
Unsettling Sexual Citizenship

Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*. Stanford, Cal.: Stanford University Press, 2007. Pp. 244 [cloth \$55 (U.S.)].

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In a time of burgeoning repression of undocumented immigrants in the United States, this review/essay argues that sexual citizenship theorizing should be more cognizant of citizenship as a formal legal status and its attendant circumstances.

The review/essay situates Brenda Cossman's book *Sexual Citizens* in the context of citizenship discourse. Sexual citizenship discourse emerged from the critique that dominant citizenship theories failed to recognize citizenship as gendered, racialized and sexualized. Cossman, like other theorists, employs the term "citizenship" to include forms of belonging, recognition, and participation in a nation and society. Using examples from popular culture, she seeks to illustrate that the emerging sexual citizenship in the United States is overtly sexual, yet also privatized and self-disciplined. The authors argue that despite trenchant observations, Cossman's conception of sexual citizenship is too elastic to be useful in legal theorizing.

Using Cossman's book as an example, the authors suggest that notions of sexual citizenship must be grounded in the legal consequences of sexual minorities' access and denial of access to citizenship. Failing to address formal legal status erases individuals who do not have access to even the basic rights of citizenship. Sexual citizenship discourse must include understandings of the ways in which immigration law regulates sexual practices and should explore the relationships between the regulations of noncitizens and sexual minorities in both concrete and metaphorical terms. Although the language of citizenship is an apt response when the state invokes citizenship, this response must confront the notion of citizenship itself. While the regulation of nation-states needs rigorous theorizing, the rubric for this theorizing should not be citizenship, because it risks perpetuating the exclusion of noncitizens. The authors thus propose that other terms should replace citizenship, suggesting the language of "personhood".

À une époque de répression croissante des immigrants sans-papier aux États-Unis, cette recension/critique affirme que la théorisation en matière de citoyenneté sexuelle devrait s'attarder davantage sur la citoyenneté comme statut formel et juridique et sur ses effets concomitants.

La recension/critique traite du livre de Brenda Cossman *Sexual Citizens* dans le contexte du discours sur la citoyenneté. Le discours de la citoyenneté sexuelle a émergé de la critique selon laquelle les théories dominantes de la citoyenneté ne reconnaissaient pas que celle-ci est marquée par le genre, la race et le sexe. Cossman, comme d'autres théoriciens, emploie le terme «citoyenneté» pour inclure les formes d'appartenance, de reconnaissance et de participation à une nation et à une société. Utilisant des exemples de la culture populaire, elle cherche à illustrer que le courant émergent de la citoyenneté sexuelle aux États-Unis est fortement sexualisé, bien qu'il soit aussi privatisé et auto-discipliné. Les auteurs affirment qu'en dépit de ses observations incisives, la conception de la citoyenneté sexuelle de Cossman demeure trop élastique pour être utile à la théorie juridique.

En se référant au livre de Cossman en tant qu'exemple, les auteurs suggèrent que les notions de citoyenneté sexuelle doivent trouver leurs fondements dans les conséquences juridiques pour les minorités sexuelles de l'accès ou non à la citoyenneté. Ne pas prendre en considération le statut juridique formel négligerait les individus qui n'ont même pas accès aux droits fondamentaux de la citoyenneté. Le discours de la citoyenneté sexuelle doit chercher à comprendre la manière dont le droit de l'immigration régit les pratiques sexuelles et à explorer les relations qui existent entre les réglementations des non-citoyens et des minorités sexuelles, de manière concrète comme métaphorique. Bien que l'emploi du langage de la citoyenneté soit une réponse appropriée lorsque l'État invoque la citoyenneté, cette réponse doit aussi confronter la notion même de citoyenneté. Bien que la régulation des États-nations ait besoin d'une théorisation rigoureuse, cette théorisation ne devrait pas se faire sous la rubrique de la citoyenneté, puisque l'usage de ce terme risque de perpétuer l'exclusion des non-citoyens. Les auteurs suggèrent à ce titre de remplacer le terme citoyenneté par «personnalité» («*personhood*»).

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Introduction

Across Canada's southern border, contemporary issues of citizenship are contentious, often ugly, and occasionally violent. As white settler nations, both the United States and Canada have difficult histories dealing with citizenship claims by aboriginal peoples and by nonwhite immigrants. However, the current situation in the United States has reached alarming proportions.

Testifying before the United States House of Representatives, Michael Graves described a December 2006 Immigration and Customs Enforcement (ICE) raid on the meat-packing plant where he worked: he was stopped by “a man in full SWAT uniform with a gun,” then handcuffed for an hour, interrogated about his citizenship, place of birth, and the route to his parents' house, marched outside in the Iowa winter without coat or gloves, and then held with hundreds of his coworkers for the next seven hours without access to food, water, or the means to communicate with the outside world. Although Graves testified he is a U.S. citizen, born and raised in Iowa, and had “never been overseas” in his life, he stated that no one—regardless of citizenship status—should be treated the way he and his coworkers were treated.¹ At a different hearing, Secretary of Homeland Security Michael Chertoff stated that ICE had “dramatically improved the enforcement of [U.S.] immigration laws,” heralding the “more than 4,300 arrests and apprehensions” in the 2006 fiscal year.² Some of these apprehensions led to confinement in prison and mistaken deportation of citizens; some left minor children without adult supervision.³ Additionally, local police have been empowered since 2000 to enforce national immigration laws.⁴ This

¹ U.S., *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, House of Representatives*, 110th Cong. (Washington, D.C.: United States Government Printing Office, 2008) at 38-39 (written statement of Michael Graves), online: United States House of Representatives Committee on the Judiciary <<http://judiciary.house.gov/hearings/printers/110th/40742.pdf>>.

² U.S., *Comprehensive Immigration Reform: Hearing Before the Committee on the Judiciary, United States Senate*, 110th Cong. (Washington, D.C.: United States Government Printing Office, 2007) at 125 (written statement of Michael Chertoff), online: United States Government Printing Office <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:37096.pdf>.

³ *Supra* note 1 at 40-42, 53-55 (testimony of Karla Hartzler, Florence Immigrant & Refugee Rights Project).

⁴ The *Antiterrorism and Effective Death Penalty Act of 1996* (Pub. L. No. 104-132, § 439, 110 Stat. 1214 at 1276, codified as amended at) and the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Pub. L. No. 104-208, § 133, 110 Stat. 3009-546 at 3009-563-564 (codified as amended at 8 U.S.C. § 1357(g) (2000)) [*IIRIRA*]) expanded the role of local law-enforcement agencies in enforcing federal immigration law. *IIRIRA* introduces § 287(g) of the *Immigration and Nationality Act* (*infra* note 223), which allows the Attorney General of the United States to permit designated officers and employees of these authorities to “perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens ...” (*IIRIRA*, *ibid.*).

power is subject to abuse,⁵ and it is a power that the police may not always welcome.⁶ Furthermore, a law mandating fencing the southern border of the United States—and studying the “feasibility of a state-of-the-art infrastructure security system” along the northern border with Canada—was passed by Congress and signed by the President of the United States in late 2006.⁷

Drawing on citizenship theory, Brenda Cossman, a Canadian law professor and author of *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*,⁸ locates her theorizing of sexual citizenship in the United States. Citizenship discourse began by noting three components of citizenship: civil, political, and social. More recent scholarship examines the ways in which citizenship is gendered, racialized, and sexualized. In particular, theorists of sexual citizenship argue that citizenship claims are based on heterosexual and male privilege. Cossman does not analyze direct connections between citizenship and sexuality such as the per se immigration ban on sexual minorities, which characterized these minorities as sexual deviates and was only repealed by the United States Congress in 1990,⁹ or the ability of sexual minorities to apply for asylum based on membership in a social group if they have a well-founded fear of persecution in their country of origin.¹⁰ Instead, her work is situated within the developed theoretical construct of “sexual citizenship”. This construct is built on the accurate perception of sexual minorities as “second-class citizens”. If citizenship confers certain rights, denying some citizens those rights means those persons are not “full” citizens. In the United States, the denial of the right (or responsibility) of military service to homosexuals is a seemingly obvious example.¹¹ The example is more complicated than it seems, however, because noncitizens can—and do—serve in the U.S. military.¹²

⁵ See Hannah Gladstein *et al.*, *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004* (Paper prepared for the Migration Policy Institute, New York University School of Law, 2005), online: Migration Policy Institute <http://www.migrationpolicy.org/pubs/MPI_report_Blurring_The_Lines_120805.pdf>.

⁶ See Major Cities Chiefs Association, *Immigration Committee Recommendation for Enforcement of Immigration Laws by Local Police Agencies* (June 2006), online: Major Cities Chiefs Association <http://www.majorcitieschiefs.org/pdfpublic/mcc_position_statement_revised_cef.pdf>.

⁷ *Secure Fence Act of 2006*, Pub. L. No. 109-367, § 3, 4(a), 120 Stat. 2638 at 2638-39 (codified as amended at 8 U.S.C. § 1103 (2007)). See also David Stout, “Bush Signs Bill Ordering Fence on Mexican Border” *The New York Times* (26 October 2006).

⁸ (Stanford, Cal.: Stanford University Press, 2007).

⁹ 8 U.S.C. § 1182(a)(4) (1990), as rep. by *Immigration Act of 1990*, Pub. L. No. 101-649, § 601, 104 Stat. 4978 at 5067-77.

¹⁰ See e.g. *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

¹¹ 10 U.S.C. § 654(a)(13) (1994) (including a finding that “the prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service”).

¹² The *National Defense Authorization Act for Fiscal Year 2006* established a uniform citizenship or residency requirement for enlistment in the Armed Forces of the United States, and authorized

Cosman's attention to sexual citizenship concentrates on the more metaphorical notions of citizenship. Sexual citizenship here does not pertain to formal regulations of citizenship, but to legal regulations of sexuality: sexual practices, sexual speech, public entitlements (welfare), and marriage. While certainly these regulations can and do link to citizenship status, as a debate about requiring proof of citizenship for a marriage licence illustrates,¹³ Cosman is mainly concerned with the relationship between legal regulations of sexuality and notions of social worth. She is also attentive to cultural representations of sexuality. She argues, for example, that legal discourse and television programs such as *Dr. Phil*, *Sex and the City*, and *Desperate Housewives* influence one another to construct sexual citizenship as "practices of belonging".¹⁴ Cosman is not the only theorist to focus on cultural belonging rather than legal citizenship. The scholars who have not addressed nationality or naturalization as part of sexual citizenship were early proponents of a theory of sexual citizenship.¹⁵ The contemporary discourse is often more nuanced, but nevertheless the construct of "sexual citizenship" needs to be grounded in the realities of citizenship.

This review/essay argues that the theoretical construct of sexual citizenship merits serious reconsideration. Part I provides an overview of the development of sexual citizenship discourse. Part II summarizes Cosman's book, *Sexual Citizens*. Part III engages with the elastic definition of citizenship throughout Cosman's book. It highlights the problematic limitations of Cosman's approach by, among other things, examining two groups of sexual minorities—lesbians and transgender people—whose concerns in relation to citizenship are generally absent from Cosman's analysis. Part IV contends that for sexual citizenship to remain a useful analytic tool, it must be more than a metaphor: it must be grounded in the legal consequences of sexual minorities' access and denial of access to citizenship. While the language of metaphor can be useful, it cannot be disconnected from the reality of sexual minorities' lives. This part describes the impact of U.S. immigration policy on sexual minorities, and explores other metaphors available to sexual minorities.

enlistment for "[a]n alien who is lawfully admitted for permanent residence ..." (Pub. L. No. 109-163, § 542, 119 Stat. 3136 at 3253 (codified as amended at 10 U.S.C. § 504 (2007))).

¹³ See *Buck v. Stankovic*, 485 F.Supp.2d 576 (M.D. Pa. 2007) (granting a preliminary injunction prohibiting clerks from requiring proof of citizenship for the issuance of a marriage licence).

¹⁴ *Supra* note 8 at 18.

¹⁵ See e.g. Jeffrey Weeks, "The Sexual Citizen" (1998) 15:3 *Theory, Culture & Society* 35 (discussing "new possibilities of self and identity" without addressing formal legal status).

