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## Pansexuality and the Law

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## PANSEXUALITY AND THE LAW

JENNIFER ANN DROBAC\*

- Attorney: So, as a pre-operative transgendered<sup>1</sup> person, are you heterosexual, homosexual or bisexual?
- Client: Well, I don't feel that I fit into any of those categories.
- Attorney: Alright. But I need to fill out this form for the Department of Fair Employment. Since we are alleging discrimination on the basis of sex and perceived sexual orientation, I need to know what your orientation is.
- Client: Well, I just can't be pigeonholed in that manner.
- Attorney: [feeling embarrassed and frustrated] I understand your not wanting to be pigeonholed but we need to satisfy certain formalities before we can proceed with the lawsuit. So, quite bluntly, I need to know whether you have relations with men or women.
- Client: [also feeling embarrassed and frustrated] You don't understand, I just can't be pigeonholed in that manner; it's not that simple for me.
- Attorney: Okay, let's do it this way. How do you self-identify; how would you describe yourself?
- Client: Well, I'm pansexual.

The revelatory concept impacted me instantly; my client's enlightenment struck me profoundly. As I considered her announcement and the concept, I realized not only was my client pansexual, we all are.<sup>2</sup>

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\* Lecturer at Law, Stanford Law School; J.S.D. Candidate, Stanford Law School, 1999; J.D., Stanford Law School, 1987; A.M. (English History), Stanford University, 1987; A.B., Stanford University, 1981. This essay simply introduces the term pansexuality and is not meant to be an exhaustive analysis of the concept. I thank Margaret Marr for the many hours she devoted to assisting me in this project. I also thank Professor William Eskridge for his generous encouragement and the following friends who read drafts of this essay: Derek Allison, Pat Dellin, Dina Hoffman and Lori Klein. This essay is dedicated to my former client who graciously shared her wisdom with me.

1. Transgendered (or Trans) refers to persons who feel that their native biological sex differs from their inner gender identity. Transsexuals change or desire to change their physical sex through hormone therapy and possibly through surgery to match their gender identity. See generally ANNE BOLIN, IN SEARCH OF EVE: TRANSSEXUAL RITES OF PASSAGE (1988); LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO DENNIS RODMAN (1996); MARTINE ROTHBLATT, THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER (1995).

2. I use the female pronoun to refer to my former client because she self-identified as female.

This essay introduces the term pansexuality and suggests briefly that pansexuality, as a concept, simplifies communication and provides a useful tool for understanding that sexuality includes more than just three subcategories: heterosexuality, homosexuality, and bisexuality. This essay also proposes that a pansexual perspective deconstructs the stereotypical interrelation between biological sex and sexual behavior. Specifically, pansexuality demonstrates that biological sex does not correlate strictly with particular sexual behaviors. For example, "real" men are not necessarily heterosexual and may enjoy being pursued; some "real" women may pursue both men and women and enjoy sexually dominating them. By adding another conceptual term to our lexicon, we could improve the way we analyze and discuss issues involving gender, sexuality, and the law.

### I. PANSEXUALITY

Since at least the nineteenth century, Americans have associated biological sex with specific sexual behaviors.<sup>3</sup> Sexually assertive and knowledgeable men pursued women.<sup>4</sup> White, upper-class women were sexually submissive.<sup>5</sup> People were presumed to be heterosexual.<sup>6</sup> We considered variance from the stated sexual norm

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3. See REAY TANNAHILL, *SEX IN HISTORY* 348-426 (1980); Kathy Peiss & Christina Simmons, *Passion and Power: An Introduction*, in *PASSION AND POWER* 3, 5 (Kathy Peiss et al. eds., 1989).

