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# Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability

Janet E. Halley\*

*Three recent scientific reports that purport to show a biological basis for homosexuality have changed the face of pro-gay equal protection litigation by making the argument from immutability more attractive. Professor Janet E. Halley critiques these studies and their reception in legal culture. Because immutability is not a requirement for successful pro-gay litigation, moreover, Professor Halley contends that pro-gay litigators who invoke the argument from immutability do so not only at their option, but at the risk of misrepresenting and dividing the community they hope to represent. She argues that pro-gay legal argument should focus instead on common ground that adequately represents the self-conceptions of both pro-gay essentialists and pro-gay constructivists. And she suggests just such a common ground for more effectively articulating pro-gay equal protection arguments.*

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\* Associate Professor of Law, Stanford University. J.D., Yale Law School, 1988; Ph.D. (English), U.C.L.A., 1980; B.A., Princeton University, 1974. Thanks are gratefully extended to Paul R. Billings, Paul Brest, Jon W. Davidson, Kay Diaz, Marcus W. Feldman, Thomas C. Grey, Ruth Hubbard, Vicki Laden, Mark Kelman, Andrew Koppelman, Mary Newcomb, Daniel R. Ortiz, Judge Richard A. Posner, Margaret Jane Radin, William H. Simon, Edward Stein, David A. Strauss, and Catherine Wells for making the construction of this argument into an extended cross-disciplinary conversation; to the San Francisco Bay Area Group with Interests in Genetics and Society, the New York University Gay and Lesbian Symposium, and the Feminist Legal Theory Seminar of the University of Chicago Law School for lively discussions; to Andy Eisenberg, Paul Lomio, and Iris Wildman for bibliographical assistance; to Lisa Hayden and Suzanne Woods for clear-headed research assistance; and to the Dorothy Redwine Estate for research support.

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## INTRODUCTION

The claim that sexual orientation is biologically determined has become increasingly salient in legal arguments that lesbians and gay men comprise a minority population warranting meaningful constitutional protection. According to this argument, gay men and lesbians constitute a suspect class under the Equal Protection Clause in part because the characteristic that differentiates them, and that constitutes the basis of discrimination against them, is immutable.

A series of recent scientific reports,<sup>1</sup> and the way that legal culture has received them, have made biological causation theories far more plausible. These studies have stimulated media and activist speculation that, confronted with scientific proof of the immutability of homosexuality, judges will be forced to deem gay men and lesbians a suspect class.<sup>2</sup>

1. The most important studies are J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991); Dean H. Hamer, Stella Hu, Victoria L. Magnuson, Nan Hu & Angela M.L. Pattatucci, *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991). For a discussion of related reports, see notes 102-105 *infra*.

2. Richard Green, introduced on Ted Koppel's *Nightline* as an attorney and psychiatrist, gave both legal and medical legitimacy to the claim that biological causation is the key to equal rights for gays and lesbians:

Well, legally, I think, [the LeVay study] could make a very big difference. In American constitutional law, groups that are prejudiced against or stigmatized are given special protection by the courts if the feature for which they are discriminated is what's called immutable or innate or essentially unchangeable. . . . So if we can find, the scientists can find that a specific part of the brain is primarily responsible for sexual orientation, then the stigmatization and the legal discrimination against gays and lesbians in this country should fall.

*Nightline* (ABC television broadcast, Aug. 30, 1991) (available in LEXIS, Nexis library, ABCNEW File). Green has more recently been quoted in a similarly sweeping statement. Natalie Angier, *Study on Sexual Orientation*, N.Y. TIMES, July 18, 1993, § 1, at 24, 24 ("If sexual orientation were demonstrated to be essentially inborn," [Green] said, "most laws that discriminate against gays and lesbians, including sodomy laws, housing and employment discrimination laws, all would fall.").

Similar statements have appeared in major print media. E.g., Natalie Angier, *The Biology of What It Means to be Gay*, N.Y. TIMES, Sept. 1, 1991, § 4, at 1, 4 ("If homosexuality were viewed legally as a biological phenomenon, rather than a fuzzier matter of 'choice' or 'preference,' then gay people could no more rightfully be kept out of the military, a housing complex or a teaching job than could, say, blacks."); David Gelman, Donna Foote, Todd Barrett & Mary Talbot, *Born or Bred?*, NEWSWEEK, Feb.

At the same time, remarkable changes in identity politics over the past decade, most notably the emergence of queer identity and of an unrepentant movement of self-described bisexuals, have complicated gay and lesbian communities.<sup>3</sup> New voices are heard, offering a sustained, community-based attack on the idea that subordinated communities should endorse the identities through which superordinated groups suppress them. Many gay men, lesbians, bisexuals, and queers reject the view that they constitute a minority distinguished by a stable, natural identity.

Two new theoretical developments support this attack. The postmodern critique of liberal explanations of the self posits that culture, not human nature, gives humans their sexual orientations.<sup>4</sup> In a distinct but related critical setting, cultural critics of science argue that science is part of culture, not its opposite.<sup>5</sup>

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24, 1992, at 46, 48 (Proof that homosexuality is biologically caused "could gain [the 'gay community'] the civil-rights protections accorded any 'natural' minority, in which the legal linchpin is the question of an 'immutable' characteristic.").

The scientists themselves have predicted that their findings will change the equal protection landscape. Simon LeVay, author of the brain study described at text accompanying notes 117-136 *infra* has speculated as follows:

"Is homosexuality immutable or a chosen lifestyle? The last time the Supreme Court ruled on this matter, it was argued that it was biological, but nobody believed it. This work may show that sexual orientation is genetically determined like skin color, and may therefore have implications for the civil rights of gays and lesbians."

Jamie Talan, *Study Shows Homosexuality Is Innate: Gay Scientist Is a Hero and a Villain*, NEWSDAY, Dec. 9, 1991, at 41, 41 (quoting LeVay); see also Sharon Kingman, *Nature, Not Nurture?*, THE INDEPENDENT, Oct. 4, 1992, at 56 ("In the United States there is a law that protects people who have immutable characteristics, such as race, from discrimination. So if homosexuality were proved also to be an immutable characteristic, then the law would have to be changed.") (quoting Laura S. Allen, who coauthored a brain study similar to LeVay's; see note 103 *infra*).

3. On bisexuals, see *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT* (Lorraine Hutchins & Lani Kaahumanu eds., 1991); *CLOSER TO HOME: BISEXUALITY & FEMINISM* (Elizabeth Reba Weise ed., 1992); *Bisexualities: Theory and Research*, 11:1/2 J. HOMOSEXUALITY (Fritz Klein & Timothy J. Wolf eds., 1985) (special issue). On queer identity and politics, see *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993) [hereinafter *FEAR OF A QUEER PLANET*]; Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, in *FEAR OF A QUEER PLANET*, *supra*, at 193; Steven Seidman, *Identity and Politics in a 'Postmodern' Gay Culture: Some Historical and Conceptual Notes*, in *FEAR OF A QUEER PLANET*, *supra*, at 105; Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET*, *supra*, at vii. See also Lisa Duggan, *Making It Perfectly Queer*, 22 *SOCIALIST REV.* 11 (1992) (tracing history and politics of queer movement); *Identity Crisis: Queer Politics in the Age of Possibilities*, VILLAGE VOICE, June 30, 1992, at 27 (roundtable discussion of queer identity with Holly Hughes, Gregg Bordowitz, Marcellus Blount, Eve Kosofsky Sedgwick, Alisa Solomon, and Jeff Nunokawa); Eve Kosofsky Sedgwick, *Queer and Now*, in *TENDENCIES* 1, 5-9 (Eve Kosofsky Sedgwick ed., 1993).

4. See, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 42-49 (Robert Hurley trans., 1978); see also WILLIAM E. CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 73-78 (1991); DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE* 41-53 (1990).

5. See, e.g., LUDWIK FLECK, *GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT* (Thaddeus J. Trenn & Robert K. Merton eds. & Fred Bradley & Thaddeus J. Trenn trans., 1979) (1935); DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 7-20 (1991); KARIN D. KNORR-CETINA, *THE MANUFACTURE OF KNOWLEDGE: AN ESSAY ON THE CONSTRUCTIVIST AND CONTEXTUAL NATURE OF SCIENCE* (1981); BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* 43-90 (1979); 4 *THE SOCIAL PROCESS OF SCIENTIFIC INVESTIGATION* (Karen D. Knorr, Roger Krohn & Richard Whitley eds., 1980); Kathryn Pyne Addelson, *The Man of Professional Wisdom*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* (Sandra Harding & Merrill B. Hintikka eds., 1983); David Bloor, *Durkheim and Mauss Revisited: Classification and the Sociology of Knowledge*, 13 *STUD. HIST. & PHIL. SCI.* 267 (1982).

Together, these political and intellectual movements have produced pro-gay constituencies eager to deny the claim that homosexuality is biologically caused or to assert that the biological status of sexual orientation is an answer to the wrong question.

The result is the celebrated essentialism/constructivism debate—or, more accurately, impasse. This article attempts to get beyond that impasse by going around it. It argues that pro-gay legal argument should not focus on positive claims of biological causation, or on pure constructivist claims that homosexuality is a historically contingent artifact, but should repair to a common middle ground. On that middle ground, sexual orientation, no matter what causes it, acquires social and political meaning through the material and symbolic activities of living people. This is the arena of representation, the arena in which we signify to one another who we are, negotiate the norms attaching to that, and arrange and rearrange power along the sexual orientation hierarchy.

Part I examines the doctrinal, jurisprudential, and strategic history of the argument from immutability in general and its use in cases challenging discrimination against gay men, lesbians, and bisexuals. It concludes that immutability is not a requirement for suspect class status and is unlikely to become one, so that pro-gay litigators who invoke the argument from immutability do so at their option. Part II describes the pro-gay argument from immutability as a form of pro-gay essentialism, and notes that pro-gay constructivists vigorously oppose both. It maps a topography of this disagreement among pro-gay advocates, and concludes that we should not attempt to resolve this disagreement *in litigation*. Part III turns to the scientific studies that have been cited in some gay-rights cases as conclusive proof that homosexual orientation is immutable. A close reading of two of those studies argues, first, that they have been absorbed into the broader culture as scientific confirmations that homosexual orientation should be understood as essentialist rather than constructivist, while in fact the studies incorporate essentialist models of sexual orientation as untested hypotheses; and second, that the more constructivist aspects of sexual orientation *identity* excluded from the studies are nevertheless important to the social subordination of gay men, lesbians, and bisexuals. Finally, Part IV seeks out common ground from which to build legal arguments that adequately represent the self-conceptions of pro-gay essentialists and pro-gay constructivists. It proceeds by disaggregating essentialism and constructivism, mapping the significant territory of their overlap in sexuality studies, and locating the optimal places in that conceptual zone for articulating equal protection arguments.