I. Citizenship Discourses

A. Foundations of Citizenship Theory: Marshall and his Critics

The formative theorist of citizenship T.H. Marshall divided citizenship into three parts: civil, political, and social.¹⁶ Civil citizenship comprised the rights “necessary to individual freedom,” such as liberty of the person, freedom of speech, the right to own property and the right to justice.¹⁷ The political aspect of citizenship was “the right to participate in the exercise of political power.”¹⁸ The social aspect ranged from the right to economic welfare and security to the right to share in the “social heritage and to live the life of a civilised being according to the standards prevailing in the society.”¹⁹ In Marshall’s view, citizenship evolved: civil rights developed in the eighteenth century, political rights in the nineteenth century, and social rights in the twentieth century.²⁰

Marshall has been critiqued for a simplistic evolutionary view and for his omission of important aspects of citizenship such as the cultural and the economic.²¹ Expanding on these critiques, cultural citizenship has subsequently been defined as “the capacity to participate effectively, creatively, and successfully within a national culture.”²² The economic aspects of citizenship include the interplay between the state and the market, increasingly defined in terms of consumerism.²³ Moreover, Marshall’s citizenship theories have been criticized as failing to recognize citizenship as racialized, gendered, and sexualized.²⁴ For example, Sylvia Walby argues that Marshall’s theory of citizenship progression fails to account for the fact that prior to the 1920s, women in the United Kingdom and the United States lacked full civil and political citizenship, as well as liberty of the person with regard to access to abortion and contraception, the right to own property as married women, the right to vote, and to a large degree the right to work.²⁵ Walby contends that without political citizenship,

¹⁶ See generally T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).

¹⁷ *Ibid.* at 10.

¹⁸ *Ibid.* at 11.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 14, 23-43, 70-83, 102-07.

²¹ See Bryan S. Turner, *Citizenship and Social Theory* (Cambridge: Cambridge University Press, 1993) at 7-8 (summarizing the criticisms of other scholars).

²² *Ibid.* at 12.

²³ David T. Evans, *Sexual Citizenship: The Material Construction of Sexualities* (London: Routledge, 1993) at 4-5.

²⁴ See e.g. Sylvia Walby, “Is Citizenship Gendered?” (1994) 28 *Sociology* 379; Evans, *ibid.* at 9; Diane Richardson, *Theorising Heterosexuality* (Buckingham, U.K.: Open University Press, 1996) at 16-19 [Richardson, *Theorising*]; Floya Anthias & Nira Yuval-Davis, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle* (London: Routledge, 1992).

²⁵ *Ibid.* at 380-81.

women cannot achieve civil or social citizenship.²⁶ In her view, citizenship is about not just changing class relations, but about a “transition from private to public patriarchy.”²⁷

Scholars focusing on sexual aspects of citizenship have expanded on gender critiques, arguing that citizenship claims are based on heterosexual and male privilege.²⁸ Scholars have also integrated the cultural and economic theories of citizenship with issues of sexuality. Although grounded in Marshall’s theories of citizenship, the field of sexual citizenship has become an independent inquiry.

B. Defining Sexual Citizenship

One of the pioneers in sexual citizenship studies, the British sociologist Diane Richardson, has observed that there is no agreed-upon definition of “sexual citizenship.”²⁹ In some instances, sexual citizenship is used to denote a collection of legal or political rights. In other instances, the emphasis is on the relation of the consumption of goods and services to sexual practices and identities. At times, scholars stress the cultural aspects of sexuality and citizenship. Most often, theorists of sexual citizenship deploy various meanings of citizenship. This latter approach may be appropriate, because, as Richardson has argued, every conception of citizenship, whether Marshallian, communitarian, within a human-rights framework, cultural, or consumer, is gendered and sexualized.³⁰

Richardson has argued that because citizenship is premised on institutionalized heterosexuality, gays and lesbians lack legal protection from discrimination or harassment, have limited political rights, and have limited access to “full social citizenship”, even in the realms of welfare, education, parenting, employment, and housing.³¹ Gays and lesbians are tolerated as “partial” citizens: they must conform to the condition “that they remain in the private sphere and do not seek public recognition or membership in the political community.”³² With homosexuality viewed as a threat to the nation-state, gays and lesbians are excluded from the “construction of ‘nation’ and nationality.”³³ She notes that resistance to exclusion and negative portrayals of gays and lesbians in popular culture and the press initially took the form of subcultural efforts on the part of gays and lesbians, though such efforts are becoming increasingly mainstream.³⁴ Popular depictions of gays and lesbians can be

²⁶ *Ibid.* at 389.

²⁷ *Ibid.* at 392.

²⁸ See e.g. Richardson, *Theorising*, *supra* note 24.

²⁹ “Extending Citizenship: Cultural Citizenship and Sexuality” in Nick Stevenson, ed., *Culture and Citizenship* (London: Sage, 2001) 153 at 154 [Richardson, “Extending Citizenship”].

³⁰ Diane Richardson, “Sexuality and Citizenship” (1998) 32 *Sociology* 83.

³¹ *Ibid.* at 88-89.

³² *Ibid.* at 89.

³³ *Ibid.* at 90.

³⁴ “Extending Citizenship”, *supra* note 29 at 160.

viewed as an important form of acknowledgement, or alternatively, as a process of commodification and assimilation into dominant culture.

Richardson has also noted the increasing use of the language of sexual citizenship in contrast to the language of sexual liberation.³⁵ Indeed, “queer” scholars such as Jeffrey Weeks, Ken Plummer, and Shane Phelan have each made liberatory claims for sexual minorities in the language of sexual citizenship, albeit with different inflections. Weeks argues that the sexual citizen breaches the public–private divide by bringing sexuality into the public sphere.³⁶ He posits that sexual movements such as feminism and the gay and lesbian movement have two elements: a moment of transgression, in which a new sense of self is reinvented and traditional institutions are challenged, and a moment of citizenship, in which equal rights and equal legal protections are claimed.³⁷ The claim to sexual citizenship arises from cultural shifts that are undermining traditional hierarchical relationships.³⁸ With economic and cultural changes that tend to “exalt” the individual over the collective, the idea of individual freedom has led to a new “moral fluency”.³⁹

Plummer similarly concludes that intimacy in Western countries has been shaped by an ideology of individualism that “increasingly seems to create a world of choices.”⁴⁰ He proposes a new concept, intimate citizenship, that examines rights and duties involved in the “*intimate spheres of life*—who to live with, how to raise children, how to handle one’s body, how to relate as a gendered being, how to be an erotic person.”⁴¹ This inclusive concept, transcending sexuality and gender, includes four arenas of analysis: public spheres, culture wars and the need for dialogue, narrativization and moral stories, and globalization.⁴² He adopts feminist scholars’ conception of “multiple, hierarchically layered and contested public spheres” and notes that “emerging zones” of the modern public sphere include new social-movement worlds, media worlds, educational worlds, and art worlds.⁴³ Echoing Weeks, he observes the emergence of moral conflicts in “deeply pluralised” public worlds, and suggests that “day to day stories of new ways of living” are needed to supplant abstract debates on morality.⁴⁴

³⁵ Diane Richardson, “Claiming Citizenship? Sexuality, Citizenship and Lesbian/Feminist Theory” (2000) 3 *Sexualities* 255 at 256 [Richardson, “Claiming Citizenship”].

³⁶ *Supra* note 15 at 36.

³⁷ *Ibid.* at 36, 37.

³⁸ *Ibid.* at 40.

³⁹ *Ibid.* at 43, 44.

⁴⁰ Ken Plummer, “The Square of Intimate Citizenship: Some Preliminary Proposals” (2001) 5 *Citizenship Studies* 237 at 239.

⁴¹ *Ibid.* at 238 [emphasis in original].

⁴² *Ibid.* at 242.

⁴³ *Ibid.* at 243–44 [emphasis in original].

⁴⁴ *Ibid.* at 247–48.

Linking cultural and sexual citizenship, American political scientist Shane Phelan argues that sexual minorities in the United States are “strangers” excluded from full citizenship.⁴⁵ Her definition of stranger is cultural: the stranger is a “figure of ambivalence who troubles the border between us and them.”⁴⁶ For Phelan, citizenship requires that one be recognized fully—“not in spite of one’s unusual or minority characteristics, but with those characteristics understood as part of a valid possibility for the conduct of life.”⁴⁷ She views acknowledgement as the “heart of citizenship”; in this sense, citizenship goes beyond claims of legal and political rights, but includes a “claim on public attention and concern.”⁴⁸

One of the most extensive treatments of sexual citizenship is found in David Bell and Jon Binnie’s book *The Sexual Citizen: Queer Politics and Beyond*.⁴⁹ Bell and Binnie argue that all citizenship is sexual citizenship because “the foundational tenets of being a citizen are all inflected by sexualities.”⁵⁰ At the same time, “we are not equal sexual citizens.”⁵¹ Thus, the authors argue it is important to be mindful of “*who* loses and *who* wins in rights claims.”⁵² Bell and Binnie examine claims to sexual citizenship rights of marriage and to join the military, arguing that while the denial of “the right to fight or marry marks sexual dissidents as second-class citizens,” a symbolic victory in a fight for such rights does not necessarily radically change the parameters of sexual citizenship.⁵³ Yet they also link love (and friendship) with citizenship: relying on Michel Foucault’s call for “as yet unforeseen kinds of relationships,” they extrapolate a rethinking of “as yet unforeseen kinds of citizenship.”⁵⁴

C. From Foucault to Globalization

Citizenship theorists are concerned with the relationship between individuals and the state—the concept of citizenship has little relevance without a nation or quasi nation. For theorists of sexual citizenship, Foucault’s analysis of governmentality—government practices that monitor and shape individuals’ conduct⁵⁵—and self-

⁴⁵ Shane Phelan, *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001) at 5.

⁴⁶ *Ibid.* at 5, citing Zygmunt Bauman, *Modernity and Ambivalence* (Ithaca, N.Y.: Cornell University Press, 1991).

⁴⁷ Phelan, *ibid.* at 15-16.

⁴⁸ *Ibid.* at 17.

⁴⁹ (Cambridge: Polity Press, 2000).

⁵⁰ *Ibid.* at 10.

⁵¹ *Ibid.* at 142.

⁵² *Ibid.* at 144.

⁵³ *Ibid.* at 66.

⁵⁴ *Ibid.* at 140, quoting Michel Foucault, “Sexual Choice, Sexual Act” in Sylvère Lotringer, ed., *Foucault Live* (New York: Semiotext(e), 1989) at 229.

⁵⁵ Michel Foucault, “Governmentality” in Graham Burchell, Colin Gordon & Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Hemel Hempstead: Harvester Wheatsheaf, 2005) 87.

discipline—the ways in which individuals act upon themselves⁵⁶—has obvious relevance. When citizenship transcends national boundaries, new questions arise, such as which government or international entity is regulating individuals.

Carl Stychin, a pre-eminent queer legal theorist and native Canadian, views the Foucaultian claim that citizenship has a disciplinary function as “intuitively persuasive”, but maintains that “rights and citizenship retain an unruly and unpredictable political and social edge.”⁵⁷ In this sense, discipline is “resistable”.⁵⁸ He argues that historically citizenship has been built on exclusions through binary divisions, with two primary axes: private/public and active/passive.⁵⁹ Examining European citizenship, he identifies an unruliness in the broadening of the concept of European citizenship from one representing a mere economic impetus to one that includes a normative rationale, with “equality” as a fundamental tenet.⁶⁰ Sexual citizenship articulates sexuality in the public sphere, by way of claims for rights and participation, while also claiming a “right to spaces for subcultural life.”⁶¹ Stychin sees in European citizenship, like in sexual citizenship, a tension between the “need to construct meaningful categories of belonging and the need to ‘live with’ the differences which challenge and undermine fixity of boundaries which contain the categorization.”⁶² Ultimately he argues for a “language of coalition and affinity,” recognizing that community boundaries are open to dispute.⁶³

It is not only community boundaries but also national boundaries that are open to dispute. American legal scholar Linda Bosniak argues that citizenship can be located beyond the boundaries of nation-states; this entails an understanding of citizenship that is “multiple and overlapping.”⁶⁴ She contends that while citizenship is being “dramatically reconstituted in Europe,” EU citizenship is still subordinate to national citizenship.⁶⁵ Although scholarship traditionally assumed that “the site of citizenship is the national society,” the emergence of post-World War II international rights regimes set out rights that transcend the boundaries of nation-states.⁶⁶ Because such rights are not self-executing, the notion that these regimes create transnational

⁵⁶ L.H. Martin *et al.*, *Technologies of the Self: A Seminar with Michel Foucault* (London: Tavistock, 1998) at 16.

⁵⁷ *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart, 2003) at 13 [Stychin, *Governing Sexuality*].

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 8-9.

⁶⁰ *Ibid.* at 15.

⁶¹ *Ibid.* at 17.

⁶² *Ibid.* at 19.

⁶³ *Ibid.* at 21.

⁶⁴ “Citizenship Denationalized” (1999–2000) 7 *Ind. J. Global Legal Stud.* 447 at 450 [Bosniak, “Denationalized”].

⁶⁵ *Ibid.* at 458.