4. See TANNAHILL, *supra* note 3, at 355-56; THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *THE NEW OUR BODIES OURSELVES* 185 (1984) (describing prominent stereotypes that interrelate biological sex and sexual behavior). "Men are 'supposed' to know more about sex, to initiate it, to have a stronger sex drive. Women are 'supposed' to be passive recipients or willing students. Supposedly *they* want sex and *we* want love. Such rigid classifying of people by gender is false, silly and damaging." *Id.*

5. See TANNAHILL, *supra* note 3, at 354-55; George Chauncey, Jr., *From Sexual Inversion to Homosexuality: The Changing Medical Conceptualization of Female "Deviance,"* in *PASSION AND POWER*, *supra* note 3, at 87, 89; Peiss & Simmons, *supra* note 3, at 6 (contrasting the image of Victorian middle-class and aristocratic women with that of "working-class and African-American women, who were depicted as loose, rowdy, carnal, and debased"); see also Kathy Peiss, "Charity Girls" and *City Pleasures: Historical Notes of Working-Class Sexuality, 1880-1920*, in *PASSION AND POWER*, *supra* note 3, at 57, 57-67 (describing late nineteenth and early twentieth-century attitudes concerning the sexuality of working-class women).

6. See Robert Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, in *PASSION AND POWER*, *supra* note 3, at 14, 23; Peiss & Simmons, *supra* note 3, at 7; Jeffrey Weeks, *Movements of Affirmation: Sexual Meanings and Homosexual Identities*, in *PASSION AND POWER*, *supra* note 3, at 70, 70-72.

to be deviant or an illness.<sup>7</sup> Moreover, deviance carried a negative connotation.<sup>8</sup> Today, stereotypes about men and women persist in attributing particular behaviors and characteristics to different biological sexes.<sup>9</sup>

Advances in the behavioral and biological sciences have contributed important information regarding the diversity of human sexuality.<sup>10</sup> While stereotypes persist, most scientists acknowledge, and many people understand, that not all behaviors formerly labeled deviant are abnormal.<sup>11</sup> Homosexuality and bisexuality, despite the protests of religious adherents, are evolving slowly, and in some regions have evolved, from descriptions of sick deviance into categories of accepted sexual difference.<sup>12</sup>

Greater acceptance and exploration of these categories, however, demonstrate that many people cannot be pigeonholed into these subcategories.<sup>13</sup> Heterosexuality, homosexuality, and bisexuality track only the biological sex of the actors in a relationship, as defined by sexual desire.<sup>14</sup> These subcategories fail to describe adequately the panoply of human sexual behavior. First, they fail to describe sexual desire in persons, such as my former client, for whom biological sex is in transition. Second, they fail to

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7. See CAROLYN J. DEAN, *SEXUALITY AND MODERN WESTERN CULTURE* 19 (1996); BOLIN, *supra* note 1, at 53; Padgug, *supra* note 6, at 21; Peiss & Simmons, *supra* note 3, at 7; Weeks, *supra* note 6, at 73.

8. See Weeks, *supra* note 6, at 75, 80.

9. See, e.g., *READER'S DIGEST GUIDE TO LOVE & SEX* 65 (Dr. Amanda Roberts & Dr. Barbara Padgett-Yawn consulting eds., 1998).

Sex researchers now know that fantasies play as important a part in a woman's sexual behavior as they do in a man's . . . . As a rule, more men have fantasies in which they are the dominant partner, while more women imagine situations in which they play a submissive role. With fantasies, however, as with most other aspects of sexual behavior, numerous exceptions exist to such rules.

*Id.* Even though *Reader's Digest* acknowledged numerous exceptions, it still categorized some sexual behaviors as being more typically female and attributed others to men.

10. See, e.g., ROTHBLATT, *supra* note 1, at 6-16 (examining chromosomal and thought pattern differences between men and women); TANNAHILL, *supra* note 3, at 404 (discussing sexuality after World War II and relying on ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) and ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953)).

11. In 1973, the American Psychiatric Association declassified homosexuality as a mental illness. See Robert A. Padgug, *Gay Villain, Gay Hero: Homosexuality and the Social Construction of AIDS*, in *PASSION AND POWER*, *supra* note 3, at 293, 306.