This article argues that pro-gay legal arguments from biological causation should be abandoned. Instead, pro-gay essentialists and constructivists should design legal strategies that emphasize the political dynamics that inevitably attend sexual orientation identity—no matter how it is caused.

## I. THE ARGUMENT FROM IMMUTABILITY

Gay rights advocates writing about equal protection before 1986, when the Supreme Court issued its baneful decision in *Bowers v. Hardwick*,<sup>6</sup> echoed a reassuring refrain: Since homosexuality is immutable, it qualifies as a suspect classification, or at least meets one of several criteria for suspect class status under equal protection analysis. Most often this argument depended on an empirical claim that sexual orientation is either hardwired into us at birth or branded upon us so soon thereafter that it cannot be altered.<sup>7</sup>

These arguments accepted an invitation apparently issued by a Supreme Court plurality in *Frontiero v. Richardson*,<sup>8</sup> which concluded that discrimination based on sex warranted strict scrutiny.<sup>9</sup> The plurality opinion stated a number of discrete reasons for its decision that sex discrimination was constitutionally sensitive: "a long and unfortunate history of sex discrimination" perpetuated through "stereotyped distinctions between the sexes"; the "high visibility of the sex characteristic" exposing women to "pervasive . . . discrimination"; and the fact that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."<sup>10</sup>

Two features of the Court's subsequent treatment of immutability were accurately foreshadowed in *Frontiero*. First, immutability is not a *requirement* but a *factor*.<sup>11</sup> Second, that factor is not immutability alone but immutability-*plus*. The careless reader of *Frontiero* might well suppose that the plurality had completed its analysis of immutability when it observed that discrimination against women based on their sex "would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"<sup>12</sup> But there is more. The Court went on to note that many immutable characteristics—its examples were intelligence and physical disability—form the basis of discriminatory decisions that are widely regarded

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6. 478 U.S. 186 (1986) (upholding state law criminalizing sodomy against due process and privacy challenges).

7. See Stacy Lynn Boyle, Note, *Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitants*, 14 HASTINGS CONST. L.Q. 111, 127-28 (1986); Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U. DAYTON L. REV. 575, 583-85 (1985); Kenneth Lasson, *Civil Liberties for Homosexuals: The Law in Limbo*, 10 U. DAYTON L. REV. 645, 656-57 (1985); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817-21 (1984); see also Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1625-26 (1974); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 576 (1973).

8. 411 U.S. 677 (1973) (plurality opinion).

9. *Id.* at 688. The concurring Justices refused to apply strict scrutiny, *id.* at 691, and the determination that intermediate scrutiny should apply to classifications based on sex was not reached for another three years. *Craig v. Boren*, 429 U.S. 190 (1976).

10. *Frontiero*, 411 U.S. at 684-86. A fourth factor that the plurality considered important was Congress' recent amendment to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and its approval of the Equal Rights Amendment, which together evinced a "conclu[sion] that classifications based upon sex are inherently invidious." *Id.* at 687.

11. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (holding that relatives are not a suspect class); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (same). I am unaware of any case in which the Supreme Court has gone beyond this moderated emphasis on immutability.

12. *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972)).

as unproblematic.<sup>13</sup> The Court's examples are a little dubious—one wonders whether intelligence is unequivocally and certainly immutable, and discrimination based on physical disability exemplifies not the class of unproblematic discriminations but the ones that seem to require more probing analysis than a mere determination that they turn on an immutable characteristic. What makes some discriminations based on physical disability acceptable, and others unacceptable, is their *relatedness* to the particular purpose at hand. Nearsightedness may legitimately disqualify potential fighter pilots but not potential law professors.<sup>14</sup> Recognizing these problems at the level of doctrine, the *Frontiero* plurality determined that heightened scrutiny was needed in cases involving sex discrimination because “the sex characteristic,” *in addition* to being immutable, “frequently bears no relation to ability to perform or contribute to society.”<sup>15</sup> *Frontiero* thus expresses a conclusion that, when a characteristic is both immutable and unrelated to the legitimate purposes at hand, discriminations based on it may suggest unfairness.<sup>16</sup>

John Hart Ely has argued that this “relevance” criterion, once invoked to cure the defects of immutability as a test for unacceptable inequality, promptly swallows the immutability factor whole:

[C]lassifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?<sup>17</sup>

Well, there might be, if there is any reason to suppose that an unrelated *immutable* characteristic is more invidious than a classification based on an unrelated *mutable* one. The boilerplate response to this query is to say (as the plurality did in *Frontiero*) that it is a “basic concept of our system that legal burdens should bear some relationship to individual responsibility.”<sup>18</sup> But that response is unsatisfying because it assumes exactly what is to be decided: that the state

13. *Id.* at 688.

14. This is not to underestimate the difficulty of determining relatedness in the context of physical disability, where pre-existing arrangements, themselves mutable, may *create* relatedness where none need exist. The need to use a wheelchair is related to any job in a building with stairs and no ramps or elevators. See Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 866-68 (1988); Rosalie K. Murphy, Note, *Reasonable Accommodation and Employer Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1613-14 (1991).

15. *Frontiero*, 411 U.S. at 686. There are plenty of careless misreaders of *Frontiero* who construe it to state a freestanding immutability factor uninflected by relatedness. See, e.g., *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989) (holding that prisoners do not constitute a suspect classification because the status of incarceration is neither immutable nor an indicator of invidiousness) (citing *Frontiero* on immutability without reference to relatedness).

16. For a reprise of the stipulation that immutability should trigger suspicion only when conjoined with irrelevance, see *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976) (conceding the immutability of illegitimate status, but noting that distinctions based on legitimacy may be rational in some contexts).

17. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 150 (1980) (emphasis in original) (footnote omitted).

18. *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972)).

actor has a rightful power to *make* it someone's responsibility to conform to state wishes that are (*ex hypothesi*) totally unrelated to the job at hand. The immutability argument thus rests on an unexpressed premise that the Equal Protection Clause harmonizes well with a state-sponsored cultural conformity and assimilationism.<sup>19</sup>

There are other problems with the immutability argument as well. Assuming a *Carolene Products* approach to equal protection,<sup>20</sup> Bruce Ackerman argues that "anonymous and diffuse" groups are often *more* vulnerable to invidious exclusion from political decisionmaking than "discrete and insular" ones.<sup>21</sup> The characteristics that define anonymous and diffuse groups are often acutely mutable, especially when they can be hidden: Then they can be professed by and ascribed to a different set of people every year, month, day, or even hour. That certainly holds true for gay men, lesbians, and bisexuals: Anonymity and diffuseness produced by the closet are our chief organizing challenges, and they emerge from elements of our identity that are often radically mutable—private and public identity.<sup>22</sup> It's not just that the discrete-and-insular-minority model, with its immutability corollary, is a bad fit with the political realities of gay, lesbian, bisexual, and queer life. The problems gay men, lesbians, and bisexuals have entering fully into pluralist politics tend to confirm that, at least as it functions in process-based analysis, the immutability theory is simply wrong.

The Court tentatively suggested in *Frontiero* that immutability is a factor that intensifies the invidiousness of government-imposed burdens unrelated to the job at hand. Academic assessments of the theory of suspect classifications have not encouraged the Court to give any further emphasis to this factor. In-

19. The regulation of appearance at work offers just one example of the way in which the argument from immutability expressly facilitates monocultural impulses. See Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); see also *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050, 1065, 856 P.2d 1143, 1153, 22 Cal. Rptr. 2d 287, 297 (1993) (holding that a worker denied employment because she was overweight could not obtain protection under state disability law unless she could show that her weight was an immutable medical condition, "a physiological, systemic disorder," over which she had no control).

20. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). This celebrated footnote proposed a new role for federal judges following the demise of substantive due process: Instead of policing legislatures' substantive decisions, judges would monitor their decisional process. In particular, judges could use the Equal Protection Clause to ensure that "discrete and insular minorities" are not unfairly boxed out of political decisionmaking. This process-based approach has been most forcefully promoted by John Hart Ely. See ELY, *supra* note 17. But it has also been criticized for resting on an unstable distinction between substance and process. See, e.g., C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1058-61 (1980); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1090-91 (1982); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980).

21. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985).

22. For a more detailed explication of this problem, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 930-63 (1989).



deed, although academic commentators writing in the period between *Frontiero* and *Hardwick* clearly regarded the justification for heightened judicial review under the Equal Protection Clause to be painfully problematic, they rarely, if ever, even alluded to immutability as a conceptual solution.<sup>23</sup> The Supreme Court echoed this lukewarm-to-cold reception of the idea that immutability justifies heightened scrutiny in its 1985 decision, *Cleburne v. Cleburne Living Center*.<sup>24</sup> Refusing to hold that mentally retarded residents of group homes constitute a suspect or "quasi-suspect" classification,<sup>25</sup> the Court looked directly to Ely's attack on the immutability theory. Laying out the complete passage from Ely quoted above,<sup>26</sup> the Court emphasized that "those who are mentally retarded" are "different, immutably so, in relevant respects," from others whom the state treated differently.<sup>27</sup> Nevertheless, the Court refused to infer from this kind of difference a need for formally heightened judicial solicitude. Indeed, the Court cited *Frontiero* as precedent not for relying in whole or in part on immutability, but for inquiring into relevance instead.<sup>28</sup> After *Cleburne*, immutability remains a factor, but it is not clear that the Court will ever again make even an asymptotic approach to a claim that discrimination based on a characteristic the bearer cannot shed is intrinsically repellent to any "basic concept of our system."<sup>29</sup>

Two developments since *Cleburne* have contributed to a startling *resorgimento* of immutability-based arguments among gay-rights advocates notwith-

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23. See, e.g., Baker, *supra* note 20, at 1090, 1094 (concluding that the Supreme Court's equal protection practice in the sex discrimination cases focused on either a "purpose[ ] [to] contribute[ ] to the subordination of a sexual group" or a classification that "embodies a negative or stereotyped judgment about the capacities or qualities of either sex"); Brest, *supra* note 20, at 141-42 (concluding that laws "which treat people based on certain stereotypes, inflict a dignitary harm, an insult, a stigma" that warrants substantive condemnation as "an evil in itself," and recommending that equal protection theory stop trying to avoid such substantive evaluation); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Majorities*, 91 YALE L.J. 1287 (1982) (arguing that heightened scrutiny properly applies to minorities subject to intermittent or occasional mistreatment and especially to blacks whose disadvantages are a product of the political process itself); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148-55 (1976) (arguing that the Equal Protection Clause protects "specially disadvantaged groups," and arguing that blacks constitute such a group because they form a social, not merely a legal group, they have been in a position of "perpetual subordination," and they have been excluded from political power). None of these analyses look to immutability for help in justifying judicial intervention in political decisions. Even Fiss's distinction between "natural" and "artificial" classes actually distinguishes between groups that are socially generated and those created by the majoritarian decision disadvantaging them. *Id.* at 148, 156.