⁶⁶ *Ibid.* at 466-67.

citizenship is problematic.⁶⁷ Bosniak examines the concept of citizenship as “active engagement in the life of the community,” which can cross national boundaries,⁶⁸ finding that such conceptions of transnational citizenship have value in their expansive view of the ““common good”” and the ““public domain””.⁶⁹ Yet she acknowledges that a sociological discourse of ““feeling of citizenship”” might risk “producing a concept of citizenship that begins to mean very little since it can so readily mean so much.”⁷⁰

II. Cossman on Sexual Citizens

In her book *Sexual Citizens*, Brenda Cossman acknowledges that historically the term “citizenship” has denoted “formal legal status of membership in a nation state,”⁷¹ but makes clear that she will employ the term more broadly to suggest forms of “belonging, recognition and participation” in the nation state, as exemplified in popular cultural representations of sexuality.⁷² She argues that citizenship is “about the process of becoming recognized subjects, about the practices of inclusion and membership.”⁷³ At the same time, “new practices [of citizenship] are producing newly bad or failed sexual citizens, implicating a process not only of becoming but of unbecoming citizens.”⁷⁴ Cossman examines the role of legal discourse in constructing and disciplining sexual citizens, looking at court cases involving the right to privacy, the rights of gays and lesbians to marry, as well as marriage rights and welfare statutes. Using examples from popular television shows and movies, Cossman argues that the sexual citizenship that is emerging may well be “overtly sexed but [is] simultaneously privatized and self-disciplined.”⁷⁵ The television show *Queer Eye for the Straight Guy* illustrates such a new modality of citizenship “in which practices of belonging for gay and heterosexual subjects alike are being increasingly sexed but not too much, privatized through a celebration of market consumption, and transformed into projects of self-governance.”⁷⁶

In the first chapter, “Consensual Sex and the Practices of Citizenship,” Cossman argues that sexual citizenship is being transformed as the “borders of old” are transgressed and the “citizens of new” are domesticated.⁷⁷ She notes that the sexualities of the four single women depicted in *Sex and the City*, a popular American

⁶⁷ *Ibid.* at 467-68.

⁶⁸ *Ibid.* at 474.

⁶⁹ *Ibid.* at 479.

⁷⁰ *Ibid.* at 487.

⁷¹ *Supra* note 8 at 195.

⁷² *Ibid.* at 3.

⁷³ *Ibid.* at 2.

⁷⁴ *Ibid.* at 3.

⁷⁵ *Ibid.* at 195.

⁷⁶ *Ibid.* at 2.

⁷⁷ *Ibid.* at 21.

television show set in New York, “are a crucial part of their citizenship in the republic of New York City.”⁷⁸ The show represents the “normalization of sex and recuperation of the sexual outlaw in popular culture ... ,” a normalization that remains controversial in popular culture and the law.⁷⁹ Cossman then rehearses U.S. doctrine under the Fourteenth Amendment of the United States Constitution, which arguably protects sexual autonomy. She argues that the right to privacy protects good but not bad sexuality, discussing cases of the Supreme Court of the United States on constitutional privacy from the 1960s and early 1970s.⁸⁰ To introduce her section on sodomy laws, Cossman notes that the “late 1990s were marked by a Wildean moment” in which plays, a film, and books on Oscar Wilde remade Wilde into a sexual citizen as well as a “victim of injustice, critic of outdated values and sexual hypocrisy.”⁸¹ The film *Wilde* “recuperat[es] ... sodomy as a defining gay male act.”⁸² Cossman argues that in this context, *Bowers v. Hardwick*,⁸³ in which the Supreme Court of the United States upheld a sodomy statute against constitutional challenge, was out of sync with the “cultural discourse around gay sex,” and that depictions of gays and lesbians, while mostly asexual, contributed to the legal transformation in which *Bowers* was later overturned.⁸⁴ In *Bowers*, the court expressed anxiety about its ability to police the border between legitimate and illegitimate sex if consensual gay sex were to be recognized as a right.⁸⁵ Taking up *Lawrence v. Texas*,⁸⁶ in which the Supreme Court of the United States reversed *Bowers* seventeen years after it had been decided, Cossman contends that the court recognized a liberty right—a right to “make certain private choices about intimate matters” —even while carefully circumscribing the right by emphasizing “the private, the domestic, the home as the location of the liberty interest.”⁸⁷ Noting that the majority uses the term “adult sexual intimacy” rather than the term “sodomy,” she argues that decision marks the “transformation of sodomite as outcast to gay subject engaged in sodomy as sexual citizen.”⁸⁸

Cossman then turns to sexual speech under the United States Constitution’s First Amendment, arguing that the film *The People vs. Larry Flynt* reconstitutes a sexual

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at 22.

⁸⁰ *Poe v. Ullman*, 367 U.S. 497 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

⁸¹ *Supra* note 8 at 25-26.

⁸² *Ibid.*

⁸³ 478 U.S. 186 (1986) [*Bowers*].

⁸⁴ *Supra* note 8 at 28, citing *Bowers*, *ibid.* Unfortunately, Cossman does not elaborate on this assertion. She generally does not examine the effect of cultural representations on social and legal discourses or vice versa, instead presenting them as reflections of each other. Nor does she address questions regarding which cultural representations are influential, who is producing the representations, and how they function to influence legal discourse.

⁸⁵ *Ibid.* at 27.

⁸⁶ 539 U.S. 558 (2003) [*Lawrence*].

⁸⁷ *Supra* note 8 at 28.

⁸⁸ *Ibid.* at 31, citing *Lawrence*, *supra* note 86 at 564.

outlaw “as a political citizen.”⁸⁹ She contends that the widespread presence of sexual imagery “challenges the categories of pornography and obscenity themselves,” and thus the borders of “legitimate sexual speech” are shifting.⁹⁰ Cossman compares the cases of two “border speakers”, hip hop artist Sarah Jones and “hard core” pornographic filmmaker Lizzie Borden. She asserts that Jones “ended up on the side of speakability and legitimate sexual citizenship by shoring up the very borders that divide citizen from outlaw.”⁹¹ On the other hand, Lizzie Borden challenged “the limits of speakability” and could not cross the border into citizenship because she rejected its line drawing⁹²

Cossman devotes the second of her four chapters to “Marriage, Sex and Adultery as Practices of Self-Governance,” arguing that intimacy is becoming individualized, resulting in “practices of responsabilization, wherein individuals are being called upon to manage the risk of the increasing fragility of their relationships.”⁹³ Sexuality within marriage has been transformed, from a form of regulation by law and social sanction to a way of increasing self-governance.⁹⁴ Marriage, more than a right of citizenship, is “one of citizenship’s central and constitutive practices.”⁹⁵ Furthermore, the norms of marriage’s sexual practices define who is a good or bad citizen.⁹⁶ Cossman supports her argument with a discussion of television-pop-psychologist Dr. Phil’s approach, which emphasizes that individuals have the power to change if they

⁸⁹ *Ibid.* at 44.

⁹⁰ *Ibid.* at 46.

⁹¹ *Ibid.* at 48. Jones sued the Federal Communications Commission (FCC) after it had fined a radio station for airing her poem-rap song *Your Revolution*, which the FCC found indecent (*Jones v. FCC*, 2002 WL 2018521 (S.D.N.Y. 2002) [*Jones*]). The song critiques misogynistic hip-hop music by quoting and denouncing macho lyrics. Jones argued that her song was not indecent but was “a protest against indecency in popular culture” (Cossman, *ibid.* at 52). Cossman contends that this approach “tacitly accepted the power of the FCC to draw these lines and reinforced the category of indecency for future use” (*ibid.*). For an excellent analysis of *Jones*, see Nasoan Sheftel-Gomes, “Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves” (2006–07) 24 *Cardozo Arts & Ent. L.J.* 191.

⁹² Cossman, *ibid.* at 57. Cossman further argues that “the self-disciplining citizen needs an unruly subject against which to emerge” (*ibid.*). In examining *U.S. v. Extreme Associates* (431 F.3d 150 (3d Cir. 2005)), Cossman finds that, in contrast to Jones, the producers of pornography in that case “are challenging the limits of speakability” (*ibid.* at 57). Compare Sienna Baskin, “Deviant Dreams: Extreme Associates and the Case for Porn” (2006–07) 10 *N.Y. City L. Rev.* 155 at 158 (arguing that the issue is personal autonomy rather than free speech and obscenity).

Cossman concludes that the citizenship of pornography entrepreneurs is “constituted in the neo-liberal discourse of the market ... as long as they self-discipline” (*ibid.* at 63). Noting the racialized and gendered constructions of citizenship, Cossman asserts that as an African-American woman, Jones could not be cast as a successful entrepreneur, as Larry Flynt had been, and therefore she “had to wrap herself in the flag” by invoking political speech (*ibid.* at 68).

⁹³ *Ibid.* at 70.

⁹⁴ See *ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at 71.

take responsibility for their lives,⁹⁷ and she notes that individuals are being called on to treat their marriage as a project.

The project of marriage includes sex, according to both Dr. Phil and the courts.⁹⁸ Reviewing American decisions that separate consummation from child bearing and define consummation as heterosexual sexual intercourse, Cossman contends that the “act of consummation transformed the marriage contract from civil contract to something larger, more sacrosanct, more public.”⁹⁹ It is the act of sexual consummation that “produced the legitimate sexual citizen.”¹⁰⁰ Indeed, “[m]arriages without sex are marriages at risk of infidelity and divorce and therefore of citizenship failure.”¹⁰¹

While adultery is seldom prosecuted as a criminal offence, its meaning is culturally produced: adultery is a “failure of self-discipline ... [T]he adulterer is becoming a new kind of unbecoming citizen.”¹⁰² After briefly reviewing American criminal adultery cases and noting the historical double standard that once treated female adulterers more harshly than males,¹⁰³ Cossman discusses adultery in films and television programs such as *Unfaithful*, *Desperate Housewives*,¹⁰⁴ and *Oprah*.¹⁰⁵ She also notes the rise of covenant marriage laws, in which couples agree to limit the grounds for divorce.¹⁰⁶ The new laws “operat[e] within the logic of individual choice and self-governance” because they aim “to reduce divorce through responsabilization.”¹⁰⁷ However, Cossman find it significant that adultery nonetheless remains a ground for divorce within this legal framework. “[G]ood citizens” do not have sex outside of marriage, or, if they do, they “confess, apologize and recommit to

⁹⁷ *Ibid.* at 69-70.

⁹⁸ *Ibid.* at 75-77.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* at 78.

¹⁰¹ *Ibid.* at 80.

¹⁰² *Ibid.* at 84.

¹⁰³ *Ibid.* at 85-86. She observes that some courts have broadened the definition of adultery to include sexual encounters other than heterosexual sexual intercourse (*ibid.* at 86-88). Cossman argues that adultery is now framed as not just a sexual but an emotional betrayal, citing the Clinton-Lewinsky scandal and surveys indicating that most people think oral sex constitutes adultery (*ibid.* at 88-89).

¹⁰⁴ Adultery is similarly portrayed in the television show *Desperate Housewives* as “a crossing of the line” that “unleashes the wave of relationship destruction” (*ibid.* at 104).

¹⁰⁵ Cossman describes the treatment of adultery on *Oprah* and *Dr. Phil* “with a marked emphasis on the possibility of redemption after the fact” (*ibid.* at 97). She argues that both television hosts take an “approach of self-help as the path to the American Dream” (*ibid.* at 99).

¹⁰⁶ *Ibid.* at 108.

¹⁰⁷ *Ibid.* at 108-09.

the relationship.”¹⁰⁸ Those who fail to redeem their citizenship “become the unbecoming citizens.”¹⁰⁹

The strong connection between sex, marriage, and the success or failure of citizenship is also manifested in sexual stereotypes of African-Americans, as discussed in the chapter entitled “Unbecoming Citizens: Welfare Queens, Deadbeat Dads, and the Privatization of Dependency.” Cossman begins with a description of the movie *Claudine*, which she contends challenged stereotypes of welfare recipients and “the creeping pathologization of African-American families.”¹¹⁰ She reviews the history of welfare statutes in the United States, noting that states historically excluded African-American mothers from aid through the use of various eligibility criteria. As the number of black women receiving welfare benefits increased, due in part to the civil-rights and welfare-rights movement, black women became “the new face of welfare”: the trope of the “welfare queen” was created.¹¹¹ In Cossman’s view, both conservative and neo-liberal criticisms of women on welfare are properly understood as accusations of failures of citizenship. Social conservatives viewed illegitimacy as the cause of welfare dependency; strategies to end welfare included sexual abstinence programs and programs to encourage women to marry their children’s father. This approach casts the welfare queen as a “failed citizen because she fails to sexually self-discipline, to choose marriage and to adopt appropriate gender roles as wife and mother within a traditional family.”¹¹² The neo-liberal view stresses work, casting the “citizenship failure of the welfare queen” in market terms.¹¹³

In a section on “deadbeat dads”, Cossman argues that the stereotype of the deadbeat dad emerged out of the divorce revolution.¹¹⁴ He was a market citizen, whose “citizenship failure lay in not supporting his dependents ... He was an unbecoming citizen because he was not assuming his familial responsibilities ... ”¹¹⁵

¹⁰⁸ *Ibid.* at 111.