12. Statutes that protect against discrimination on the basis of sexual orientation demonstrate that Americans are beginning to treat sexual differences as they do other human characteristics, such as race and ethnicity. See, e.g., CAL. LAB. CODE § 1102.1 (West Supp. 1999). *But cf.* Richard Jerome et al., *Growing Up Gay*, *PEOPLE*, Aug. 17, 1998, at 44, 46 (quoting Senate Majority Leader Trent Lott who "likened gays and lesbians to 'sinners, addicts and kleptomaniacs'").

13. See Padgug, *supra* note 6, at 23.

14. See *id.*

describe sexual bonding or dominance behaviors that may not be motivated by sexual desire. For example, some fraternity brothers engage in sexualized rituals during hazing. Are they sexual deviants? Some male heterosexuals rape men in prisons. Are these rapists really homosexual, or even bisexual?

The relaxation of societal penalties for cross-category behaviors has allowed people like author Carren Strock, a woman married to a man, to announce that she is a lesbian.<sup>15</sup> Popular movies like *Chasing Amy*<sup>16</sup> explore the tenuous boundaries between heterosexual and homosexual self-identification and suggest that bisexuality (and perhaps pansexuality) is more prevalent in our society than acknowledged.

Medical advances have made it possible for people like my former client to transform their physical identity to match their self-identified gender.<sup>17</sup> Trans men and women, intersexuals and hermaphrodites<sup>18</sup> clearly demonstrate that biological sex does not strictly correlate with gender and sexual behavior.<sup>19</sup> The terms heterosexual, homosexual and bisexual define behavior in ways that fail to describe adequately the variety of human sexual experiences currently recognized as "normal" for particular categories of people.<sup>20</sup>

Pansexuality<sup>21</sup> encompasses all kinds of sexuality. It differs,

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15. See Carren Strock, *My Turn: A Painful Discovery*, NEWSWEEK, May 8, 1998, at 16. See generally CARREN STROCK, MARRIED WOMEN WHO LOVE WOMEN (1998) (discussing the reasons married women are lesbians).

16. CHASING AMY (Miramax 1997) (depicting the life of a lesbian who falls in love with a man, faces the scorn of her former lesbian friends, and finds her heterosexual relationship in ruin after her boyfriend's male, "heterosexual" roommate becomes jealous and reveals details of her high school sexual experience with two male partners).

17. See BOLIN, *supra* note 1, at 2.

18. For a definition of Trans, see *supra* note 1. Intersexuals are individuals with ambiguous physical gender characteristics. They are "intermediate in sexual characters between a typical male and a typical female." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1183 (1981) [hereinafter WEBSTER'S]. Hermaphrodites are "equipped with both, male and female reproductive organs." *Id.* at 1059.

19. See BOLIN, *supra* note 1, at 14; ROTHBLATT, *supra* note 1, at 9. See, e.g., Shirley Liu, *Cheryl Chase*, CURVE: THE LESBIAN MAGAZINE, July 1998, at 6 (profiling Cheryl Chase, founder of the Intersex Society of North America).

20. See ROTHBLATT, *supra* note 1, at 140.

21. Pan refers to "all" or "whole." WEBSTER'S, *supra* note 18, at 1628. Sexuality is defined as follows: "the quality or state of being sexual[;] . . . the condition, potential, or state of readiness of the organism with regard to sexual activity." *Id.* at 2082. Another possible perspective is that of unisexuality, as developed by Martine Rothblatt:

The paradigm of sexual continuity points out that all persons are inherently bisexual but uses the term unisexual to reflect this potentiality. The term *unisexual* is used to avoid the implication that there are but two ("bi") sexes from which to choose lovers. Unisexual emphasizes the uniqueness of our sexuality and that of our lover. It also emphasizes the oneness of sexual

however, from pansexualism, a perspective that declares "all desire and interest are derived from the sex instinct."<sup>22</sup> Pansexuality includes heterosexuality, homosexuality, bisexuality, and sexual behavior that does not necessarily involve a coupling. It includes, for example, masturbation, celibacy, fetishism, and fantasy.<sup>23</sup> Moreover, pansexuality includes heteroerotic and homoerotic play and sexual aggression, sometimes mislabeled as "horseplay."<sup>24</sup>

I submit we are all pansexual, individually, and as a collective. Each individual has the ability to manifest more than one form of sexuality. Because pansexuality includes sexual fantasizing and masturbation, as well as heterosexual or homosexual coupling activity, many individuals who formerly might have fallen into one category now fit into two or more categories. Consider, for example, a woman who regularly has sexual relations with her husband and also occasionally fantasizes about women when she has sex with her husband or when she masturbates. Or, consider a man who formerly had sex only with women and has had only male partners for the last ten years, but still occasionally fantasizes about women.