24. 473 U.S. 432 (1985).

25. *Id.* at 433. The plaintiffs in *Cleburne* sought a zoning permit allowing them to establish a group home for mentally retarded residents. *Id.* Though the Court refused heightened scrutiny, it went on to hold that the permit denial failed rational basis scrutiny. *Id.* at 447-50. Its rational basis analysis makes no mention of immutability. *Id.*

26. *Id.* at 442 n.10 (quoting Ely, *supra* note 17, at 150 (footnote omitted)); see text accompanying note 17 *supra*. The Court also relied on Ely's position that immutability is not a good indicator of process failure: "'Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling.'" 473 U.S. at 442 n.10 (quoting Ely, *supra* note 17, at 150).

27. 473 U.S. at 442.

28. *Id.* at 440-41.

29. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972)).

standing their anemic condition in Supreme Court thinking and in the academic literature. First, equal protection law about sexual orientation began to focus on the identity or status of homosexuals—an issue that the pro-gay argument from immutability seems tailored to illuminate. This development began when the Supreme Court held in *Bowers v. Hardwick*<sup>30</sup> that states did not violate federal constitutional guarantees of due process and privacy by criminalizing same-sex sodomy. *Hardwick* was soon followed by a series of federal court holdings that refused to apply heightened *equal protection* review to discrimination based on sexual orientation because of *Hardwick's due process* holding. They reasoned that, because *Hardwick* permitted states to criminalize same-sex sodomy, and because same-sex sodomy is the “behavior that defines the class of homosexuals,”<sup>31</sup> *Hardwick* precluded the application of heightened scrutiny to anti-gay discrimination. “After all,” one court reasoned, “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”<sup>32</sup>

These cases challenged gay-rights advocates to convince courts that sodomy alone does not define the class of gay men, lesbians, and bisexuals. Litigators set out to constrain *Hardwick* by framing equal protection cases in which plaintiffs had been subjected to unfavorable treatment not because of any sexual conduct but because of their public and private identities as gay, lesbian, or bisexual.<sup>33</sup> This strategic choice resulted in an emphasis on military cases

30. 478 U.S. 186 (1986).

31. *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (holding that *Hardwick* “forecloses [plaintiff’s] efforts to gain suspect class status for practicing homosexuals” because, “[i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious”); see also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir.) (reasoning that “because homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class”), *reh’g denied*, 909 F.2d 375 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989) (same), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that homosexuals cannot constitute a suspect class both because their defining characteristic is not immutable and can be criminalized), *cert. denied*, 494 U.S. 1003 (1990).

32. *Padula*, 822 F.2d at 103.

33. In *Padula*, the FBI refused to employ the plaintiff because a background check revealed that she was a “practicing homosexual.” 822 F.2d at 99. Subsequent cases challenging discrimination against military personnel are distinguishable because they lack record evidence even that tenuous of homosexual conduct. In *Steffan v. Cheney*, 780 F. Supp. 1, 4-5 (D.D.C. 1991), another district court similarly reasoned that because the plaintiff was discharged from the Naval Academy based on his own statements that he was homosexual, and because his resignation from the Navy and subsequent refusal to answer discovery questions foreclosed further investigation into his sexual conduct, “this is primarily a case about the plaintiff’s status as a homosexual.” After an interesting skirmish in which the district court held that the Secretary of Defense was entitled to discovery of Steffan’s sexual conduct, 733 F. Supp. 121 (D.D.C. 1990), and the Court of Appeals for the District of Columbia Circuit reversed, holding that the plaintiff’s sexual conduct was irrelevant to a discrimination claim based on sexual orientation status alone, 920 F.2d 74 (D.C. Cir. 1990), the district court reintroduced conduct into the case by other means. Applying rational basis scrutiny, it held that the plaintiff could rationally be dismissed, in part on grounds that he “could one day have acted on his preferences in violation of regulations prohibiting such conduct.” 780 F. Supp. at 13 (emphasis added). Reversing, the court of appeals held that the military policy under which the Naval Academy forced Steffan’s resignation targeted status and not conduct; that it was irrational to presume past or future conduct on the basis of Steffan’s profession of homosexual orientation; and that, to the extent the policy was concerned with a “propensity” to engage in homosexual conduct, it regulated intent and thoughts in violation of “various common law and consti-

notwithstanding the unfavorable deference with which courts typically treat military policy. The military, after all, was in the business of discharging troops based solely on their sexual-orientation identity, and of generating potential plaintiffs with records devoid of any evidence of prohibited (or even disparaged) conduct.<sup>34</sup> In many of the resulting cases, however, courts imputed sodomitical conduct on the basis of identity and denied heightened scrutiny.<sup>35</sup> What Patricia A. Cain calls "litigating around *Hardwick*"<sup>36</sup> thus became, in part, a campaign to regain some control over the *legal definition of homosexual identity*.<sup>37</sup>

A second development since *Cleburne* has intensified gay-rights advocates' interest in immutability theories: the cultural success of genetics as a source of knowledge about *who we are* as humans.<sup>38</sup> Before the Human Genome Project became a household word, gay-rights articles asserted the argument from immutability in dispassionate, even perfunctory, recitations.<sup>39</sup> The first serious reevaluation of equal protection for gay men and lesbians after *Hardwick* em-

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tutional principles that guard the sanctity of a person's thoughts against government control." Steffan v. Aspin, 8 F.3d 57, 64-68 (D.C. Cir. 1993). Nor is the panel's decision likely to be the last word. At the time this article went to press, the Court of Appeals for the D.C. Circuit has vacated the panel discussion pending en banc review. Steffan v. Aspin, 62 U.S.L.W. 2309 (D.C. Cir. Jan. 7, 1994).

In *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1455, 1457 (C.D. Cal. 1993), a district court held that the Department of Defense's policy of banning gay men and lesbians "based merely on status, and not conduct" violated the Equal Protection Clause. See also *High Tech Gays*, 895 F.2d at 571, 573 n.9 (holding that, after *Hardwick*, "it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct," and rejecting plaintiff's argument that *Hardwick* should not apply to the heightened scrutiny issue because the challenged regulations "all relate to conduct"), *reh'g denied*, 909 F.2d 375, 380 (9th Cir. 1990) (Canby & Norris, JJ., dissenting) (arguing that "It is an error of massive proportions to define the entire class of homosexuals by sodomy. . . . [T]he Department of Defense is discriminating against homosexuals for what they *are*, not what they *do*"); *Watkins v. United States Army*, 847 F.2d 1329, 1340, 1345 (9th Cir. 1988) (holding that Army's discharge of soldier based on his homosexual identity violated the Equal Protection Clause and distinguishing *Hardwick* because plaintiff's discharge was based solely on his sexual orientation without reference to conduct), *vacated & order aff'd on other grounds*, 875 F.2d 699 (en banc) (holding that plaintiff's discharge was improper on equitable estoppel grounds), *cert. denied*, 498 U.S. 957 (1990).

Analysis of the conduct/identity problem in post-*Hardwick* litigation has been offered by Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617-27 (1993); and Nan D. Hunter, *Life after Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 543-53 (1992); see also Halley, *supra* note 22, at 948-61.

34. For an implicit admission that the Justice Department has found these pure identity cases difficult to defend, see Memorandum from Janet Reno, Attorney General, to Bill Clinton, President (July 19, 1993) (assessing the Clinton Administration's proposed new policy on homosexual conduct in the armed forces) (on file with the *Stanford Law Review*).

35. See note 33 *supra*.

36. Cain, *supra* note 33, at 1617.

37. For a discussion of alternate routes to legal protection that do not rely on the immutability argument, see text accompanying notes 244-253 *infra*.

38. Walter Gilbert, *A Vision of the Grail*, in *THE CODE OF CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT* 83, 84 (Daniel J. Kevles & Leroy Hood eds., 1992) [hereinafter *CODE OF CODES*] (predicting that the Human Genome Project will help answer the questions: "[W]hat actually specifies the human organism? What makes us human?"). For a more detailed description of the "new genetics," see text accompanying notes 72-89 *infra*.

39. See note 7 *supra*.

braced the argument from immutability with readily apparent reluctance.<sup>40</sup> As stronger biological claims pointing to a genetic role emerged, that tone changed; indeed, the first strong post-*Hardwick* proposal emphasizing immutability came from the intersection of law and medicine.<sup>41</sup> Bolstered by citations to recent scientific experiments claiming to show that human sexual orientation rests on a biological substrate, the argument from immutability has become the platform on which many gay-rights advocates prefer to contest post-*Hardwick* courts' equation of homosexual identity with criminalizable sodomy.<sup>42</sup>

Although pro-gay advocates often advance the argument from immutability with enthusiasm, it is clear that many judges do not find it persuasive. In three nonbinding opinions, federal judges have deemed homosexual orientation immutable in the limited sense that attempting to reverse it through social policy is as cruel and futile as attempting to change it through medical or psychological therapy.<sup>43</sup> But the actual holdings on record reject the argument outright.<sup>44</sup> Strong biological evidence, however, might alter future judicial outcomes.

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40. Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 154-55 (1988) (arguing that "[m]aking discrete and insular status depend on . . . immutability . . . fails on deeper analysis," but nevertheless concluding that "at least for constitutional purposes, sexual orientation can be treated like race or gender, since in the vast majority of cases it is virtually an immutable trait").

41. Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. PSYCHIATRY & L. 537 (1988). Green, who holds a J.D. and an M.D., listed immutability as a necessary requirement of suspect classification. *Id.* at 538-39. In his more recent book, he has moderated his statement of the relevant law. RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 62-63 (1992) (arguing that judicial acknowledgement of new suspect classifications "often" depends on the immutability of a defining trait). But see *Nightline*, *supra* note 2, for his statement to the press that immutability not only is a necessary but may even be a sufficient ground for invalidating official anti-gay laws.