¹⁰⁹ *Ibid.* The meaning of Cossman’s term “unbecoming citizen” is somewhat unclear; it seems to denote “bad citizen”.

¹¹⁰ *Ibid.* at 115. The mother of six played by Diahann Carroll works hard to care for her children, but faces numerous obstacles, including an unhelpful welfare worker. Her love interest is a man who is an absentee father but eventually commits to Claudine and her children (*ibid.* at 116). Cossman contrasts the movie’s complex characters with the emergence of “the welfare queen and deadbeat dad” as “icons of bad citizenship” (*ibid.* at 117). She argues that neo-liberal and neo-conservative discourses produced the stereotypes, constructing them as failing to abide by “the privatized and self-disciplining codes of belonging, with particularly racialized and gendered narratives” (*ibid.* at 118). The myths were used to dismantle “the limited American welfare state,” replacing it with “the authoritarian deployment of the rhetoric of self-governance” (*ibid.*).

¹¹¹ *Ibid.* at 120.

¹¹² *Ibid.* at 123.

¹¹³ *Ibid.* at 121.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* at 130-31.

Both the welfare queen and deadbeat dad stereotypes have thus become “specters of bad citizenship, haunting all African-Americans, regardless of income.”¹¹⁶

The controversy among some in the African-American community over R&B artist Lauryn Hill’s unmarried motherhood demonstrates that “even those very few black women who reach the apex of success are still at risk of being caught in [the] shadow” of the stereotype of the welfare queen.¹¹⁷ The Sean Combs child-support case is analyzed in a similar fashion, with Cossman arguing that although Combs is “a self-made market citizen, a highly successful entrepreneur, and a pop culture icon,” his citizenship “remains precarious at best” because of the “racialized script of irresponsibility.”¹¹⁸ Cossman also uses the films *Disappearing Acts* (which “refuses the association of African-American women with the welfare queen” yet “bumps up against its legacy”)¹¹⁹ and *Baby Boy* and *My Baby’s Daddy*¹²⁰ (which “tell contested narratives of self-governance, of the need of African-American men to step up and transform themselves into responsible, privatized, and self-disciplining citizens”)¹²¹ to assert that “[b]ecoming a citizen for the unmarried African-American parent remains an elusive challenge, even for those who appear to have otherwise met the criteria of citizenship.”¹²²

In seeking to enrich the same-sex marriage debate through the lens of sexual citizenship, Cossman places particular importance in the ambivalence of the metaphorical borders that separate legitimacy from illegitimacy. In her final chapter, “Queer as Citizens”, Cossman begins by contrasting the movie *Kissing Jessica Stein*—a story about “citizenship as normalization”—with the television series *Queer as Folk*—“a story about sexual citizenship that refuses normalization and assimilation.”¹²³ She argues that these poles reflect the debate within gay and lesbian communities about same-sex marriage, viewed by some as “fundamental to the full citizenship of gay men and lesbians” and by others as “normalizing and domesticating, undermining and excluding the more subversive dimensions of queer identities.”¹²⁴ Cossman asserts that the debate is oversimplified and that the film and television show can be reread to embody more complexity. The two female protagonists in *Kissing Jessica Stein* “have a fluid sexuality, and their identities are

¹¹⁶ *Ibid.* at 142.

¹¹⁷ *Ibid.* at 145-46.

¹¹⁸ *Ibid.* at 152-53.

¹¹⁹ *Ibid.* at 147.

¹²⁰ She notes that the latter was poorly received and critically panned, but asserts that it is worth examining because of its message “articulated by an otherwise serious filmmaker” (*ibid.* at 156). In the absence of any context or analysis of who is producing and who is consuming cultural representations, the inclusion of an unpopular movie to demonstrate popular representations of African-American men makes little sense.

¹²¹ *Ibid.* at 156.

¹²² *Ibid.* at 157.

¹²³ *Ibid.* at 159-60.

¹²⁴ *Ibid.* at 160.

not derived from these sexualities.”¹²⁵ The film thus “destabiliz[es] the line between heterosexual and homosexual.”¹²⁶ In *Queer as Folk*, the gay men are consumers, and many of them come to embrace monogamy and marriage.¹²⁷ Citing Judith Butler’s assertion that there are “middle zones and hybrid formations” between legitimacy and illegitimacy, Cossman explains her intention to “use the ambivalence of border crossing as an entry point into the same-sex marriage debate ...”¹²⁸

In a section entitled “Same-Sex Marriage and the Zones of Ambivalence,” Cossman examines the portrayal of same-sex marriage in *Queer as Folk* and finds that same-sex marriage involves a “process of becoming” that brings with it new choices and transforms identity.¹²⁹ An episode in which two characters get married “performs a multiplicity of border crossings, including a literal one.”¹³⁰ Crossing the U.S.-Canadian border, the couple is prohibited from using a single customs form. “The process of crossing the territorial border is simultaneously a recrossing of the social citizenship border; they are cast back into noncitizens, or less than full citizens, as they are reconstituted as unmarried.”¹³¹ Cossman continues to rely on the border metaphor, arguing that “the cultural border between gay/straight, married/not married undergoes its own transformation.”¹³² In the final scene of the episode, the two men have sex with their wedding bands on their fingers: they “may be highly domesticated subjects, but they refuse to be de-eroticized.”¹³³ Cossman compares this to the portrayal in *Wilde* and to the *Lawrence* decision, in which “citizenship is accomplished not through an erasure of the act of sodomy but, rather, in and through it.”¹³⁴ She argues that the consummation scene in *Queer as Folk* represents a Butlerian “middle zone between marriage and nonmarriage, between legitimate and illegitimate citizenship.”¹³⁵

Examining the legal recognition of same-sex marriage in the United States in a section entitled “Real Marriage in Real Time”, Cossman further asserts this ambiguity, arguing that the constitutional challenges related to same-sex marriage laws “invoke all of the hopes and fears of border crossings and border patrol.”¹³⁶ Courts are divided not only on the legitimacy of same-sex marriage but “on the underlying question of the nature of marriage,” which she terms “border patrol of the

¹²⁵ *Ibid.* at 161.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* at 162, citing Judith Butler, *Undoing Gender* (New York: Routledge, 2004) at 108.

¹²⁹ *Ibid.* at 164.

¹³⁰ *Ibid.*

¹³¹ *Ibid.* at 165.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*; *Lawrence*, *supra* note 86.

¹³⁵ *Ibid.* at 166.

¹³⁶ *Ibid.* at 167.

institution of marriage.”¹³⁷ Cossman reviews state court decisions that view marriage as heterosexual “at the definitional level,” noting that these decisions often link marriage, procreation and childrearing, even while courts begin to recognize that same-sex couples are having children.¹³⁸

The push for constitutional amendments prohibiting same-sex marriage also reflects the new begrudging acknowledgment of limited citizenship.¹³⁹ Unlike the debates over the *Defense of Marriage Act*,¹⁴⁰ the more recent debates over the *Federal Marriage Amendment*¹⁴¹ are not so focused on moral condemnation of homosexuality. Instead, proponents of the amendment deny the charge that it is discriminatory, implying that discrimination against gays and lesbians is not acceptable.¹⁴²

Furthermore, in reviewing the decisions that have held unconstitutional U.S. laws prohibiting same-sex marriages, Cossman finds that “marriage is increasingly defined in the language of commitment and intimacy.”¹⁴³ Broader social transformations in relations of intimacy have made same-sex marriage “imaginable”.¹⁴⁴ Yet in these court decisions, “marriage is all about social stability through the orderly distribution of rights and responsibilities, the privatization of dependency, and raising children,” and this resembles the view of marriage articulated by decisions that oppose same-sex marriage.¹⁴⁵ According to Cossman, the court’s insistence in *Goodridge v. Department of Public Health* that its decision “does not disturb the fundamental value of marriage in our society” is a “performance of border patrol” akin to Justice Kennedy’s in the *Lawrence* decision.¹⁴⁶ While gays and lesbians are now included in the category of good citizen, the border between good and bad citizens is maintained.

Cossman asserts that as “they cross the border into marriage,” same-sex couples will find themselves “subject to its regulatory practices.”¹⁴⁷ “[M]essages of self-

¹³⁷ *Ibid.* at 168-69.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)) [*DOMA*].

¹⁴¹ *The Federal Marriage Amendment* is a proposed amendment to the United States Constitution that would limit the definition of marriage to heterosexual unions. Various versions of the amendment have been introduced to both the United States House of Representatives and the United States Senate, but none has yet been adopted. See e.g. U.S., H.R.J. Res. 56, *Proposing an Amendment to the Constitution of the United States Relating to Marriage*, 108th Cong., 2003; U.S., S.J. Res. 43, *Marriage Protection Amendment*, 110th Cong., 2008.

¹⁴² Cossman, *supra* note 8 at 172.

¹⁴³ *Ibid.* at 173, citing *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005).

¹⁴⁴ *Ibid.* at 174.

¹⁴⁵ *Ibid.* at 174-75.

¹⁴⁶ *Ibid.* at 175 [emphasis removed], citing 798 N.E.2d 941 (Mass. 2003); *Lawrence*, *supra* note 86 at 578.

¹⁴⁷ *Ibid.* at 177.

regulation” are starting to appear in the “cultural domain of same-sex marriage.”¹⁴⁸ For example, on the television show *Queer as Folk*, a lesbian in a long-term relationship has an affair, an infraction that is particularly egregious because her partner is pregnant with their second child.¹⁴⁹ The fact that her affair is with a man raises questions about her sexual identity, which “confuse the gay/straight dichotomy.”¹⁵⁰ In contrast to this fluid sexuality, “there is no narrative ambivalence over the infidelity.”¹⁵¹ Cossman notes that another couple on the show is nonmonogamous but with rules; these rules create “their own version of fidelity.”¹⁵²

The blurring of the borders of citizenship that these changing regulatory practices engender is depicted in *Queer Eye for the Straight Guy*. Circling back to the show, Cossman argues that the “Fab Five” (the five main characters) are “heroic citizens ... com[ing] to the rescue of domesticity, heterosexuality and masculinity.”¹⁵³ With gay men coming to the rescue of a straight man, showing him how to dress, decorate, groom himself, become cultured and cook in order to become “a better boyfriend or husband,”¹⁵⁴ the show delivers the message that marriages, and relationships generally, are projects.¹⁵⁵ Both the show and same-sex marriage, Cossman argues, represent the “queering of citizenship,” in which “the boundaries that produced gay and straight, citizen and non-citizen, hero and outlaw ...” begin to blur.¹⁵⁶ Throughout the book, Cossman remains faithful to the examination of the “legal and cultural regulation of sex and sexuality through the lens of citizenship” because the “idea of citizenship directs analytic attention to questions of belonging and borders.”¹⁵⁷ Citizenship “requires borders, and borders require exclusion.”¹⁵⁸ Cossman suggests that further inquiry should address the sexually excluded, and asserts that the denunciation of promiscuous gay men has created a new outlaw.¹⁵⁹ One area of inquiry she suggests is an analysis of not just “figurative borders of social belonging” but also “literal geographic borders of more traditional invocations of citizenship.”¹⁶⁰ She says that anxieties about the borders of marriage have played out in the arena of immigration, describing the mail-order-bride industry and its representations in popular culture.¹⁶¹ The industry exemplifies the way in which “[m]arriage remains a site of contestation and anxiety in contemporary citizenship practices and

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.* at 179-80.

¹⁵⁰ *Ibid.* at 182.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.* at 183.

¹⁵³ *Ibid.* at 187.

¹⁵⁴ *Ibid.* at 188.

¹⁵⁵ *Ibid.* at 189.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at 196.

¹⁵⁸ *Ibid.* at 197.

¹⁵⁹ *Ibid.* at 197-98.

¹⁶⁰ *Ibid.* at 199.