Commercial advertising patterns and the Internet both support the notion that we are individually and collectively pansexual. Glamorous women sell women everything, from clothing to cars. It is possible that those sexy Victoria's Secret<sup>25</sup> spokeswomen, who do very little speaking, are simply modeling luxurious underwear. It is also possible that they are "seducing" women into a purchase. Voluptuous Xena, Warrior Princess, and her sexy young apprentice, Gabrielle,<sup>26</sup> sell television advertising time to heterosexual men and

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continuity, just as the word universe means one reality full of diversity.

ROTHBLATT, *supra* note 1, at 141; *see also id.* at 143-48. Rothblatt's unisexuality appears very similar to the concept of pansexuality. Unisexuality's continuum seems more restrictive, however, than pansexuality's multidimensional perspective. For this reason, I prefer the term pansexual, but I endorse Rothblatt's concept, which deconstructs the strict interrelation of biological sex and sexual behavior.

22. WEBSTER'S, *supra* note 18, at 1631. Pansexualism is further defined as "the suffusion of all experience with erotic feeling." *Id.*

23. Fantasizing may not constitute a "behavior" for behavioral scientists. As a scientific layperson, however, I consider thinking to be an activity, which is, in some measure, personally regulable. Moreover, I believe that thoughts, as well as observable actions, define our individual sexuality. Additionally, I include both flirtation and courtship in the list of pansexual behaviors. I consider both to be a sexualized form of social interaction that initiates sexual activity. *But cf.* *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998) (describing "intersexual flirtation" as "ordinary socializing").

24. Horseplay is defined as "rough or boisterous play." WEBSTER'S, *supra* note 18, at 1093. Note that this definition includes neither a sexual element nor animus. *Cf. Oncale*, 118 S. Ct. at 1003 (describing "male-on-male horseplay" as "ordinary socializing").

25. Victoria's Secret is a chain of lingerie stores.

26. These characters appear on a television show titled "Xena: Warrior Princess" presently airing on the FOX television network.

women. Androgynous nudes sell perfume to men and women. In addition, by offering the option of anonymity, cyberspace liberates shy pansexuals and allows them to explore, via the Internet, their own sexuality.<sup>27</sup> An Altavista search of the word "pansexual" currently produces 1554 web site hits.<sup>28</sup>

Some individuals, who engage sexually with only one other person, may never fantasize or masturbate. Even those persons, however, may be pansexuals with moral codes that tolerate only one type of expression or behavior. For example, a priest might once have been a heterosexual who fantasized and masturbated. Even in choosing a life of celibacy, that priest is still a pansexual whose vows constrain his sexual expression. This example highlights that individual sexuality, like religious conviction and practice, can change and evolve.

Pansexuality enabled my former client to identify herself as a sexual person without having to pigeonhole herself into a more specifically defined subset. Additionally, she avoided the term "queer" which many people consider a derisive label or one that separates those who are "queer" from those who are "straight."<sup>29</sup> The beauty of pansexuality is that everyone is a member of the pansexual community with a position and dignity equal to that of all other people.

## II. PANSEXUALITY AND THE LAW

The general utility of the concept of pansexuality in teaching law became apparent at the recent Yale Law School symposium on sexual harassment.<sup>30</sup> Between panel discussions, several law school professors commiserated about the lexicon associated with law, gender, and sexuality. All of these professors taught classes in which they needed to refer to sexual minorities, such as sado-masochists, as well as more broadly defined types of sexuality, such as heterosexuality and homosexuality. They agreed that "queer" alienated or offended some students. It also failed to include all categories. They seemed to want a term that would comfortably

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27. See ROTHBLATT, *supra* note 1, at 149-53.