42. For examples from popular legal culture, see note 2 *supra*.

43. The successes include a dissent, a concurrence, and a district court opinion reversed on other grounds. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc) (relying on "the overwhelming weight of respectable authority" to conclude that "[s]exual identity is established at a very early age; it is not a matter of conscious or controllable choice"); *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) (concluding that even if therapy made sexual reorientation possible, "the possibility of such a difficult and traumatic change does not make sexual orientation 'mutable' for equal protection purposes" and that "allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the Constitutional ideal of equal protection of the laws"), *cert. denied*, 498 U.S. 957 (1990); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (noting that "available scientific evidence . . . strongly supports the view that sexual orientation is not easily mutable"), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993). When the district court's opinion in *Jantz* was reversed on other grounds, pro-gay advocates lost not only its finding that homosexuality is immutable, but also its express holding that immutability is not a requirement for strict scrutiny. *Id.* at 1548 (citing Supreme Court cases that omit immutability from the list of suspect class requirements and concluding that "complete and absolute immutability simply is not a prerequisite for suspect classification").

For an account of therapeutic efforts to alter sexual orientation (always, as it happens, in the direction of heterosexuality), see GREEN, *supra* note 41, at 77-84.

44. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (finding that "[h]omosexuality is not an immutable characteristic"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (finding that "homosexuality is primarily behavioral in nature" compared to race and gender which "exhibit immutable characteristics"), *cert. denied*, 494 U.S. 1003 (1990); see also *Steffan v. Cheney*, 780 F. Supp. 1, 6-7 (D.D.C. 1991) (finding that "homosexual orientation is neither conclusively mutable nor immutable"), *rev'd sub nom.* *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated for reh'g en banc*, 62 U.S.L.W. 2309 (D.C. Cir. Jan. 7, 1994). The Ninth Circuit's

Several courts have noted that the *controversy* over biological causation is a reason to reject the argument from immutability,<sup>45</sup> a rationale that might cut the other way if the scientific community were to reach consensus on the etiology of homosexual orientation. Courts are increasingly prepared, moreover, to commit the questions raised when pro-gay litigators rely on recent scientific reports to the jury for factfinding.

Not discouraged by this lackluster track record, gay-rights plaintiffs have begun to bolster the argument from immutability by citing the new scientific reports. In at least four recent cases challenging discrimination against gay men, lesbians, and bisexuals, plaintiffs' attorneys have cited the new scientific findings to support their arguments that homosexual orientation is a suspect classification because it is immutable.<sup>46</sup>

In *Dahl v. Secretary of the United States Navy*,<sup>47</sup> challenging a sailor's discharge from the Navy, in *Steffan v. Aspin*,<sup>48</sup> challenging the forced resignation of a midshipman from the United States Naval Academy, in *Baehr v. Lewin*,<sup>49</sup> in which plaintiffs have already won heightened scrutiny of Hawaii's refusal to recognize same-sex marriages, and in *Evans v. Romer*,<sup>50</sup> in which plaintiff sought and obtained injunctive relief against Colorado's Amendment Two, these arguments have failed. The plaintiff in *Dahl* cited the studies of Simon LeVay and of Bailey and Pillard to support a claim that "it has now been conclusively and authoritatively established that sexual orientation is biological, genetic and innate."<sup>51</sup> Plaintiff's offer to prove this claim at trial was declined only because the court denied heightened scrutiny on other grounds and proceeded to grant the plaintiff summary judgment under rational basis review.<sup>52</sup> Lawyers asked for summary judgment in *Steffan* in part on the

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decision in *High Tech Gays* is particularly troubling because the panel majority, though it described immutability as a factor, applied it as a requirement. 895 F.2d at 573.

45. See, e.g., *Steffan*, 780 F. Supp. at 6 n.12 (stating that "[w]ithout a definite answer at hand, yet confident that some people exercise some choice in their own sexual orientation, the Court does not regard homosexuality as being an immutable characteristic"); *Baehr v. Lewin*, No. 91-1394-05, at 5 (Haw. Ct. App. Sept. 3, 1991) (order granting Defendant's motion for judgment on the pleadings) (holding that homosexuals do not constitute a suspect class, in part because "[t]he issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community"), *rev'd on other grounds*, 852 P.2d 44 (Haw. 1993).

46. *Steffan v. Aspin*, 8 F.3d 57, 64-68, (D.C. Cir. 1993), *vacated for reh'g en banc*, 62 U.S.L.W. 2309 (D.C. Cir. Jan. 7, 1994); *Evans v. Romer*, No. 92CV7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (M.D. Fla. 1993); *Baehr*, 852 P.2d at 44.

47. 830 F. Supp. at 1323.

48. 8 F.3d at 57. For plaintiff's immutability argument, see Plaintiff's Motion for Summary Judgment and Affidavits I and II of Richard Green, published in slightly modified form in *GAYS IN THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES* 3, 17-19, 56-83, 171-73 (Marc Wolinsky & Kenneth Sherrill eds., 1993) [hereinafter *GAYS IN THE MILITARY*].

49. 852 P.2d 44 (Haw. 1993).

50. No. 92CV7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993).

51. *Dahl*, 830 F. Supp. at 1323 (quoting Plaintiff's Memorandum in Support of Motion for Summary Judgment).

52. The *Dahl* court held that plaintiff "may have submitted sufficient evidence to create a triable issue of material fact as to whether homosexuality is an 'immutable' characteristic," but refused heightened scrutiny on other grounds. *Id.* at 1324. The fact that the court nevertheless granted the plaintiff summary judgment under a rational basis review that carefully examined the Navy's discriminatory

grounds that recent scientific findings about the etiology of homosexual orientation offered "conclusive" evidence of its immutability; in findings on this point reached without a hearing, the district court noted that the immutability claim seemed irrelevant to the "great 'in between'" inhabited by bisexuals, and concluded that scientific controversy on the issue left unchallenged its own intuition that "some people have some choice in their own sexual orientation."<sup>53</sup> The appellate panel reviewing this decision was able (like the trial court in *Dahl*) to rule for plaintiff on rational basis grounds and pretermitted consideration of plaintiff's arguments for heightened scrutiny.<sup>54</sup> Similarly strong biological causation claims were advanced in *Baehr*, where they met an intricate fate that indicates how liable to backfire the argument from immutability, even when bolstered by the new scientific findings, really is.<sup>55</sup>

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practices against *Dahl*, *id.* at 1335-37, suggests that the immutability argument, even if provable, remains unnecessary.

53. *Steffan*, 780 F. Supp. at 6 n.12 (emphasis in original); see Memorandum of Law In Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, in *GAYS IN THE MILITARY*, *supra* note 50, at 3, 3-39 (plaintiff's argument from immutability).

54. *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated for reh'g en banc*, 62 U.S.L.W. 2309 (D.C. Cir. Jan. 7 1994).

55. The plaintiffs in *Baehr v. Lewin* asserted that Hawaii's refusal to acknowledge same-sex marriage discriminated against them on the basis of sexual orientation and violated the state's equal protection clause. 852 P.2d 44 (Haw. 1993). Their brief cited Simon LeVay's experimental report, examined in more detail below, *see* text accompanying notes 117-120 *infra*, which concludes that a sex-related brain structure differs in size among homosexual and heterosexual men and predicts eventual identification of a causal link between brain structure and homosexual orientation; but the trial court held that homosexuality is not an immutable characteristic, in part because science was in controversy. *See Baehr v. Lewin*, No. 91-1395-05, at 5 (Haw. Ct. App. Sept. 3, 1991) (order granting Defendant's motion for judgment on the pleadings), *rev'd on other grounds*, 852 P.2d 44. Plaintiffs challenged this finding as erroneous in their appeal, and relied on the study of Bailey and Pillard, examined below, *see* text accompanying notes 138-163 *infra*. Opening Brief for Appellants at 14-15, 15 n.5, *Baehr*, 852 P.2d 44 (No. 91-1395-05). Ruling for the plaintiffs, a plurality of the Hawaii Supreme Court held that the state's refusal to recognize marriage of same-sex partners discriminated not on the basis of sexual orientation but on the basis of sex and, declaring sex to be a suspect classification in state equal protection doctrine, remanded for application of strict scrutiny. *Baehr*, 852 P.2d at 64-67. The plurality vigorously denied that immutability had anything to do with the constitutional claim, but failed to convince Justice Burns, who concurred only in the result. *Id.* at 53 n.14. The plurality noted, with admirable precision, that a same-sex marriage does not necessarily involve a homoerotically related pair and refused to consider plaintiffs' professed homosexuality relevant to the decision. *Id.* at 51 n.11, 53 n.14. Writing for himself, however, Justice Burns concluded that, to prevail on a sex discrimination claim, same-sex couples must prove that their homosexuality was "biologically fated" and thus a natural component of their "sex." *Id.* at 69-70 (Burns, J., concurring).

At the time the plurality decision was handed down, Justice Burns' concurrence appeared to be necessary to the judgment in plaintiff's favor. (Even this is unclear: Of the five justices who heard oral argument in the case, one dissented outright from the judgment, and another—a temporary justice whose appointment expired before judgment was entered—sought to join in the dissent. *Id.* at 48 n.\*, 70 n.1. His concurrence was treated as legally ineffective by the plurality, but as part of the tally by the dissenter.) The plaintiffs filed a motion for clarification seeking clear guidance on the standard they would have to meet on remand. Justice Burns and the dissenter could have then blocked any clarification of the immutability question, and forced a remand to a trial court which had already found "that homosexuality was not an immutable characteristic," *Baehr*, No. 91-1394-05, at 5 (order granting Defendant's motion for judgment on the pleadings). By the time the court ruled on the motion for clarification, however, the temporary justice concurring in the dissent had been replaced with a new permanent justice who voted with the plurality to issue an order requiring the trial court to adjudicate the case under the law as stated in the plurality opinion.