¹⁶¹ *Ibid.*

transnational border crossings.”¹⁶² Cossman describes depictions of mail-order brides in three relatively recent movies, noting that while in legal discourse, “the men have become suspect citizens, and the women are their potential victims,” these roles are reversed in the movies.¹⁶³ Despite these differences, she finds that both legal and cultural representations of mail-order brides “reflect the idea that sexual practices are central to contemporary citizenship.”¹⁶⁴

III. Questioning *Sexual Citizens*

Cossman’s book exhibits the risk identified by Linda Bosniak: the “concept of citizenship” can begin to “mean very little since it can so readily mean so much.”¹⁶⁵ Throughout *Sexual Citizens*, the idea of citizenship is elastic and remains ill-defined. Cossman explicitly frames citizenship as including “not only legal and political practices but also cultural practices and representations, and clearly focuses on the latter.”¹⁶⁶ Yet the significance of the cultural practices and representations discussed in the book can be unclear. Legal decisions and statutes are products of a particular government. Cultural representations such as *Queer Eye for the Straight Guy* are not. If a television show constructs persons as citizens, what are they citizens of? By watching *Queer Eye for the Straight Guy*, does a person belong to the nation-state that produced the show? What if the person is watching the show in Canada, or South Africa? Or does one become a member of the “nation” of *Queer Eye for the Straight Guy* viewers? For a popular show, the viewers may indeed constitute a kind of nation. But what about films that are not popular? Are all cultural representations equally worthy of analysis? Describing a film as a representation of belonging is certainly valid, but the contention that the film constructs citizenship is less convincing.

The relationship between culture and citizenship is certainly worth examining. Leti Volpp has argued that citizenship is constructed as “culture-free” in contrast with “culturally encumbered” minorities, a construction that assumes a “neutral state that must either tolerate or ban cultural differences.”¹⁶⁷

The citizen is assumed to be modern and motivated by reason; the cultural other is assumed to be traditional and motivated by culture. In order to be assimilated into citizenship, the cultural other needs to shed his excessive and archaic culture. Citizenship emerges through its distinction from the cultural other, who is measured and found wanting for citizenship. We should therefore understand that the cultural other is constitutive of the citizen.¹⁶⁸

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at 201-02.

¹⁶⁴ *Ibid.* at 203.

¹⁶⁵ “Denationalized”, *supra* note 64 at 487.

¹⁶⁶ *Supra* note 8 at 5.

¹⁶⁷ “The Culture of Citizenship” (2007) 8 *Theor. Inq. L.* 571 at 574.

¹⁶⁸ *Ibid.*

In analyzing the French law banning students from wearing conspicuous religious symbols in educational institutions, Volpp finds that although the law was presented as culturally neutral, it was in fact exclusionary.¹⁶⁹ Volpp's conception of citizenship is not limited to formal legal status. She relies on Linda Bosniak's articulation of four types of citizenship: "citizenship as formal legal status ... , citizenship as rights, citizenship as political activity, and citizenship as identity/solidarity."¹⁷⁰ Volpp points out the exclusionary assumptions underlying popular understandings of citizenship. Like Cossman, she is concerned with the values that preclude some from citizenship. Unlike Cossman, however, her critique encompasses actual present and historical exclusions from legal citizenship and naturalization,¹⁷¹ a dimension necessary to any full discussion of cultural aspects of citizenship.

Critics have suggested that the discipline of cultural studies too often ignores the political economy of cultural production, "exaggerat[ing] the freedoms of consumption and daily life," a critique that also applies to Cossman.¹⁷² Debates about sexual citizenship are "marked by questions of geography,"¹⁷³ but Cossman does not highlight geographical or political considerations. As a Canadian law professor analyzing media representations from the United States, Cossman might have engaged with Canada's "cultural sovereignty" policies.¹⁷⁴ For example, does it matter that the television series *The L Word* is set in Hollywood, California, but sometimes filmed in Vancouver, British Columbia? Is this connected at all to different conceptions of citizenship or different regulations of sexuality in the two nations?

Cossman sees "citizenship at its most general as invoking a set of rights and practices denoting membership and belonging in a nation state."¹⁷⁵ This generalized notion of citizenship is effectively illustrated in a description of an episode of *Queer as Folk*:

As the Liberty Ride comes to the Canada/U.S. border, Ben and Michael have their first newlywed encounter with the U.S. state, as they attempt to cross the border as a married couple. The U.S. federal government does not recognize

¹⁶⁹ While France claims to embrace secularism, its national holidays are Christian and the government funds Catholic schools and Catholic chaplains in public schools (*ibid.* at 590-91). Furthermore, Volpp argues that "the ban on religious display selectively favors Christians and targets Muslims and Jews" (*ibid.*).

¹⁷⁰ *Ibid.* at 578, citing Bosniak, "Denationalized", *supra* note 64 at 456-88.

¹⁷¹ *Ibid.* at 580-82.

¹⁷² Nicholas Garnham, "Political Economy and Cultural Studies: Reconciliation or Divorce?" (1995) 12 *Critical Studies in Mass Communication* 5.

¹⁷³ David Bell & Jon Binnie, "Editorial: Geographies of Sexual Citizenship" (2006) 25 *Political Geography* 869 at 869.

¹⁷⁴ Canada, Library of Parliament, Parliamentary Research Branch, *The Arts and Canada's Cultural Policy*, Current Issue Review 93-3E (15 October 1999) at 2-3 (authored by Joseph Jackson & René Lemieux), online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/933-e.pdf>>.

¹⁷⁵ *Supra* note 8 at 5.

same-sex marriage and therefore refuses to allow them to submit a single custom's card. The process of crossing the territorial border is simultaneously a recrossing of the social citizenship border; they are cast back into noncitizens, or less than full citizens, as they are reconstituted as unmarried. As the subjects cross the territorial border, their marriage is effectively annulled. Yet, the cultural reality of their marriage does cross the border—the couple wears their wedding rings, they made their commitment, they know in their hearts that their marriage is real.¹⁷⁶

Yet this analysis of an episode of a television series obscures some important realities. It may seem that the power of the United States is limited to determining who may share a customs form rather than determining who is allowed to cross the border at all. The border, as in so much of Cossman's book, is more like a metaphor than a military station with armed government agents. The use of this metaphor is based on a presumption that formal legal citizenship has been attained.

Similarly, marriage is also a metaphor: its importance is “in their hearts” rather than in the benefits—including citizenship—that might flow from a marital relationship.¹⁷⁷ Cossman elaborates on the Canadian marriage of Ben and Michael in *Queer as Folk* as a way of discussing “the underlying gender politics of the show.”¹⁷⁸ She trenchantly observes that the marriage of the gay male couple means it is “no longer simply the heteronormativized lesbians who embrace familial identity” and further that the gay men may even be better at sexual matrimony than lesbians, given the plot twist of the lesbian couple's separation because one of them is having a sexual affair with a man.¹⁷⁹ For Cossman, the lesbian characters have “stumbled on the terrain of citizenship” and are “bad citizens—not by being outside marriage, but by failing within its terms.”¹⁸⁰

Yet Cossman's treatment of lesbians as sexual citizens is uneven, revealing important limitations with her metaphorical approach to citizenship. While Cossman discusses lesbians in the context of television shows and films such as *Queer as Folk* and *Kissing Jessica Stein*, she does not address whether sexual citizenship treats gay male and lesbian sexuality differently. She might have engaged more with the work on lesbian citizenship of Diane Richardson, who has noted that sexual obligations are often implied in citizenship and queries whether the obligations of lesbians are different from those of heterosexual women.¹⁸¹ A comparative norm—who do lesbians seek to be equal to?—is often absent in discussions of lesbian citizenship. One approach to lesbian equality rejects attempts to attain citizenship status within

¹⁷⁶ *Ibid.* at 164-65.

¹⁷⁷ Cossman does devote attention to the shifting legal terrain of same-sex marriages in the United States (*ibid.* at 167-77), but although her analysis is sound and insightful, again it could have profited from Canadian comparisons.

¹⁷⁸ *Ibid.* at 166.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ “Claiming Citizenship”, *supra* note 35 at 268.

the present structure in favour of developing a “‘lesbian-specific’ system of rules of justice governing claims to citizenship.”¹⁸² This idea has been criticized for assuming that lesbian interests are commonly shared, where the term lesbian includes a diverse group of women and lesbian/feminist theory recognizes the fluidity of lesbian identities.¹⁸³ Yet Richardson argues that “the theoretical and political shift towards sexual citizenship is problematic from a lesbian/feminist perspective”: attempting to attain rights in a system that depends on defining lesbians as outsiders to “‘confirm the ‘normality’ of heterosexuality’” runs the risk of upholding heterosexual institutions and gender hierarchies.¹⁸⁴ She suggests that both the pursuit of rights in the political sphere, and the pursuit of symbolic representations of gays and lesbians are “antithetical to the radical challenge of lesbian/feminist theory.”¹⁸⁵ She concludes by arguing that it is important to acknowledge that citizenship discourses have “reproduced a particular version of the responsible/good citizen” based on assimilationist norms and values, even while acknowledging the increasing power of the language of citizenship.¹⁸⁶

While lesbian citizenship might be incompletely theorized in Cossman’s book, more troubling is the virtually complete absence of any discussion about how concepts of sexual citizenship relate to transgendered persons.¹⁸⁷ Perhaps the omission of transgendered persons points to the problem with relying upon cultural representations of citizenship. While there are transgendered representations in popular culture—and some would even argue that transgendered representations are pronounced¹⁸⁸—they are much less prominent than gay and even lesbian representations. In the legal regulation of citizenship, however, transgendered persons face particular difficulties, especially with regard to immigration into the United States. Post-9/11 initiatives to verify immigrants’ identities rely on physical appearance as well as the matching of data, such as birth date and sex, which are also presumed to be unchanging. Disparities in records can lead to harsh legal penalties and increased scrutiny on transgender immigrants.¹⁸⁹ Transgender immigrants’ access to marriage-based immigration is also severely limited: a subdivision of the

¹⁸² *Ibid.* at 264, citing Ruthann Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (Ithaca, N.Y.: Firebrand Books, 1992).

¹⁸³ Richardson, “Claiming Citizenship”, *ibid.* at 264.

¹⁸⁴ *Ibid.* at 265-66.

¹⁸⁵ *Ibid.* at 269.

¹⁸⁶ *Ibid.*

¹⁸⁷ The index does have an entry for “transsexuals” that lists three pages. The first of these pages is a mention from another theorist, the second two pages are the appearance of the term “transsexuals” in a list of prohibitions in an adult-entertainment guideline (*supra* note 8 at 243, 247, 260, 263).

¹⁸⁸ “They’re everywhere: transsexuals, intersexed individuals, and others of uncertain gender classification. Transgender issues have come out of the closet as popular culture seems to have discovered a new favorite” (Susan Frelich Appleton, “Contesting Gender in Popular Culture and Family Law: *Middlesex* and Other Transgender Tales” (2005) 80 Ind. L.J. 391 at 391).

¹⁸⁹ Adam Francoeur, “The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat” (2007) 3 Stan. J. C.R. & C.L. 345 at 366-67.

Department of Homeland Security issued an interpretive internal memorandum in 2004 directing immigration officials to “not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so” when a partner seeks a spousal or fiancé visa.¹⁹⁰

Whether Cossman’s work on sexual citizenship might be useful to transgendered persons making citizenship claims is uncertain. In the last pages of *Sexual Citizens*, Cossman “gestures” toward further inquiries in sexual citizenship studies.¹⁹¹ She points to her “brief foray” into the problem of mail-order brides (five pages, more than half of which discuss several nondocumentary movies on the subject) as an example of how the analysis of sexual citizenship she developed might be deployed when formal legal citizenship is at stake. The example, however, is not illuminating. Cossman states that she has not argued against the relevance of legal regulation of mail-order brides, but for a more expansive analysis of the modes of regulation.¹⁹² Yet how this contributes to citizenship—as opposed to cultural understandings—remains unclear. Cossman evocatively mentions that legal regulation sought to balance concerns about marriage fraud (to obtain citizenship) and domestic violence,¹⁹³ yet why citizenship should be so prized and how citizenship relates to marital violence are questions left unexplored.

This is not to argue that sexual citizenship must be confined to matters of formal legal citizenship. It is, however, to argue that formal legal and political citizenship, far from tangential, are integral to any discussion of sexual citizenship. Cossman’s resort to citizenship studies as a frame for her theorizing is understandable given the elasticity of citizenship studies. Perhaps the time has come, however, to rethink sexual citizenship and what it should mean. In the next section, we offer a few suggestions for reconceptualizing sexual citizenship.

IV. Rethinking Sexual Citizenship

A. Denaturalizing Citizenship

Queer theorists have explained that arguably natural sexual identities and practices are constructed, contested, and hierarchal. Similarly, citizenship theorists

¹⁹⁰ Interoffice Memorandum by William Yates, Associate Director for Operations, United States Citizenship and Immigration Service (16 April 2004) at 3 [unpublished], online: immigration.com <<http://www.immigration.com/newsletter1/pettransexual.pdf>>, cited in Justin L. Haines, “Fear of the Queer Marriage: The Nexus of Transsexual Marriages and U.S. Immigration Law” (2005–06) 9 N.Y. City L. Rev. 209 at 224–25.