28. See Altavista (visited Feb. 26, 1999) <<http://www.altavista.com>> (searching for "pansexual"). Altavista is an Internet search engine. Another Internet search engine, Hotbot, produced 710 matches. See Hotbot (visited Feb. 26, 1999) <<http://www.hotbot.com>> (searching for "pansexual").

29. Queer is defined as "differing in some odd way from what is usual or normal[;] . . . slang : sexually deviate : homosexual[.]" WEBSTER'S, *supra* note 18, at 1863.

30. See generally Videotape: Sexual Harassment Conference at Yale Law School 1998 (Access Audio-Visual Systems 1998) (on file with Stanford Law School Library).

cover the wide array, or panorama, of sexual experiences and also associated identity. Pansexuality neatly serves this purpose.

Pansexuality does more than provide an all-encompassing term, however. It has 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. Consider, for example, the much-discussed issue of sex-segregated bathrooms.<sup>31</sup> Legal philosopher Richard A. Wasserstrom suggests:

What seems to be involved [in sex-segregated bathrooms]—at least in part—is the importance of inculcating and preserving a sense of secrecy concerning the genitalia of the opposite sex. What seems to be at stake is the maintenance of that same sense of mystery or forbiddenness about the other sex's sexuality, which is fostered by the general prohibition upon public nudity and the unashamed viewing of genitalia.

. . . [T]he case against them [sex-segregated bathrooms] now would rest on the ground that they are, perhaps, one small part of that scheme of sex-role differentiation which uses the mystery of sexual anatomy, among other things, to maintain the primacy of heterosexual sexual attraction central to that version of the patriarchal system of power relationships we have today.<sup>32</sup>

If Professor Wasserstrom is correct, then sex-segregated bathrooms provide an order that fosters a heterocentrist society. Why else do bathrooms segregate by biological sex?

Trans men and women, homosexuals, and bisexuals confound the purpose of sex-segregated bathrooms. Trans persons introduce the possibility that the anatomy of the "opposite" sex is present in the bathroom; homosexuals and bisexuals introduce the possibility of same-sex sexual attention. If we recognize that we are all truly pansexual, however, then there should be no need for bathrooms segregated only by biological sex. Preserving both the anatomical mystery (as if anatomy is really a mystery in this day and age) and the heterocentrist focus is no longer a priority. We may want to have individual bathroom facilities or private stalls in communal facilities that allow for personal privacy and modesty. Similarly, separate stalls may serve to reduce the incidence of violence against

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31. For an interesting, unisexual perspective on sex-segregated bathrooms, see ROTHBLATT, *supra* note 1, at 91-95.

32. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 593-94 (1977).



women in bathrooms, but our current system of sex-segregated bathrooms makes no sense from a pansexual perspective.

Pansexuality serves to deconstruct the stereotypical interrelation between biological sex and behavior in legal reasoning, as well as in the ordering of more banal human relations and activities. *Oncale v. Sundowner Offshore Servs., Inc.*<sup>33</sup> highlights the potential utility of pansexuality in this regard.<sup>34</sup> The Court held that members of one sex could sue members of the same sex for sexual harassment under Title VII.<sup>35</sup> Reassuring that same-sex harassment suits will not “transform Title VII into a general civility code[,]”<sup>36</sup> the Court emphasized that plaintiffs must still prove that first, the harassment was based on sex, and second, the harassment was “severe or pervasive enough to create an objectively hostile or abusive work environment . . . .”<sup>37</sup> In its discussion of what constitutes behavior based on sex, the Court suggested that other courts may consider the harasser’s sexual motivations and sexuality.<sup>38</sup> The Court’s reasoning concerning sexuality, however, reflects narrow, stereotypical notions pertaining to human sexuality.

For example, Justice Scalia reasoned that if a male perpetrator proposed sexual activity to a female target, courts and juries could reasonably conclude that the harassment was based on sex.<sup>39</sup> He next expressed his assumption that males would not make sexual advances to other males.<sup>40</sup> Implied but unstated in *Oncale* is the assertion that courts may presume that male perpetrators are

33. 118 S. Ct. 998 (1998).