Even when plaintiffs in *Evans v. Romer* framed more moderate claims on the basis of new scientific reports about homosexual orientation and its causes, the court misconstrued them as strong claims of the sort advanced by plaintiffs in *Dahl*, *Steffan*, and *Baehr*. In *Evans*, plaintiffs argued that "sexual orientation is highly resistant to change, *whatever its etiology*," and when they cited the work of Dean Hamer and Simon LeVay, they added the proviso that "it is not necessary for a trait to be genetically determined for it to be an involuntary trait that is highly resistant to change."<sup>56</sup> At a full trial on the merits, however, the court heard a much more absolute immutability claim—"Plaintiffs strongly argue that homosexuality is inborn"—and rejected it on the basis of the testimony offered by plaintiffs' own witness, Dean Hamer.<sup>57</sup>

The scientific evidence available has not made judges more likely to accept pro-gay advocates' argument from immutability. As the foregoing legal analysis suggests, gay-rights advocates who base their equal protection cases on the argument from immutability do so at their option. As I argue in the next Part, they do so at the cost of dividing the communities they serve. As I argue in Part III, they do so despite the failure of the existing science to support their empirical claim that homosexual orientation is immutable. It is time to think carefully about whether the pro-gay argument from immutability has any justifiable part to play in pro-gay litigation.

## II. THE TOPOGRAPHY OF DISAGREEMENT

I argue in this Part that those who wish to premise legal rights of gay men, lesbians, and bisexuals on a biological argument should cease and desist, and should seek instead a common litigation strategy with those in the pro-gay community who resist the argument from immutability. Some distinctions are in order first.

By *anti-gay*, I mean to describe those who believe that homosexuality is bad or harmful and should be punished, hidden, or restrained; by *pro-gay*, I refer to those who believe that homosexuality is good or value neutral and should be celebrated or tolerated. For purposes of this Part, an *essentialist* view of homosexual orientation claims that it is a deep-rooted, fixed, and intrinsic feature of individuals. This essentialist view assumes that homosexual orientation is determined (by nature or nurture), not chosen. (I will later redesignate this position "strong essentialism.") The *constructivist* view of homosexual orientation claims that it is a contingent, socially malleable trait that arises in a person as she manages her world, its meanings, and her desires. The pro-gay

56. Trial Memorandum on Plaintiffs' Case in Chief at 35 & n.8, *Evans v. Romer*, No. 92CV7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993).

57. *Evans*, 1993 WL 518586, at \*11 ("The preponderance of credible evidence suggests that there is a biologic or genetic 'component' of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is some genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on 'nature' vs 'nurture' is a decision for another forum, not this court, and the court makes no determination on this issue."). For a critical review of plaintiffs' use of scientific testimony in the *Evans v. Romer* trial, see Donna Minkowitz, *Trial by Science: In the Fight over Amendment 2, Biology is Back—and Gay Allies Are Claiming It*, VILLAGE VOICE, Nov. 30, 1993.

argument from immutability is, on these definitions, essentialist. When the pro-gay argument from immutability adds a reliance on biological causation theories, it merely locates the source of determination in nature.

Neither essentialism nor constructivism is *necessarily* gay-affirmative. Anti-gay conservatives use both essentialist and constructivist justifications for their discriminatory policies, even as pro-gay advocates use essentialist and constructivist arguments to defeat them. Thus there are four, not two, opposed positions—pro-gay essentialism, pro-gay constructivism, anti-gay essentialism, and anti-gay constructivism—each incorporating its causal theory into its social policy argument:

\* *Pro-gay essentialism* holds that because homosexual orientation is fixed, immutable, and definitional, it should be protected from discrimination.

\* *Pro-gay constructivism* holds that all forms of sexual orientation are mutable, either across an individual's life, at some important moment of personal choice, or across historical periods, and that social policy on sexual orientation should not impede these variations.

\* *Anti-gay essentialism* holds that homosexual orientation is fixed, immutable, and normatively bad or sick, either in itself or in its manifestation, and that society should tailor discrimination against gay men and lesbians to express normative judgments, deter manifestations of homosexual orientation, or cure homosexuals of their illness.

\* *Anti-gay constructivism* either emphasizes the mutability of *heterosexual* orientation, arguing that heterosexuality must be shored up by anti-gay discrimination, or points to the mutability of *homosexual* orientation, arguing that discrimination should be designed to convert gay men and lesbians to heterosexuality.

Pro-gay activists usually limit their debate to the first two categories—pro-gay essentialism and pro-gay constructivism. But without taking into account the *anti-gay* positions that these causal theories sometimes support, pro-gay analysis cannot adequately assess the relative merits of essentialism and constructivism.

#### A. Choice

Anti-gay constructivists say that being gay, lesbian, or bisexual is a choice, and for that reason forms a proper target for a majority that thinks these ways of being are morally bad and seeks to deter people from adopting them. Former Vice President Dan Quayle became the most visible proponent of this position during the 1992 presidential campaign when he announced, "My viewpoint is that it's more of a choice than a biological situation. . . . I think it is a wrong choice."<sup>58</sup>

58. Karen De Witt, *Quayle Contends Homosexuality Is a Matter of Choice, Not Biology*, N.Y. TIMES, Sept. 14, 1992, at A17. Former Vice President Quayle further explained his position: "It is a wrong; it is a wrong choice. I do believe in most cases it certainly is a choice." *Id.*

Anti-gay political appeals echo Quayle's argument with increasing frequency. The chief proponent of Amendment Two in Colorado told the *New York Times*: "'From up until the time I was in the eighth or ninth grade, I didn't really like girls, wasn't interested in them. . . . If I had [had] a counselor who was predisposed in that way, he could easily have convinced me: 'You're one of us. We like guys.''"



Most contemporary efforts to justify discrimination against gay men and lesbians rely on former Vice President Quayle's factual assumption. For example, Judge Posner assumes throughout his analysis of homosexuality that, to the extent that society can prevent or deter homosexuality at an acceptable cost, its repression is justified to "make persons who would otherwise become or remain homosexuals happier."<sup>59</sup> As it happens, he concludes that many, but by no means all, forms of discrimination against homosexuals function inefficiently.<sup>60</sup> But other conservative analysts justify capacious regimes of discrimination on the factual assumption that homosexuality is to some extent chosen. Conservative commentator E.L. Pattullo, for example, posits that at least some individuals choose their sexual orientation, and argues on that basis that discrimination against gay men and lesbians, including constraints on their speech, should be tailored to deter such sexual-orientation "waverers" from choosing homosexuality over heterosexuality.<sup>61</sup>

Pro-gay essentialism offers a refutation of this anti-gay constructivist reasoning. It is an exoneration strategy, describing gay men and lesbians as incapable of resisting their sexual orientation and thus not "responsible" for it. Its claim to fairness taps a deep reservoir of intuitive plausibility: that an individual should not be criminally punished or civilly burdened because he or she helplessly bears a disfavored characteristic.<sup>62</sup> Pro-gay essentialism is also a practical strategy, claiming that punishing homosexuality is useless because it

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Dirk Johnson, "I Don't Hate Homosexuals," N.Y. TIMES, Feb. 14, 1993, at A24 (quoting Will Perkins). Much of the revulsion expressed by young men in the military services at the idea of being seen in the shower by a gay man is premised on anti-gay constructivism. Like Perkins, these men are concerned that their own heterosexuality, far from being immutable, is a tentative accomplishment. See Kendall Thomas, *Shower/Closet*, 20 ASSEMBLAGE 80, 83 (1993) (describing this fear as the "shock of recognition that would follow from the revelation that the straight male shower and the gay male closet are neither opposing nor even abutting structures").

59. RICHARD A. POSNER, *SEX AND REASON* 308, 303-09 (1992) [hereinafter POSNER, *SEX AND REASON*]. Posner doubts, however, that homosexual orientation can be chosen, *id.* at 297, and thus constructs his efficiency arguments on a premise he is willing to have thrown into doubt. Since writing *Sex and Reason*, he has taken a more agnostic position on immutability and developed new arguments that do not rely on it. See Richard A. Posner, *Economics and the Social Construction of Homosexuality*, in RICHARD A. POSNER, *OVERCOMING LAW* (forthcoming 1995) ("It is of no importance to my economic analysis" whether homosexuality is immutable or not.).

60. In *Sex and Reason*, Judge Posner concluded that sodomy laws should be repealed, POSNER, *SEX AND REASON*, *supra* note 59, at 311, and that the military should exclude gay men and lesbians only for conduct that is also prohibited for heterosexuals, *id.* at 321. But Posner cautioned that antidiscrimination protection for homosexual educators of young people "may be premature," *id.* at 322, 403-04, and concluded that society justifiably retains the ban on same-sex marriage, *id.* at 311-14. In his more recent examination of marriage policy, Posner concludes that principles of contract, not status, should govern marriage, and that such a regime removes the barrier to the legal recognition of same-sex relationships. See Posner, *supra* note 59, at 16-17.

61. E.L. Pattullo, *Straight Talk About Gays*, COMMENTARY, Dec. 1992, at 22-23.

62. Surveys have shown that people who think homosexuality is immutable tend also to disapprove of discrimination against gay men and lesbians. Jeffrey Schmalz, *Poll Finds an Even Split on Homosexuality's Cause*, N.Y. TIMES, Mar. 5, 1993, at A14 ("Americans who say individuals cannot change their homosexuality—43 percent of those surveyed—are more sympathetic to the gay view on these issues [gays in the military and gay lifestyles generally] than the 44 percent who see it as a choice."); see also Kurt E. Ernulf, Sune M. Innala & Frederick L. Whitam, *Biological Explanation, Psychological Explanation, and Tolerance of Homosexuals: A Cross-National Analysis of Beliefs and Attitudes*, 65 PSYCHOL. REP. 1003, 1007-09 (1989) (finding similar results among Filipino and Swedish as well as American subjects).

cannot be deterred. The argument from immutability may be the only "high concept" argument against anti-gay discrimination in the repertoire of popular debate today.