¹⁹¹ *Supra* note 8 at 197ff.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

have argued that categories and practices of citizenship are constructed, contested, and hierarchical. However, in some sexual citizenship theorizing, formal legal citizenship has become naturalized: it is the assumed condition, as if citizenship were not a product of nation-states but of nature. Sexual citizenship theorizing should be more cognizant of citizenship as a formal legal status and its attendant consequences. To overlook the status of citizenship is dangerous and imperialistic: it assumes that everyone is a legal citizen exercising what Cossman calls “choices” about how to exercise citizenship.¹⁹⁴ It equates metaphorical “unbecoming” citizens by sexual choices with deportation and confinement.

As the repression of undocumented immigrants—and those perceived to be undocumented¹⁹⁵—burgeons in the United States and the immigrants’-rights movements gain momentum, this is no time for a discourse of sexual citizenship that is disconnected from real-world events. In 2006, about twelve million legal permanent residents¹⁹⁶ and almost as many “unauthorized immigrants” were living in the United States.¹⁹⁷ In Canada, in 2006, there were just over 250,000 permanent residents¹⁹⁸ and 268,000 temporary residents.¹⁹⁹ Since 1925, more than forty-four million noncitizens have been ordered to leave the United States.²⁰⁰ From 2001 to 2004, over 720,000 noncitizens were formally removed; more than four million were expelled pursuant to a “voluntary departure”.²⁰¹ Detentions are on the rise. The

¹⁹⁴ *Ibid.* at 15.

¹⁹⁵ Workplace and home raids affect undocumented and lawful permanent residents alike, as well as American citizens. See *supra* note 1 and accompanying text. See also Second Amended Class Action Complaint, *Aguilar v. Immigration and Customs Enforcement*, ECF Case Civil Action No. 07 CIV 8224 (JGK) (FM) at paras. 14, 22 (S.D.N.Y. 30 May 2008), online: Latino Justice PRLDEF <[http://www.prldef.org/civil_rights/ICE/Aguilar%20Filed%20Stamped%20Second%20Amended%20Complaint%20\(3\).pdf](http://www.prldef.org/civil_rights/ICE/Aguilar%20Filed%20Stamped%20Second%20Amended%20Complaint%20(3).pdf)> (claiming ICE unlawfully entered the homes of lawful permanent residents, undocumented immigrants and U.S. citizens, all Latinos, without informing them of their rights or producing warrants).

¹⁹⁶ U.S., Department of Homeland Security, *Estimates of the Legal Permanent Resident Population in 2006* by Nancy Rytina (February 2008) at 1, online: United States Department of Homeland Security <http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_PE_2006.pdf>.

¹⁹⁷ U.S., Department of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006* by Michael Hoefer, Nancy Rytina & Christopher Campbell (August 2007) at 1, online: United States Department of Homeland Security <http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf>.

¹⁹⁸ Citizenship and Immigration Canada, *Facts and Figures: Immigration Overview: Permanent and Temporary Restraints, 2006* (Ottawa: Minister of Public Works and Government Services Canada, 2007) at 2, 62.

¹⁹⁹ *Ibid.*

²⁰⁰ Daniel Kanstroom, *Deportation Nation: Outsiders in American History*, vol. 3 (Cambridge, Mass.: Harvard University Press, 2007).

²⁰¹ *Ibid.*

number of noncitizens detained in the United States increased 129 per cent from around 9,000 in 1996 to over 20,000 in 2006.²⁰²

Issues of formal legal citizenship do not merely involve citizens of one nation seeking to become citizens of a different nation. Some persons do not have citizenship in any nation. There are an estimated eleven million people in the world who are stateless. Stateless persons are essentially “international orphans” who do not have the status and claims of citizenship in any nation. Further, despite a United Nations mandate governing stateless persons, they are generally unprotected and unaided by international aid organizations or by particular nations.²⁰³

Obviously, some percentage of immigrants and stateless persons are sexual minorities. Whether one names this fact “intersectionality” or “multiple oppressions” or simply common sense, it is important to remind ourselves that noncitizens and sexual minorities are not mutually exclusive groups. This is especially important when the group interests are presented as oppositional. For example, the openly gay Dutch politician Pim Fortuyn, who was a leading candidate for prime minister when he was murdered in 2002,²⁰⁴ based his populist appeal on an anti-immigrant platform, part of a backlash against immigrants to the Netherlands from Turkey and Morocco.²⁰⁵ He advocated for the closing of Dutch borders and called Islam a “backward” culture,²⁰⁶ comparing the status of women and sexual minorities in the Netherlands and in Islamic countries: “In Holland, homosexuality is treated the same way as heterosexuality: in what Islamic country does that happen?”²⁰⁷ An outspoken and flamboyant gay man,²⁰⁸ Fortuyn promoted “a form of xenophobia ideally suited to a nation that prides itself on its tolerance.”²⁰⁹

Additionally, whether sexual minorities or not, all noncitizens are entitled to sexual freedom. No sexual citizenship theorist would approve regulating the sexual practices of immigrants or stateless persons by an extreme measure such as castration,

²⁰² U.S., Congressional Research Service, *Immigration Enforcement Within the United States*, CRS Report for Congress by Alison Siskin *et al.* (6 April 2006) at 22, United States Department of State, online: <<http://fpc.state.gov/documents/organization/64931.pdf>>.

²⁰³ M. Lynch, *Lives on Hold: The Human Cost of Statelessness* (February 2005), online: Refugees International <<http://www.refugeesinternational.org/content/publication/detail/5051/>>. For further discussion of statelessness, see Audrey Macklin, “Who is the Citizen’s Other? Considering the Heft of Citizenship” (2007) 8 *Theor. Inq. L.* 333.

²⁰⁴ See Elizabeth Kolbert, “Beyond Tolerance: What did the Dutch see in Pim Fortuyn?” *The New Yorker* (9 September 2002) 106.

²⁰⁵ See Tjitske Akkerman, “Anti-immigration Parties and the Defence of Liberal Values: The Exceptional Case of the List Pim Fortuyn” (2005) 10 *Journal of Political Ideologies* 337.

²⁰⁶ Kolbert, *supra* note 204 at 106; Akkerman, *ibid.* at 347.

²⁰⁷ Kolbert, *ibid.* at 110.

²⁰⁸ See e.g. Ian Buruma, *Murder in Amsterdam: The Death of Theo van Gogh and the Limits of Tolerance* (New York: The Penguin Press, 2006) at 39, 54 (describing Fortuyn as “proudly, even flamboyantly, homosexual”).

²⁰⁹ Kolbert, *supra* note 204 at 112.

for example. Less clear, however, is the extent to which the regulations of sexuality being theorized in the context of citizenship apply to noncitizens. Citizenship is an exclusionary term. Using it in a naturalized manner—and in a manner that is perhaps meant to be inclusive—perpetuates imperialism and invisibility.

B. Sexual Regulation of Citizenship Status

The United States has a plethora of regulations pertaining to citizenship, many of which are aimed at sexual practices. To begin with, formal marital status is a “building block” of U.S. immigration law.²¹⁰ As Janet Calvo has argued, marital status in immigration law often retains the character of common law coverture—the notion that a wife is subordinate to her husband—which was incorporated into early immigration law and sometimes strengthened by contemporary reforms.²¹¹ U.S. immigration law’s privileging of formal marital status results in family-based immigrant visas that are available only to immediate family members, including spouses, and marital status can qualify an immigrant being denied entry or facing deportation for an exception or waiver.²¹² Immigration law privileges citizens’ sponsorship of spouses over the sponsorship of spouses by legal permanent residents and generally grants the power to petition for a spouse or family member to the citizen or resident rather than the immigrant seeking a visa.²¹³

Family-based immigration provisions subject immigrants and their families to regulation and government scrutiny. Immigration law involves itself in relationships even prior to marriage, by granting fiancé visas that require couples to marry within ninety days of the immigrant partner’s entry.²¹⁴ After marriage, applicants for immigration status based on marriage must prove that their relationship is bona fide—i.e., that it was not entered into solely for immigration purposes. Couples are subject to intense scrutiny by immigration officials, who examine the marriage for evidence of cohabitation, financial commingling and childbearing. Marriages that fail to conform to these forms of evidence, or to the expectations of immigration officials, may be deemed fraudulent.²¹⁵ The sponsoring relative must show that his or her

²¹⁰ Kerry Abrams, “Immigration Law and the Regulation of Marriage” (2007) 91 Minn. L. Rev. 1625 at 1634 (arguing that immigration law functions as a form of family law for those regulated by it).

²¹¹ Janet M. Calvo, “Spouse-Based Immigration Laws: The Legacies of Coverture” (1991) 28 San Diego L. Rev. 593; Janet Calvo, “A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment But Not Its Demise” (2004) 24 N. Ill. U.L. Rev. 153.

²¹² Abrams, *supra* note 210 at 1634-35. Abrams notes that family-based immigration is the largest of the four avenues to obtain permanent-legal-resident status, “accounting for nearly half of all legal immigration in 2005, with spousal immigration accounting for over one-quarter of all immigration” (*ibid.* at 1635).

²¹³ *Ibid.* at 1636.

²¹⁴ *Ibid.* at 1651-52.

²¹⁵ *Ibid.* at 1683-85.

income is at least 125 per cent of the federal poverty level, to prevent the sponsored immigrant from becoming a “public charge”.²¹⁶

Access to citizenship for the children of U.S. citizens further illustrates the gendered nature of immigration determinations in the United States. In *Miller v. Albright*, a plurality of the Supreme Court of the United States upheld an immigration statute that treated mothers and fathers differently in the conferring of citizenship status on children.²¹⁷ While a child gains the status of citizen by virtue of simply being born to a U.S.-citizen mother, in order for an unmarried citizen father to transmit citizenship, he must acknowledge paternity or be subject to adjudicated paternity before the child reaches the age of eighteen. In *Nguyen v. I.N.S.*, the Supreme Court of the United States rejected a challenge to a statute imposing different requirements for the acquisition of citizenship by a child born outside of the United States depending on whether the citizen parent is the mother or father.²¹⁸ The statute provides that a child born out of wedlock acquires at birth the nationality status of a citizen mother who meets specified residency requirements, but where the father is the citizen parent, the child only acquires citizenship if the father agrees to provide financial support for the child and the child is legitimated or paternity is acknowledged or established by adjudication.²¹⁹ In upholding the statute, the court noted that given “the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity,” and that this “fact takes on particular significance in the case of a child born overseas and out of wedlock.”²²⁰ The court was also concerned with “young people, men for the most part, who are on duty with the Armed Forces in foreign countries.”²²¹ On this view of sexuality, male members of the military have no responsibility when they are “overseas”.²²²

Sexual minorities’ current place in immigration law and policy follows almost forty years of per se exclusion from entry into the United States. The 1952 *Immigration and Nationality Act*²²³ provided for the exclusion of immigrants from entry into the United States on a number of grounds, including political ideology and “psychopathic personality, epilepsy or mental defect.”²²⁴ Psychopathic personality and mental defect were categories that were sufficiently broad to also exclude “homosexuals and sex perverts”, according to an opinion from the U.S. Public Health

²¹⁶ *Ibid.* at 1700.

²¹⁷ 523 U.S. 420 (1998); 42 U.S.C. § 1409 (1988).

²¹⁸ 533 U.S. 53 (2001) [*Nguyen*].

²¹⁹ 8 U.S.C. § 1409(a) (2000).

²²⁰ *Nguyen*, *supra* note 218 at 65.

²²¹ *Ibid.*

²²² In her dissenting opinion, O’Connor J. described the statute as “paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children,” and noted that domestic child custody law has departed from these notions of inequality (*ibid.* at 92).

²²³ Pub. L. No. 414, 66 Stat. 163 (1952).

²²⁴ *Ibid.*, § 212(a) at 182.