34. The Supreme Court did not determine whether Joseph Oncale had established a sexual harassment prima facie case. It simply remanded his case for further proceedings consistent with its opinion. *See id.* at 1003. For a complete analysis of this opinion from a pansexual perspective, see Jennifer Ann Drobac, *The Oncale Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. (forthcoming 1999) (manuscript on file with author).

35. *See Oncale*, 118 S. Ct. at 1001-02.

36. *Id.* at 1002.

37. *Id.* at 1003.

38. *See id.* at 1002-03.

39. *See id.* at 1002.

40. *See id.* Scalia wrote: “Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.” *Id.* Simple character equations map the Court’s reasoning:

Hetero♂ + SEX + ♀ = because of sex // Hetero♀ + SEX + ♂ = because of sex
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Hetero♂ + SEX + ♂ ≠ because of sex // Hetero♀ + SEX + ♀ ≠ because of sex
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*See infra* Appendix 1 for a symbol legend.

heterosexual unless proven otherwise. Such a presumption reflects and perpetuates a heterocentrist worldview and traditional gender stereotypes about men: "real" men are heterosexual.

However, Justice Scalia also dealt with the homosexual perpetrator. He noted that if credible evidence demonstrated that a perpetrator of same-sex harassment was homosexual, then courts could conclude that the harassment was based on sex.<sup>41</sup> The Court's reasoning in *Oncale* suggests that in same-sex, sexual advance cases, courts should find only homosexuals liable. In fact, some heterosexual perpetrators may find the same-sex, sexual behaviors committed against Joseph Oncale erotic and sexually stimulating.<sup>42</sup> These "heterosexuals" could escape liability if courts apply *Oncale's* heterocentrist reasoning that relies on obvious sex stereotypes, interrelating biological sex and behavior.

The *Oncale* decision further failed to recognize the variances in human sexuality by ignoring the scenario of the bisexual or equal opportunity harasser. If behavior constitutes sexual harassment when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed[,]"<sup>43</sup> then arguably bisexual harassers avoid liability under Title VII because they target both men and women. Thus, their behavior is not discrimination based on sex.<sup>44</sup> I would argue that the bisexual harasser's behavior is based on sex in that it discriminates against both men and women.<sup>45</sup> These examples are only a sampling of the ways in which gender stereotypes and heterocentrism corrupt the analysis in *Oncale* and possibly other sex discrimination and harassment cases.

41. See *Oncale*, 118 S. Ct. at 1002.

Homo♂ + SEX + ♀ = because of sex // Homo♀ + SEX + ♂ = because of sex

See *infra* Appendix 1 for a symbol legend.

42. The lower court summarized *Oncale's* allegations:

Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises. Oncale alleges both quid pro quo and hostile work environment sexual harassment.

*Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (1996). The court referred to homosexual rape but did not specifically explore the parties' sexuality. See *id.*

43. *Oncale*, 118 S. Ct. at 1002 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

44.

(Bi♂ or Bi♀) + SEX + (♂ & ♀) = because of sex

See *infra* Appendix 1 for a symbol legend.

45. See Drobac, *supra* note 34.

Pansexuality deconstructs the stereotypical interrelation between biological sex and sexual behavior evident in *Oncale*. Pansexuality tracks not just biological sex and its stereotypical association with sexual desire. It also accounts for motivations other than sexual desire, as well as for gender identities other than those determined by chromosomes. Moreover, if we are all truly pansexual, then the sexuality of the harasser should make no difference in Title VII sexual harassment equations. A pansexual approach would force courts to focus on the offensive conduct and the civil rights injury perpetrated, rather than on the harasser's motivations or sexuality. It redirects our focus onto demeaning sexual or hostile behavior that injures workers by denying them the employment opportunities enjoyed by others who exhibit different sex traits or behaviors. Severe or pervasive sexual conduct would remain actionable regardless of the harasser's motivations.<sup>46</sup>

Pansexuality accounts for the panoply of human sexual behaviors and could assist courts in avoiding an underinclusive approach to sex discrimination cases. Moreover, a pansexual perspective would save courts from the impossible and invasive task of identifying the behaviors that could constitute homosexuality and, thereby, obviate the need to distinguish a homosexual perpetrator from a heterosexual one.