For a number of reasons, the pro-gay argument from immutability, when advanced as a legal claim, is not the silver bullet its proponents think. First, as we have seen, this "folk" form of antidiscrimination reasoning has not survived the exactions of constitutional analysis, which seeks a principled way of distinguishing the many discriminations based on immutable characteristics that we do not find normatively or legally troubling. Second, as many proponents of the argument from immutability concede, the empirical record suggests not that changing someone's sexual orientation is impossible, but that it is so wrenchingly difficult as to be cruel (and thus, in some versions, excessively costly when tallied with the scarcity of effective conversions).<sup>63</sup> Staking the immutability argument on this particular ground is problematic in several ways. The first resort of these arguments is a description of personality or personhood, in which the "traits" associated with homosexual orientation "are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."<sup>64</sup> Personhood arguments transpose the site of immutability from the body to the personality. As Kendall Thomas argues, such a move risks "perpetuat[ing] the psycho-medical conception of the origins and nature of sexual orientation . . . [.] leav[ing] the door open for effective regulation simply by substituting a medical response to homosexual conduct . . . for a legal

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63. It is also possible to cast a moderated immutability argument in terms that emphasize the agency of gay men and lesbians in adopting and affirming their sexual orientations. Lesbian philosopher Claudia Card points out that one can have an option, exercise it, and thereafter be unable to revisit that decision and "make it again." Claudia Card, *Lesbianism and Choice*, 23 J. HOMOSEXUALITY 39, 41-42 (1992). Card argues that sexual orientation might be labile, mutable, and subject to autonomous decisionmaking at one point in a person's life, but that once a choice is made certain ethical, psychic, and interpersonal dynamics make changing that choice impossible, or so costly as to be catastrophic. *Id.* Similarly, William Connolly's account of "branded or entrenched contingencies" in identity—"obdurate contingencies"—allows him to "emphasize[ ] how [certain identities] are both contingent formations and resistant to modification once consolidated." CONNOLLY, *supra* note 4, at 176. Pro-gay essentialists shy away from this moderated conception of immutability because it defeats their preferred polemical point, that gays should not be punished because they cannot be deterred. The plaintiffs in *Evans v. Romer*, for example, argued that discrimination on the basis of homosexual orientation warrants heightened scrutiny because sexual orientation is an "involuntary characteristic," no matter how it is caused. Trial Memorandum on Plaintiff's Case in Chief at 32-36, *Evans v. Romer* 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993) (No. 92CV7223), *aff'd*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

64. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring); see also *Bowers v. Hardwick*, 478 U.S. 186, 203 n.2 (1986) (Blackmun, J., dissenting) (arguing that "[h]omosexual orientation may well form part of the very fiber of an individual's personality"); Trial Memorandum on Plaintiffs' Case in Chief at 36, *Evans* (No. 92CV7223) ("Burdening individuals on the basis of sexual orientation . . . is also unjust because sexual orientation is a characteristic central to a person's identity."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 943 (1st ed. 1978) (stating that same-sex sodomy is "central to the personalities of those singled out by" an antisodomy statute); Tribe, *supra* note 20, at 1075-77 (arguing that anti-gay legislation should be rejected on the basis of a substantive view of "what it means to be a person" because it "denies those subject to it a meaningful opportunity to realize their humanity"); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1304-05 (1985) (asserting that "a gay person's sexuality is fundamental to her personal identity" because "homosexuality is a determinative feature of personhood").

one.”<sup>65</sup> And this modified form of essentialism entirely fails to represent those pro-gay constituencies that deny the centrality of a particularized homosexual orientation to their psychic makeup, whether because they identify as bisexual, because they seek to de-emphasize the gender parameters of sexuality, because they are experimental about sexuality, or because they experience sexuality not as serious self-expressiveness but as play, drag, and ironic self-reflexivity.

Moreover, personhood arguments do not establish a rationale for delegitimizing popular decisions to sanction voluntary conduct. As philosopher Edward Stein has argued, pro-gay essentialism fails to address the anti-gay argument that homosexuality, whether it is mutable or not, is expressed through elected behavior, ranging from same-sex erotic acts to practices of self-identification.<sup>66</sup> Explaining why rules burdening conduct impinge on elements of life central to personhood would require not a psychiatric or psychological theory of sexuality but a political one. And the justification for these policies need not rest on an assumption that they tend to increase or decrease the amount of homosexuality and heterosexuality being expressed in a society: Anti-gay essentialism might espouse them on an assumption that to do otherwise would indicate approval of the conduct of an immutably defined class. For example, in an argument about gay marriage that he has since modified, Judge Posner noted that “[t]o permit persons of the same sex to marry is to declare, or more precisely to be understood by many people to be declaring, that homosexual marriage is a desirable, even a noble, condition in which to live.”<sup>67</sup> Moreover, he offered this justification for prohibiting same-sex marriage on an assumption that heterosexual orientation in those who bear it is immutable.<sup>68</sup>

Finally, anti-gay constructivists are often willing to concede that many, if not most, existing gay men and lesbians cannot switch their sexual orientation. Instead, they tailor their anti-gay social policy to deter *new* enrollments in the class of homosexuals. For these anti-gay constructivists, the suffering of those who have already and irrevocably made that choice is unimportant—and so it doesn’t matter, either, whether that suffering arises from discrimination gay men and lesbians are unable to duck because they cannot change their sexual orientation, or from transformative therapies that cause them anguish. Pattullo, for instance, reasons that even if only some children are sexual orientation “waverers,” social policy must “give [them] clear, repeated signals as to society’s preference” that they elect heterosexuality.<sup>69</sup> This is the wise thing to do, Pattullo argues, even at the cost of “condemn[ing] youngsters, who from earliest

65. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1474 (1992). Such therapies are currently suggested in § 302.60 of the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM-III) for “Gender Identity Disorder of Childhood,” which legitimates therapies intended to divert effeminacy in boys. See Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, in FEAR OF A QUEER PLANET, *supra* note 3, at 71-72.

66. Edward Stein, *The Relevance of Scientific Research About Sexual Orientation to Lesbian and Gay Rights*, in GAY ETHICS: OUTING, CIVIL RIGHTS AND THE MEANING OF SCIENCE (forthcoming 1994).

67. POSNER, SEX AND REASON, *supra* note 59, at 312.

68. *Id.* (declining to “suggest that government’s pronouncing homosexual marriage a beatific state would cause heterosexuals to rethink their sexual preference”).

69. Pattullo, *supra* note 61, at 24.

memory know themselves to be gay,"<sup>70</sup> and *a fortiori* at the cost of condemning those who have chosen and now cannot revise their choice. Indeed, the pedagogical design of discrimination under this rationale makes public displays of suffering not merely acceptable but valuable, as the clearest signal of majority preferences imaginable.

An argument from immutability that relies on the futility of, and pain caused by, psychotherapeutic efforts at conversion does not refute a program of discrimination actually tailored to prevent people who can choose to become homosexual from doing so in the first place. To refute anti-gay arguments taking this form, a legal argument from immutability *needs* biological causation. If pro-gay essentialists want to stay in the game, they will have to claim that homosexuality is immutable because it is biologically determined—causal pro-gay essentialism *tout court*. For that reason I will assume in the following Parts that pro-gay essentialism asserts biological causation. In fact, in three of the four recent cases relying on the new biological findings, that is the form that the pro-gay essentialist argument has taken.<sup>71</sup>

## B. *Genes*

In the last thirty years, genetics has undergone an astonishing ascendancy among the life sciences. It has broken disciplinary limits it adopted in order to distance itself from Nazi eugenics, and now forthrightly seeks to explain not merely the characteristics of animals and the physiological features of humans, but human behavioral and psychological traits.<sup>72</sup> Pro-gay essentialism rides the coattails of modern genetics' sweeping epistemological authority.

Recent developments in science have been invoked to support the claim that homosexuality is now known, or will soon be known, to be a biologically caused, immutable characteristic. For two reasons, this section will argue, pro-gay essentialists should hesitate to rely on these developments to support the argument from immutability. First, as scientific professionals have amply and repeatedly insisted, behavioral genetics in general, and the homosexuality studies in particular, do not support the claim that homosexual orientation is genetically caused and therefore an immutable characteristic. Second, pro-gay support for genetic explanations of sexual orientation may boomerang by validating the key premises of anti-gay eugenics.

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70. *Id.*

71. See notes 47-54 *supra* and accompanying text.

72. The most comprehensive account of the transformation of genetics is DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985). Other important contributions include RUTH HUBBARD & ELIJAH WALD, EXPLODING THE GENE MYTH: HOW GENETIC INFORMATION IS PRODUCED AND MANIPULATED BY SCIENTISTS, PHYSICIANS, EMPLOYERS, INSURANCE COMPANIES AND LAW ENFORCERS 13-38 (1993); DOROTHY NELKIN & LAURENCE TANCREDI, DANGEROUS DIAGNOSTICS: THE SOCIAL POWER OF BIOLOGICAL INFORMATION (1989); Evelyn Fox Keller, *Nature, Nurture, and the Human Genome Project*, in CODE OF CODES, *supra* note 38, at 281; and Daniel J. Kevles, *Vital Essences and Human Wholeness: The Social Readings of Biological Information*, 65 S. CAL. L. REV. 255, 273-77 (1991). An account that de-emphasizes the retreat from eugenics after World War II and emphasizes instead broader ideological origins in Western politics, economics, and philosophy is R.C. LEWONTIN, STEVEN ROSE & LEON J. KAMIN, NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE (1984).

Part III below examines the methods and claims of the most important recent studies of homosexual orientation. Even if pro-gay essentialists do not choose to heed the arguments offered there, they should beware of exaggerating the claims that human behavioral genetics can support as a general matter. Science professionals pursuing internal criticism of the behavioral genetics programme emphasize, first, that genetically caused characteristics are not necessarily immutable in the sense that they persist unchanged over time. For example, even if male pattern baldness is entirely genetically caused, it nevertheless emerges only in adulthood and then *develops*. And behavioral characteristics may exhibit even more complex developmental mutabilities than physical ones.<sup>73</sup>

Nor are genetically caused characteristics necessarily immutable in the sense that they are immune from environmental influence. Confusion on this point often arises from the popular assumption that characteristics shown to be "heritable" are, for that reason, immune from environmental influence. But population and behavioral geneticists use the term "heritable" only to describe "the level of predictability of passage of a biologically interesting phenotype from parent to offspring."<sup>74</sup> Heritability confounds phenotypic variance caused by heredity with phenotypic variance caused by environment.<sup>75</sup> Moreover, even when geneticists are able to control environmental variance (as they seek to do, for instance, in experiments involving agricultural plants and laboratory and farm animals), any finding that a certain phenotypic characteristic is likely generated through the action of a single gene not interacting with other genes ("narrow-sense heritability") *assumes* the particular environmental factors in which the characteristic emerged:

A statistical estimate for the narrow-sense heritability pertains only to a particular population studied under a specific environmental regime. It cannot be regarded as valid for a different population or under different environments. *There is nothing that can be inferred* from such an estimate about the extent to which phenotypic differences between populations are due to genetic differences.<sup>76</sup>

Inasmuch as heritability studies do not even theoretically eliminate environmental factors, they do not eliminate the possibility that phenotypic variation

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73. See L.J. EAVES, H.J. EYSENCK & N.G. MARTIN, *GENES, CULTURE AND PERSONALITY: AN EMPIRICAL APPROACH* 161-99 (1989) (developing a model for testing the relative contribution of genes and culture to behavioral characteristics that emerge in human development).