Service provided to Committee on the Judiciary of the United States Senate.²²⁵ In a case in 1967 upholding the deportation of a Canadian citizen who had been arrested for sodomy, the Supreme Court of the United States held that the inclusion of lesbians and gays in the category of psychopathic personality was in keeping with the United States Congress' intent to "exclude from entry all homosexuals and other sexual perverts."²²⁶ In 1979, the Surgeon General announced that the Public Health Service would no longer issue certificates certifying that an alien was excludable based on suspicion that the alien was homosexual,²²⁷ but the Immigration and Naturalization Service (INS) then adopted a new procedure wherein aliens were excluded if they or another party disclosed their homosexuality.²²⁸ Although a decision of the United States Court of Appeal for the Ninth Circuit in 1983 held that the INS could not circumvent Public Health Service certification by way of its own guidelines,²²⁹ the exclusion was not formally lifted until the passage of the *Immigration Act of 1990*.²³⁰

While the per se exclusion of sexual minorities has been repealed, immigration policies continue to exclude sexual minorities. The same statute that lifted the per se exclusion of sexual minorities reinforced the structural family-unification policy in immigration law, which excludes same-sex couples.²³¹ Adam Francoeur has argued that two laws passed in 1996 "have combined to renew ideological exclusions of LGBT immigrants ..."²³² The *Defense of Marriage Act* defines marriage as "only a legal union between one man and one woman as husband and wife,"²³³ and gives permission to states to refuse to recognize same-sex marriages, even if they are performed and recognized by another state or jurisdiction.²³⁴ *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996* makes it easier for immigrants to

²²⁵ See U.S., *Revision of Immigration and Nationality Laws: Report of the Committee on the Judiciary, 82nd Congress* (S. Rep. No. 82-1137) (Washington, D.C.: United States Government Printing Office, 1952) at 9, cited in Francoeur, *supra* note 189 at 353.

²²⁶ *Boutillier v. Immigration and Naturalization Service*, 387 U.S. 118 at 122 (1967).

²²⁷ 56 Interpreter Releases 387 at 398 (1979); Robert Foss, "The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration" (1994) 19 *Harvard C.R.-C.L.L. Rev.* 439 at 457 (noting that the American Psychiatric Association had removed homosexuality from its classification of psychiatric disorders in 1973).

²²⁸ 57 Interpreter Releases 440 (1980); Foss, *ibid.* at 458. Under the new policy, while aliens were not to be asked about their sexual orientation, if such information was disclosed, the person would be asked to sign a statement declaring his or her homosexuality. Refusal to sign could result in indefinite detention (*ibid.*).

²²⁹ *Hill v. United States I.N.S.*, 714 F.2d 1470 at 1472 (9th Cir. 1983).

²³⁰ Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1182(a)(4) (1990)). Although the Surgeon General issued a policy in 1979 stating that homosexuality was no longer to be considered a "mental disease or defect", INS guidelines the following year created a don't-ask-don't-tell policy, in which the INS had authority to deport noncitizens if their homosexuality was somehow revealed (Francoeur, *supra* note 189 at 355).

²³¹ Francoeur, *ibid.* at 357; *Immigration and Nationality Act*, *supra* note 223.

²³² *Ibid.* at 356.

²³³ *Supra* note 140, § 3 at 2419 (codified as amended at 1 U.S.C. § 7 (1994)).

²³⁴ *Ibid.*, § 2(a) at 2419 (codified as amended at 28 U.S.C. § 1738B (1994)).

be removed from the United States and makes family-based waivers one of the only removal exemptions.²³⁵ Although family law is generally state-based, the definition of “spouse” under federal immigration law is ruled by *DOMA*; same-sex couples thus have no legal access to immigration benefits conferred by marriage.²³⁶ Congressional proposals to ameliorate this rule, such as the *Permanent Partners Immigration Act of 2000*²³⁷ and the *Uniting American Families Act of 2007*,²³⁸ have failed.

In contrast, immigration to Canada based on same-sex partnership (recognized as a common law marriage) or legal marriage is much easier than in the United States.²³⁹ Before 2001, same-sex couples could petition for visas under the “Humanitarian & Compassionate Consideration” of the then-existing immigration law.²⁴⁰ However, Canada reformed its immigration laws in 2001 and passed the *Immigration and Refugee Protection Act*, which allows for same-sex couples to petition for immigration status under the class of visas reserved for Family Class without using the humanitarian and compassionate consideration (which is used in only rare cases now).²⁴¹ Canada will recognize same-sex marriages performed in Canada, Massachusetts, or any country that permits same-sex marriage. However, if neither partner (in either a same-sex marriage or partnership) is a Canadian citizen or resident, one partner must petition under an employment-based visa, and then file a petition for her/his partner based on common law marriage (if the relationship has lasted more than one year).²⁴²

In the United States, the problem is not simply non-recognition of same-sex relationships to provide favourable immigration treatment. Indeed, recognized same-sex relationships can have negative consequences for immigrants. As Francoeur points out, temporary visa holders and petitioners “must show that they have no intent to remain in the United States beyond the term of the visa,” and the formalization of a same-sex relationship might be a family tie that indicates an inappropriate intent to remain in the United States.²⁴³ Additionally, harboring provisions in U.S. immigration

²³⁵ *Supra* note 4.

²³⁶ Francoeur, *supra* note 189 at 358-59.

²³⁷ U.S., Bill H.R. 3650, 106th Cong., 2000 (providing a mechanism for citizens and legal permanent residents to sponsor their permanent partners). See also U.S., Bill H.R. 690, *Permanent Partners Immigration Act of 2001*, 107th Cong., 2001; U.S., Bill H.R. 832, *Permanent Partners Immigration Act of 2003*, 108th Cong., 2003; U.S., Bill H.R. 3006, *Permanent Partners Immigration Act; Uniting American Families Act*, 109th Cong., 2005.

²³⁸ U.S., Bill H.R. 2221, 110th Cong., 2007 (allowing “permanent partners ... to obtain lawful permanent resident status in the same manner as spouses ...”).

²³⁹ Immigration Equality, “Binational Couples: Canadian Options”, online: Immigration Equality <<http://www.immigrationequality.org/template.php?pageid=156>>.

²⁴⁰ *Immigration Act*, R.S.C. 1985, c. I-2, s. 114(2).

²⁴¹ S.C. 2001, c. 27, ss. 12-13.

²⁴² Canadian Immigration for Same-sex Partners, “The Canadian Immigration System: An Overview”, online: Canadian Immigration For Same-sex Partners <<http://www.legit.ca/imm.html>>.

²⁴³ *Supra* note 189 at 360.

law subject to criminal sanctions those persons who afford shelter to unauthorized aliens.²⁴⁴ While these provisions can affect all kinds of relationships, including married and unmarried people, they acutely affect same-sex couples, who have no access to spousal, family-based immigrant visas.²⁴⁵

Asylum law has begun to recognize sexual minorities as a social group deserving of protection from persecution,²⁴⁶ but this recognition has serious limitations. To qualify as a refugee, applicants for asylum must prove membership in a social group,²⁴⁷ which focuses on identity rather than conduct.²⁴⁸ This construction may limit the ability of sexual minorities who were not “out” in their country of origin to prevail in their claims.²⁴⁹ Even the developing recognition that sexual minorities constitute a social group is inconsistent: the precedent set by *In re Toboso-Alfonso* is not binding on circuits that have yet to decide whether homosexuality constitutes a social group.²⁵⁰ Furthermore, because U.S. laws continue to criminalize the sexual conduct of sexual minorities,²⁵¹ asylum seekers from countries with similar criminal

²⁴⁴ *Ibid.* at 362, citing 8 U.S.C. § 1324(a)(1)(A)(iii) (2000).

²⁴⁵ Francoeur, *ibid.*

²⁴⁶ See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 at 820-24 (B.I.A. 1990) [*Toboso-Alfonso*] (finding a gay Cuban man eligible for withholding of removal on the basis of his membership in the particular social group of homosexuals); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 at 1087, 1091-99 (9th Cir. 2000) [*Hernandez-Montiel*] (holding that a gay Mexican man with female sexual identity is a particular social group for the purposes of establishing eligibility for asylum and withholding of deportation). For a detailed discussion of asylum law’s treatment of sexual minorities, see Hollis V. Pfitsch, “Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity” (2006) 15 *Law & Sexuality* 59. See also Suzanne B. Goldberg, “Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men” (1993) 26 *Cornell Int’l L.J.* 605.

²⁴⁷ See 8 U.S.C. § 1101(a)(42)(A) (2006).

²⁴⁸ Pfitsch, *supra* note 246 at 70.

²⁴⁹ Goldberg, *supra* note 246 at 612 (noting that “many lesbians and gay men who fear persecution deny their identity and avoid association with others as a matter of self-preservation”). See also Deborah A. Morgan, “Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases” (2006) 15 *Law & Sexuality* 135 at 144-47 (recounting the story of “Mohammed”, a gay asylum seeker from Iran whose deportation order was overturned only after he presented affidavits from gay organizations, friends and a boyfriend that he was gay).

²⁵⁰ Pfitsch, *supra* note 246 at 66, n. 49, citing *In re Tenorio*, No. A72-093-558 (Immigration Court, 26 July 1993), cited in 70 *Interpreter Releases* 1100 (1993) (following *Toboso-Alfonso*). C.f. *Pitcherskaia v. INS*, 118 F.3d 641 at 647-48 (9th Cir. 1997) (refusing to follow *Toboso-Alfonso*).

²⁵¹ See e.g. *State v. Limon*, 83 P.3d 229 at 232 (Kan. Ct. App. 2004), rev’d 122 P.3d 22 at 40-41 (Kan. 2005). The court upheld the conviction for criminal sodomy of a mentally disabled eighteen-year-old who had performed oral sex on a mentally disabled fourteen-year-old. Under a state “Romeo and Juliet” law, the same act performed on a girl would have resulted in a sentence of 13 to 15 months. The court found that Limon’s sentence of 17 years was not unconstitutional, because unlike in *Lawrence*, this statute involved children, and Limon’s claim was a violation of equal protection, which *Lawrence* had not addressed (*ibid.* at 234-35).

See also 10 U.S.C. § 925 (2000) (codifying *Uniform Code of Military Justice*, c. 169, § 125, 64 Stat. 108 at 141 (1950)). § 925 subjects “any person [in the military] who engages in unnatural carnal copulation with another person of the same or opposite sex” to court martial and criminal sanction

laws may not be granted asylum.²⁵² Asylum has been granted for gay and lesbian and transgender immigrants,²⁵³ but the success of their claims depends less on the facts of their case than on the individual adjudicator.²⁵⁴

Thus it is clear that governments award or deny citizenship in ways that directly relate to sexuality. Certainly this should be a preoccupation of sexual citizenship studies. This should not, however, be the sole concern of sexual citizenship theorizing.

C. Confronting the State's Invocation of Citizenship

The language of citizenship, even if abstract, is an apt response when the state invokes citizenship. For example, legal and political theorist Davina Cooper, in examining former U.K. Prime Minister John Major's *Citizens' Charter*,²⁵⁵ which she views as a move toward "rearticulating citizenship with right-wing discourse,"²⁵⁶ defines citizenship as concerned with "the process of inclusion and exclusion, either in terms of membership of the public realm or as rights and responsibilities vis-à-vis the state."²⁵⁷ She notes that citizenship has a "key place" in modern U.K. political discourse, connoting "empowerment, membership and rights."²⁵⁸ The *Citizens' Charter*, an initiative with the stated goal of providing better quality, choice and information on public services, affirms the citizen as "customer of the state" even while trying to evade state responsibility for public services.²⁵⁹ By privileging the rights of paying customers, such as British Rail users, over the rights of welfare recipients, whose rights are nonenforceable, the *Citizens' Charter* spells out paradigms of citizenship. It shapes who is a citizen by determining who uses a particular service and by keeping some public services outside of its framework.²⁶⁰ Despite the *Citizens' Charter's* promise of public accountability, central government has cut funding and localized implementation of centralized goals, diffusing

(*ibid.*). Accord *U.S. v. Marcum*, 60 M.J. 198 at 206 (C.A.A.F. 2004). The court reasoned that a soldier's conviction for nonforcible sodomy was constitutional even after *Lawrence*: "In the military setting, ... an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life" (*ibid.*).

²⁵² See Pfitsch, *supra* note 246 at 82-83.

²⁵³ *Hernandez-Montiel*, *supra* note 246 at 1099 ("[t]hrough police harassment and rape, Geovanni suffered past persecution in Mexico on account of his sexual orientation for being a gay man with a female sexual identity"). Accord *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004).

²⁵⁴ Pfitsch, *supra* note 246 at 72-73.

²⁵⁵ The *Citizen's Charter* was a political initiative introduced in 1991 with the objective of improving government services to citizens. See Davina Cooper, "The Citizen's Charter and Radical Democracy: Empowerment and Exclusion within Citizenship Discourse" (1993) 2 Soc. & Leg. Stud. 149.

²⁵⁶ *Ibid.* at 149.

²⁵⁷ *Ibid.* at 155.

²⁵⁸ *Ibid.* at 150.

²⁵⁹ *Ibid.* at 166.