Because a pansexual approach deconstructs the stereotypical interrelation of biological sex and behavior, it risks reducing sex discrimination to differential treatment because of only chromosomes, such as XX or XY. Arguably, no one self-identifies as simply XX or XY. We identify ourselves by our genitalia and by our gender traits and gendered behaviors, including sexuality.<sup>47</sup> Therefore, the term "sex," as it applies in discrimination law, must include biological sex, gender traits, and gendered behaviors, including sexuality.

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46. See *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998) (finding heterosexual supervisor guilty of sexually harassing a sixteen year old employee through lewd comments and improper touching); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (noting that sexual harassment involves behavior by a supervisor which creates a hostile environment for an employee based on their gender, even if classically sexual overtones are not present). *But see Oncale*, 118 S. Ct. at 1003 (1998) (emphasizing the importance of a finding of discrimination. "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.").

47. See generally SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* (1978) (suggesting that our concept of gender is largely determined by society).

Contrary to what critics may say, the application of pansexuality in law does not lead to the conclusion that all pansexual subsets (such as pedophilia, bestiality, or sexual violence) deserve protection. Criminal laws provide for the prosecution of sexual abuse and violence, just as they can prohibit activities that might otherwise be protected by the Constitution or federal statutes, such as the sacramental use of illegal drugs.<sup>48</sup> Criminal laws also prohibit the perpetration of illegal conduct by persons with other statutorily protected immutable characteristics.<sup>49</sup> Conceivably, what could be protected under the application of anti-discrimination laws are biological sex and the panoply of sexual traits and legal sexual practices associated with biological sex, including pansexuality. In any case, panic over the protection of sexual minorities, "wimpy" men, or "butch" women should not prevent us from exploring the usefulness of pansexuality as a concept.

We are more pansexual than we realize. The utility and liberation of finding a term that describes us all, and insults no one,<sup>50</sup> invites exploration of the use of pansexuality as a concept in legal, as well as other, contexts. When analyzed from a pansexual perspective, *Oncale* reveals how gender biases, stereotypes, and heterocentrism continue to adulterate our thinking and court decisions. Contrary to Justice Scalia's assurances, "[c]ommon sense, and an appropriate sensitivity to social context"<sup>51</sup> will not create the egalitarian world for which many pansexuals hope. In fact, common sense has yet to settle the famous bathroom dilemma. The acknowledgment of human pansexuality is the first step on that path to greater understanding, enlightenment, and true equality.

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48. See generally *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (denying protection under the Free Exercise Clause of the Constitution to a state employee who was discharged for the ceremonial use of peyote).

49. For example, Asian Americans who commit robbery may face criminal prosecution, despite the fact they belong to a "protected class" of people for the purposes of anti-discrimination laws. See, e.g., CAL. PENAL CODE § 211 et seq. (West 1998) (failing to designate differential treatment for persons of a particular race).

50. Critics might simply argue that the term "pansexual" insults persons who narrowly define their own sexuality. Again, I emphasize that pansexuality is a concept that includes all forms of sexual behavior and expression; pansexuality does not require that people enact the behaviors described or describe themselves as pansexual. For example, pansexual describes the celibate homosexual. Surely, such critics do not mind being labeled human when humanity encompasses benevolent, as well as malevolent, behaviors, not all of which any one person demonstrates. Finally, pansexuality erases no distinctions; it simply adds to our lexicon by providing an omnibus or umbrella term.

51. *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998).

## PANSEXUALITY AND THE LAW: APPENDIX 1

<b>Symbol or Abbreviation</b>	<b>Definition</b>
♂	man or men
♀	woman or women
Hetero	heterosexual
Homo	homosexual
Bi	bisexual
<b>SEX</b>	sexual advances or sexual activity