74. Marcus W. Feldman, *Heritability: Some Theoretical Ambiguities*, in *KEYWORDS IN EVOLUTIONARY BIOLOGY* 151, 151 (Evelyn Fox Keller & Elisabeth A. Lloyd eds., 1992).

75. *Id.* at 151-52; see also M.W. Feldman & R.C. Lewontin, *The Heritability Hang-Up*, 190 *SCIENCE* 1163, 1164 (1975) ("The narrow heritability does not provide an index of the importance of an individual's genotype in determining the phenotype. It is merely an index of the amenability to selective breeding and, as such, is of practical use in the construction of breeding programs.").

76. Feldman, *supra* note 74, at 155 (emphasis added). Feldman concludes by observing that "norm of reaction" studies, in which genotypically identical individuals are reared in differing environments, produce differing measures of heritability for the same characteristic: "[E]ven if the heritability in one environment were high, it might not be in another." *Id.* at 157; see also DANIEL L. HARTL & ANDREW G. CLARK, *PRINCIPLES OF POPULATION GENETICS* 472 (2d ed. 1989) (asserting that norm of reaction studies "underscore the fact that heritability is a measure defined in one environment").

arises through a process of *interaction* between genotype and environment.<sup>77</sup> Nor do they eliminate the possibility that environmental differences result from and in turn cause genetic variance.<sup>78</sup> It is difficult if not impossible to design experiments that measure separately the wide variety of ways in which environment may contribute to an observed regularity in the transmission of phenotypic traits from parents to offspring when the object of study is *Drosophila* or corn. Human characteristics, and particularly human behavioral characteristics, are even more difficult to assess and even more inhospitable to efforts to exclude environmental and cultural factors.<sup>79</sup> Thus, according to the internal criticism offered by scientific professionals, *any* experimental program in human behavioral genetics can offer only limited claims of genetic causation, and even those claims do not necessarily demonstrate *immutability*.

At the same time, pro-gay essentialism takes some unacceptable risks when that approach borrows the plausibility of modern genetics. On a purely pragmatic level, pro-gay essentialism is just not different enough from anti-gay essentialism to mount an effective resistance to the development of anti-gay eugenics. Pro-gay essentialism fails to contest the arguments crucial to the discriminatory social policies of both anti-gay essentialism and anti-gay constructivism: that homosexuality is bad either because it is immoral or because it disrupts the social order. Pro-gay essentialism parsimoniously aims at the anti-gay constructivist premise that at least some homosexuality is chosen; but it neglects the second premise, that homosexuality is bad or harmful. Pro-gay constructivists worry that this failure to contest the moral and political meaning assigned to homosexuality leaves pro-gay essentialism vulnerable to cooptation. An anti-gay constructivist could convert to essentialism, maintaining the premise that homosexuality is bad for moral or civic order, agreeing with the important points explicitly made by pro-gay essentialism, and then, without breaking logical stride, undertake an eugenic program to eliminate homosexuals.

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77. Feldman, *supra* note 74, at 156; see also SUSAN L. FARBER, *IDENTICAL TWINS REARED APART: A REANALYSIS* 22-31 (1980); HARTL & CLARK, *supra* note 76, at 458-63. Feldman and Lewontin further argue that experimenters cannot partition gene-environment interaction unless they also isolate gene-environment correlation. Feldman & Lewontin, *supra* note 75, at 1164.

78. Feldman & Lewontin, *supra* note 75, at 1163 ("The genetic variance depends on the distribution of environments and the environmental variance depends on the distribution of genotypes.").

79. *Id.* at 1164 (concluding that in experiments involving human subjects, "experimental controls" that allow the experimenter to partition purely genetic and purely environmental contributions as well as those involving gene/culture interactions "are either impossible or unethical," rendering "statistical inference about the heritability of traits that are phenotypically plastic . . . invalid"); see also Robert Plomin, *The Role of Inheritance in Behavior*, 248 *SCIENCE* 183, 186 (1990) (concluding that "[g]enetic influence on behavior appears to involve multiple genes rather than one or two major genes, and nongenetic sources of variance are at least as important as genetic factors").

Twins studies have emerged as the most promising means of controlling for environmental variance in human genetics. For pessimistic assessments of this theoretical approach, see HARTL & CLARK, *supra* note 76, at 480-81; FARBER, *supra* note 77. For an effort to design experimental models adequately complex to accommodate the problems of research in humans, see EAVES ET AL., *supra* note 73.

Anti-gay eugenics is more than a theoretical danger. Important mainstream scientists have praised the Human Genome Project for its eugenic potential,<sup>80</sup> and researchers on the causes of homosexuality repeatedly acknowledge the possibility of anti-gay eugenics.<sup>81</sup> Moreover, modern genetics aspires not to improve or purify a national or racial gene pool—a task that would require currently unimaginable levels of official participation—but to enable individual parents to prevent the birth of less-than-optimal infants through privately obtained prenatal testing and selective abortion.<sup>82</sup> And of course selective abortion of fetuses deemed to be genetically committed to homosexuality is not the only conceivable way in which genetic information (or misinformation) could be used. Current or imagined genetics technologies could be used to subordinate or prevent the existence of gay men and lesbians in a variety of ways: genetic fingerprinting could make involuntary identification possible; cloning could provide parents with reproductive options untainted by any “gay gene”; and genetic modification could cure the “condition” of genotypic homosexuality.<sup>83</sup> All of these approaches could be used whether the targeted genetic

80. For example, Daniel Koshland, editor of *Science*, which has published a number of the leading studies claiming to identify biological causes of homosexuality, has stated that genetic diseases “are at the root of many current societal problems,” and has warned against “the immorality of omission—the failure to apply a great new technology to aid the poor, the infirm, and the underprivileged.” Daniel E. Koshland, Jr., *Sequences and Consequences of the Human Genome*, 246 *SCIENCE* 189, 189 (1989). When asked whether funding proposed for the Human Genome Project might be better given to the homeless, Koshland replied: “What these people don’t realize is that the homeless are impaired. . . . Indeed, no group will benefit more from the application of human genetics.” Keller, *supra* note 72, at 282 (quoting Koshland’s address to the First Human Genome Conference in October, 1989).

81. See, e.g., David J. Jefferson, *Studying the Biology of Sexual Orientation Has Political Fallout*, WALL ST. J., Aug. 12, 1993, at A1, A4 (quoting Dr. Laura Allen and Dr. Dean Hamer). Two researchers in neuroendocrinology have indicated that the principal obstacles to anti-gay eugenics are practical ones, making no mention of the potential moral problems that would be involved. Lee Ellis & M. Ashley Ames, *Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality*, 101 *PSYCH. BULL.* 233, 252 (1987) (urging caution in attempts to prevent homosexuality because “[s]everal decades of intense research may be required to adequately test the theory [that homosexuality and other “sexual inversions” are prenatally caused], and . . . to identify precisely where and when intervention might be feasible”). Elsewhere anti-gay eugenics are actively recommended. E.g., G. Duorner, B. Schenk, B. Schmiedel & L. Ahrens, *Stressful Events in Prenatal Life of Bi- and Homosexual Men*, 81 *EXPERIMENTAL CLINICAL ENDOCRINOLOGY* 83, 87 (1983) (“These findings indicate that prevention of war and undesired pregnancies may render possible a partial prevention of the development of sexual deviations.”). Often scientists raise a hortatory cry that prevention should not be attempted. See Hamer et al., *supra* note 1, at 326 (urging readers to regard homosexual orientation as a “normal variation in human behavior,” and stating that “[w]e believe that it would be fundamentally unethical to use [information from the Human Genome Project] to try to assess or alter a person’s current or future sexual orientation, either heterosexual or homosexual”). Even those who do not share the normative belief that homosexuality is bad may endorse prevention programs for other reasons. See, e.g., POSNER, *SEX AND REASON*, *supra* note 59, at 308 (wondering whether “science, which has worked so many wonders, may someday, perhaps someday soon, discover a ‘cure’ for homosexuality,” and opining that such a cure would be socially inefficient if applied to adults, who would suffer pain and dislocation in abandoning a social identity, but may be cost free in the case of fetuses, infants, and even children); Gelman et al., *supra* note 2, at 48 (“No parent would choose to have a child born with any factor that would make life difficult for him or her.”) (quoting the program director of the Federation of Parents and Friends of Lesbians and Gays).

82. KEVLES, *supra* note 72, at 267-68; Keller, *supra* note 72, at 289, 295-97.

83. On genetic fingerprinting, see DNA ON TRIAL: GENETIC IDENTIFICATION AND CRIMINAL JUSTICE (Paul R. Billings ed., 1992); Eric Lander, *DNA Fingerprinting: Science, Law and the Ultimate Identifier*, in CODE OF CODES, *supra* note 38, at 191. On cloning and genetic modification, see KEVLES, *supra* note 72, at 264-68.

trait unilaterally caused homosexual orientation, merely predisposed an individual to such an orientation, or had no relationship to human sexual development at all. Pro-gay essentialism is not rhetorically or materially prepared to deal with the furtive cultural dispersal of anti-gay essentialism taking all, or any, of these forms.<sup>84</sup>

Pro-gay essentialism also embodies ideological dangers that could engender concrete political ones. Genetics does not merely describe reality; it also incorporates cultural norms into its premises and diffuses into the wider culture its own implicit norms and epistemological commitments. Science scholar Evelyn Fox Keller uses the example of alcoholism to illustrate how the ideological assumptions of genetics might contribute disturbing new meanings to political life. Keller emphasizes that the medical appropriation of modern genetics, focused as it is on the concept of genetic *disease*, makes genetic normality the fundamental basis of analysis and yet pervasively fails to define it:

"Take alcoholism. Alcoholism gets defined as a genetic disease and we look for genes that characterize populations of people who are addicted to alcohol. We don't look at the genes that characterize the populations that can drink without becoming addicted. . . .

. . . [L]et's suppose a durable, robust claim for a genetic contribution to certain physiological responses that are correlated with alcoholism is obtained. . . . At that point it becomes necessary to ask: 'How did the category of alcoholism get defined in the first place?'"<sup>85</sup>

Genetics thus raises the question of "how the authority for prescribing the meaning of 'normal' is distributed"<sup>86</sup>—a question whose answer will emerge as scientific claims are interpreted and used in culture. One danger of shaping pro-gay legal strategy on genetics is that this pattern developed in genetic medicine will be reiterated in the context of sexuality: Definitions of the normal that exclude homosexuality will already be embedded in the science when it enters culture.