²⁶⁰ *Ibid.* at 157.

responsibility. At the same time, users of public services have not had input, but are instead positioned as consumers, and thereby depoliticized.²⁶¹

Cooper compares the conception of citizenship in the *Citizens' Charter* with Chantal Mouffe's idea of radical democratic citizenship, which decentres the state, viewing citizenship as a process rather than a product. Mouffe's radical democracy can be defined as "the struggle to force liberal society to live up to its promise."²⁶² Mouffe advocates for distinct domains between private morality and public politics, a notion that Cooper finds deeply problematic.²⁶³ Even so, Cooper values the radical democratic focus on the "expression of difference within civil society and the participation in a shared political community of values."²⁶⁴ She concludes that the benefits of advocating for citizenship rights depend on historical circumstances.²⁶⁵

When responding to governmental invocations of citizenship, it is certainly appropriate and often important to inflect them with sexual concerns. Yet it is also important to confront citizenship itself. The positioning of citizens as consumers of services is a dilution of citizenship. However, citizenship is already diluted because it connotes that noncitizens do not use—or are not entitled to use—state services. It is this connotation that must be addressed whenever one responds to citizenship discourse from the state.

D. Analogies of Citizenship and Sexuality

Sexual citizenship should explore the relationships between the regulations of noncitizens and the regulations of sexual minorities in both concrete and metaphorical terms. A model is the scholarship of Carl Stychin, who notes that migration has been significant in constituting gay and lesbian subjectivities, and that "escape, displacement and the search for place" are important to gay and lesbian consciousness, as well as legal discourse.²⁶⁶ His analysis encompasses both metaphorical and real-world approaches to citizenship, interrogating the relationship between the two.

Just as travel can be a metaphor for identity, migration can be a metaphor for gays and lesbians "crossing of borders and boundaries ... in refusing to continue to live in old ways."²⁶⁷ At the same time, mobility is limited by its "relationship to consumption and class," which are tied to race and gender. Stychin says that in Western nation-

²⁶¹ *Ibid.* at 159.

²⁶² *Ibid.* at 161, citing Chantal Mouffe, "Democratic Citizenship and the Political Community" in Chantal Mouffe, ed., *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verso, 1992) 225.

²⁶³ *Ibid.* at 164, 167.

²⁶⁴ *Ibid.* at 167.

²⁶⁵ *Ibid.* at 168.

²⁶⁶ *Governing Sexuality*, *supra* note 57 at 94-95.

²⁶⁷ *Ibid.* at 96.

states, group migration often triggers “social anxieties and fears of disorder.”²⁶⁸ He contrasts movement within nation-states, termed mobility and viewed as desirable by governments and corporate interests, with movement between nation-states, termed migration and viewed as illegitimate. Stychin argues that the historical desire for the social control of homosexuality is closely related to the desire for control over movement and borders.²⁶⁹ Both require “reading and controlling bodies,” and both suggest “a dangerous difference that threatens order, consensus, nation state, and a way of life.”²⁷⁰ He examines specific immigration policies and debates excluding homosexuals in the United States and the United Kingdom and argues that claims to mobility are susceptible to the same problems as rights discourse generally: both potentially discipline gay and lesbian subjects.²⁷¹ Citizenship and inclusion are tied to paid employment and the encouragement of stable relationships; these are bases of “good, responsible citizenship.”²⁷² He observes that same-sex immigration rights accompany “a requirement to replicate an idealised model of heterosexual romance,” citing the example of Australia, where immigration policies based on the privatization of financial responsibility subject migrants to surveillance and regulation.²⁷³ He observes a similar “disciplinarity of legal recognition” in the Constitutional Court of South Africa’s decision striking down a statute that excluded same-sex life partners from preferential treatment in immigration.²⁷⁴ Same-sex couples were required to prove “permanence, stability and location in a particular place,”²⁷⁵ especially ironic in a country that imposed forced mobility on many under apartheid.²⁷⁶ In examining how “recognition, social inclusion and citizenship claims come at a price,” he raises the question of “whether alternative ways of imagining a legal regime that recognizes spousal-type relationships is possible.”²⁷⁷

Other metaphorical analogies could prove enlightening. For example, although a physical border fence has not yet been built between the United States and Mexico,²⁷⁸ one might argue that the *Defense of Marriage Act* is a fence of sorts, as it creates an insurmountable barricade to legal-permanent-resident status for immigrant same-sex partners.²⁷⁹ Similarly, Jessica Chapin has pointed to metaphorical treatments of citizenship in which homophobic imagery is deployed to depict a threat to U.S. nationhood. She notes that anxieties

²⁶⁸ *Ibid.* at 98.

²⁶⁹ *Ibid.* at 99.

²⁷⁰ *Ibid.* at 100.

²⁷¹ *Ibid.* at 103.

²⁷² *Ibid.*

²⁷³ *Ibid.* at 104-05.

²⁷⁴ *Ibid.*; *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, [2000] 2 S. Afr. L.R. 1 (S. Afr. Const. Ct.) [*National Equality*].

²⁷⁵ Stychin, *Governing Sexuality*, *ibid.*

²⁷⁶ *Ibid.* at 109-10.

²⁷⁷ *Ibid.* at 113.

²⁷⁸ See *supra* note 7 and accompanying text.

²⁷⁹ *Supra* note 140.

about undocumented immigrants are often expressed in terms that suggest a homosexualization of US–Mexico relations, an inversion of hierarchies. The threat of anal penetration, a loosening of the sphincter in order to let something in instead of to push something out, is homophobically cast as a perversion of the “natural” order and a threat to the social order.²⁸⁰

Thus, sexual citizenship theorizing can—and should—benefit from the use of metaphors and analogies. However, using citizenship itself as a metaphor, as Cossman does, can cause confusion. The term “citizen”, when used to denote being a member of a nation-state, is both accurate and inaccurate. It can seem especially inaccurate during times and in cases when citizenship is a fraught and politically charged notion.

E. Citizens or Persons?

It is clear that the regulation of sexuality by nation-states needs rigorous theorizing. That the rubric for this theorizing should be citizenship is less clear. As Carl Stychin has noted, it may be surprising that “citizenship” has been adopted as a theoretical tool by sexual minorities given citizenship’s “exclusionary history”.²⁸¹ Stychin states that queer theory’s “appropriation of citizenship speaks to the power of citizenship, and to the lack of alternative languages which express both a desire for rights and participation.”²⁸²

Yet the language of “personhood” may be similarly powerful. Indeed, in the United States, the existence of the term “person” in the Bill of Rights and Fourteenth Amendment—rather than the term “citizens”—has been the source of hope for protection for noncitizens. As the Supreme Court of the United States stated in *Zadvydas v. Davis*, “the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²⁸³ In the U.S. context, it is this same concept of “personhood” or personal autonomy—again, rather than citizenship—that has been the source of sexual rights for sexual minorities and women.

The notion of personhood in the human-rights framework is potent, although like the notion of citizenship, personhood may be subject to criticism as gendered and sexualized.²⁸⁴ Yet human-rights frameworks promise that outside the boundaries of nation states, persons still possess some inherent rights. These international human

²⁸⁰ Jessica Chapin, “Closing America’s ‘Back Door’” (1998) 4 GLQ 403 at 412.

²⁸¹ *Governing Sexuality*, *supra* note 57 at 12.

²⁸² *Ibid.*

²⁸³ 533 U.S. 678 at 693 (2001).

²⁸⁴ See e.g. Wayne Morgan, “Queering International Human Rights Law” in Carl Stychin & Didi Herman, eds., *Sexuality in the Legal Arena* (London: Athlone Press, 2000) 220 (arguing that notions of privacy and tolerance in human rights law reinforce the construction of sexual difference as other).

rights can be important in particular contexts such as indigenous land rights²⁸⁵ or sexual rights.²⁸⁶ The construction of the individual in the international human-rights framework undoubtedly does raise concerns about “natural” rights, universality, or the imposition of Western neo-liberal conceptions.²⁸⁷ But it is not only a Western conception. Finding the death penalty unconstitutional, the Constitutional Court of South Africa relied on the African concept of “ubuntu”, which “recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community ... ”²⁸⁸ It is this personhood that may be a more suitable concept than citizenship.

This notion of personhood might be viewed as integral to the idea of “ethical territoriality”, which suggests “rights and recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence.”²⁸⁹ Linda Bosniak asserts that despite its shortcomings,²⁹⁰ ethical territoriality “represents the best argument for immigrants’ rights that we have.”²⁹¹ Bosniak notes that the Supreme Court of the United States has acknowledged that rights attach to persons by reason of their presence: “[Fundamental rights] are not confined to the protection of citizens ... These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, colour, or nationality.”²⁹² Yet, of course, at times the very problem

²⁸⁵ Stychin has noted that in Australia, courts have “found” rights in international law that “declares the existence of international human rights” (Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998) at 159, citing *Mabo v. Queensland* (1992), 174 C.L.R. 1 at 42 (H.C.A.)). He asserts “the language of universality can resonate in the legal arena” (*ibid.*).

²⁸⁶ The Supreme Court of the United States’ decision in *Lawrence* noted that the contention that sodomy was contrary to the values of Western Civilization was contradicted by the European Court of Human Rights’ holding that laws criminalizing sodomy are invalid under Europe’s *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 (entered into force 3 September 1953)) (*supra* note 86 at 573, citing *Dudgeon v. United Kingdom* (1981), 45 E.C.H.R. (Ser. A) 1).

²⁸⁷ Morgan, *supra* note 284 at 208 (noting that human rights law is based on a Western European tradition).

²⁸⁸ *State v. Makwanyane*, [1995] 3 S. Afr. L.R. 391 at para. 224 (S. Afr. Const. Ct.).

²⁸⁹ Linda Bosniak, “Being Here: Ethical Territoriality and the Rights of Immigrants” (2007) 8 *Theor. Inq. L.* 389 at 389-90 [Bosniak, “Being Here”]. Bosniak credits Michael Walzer for articulating this approach (*ibid.* at 392-93, citing Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 59).

²⁹⁰ Bosniak suggests that ethical territoriality is flawed in its presupposition that the existence of borders around the territory in question, the fact that borders are implemented internally and thus “function to thwart ethical territorialism's own internal universalist project” (“Being Here”, *ibid.* at 398). Further, it raises questions about why the “fortuities of birthplace and parentage” should determine people’s rights, as well as what the scope of a nation-state’s territory should include, as the question of the rights of detainees at Guantanamo Bay has illustrated (*ibid.* at 399, 401).

²⁹¹ *Ibid.* at 410.

²⁹² *Ibid.* at 393-94, citing *Yick Wo v. Hopkins*, 118 U.S. 356 at 369 (1886).

at issue is whether “all” persons possess the same rights, or any rights at all. Persons are rights holders, even as the rights they hold may be derived from particular nation-states. The extent to which those rights derive from citizenship status is a contested issue. Moving toward a theory of personhood rather than an imprecise use of citizenship may serve to illuminate the rights that inhere in our existence rather than in our formal legal relation with any particular state. Rights attached to personhood should be more enduring than rights dependent upon shifting national boundaries, politics, and documentary evidence.²⁹³

Conclusion

The theoretical construct of sexual citizenship relied upon so strongly by Brenda Cossman as well as many others needs serious rethinking. By focusing on a conception of citizenship that ignores formal legal status, such analysis trivializes the struggles of people who lack formal citizenship status. Wielded by sexual minorities, the notion of sexual citizenship threatens to exalt citizenship over personhood, thus excluding members of our own communities and our allies. Certainly, this is not the intent of any theorist of sexual citizenship. Nevertheless, although the theory of sexual citizenship is nuanced and complex, it risks perpetuating an imperialistic version of the nation-state. Instead we must envision a broader approach, in which the metaphors and language of citizenship are more carefully deployed to reveal who is excluded. In these dangerous xenophobic times, we should do no less.

²⁹³ In her Canadian study of lesbians’ view of medical power of attorney, Elizabeth Finnis includes an overview of conceptions of sexual citizenship. She attempts to incorporate this theoretical framework into her description of fieldwork in Northern Ontario to suggest the importance of “the lived experiences of lesbians and gay men” in the context of the theory (Elizabeth Finnis, “Sexual Identity, Citizenship and Medical Power of Attorney: Case Illustrations from Northern Ontario, Canada” (2004) 8 *Citizenship Studies* 159 at 161). She then describes the reactions of four lesbians to the creation of medical power of attorney, arguing that the “medical power of attorney can highlight the social/cultural, political and civil exclusion that lesbians experience” (*Ibid.* at 173). Her description of her fieldwork supports this assertion, but her use of citizenship discourse throughout the article is superfluous. Her subject does not need or benefit from the discourse of sexual citizenship: she can illuminate the issues of civil rights and social inclusion implicated in medical power of attorney just as easily without it. As persons living in the nation-state of Canada who are its juridical subjects, the lesbians in Finnis’ study are worthy of examination. Yet their transformation into sexual citizens seems to make them less than fully human.