legal change.

Changing dominant cultural understandings is a formidable task which I do not attempt to address. What I offer is a more radical and transformative approach which seeks to universalize human sexuality, while also leaving room for individual identities. It is an approach, labeled by some theorists as “pansensuality,” that attempts to attack legally prescribed sexual identity categories at a conceptual level by encompassing all sexual experiences and identities that do not fit into the dominant heterosexual/homosexual paradigm. Although Colker’s conceptualization of bisexuality as a category qualitatively different from heterosexuality and homosexuality may be the best of the three approaches in asserting the existence and legitimacy of bisexuality, her refusal to advocate cultural change differentiates her from many bisexual writers and theorists, particularly feminist-identified bisexuals. The word bisexual itself is dualistic because it implies that bisexuals are two halves instead of a whole. Bisexual writers and theorists argue for a new name which would emphasize holism and freedom over societal restrictions. One writer in particular, Paula Rust, chooses the term “pansensual,” meaning “all-sensual.” Rust argues that the term “pansensual” would adequately refer to a bisexual’s experiences by its “all-sensual” definition, while also rejecting the notion of “sex” in choosing “pansensual” over “pansexual,” which eliminates the implied reference of terms like heterosexuality, homosexuality, and bisexuality to the sex/gender of the partner. Rust further argues that pansensuality would allow a distinction between pansensuals, heterosexuals, and homosexuals, thus allowing pansensuals to determine their own sexual identities by the terms they set for themselves, instead of the

83. See Rust, supra note 50.
84. The word bisexual also overemphasizes biology as the linchpin of attraction.

“The term ‘bisexual,’ however, embodies the negative definition of ourselves just discussed: the emphasis remains upon the biological sex characteristics of potential romantic partners. Although we argue that we do not choose our partners based upon their biological sex, we still define ourselves with a word that refers to the biological sex of our partners. This is self-defeating; what we need to do instead is to remove the characteristic of partner sex from its privileged position altogether so that we are free to choose our own ways of defining ourselves and choosing our partners.”

Rust, supra note 50, at 299.
85. See Rust, supra note 50, at 299–01.
86. See Rust, supra note 50, at 300–01.
terms dictated by the dominant sexual culture. Rust wants to transform sexual culture and society, not assimilate into the prevailing culture.

A pansensual jurisprudence would attempt to "de-center" law by not seeking legal solutions to inequality. This would serve to deconstruct the law, instead of fetishizing the law as the sole source of truth and justice, as Colker has done with her bisexual jurisprudence. Such a deconstruction would call into question current truths regarding sexuality and sexual identity and "the need for such truths and dogmatic certainties," instead of adding to existing hierarchies of knowledge established through dominant cultural and legal constructions.

A pansensual jurisprudence begins by asking if the recognition of bisexuality would sufficiently challenge the heterosexual/homosexual paradigm to produce liberation. This Review's critique of Colker's vision of a bisexual jurisprudence suggests that it would not. For liberation and sexual freedom to occur, one must look beyond the addition of a third category of bisexuality to a more encompassing jurisprudence of sexuality. A pansensual jurisprudence would dissent from the dominant construction of sexuality by its inclusion of individuals not aligned on the heterosexual/homosexual/ bisexual poles, while advocating an all-encompassing "pansensuality."

A pansensual jurisprudence would present a four-part challenge to the current legal system through its focus on changing cultural representations of those individuals whom the dominant culture has deemed to be homosexual or heterosexual. First, it would challenge the societal emphasis placed on biological sex, particularly as a determinant of one's sexual identity. The biological sex of a partner would no longer indicate one's sexual preference. Instead, the option to consciously choose a set of criteria, where one's biological sex may be one criteria among many, would be emphasized. Second, it would challenge the prevailing assumption that people are either heterosexual, homosexual, or in Colker's conception, bisexual. Specific labels would not be necessary under a pansensual jurisprudence where sexual identity poles do not exist. Third, it would broaden the concept of sexuality by its inclusivity, as well as by its notion of a sensuality separate and apart

87. See Rust, supra note 50, at 301.
88. See SMART, supra note 70, at 88–89.
89. See SMART, supra note 70, at 71.
90. See Rust, supra note 50, at 300–01.
from the current construction of sexuality. Fourth, it would challenge the prevailing power structure by subverting the dominant paradigm of heterosexuality and homosexuality.91

A pansensual jurisprudence would change identity categories and meanings by changing cultural representations of gender and sexuality through increased visibility. 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. For a pansensual jurisprudence to be visible, doubt needs to exist as to the universality of defining sexuality as either heterosexual or homosexual. A pansensual jurisprudence would cause individuals to begin to question whether one's sexuality can be defined based on current observations of their partner's biological sex. If not, then perceptions of a pansensual jurisprudence will become accessible. The need for sexual poles will no longer exist when the dominant cultural meanings of sexuality and sexual identities are transformed.92

This vision of a pansensual jurisprudence transforming culture sharply contrasts with the finite vision offered by Colker, which exists within the structured and controlled realm of the legal system. Although the addition of a third category of bisexuality may allow individuals to consider whether a person fits one of three categorizable sexual identities, there will still only be finite choices offered under a tripolar system where neither freedom nor liberation are goals. Adding another category within which individuals must fit, in order to conform to societal expectations, will not transform culture. Instead, the third category will be subsumed into the existing culture of those who

91. These four challenges have been articulated by Paula Rust. See Rust, supra note 50, at 304.

92. Rust uses the following analogy to describe a shift from current cultural understandings of sexuality to a new understanding of pansensuality:

   If the edifice constructed atop biological sex continues to stand, so be it. This edifice has many inhabitants, and they like the shelter they have found. Meanwhile, however, we can build our own house. Our house may be small at first, but as we continue to gather up the bricks that have fallen out of the original edifice, it will grow larger. As it grows larger, it will become more visible. Those original inhabitants of the original edifice who are not happy with their current accommodations may move into our new house. We do not need to destroy it in order to begin to make its inhabitants aware of the new house being constructed next door. When they look out the window, they will see it. We become visible.

Rust, supra note 50, at 304–05.
are legally categorized and recognizable, and therefore societally validated, and those who are not.

Although both approaches, legal and cultural, may aid each other in pushing the bounds of categories and cultural understandings of sexuality, their goals are vastly different. Colker is using and subscribing to finite categories and boundaries, whereas pansensual jurisprudence seeks to offer infinite conceptualizations of sexuality and sensuality, while seeking to eradicate boundaries. Put another way, Colker is offering the same pie, except that she wants to divide it into smaller pieces, whereas a pansensual jurisprudence seeks to transform the pie by transforming culture.

The advancement of a pansensual jurisprudence does, however, beg certain questions as to its consequences. A pansensual jurisprudence presents a paradox for identity politics. On the one hand, a pansensual jurisprudence seems to be offering an identity, albeit a large and somewhat elusive identity as an individual who is "queer," which will have different meanings for different individuals. On the other hand, a pansensual jurisprudence rejects identity politics by abolishing the need to identify around narrow categories, such as bisexuality. Would sexual identity even exist under this type of jurisprudence? For an identity to exist, does it always need to be defined in relation to something else, thereby always creating the "other"? The questions produced by a pansensual jurisprudence are provocative and elusive at best.

What a pansensual jurisprudence could do, that a bisexual jurisprudence cannot, is push the current legal and cultural boundaries imposed on sexuality by the dominant culture. While Colker's jurisprudence works within the legal and cultural system to create change, a pansensual jurisprudence would work outside of the legal and cultural system to create change. A pansensual jurisprudence would go beyond the dominant power structure by creating a new lens which would view sexuality without the imposition of artificial dichotomies and narrow limits on individual sexual experiences. Such a lens would change the overall power structure, of which the law is an important cornerstone, by radically altering the ways in which society conceives of gender, sexuality, and power. These new conceptions of gender, sexuality, and power would reshape what people know and believe about subordinated groups, thereby changing the roots of knowledge that created inequality to roots of knowledge that create equality. The
radical approach of a pansensual jurisprudence would attempt to re-construct a culture where sexual freedom and liberty are the norm. §