Nor is the danger simply that heterosexuals will get to define the normal as identical with themselves. Heterosexual identity is a complex, indeed unstable phenomenon, as is suggested by studies showing that men affirm their identities as heterosexual even when they acknowledge having recent same-sex contacts.<sup>87</sup> The instability of genetic normality is mirrored in the instability of homosexuality as a social-representational practice. Social-descriptive con-

84. I do not think that the danger of appropriation justifies abandoning scientific studies that hypothesize a biological cause of homosexuality. If I did, I could not consistently write and publish this article, which is ripe for misappropriation by anti-gay constructivists willing to distort its central points. Nor do I think that gay men and lesbians who find themselves affirmed or reflected in narratives of biological causation should cease to say so. I argue only that they should not use *litigation* to obtain official approbation for their sexual orientation identity. See Part II.D *infra*.

85. Larry Casalino, *Decoding the Human Genome Project: An Interview with Evelyn Fox Keller*, *SOCIALIST REV.*, Apr.-June 1991, at 111, 121-22 (quoting Keller); see also Keller, *supra* note 72, at 296-97.

86. Keller, *supra* note 72, at 299.

87. See, e.g., Robert E. Fay, Charles F. Turner, Albert D. Klassen & John H. Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 *SCIENCE* 338, 338 (1989); Janet Lever, David E. Kanouse, William H. Rogers, Sally Carson & Rosanna Hertz, *Behavior Patterns and Sexual*



cepts that are this manipulable invite, and often receive, opportunistic redefinition in the political sphere. The power to define *and* redefine who and what the "normal" is, and who and what "heterosexuals" are, can become itself a method of doing politics to secure some aspects of social superordination. The overlap of genetic normality with heterosexual identity doubles the danger.

Despite the danger of the genetics model, however, it would be imprudent for pro-gay constructivists to insist that legal strategy *exclude* and *contradict* pro-gay essentialism. As Keller warns, robust scientific claims that homosexuality is genetically caused may be made any day now:

"The first reaction of leftists to the [Human] Genome Project . . . [is to argue] that behavior and personality are not products of nature, but of nurture. I think that's a position that is being radically undermined by the Genome Project and will be impossible to maintain over the course of the next years.

. . . I don't have any doubt that [genetics researchers] are going to be able to make credible claims for multi-gene "determination" of personality traits."<sup>88</sup>

Legal strategy predicated exclusively on pro-gay constructivism would be severely injured if and when researchers show, within the standards of proof that pertain in reputable modern science, that homosexuality as it is currently manifested in our culture is genetically determined. In that event, pro-gay constructivism could maintain its program of legal reform only by successfully attacking the standards of proof that pertain in reputable modern science. Though pro-gay constructivists are entitled to, and should continue to, mount such critiques,<sup>89</sup> it may not be pragmatic to predicate legal strategy on their success.

### C. Autobiographies

Tom McNaught stated an autobiography in three sentences: "It's not a matter of choice. It's who I am. . . . It's genetic."<sup>90</sup> Pro-gay essentialism makes autobiographical sense to a significant number of gay men and to many, though perhaps fewer, lesbians. But other people who experience anti-gay discrimination tell quite different stories. Some understand themselves to have chosen the form of their desire or the ways in which it structures their lives.<sup>91</sup> Others

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*Identity of Bisexual Males*, 29 J. SEX RES. 141, 151-53 (1992); see also Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

88. Casalino, *supra* note 85, at 115-16 (quoting Keller).

89. For a study of ways in which African-Americans and Jews combatted the "scientific racism" ascendant between 1870 and 1920, which claimed that they were biologically inferior, see Nancy Leys Stepan & Sander L. Gilman, *Appropriating the Idioms of Science: The Rejection of Scientific Racism, in THE BOUNDS OF RACE: PERSPECTIVES ON HEGEMONY AND RESISTANCE* 72 (Dominick LaCapra ed., 1991).

90. Tony Rogers, 'Why' of Homosexuality, CHI. TRIB., June 2, 1993, at C2 (quoting Tom McNaught).

91. See, e.g., Card, *supra* note 63; Carla Golden, *Diversity and Variability in Women's Sexual Identities*, in LESBIAN PSYCHOLOGIES: EXPLORATIONS AND CHALLENGES 19 (Boston Lesbian Psychologies Collective ed., 1987).

occupy the hotly contested historical ground that homosexual identity is a product of modernity, not nature or human nature.<sup>92</sup>

Still others worry that the designations "gay" and "lesbian" constrain at the very moment of their application. Among these are self-identified bisexuals, who repeatedly report the difficulty they confront in fitting their lives and experiences into the simple narrative form propounded by Tom McNaught.<sup>93</sup> Other strong currents in the pro-gay movements critique the very impulse to organize around gay and lesbian identity, either because doing so suppresses a sexuality distinct and semi-autonomous from homosexuality,<sup>94</sup> or because it obscures the historical, institutional, and political processes that produce identity.<sup>95</sup> To the extent that these self-articulations are anticategorical, they are increasingly performed under the rubric "queer."<sup>96</sup>

92. See, e.g., JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 10-13 (1983); FOUCAULT, *supra* note 4, at 43; HALPERIN, *supra* note 4, at 41-53; EVE KOSOFSKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990) [hereinafter SEDGWICK, *EPISTEMOLOGY*]; *THE MAKING OF THE MODERN HOMOSEXUAL* (Kenneth Plummer ed., 1981); JEFFREY WEEKS, *COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN, FROM THE NINETEENTH CENTURY TO THE PRESENT 11-44* (1977) (tracing a shift in the definition of homosexual "from sin to crime," thence to "the medical model," and at last to "a way of life"). John Boswell has voiced the most articulate opposition to this view. John Boswell, *Categories, Experience and Sexuality, in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 133 (Edward Stein ed., 1990); John Boswell, *Revolutions, Universals, and Sexual Categories*, reprinted in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 17 (Martin Duberman, Martha Bauml Vicinus & George Chauncey, Jr. eds., 1989).

93. For example, *CLOSER TO HOME: BISEXUALITY & FEMINISM*, *supra* note 3, collects a number of self-descriptive and autobiographical narratives that vary widely in their response to this problem. Perhaps the most salient difference among these essays is their implicit response to the question whether a unitary biography is possible for people whose erotic lives are invested in men and women. Some contributors aspire to lifestyles of "wholeness." See, e.g., Margaret Mihee Choe, *Our Selves, Growing Whole*, in *CLOSER TO HOME*, *supra*, at 17, 24 ("I am now at the point where I have grown tired of chopping myself up to order into tiny, less-than-human pieces. I'm going to let the cuts heal and let myself grow whole."); Ruth Gibian, *Refusing Certainty: Toward a Bisexuality of Wholeness*, in *CLOSER TO HOME*, *supra*, at 3, 14 ("Inclusion. Discovering oneness where we believed there was polarity. Healing false dichotomies."). Others, however, conclude that their lives are too "fluid" for such integration. See, e.g., Nina Silver, *Coming Out as Heterosexual*, in *CLOSER TO HOME*, *supra*, at 35, 46 ("My life is a continual process of coming out. Ultimately, I cannot identify myself even as bisexual. As a human being striving to reach my fullest potential, I can only relate as the lover."); Dvora Zipkin, *Why Bi?*, in *id.* at 55, 72 ("[The label] bisexual . . . comes closest to describing who I am, who I have been and who I may become. Might that change? Of course—that's what this essay has been about."); see also Kathleen Bennett, *Feminist Bisexuality: A Both/And Option for an Either/Or World*, in *CLOSER TO HOME*, *supra*, at 205, 228 (reviewing a selection of bisexual lifestyles and concluding that bisexuals, feminists, and "gay liberationists" should "bas[e] our identity not only on fluidity, but on fluidity of sexuality").

94. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carole S. Vance ed., 1984); see also Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diana Fuss ed., 1991); Andrew Parker, *Sensitive New Age Guys*, *LESBIAN & GAY STUD. NEWSL.*, Mar. 1993, at 31 (reviewing *ENGENDERING MEN: THE QUESTION OF MALE FEMINIST CRITICISM* (Joseph A. Boone & Michael Cadden eds., 1990)).

95. See, e.g., Joan W. Scott, *The Evidence of Experience*, 17 *CRITICAL INQUIRY* 773 (1991); Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture*, in *FEAR OF A QUEER PLANET*, *supra* note 3, at 105.

96. Sedgwick, *supra* note 3, at 8 (describing "one of the things that 'queer' can refer to: the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or *can't be* made) to

As long as people who suffer anti-gay discrimination differ about whether they were born or became gay—indeed, about whether they *are* gay—neither a purely essentialist nor a purely constructivist approach can adequately ground pro-gay legal theory. And differ we do, media reports to the contrary notwithstanding.<sup>97</sup> Immutability offers no theoretical foundation for legal protection of those gay men and lesbians who experience their sexual orientation as contingent, mutable, chosen. This exclusion will only get worse as a distinctive movement of bisexuals takes shape: The fairness theory of pro-gay essentialism does not explain why bisexuals—by hypothesis capable of satisfactory sexual encounters with members of the so-called “opposite” sex—should not be encouraged or forced to do so. But building a new foundation for legal protection on the contrary assumption—that sexual orientation is constructed *and not* biologically determined—would risk the same exclusion in reverse. An adequate legal theory should protect the entire social class on whose behalf it is articulated.

#### D. Litigation

Pro-gay litigation has a number of important objectives. It seeks concrete remedies for plaintiffs who have been materially harmed by anti-gay discrimination. It also seeks the more symbolic attributes of justice for plaintiffs personally, by restoring to them some measure of their dignity and civic engagement. More broadly, it seeks to establish rules of law that will benefit gay men, lesbians, and bisexuals (and, it is to be hoped, other subordinated groups as well), either in subsequent litigation or through the gradual and mysterious processes by which legal rules shape public and private norms. Finally, pro-gay litigation invites courts to use their privileged position as social producers of meaning—a kind of epistemological authority rivalled today by science, but still formidable—to arrest, and hopefully to replace, the meanings generated by anti-gay discrimination. Of course, pro-gay litigation can fail, even spectacularly, to obtain these goals. But win or lose, the effects of pro-gay litigation far exceed those felt by the individual plaintiff.

Unlike other political activities, litigation is special because it activates the possibility of success or defeat on any or all of these very different fronts. When pro-gay advocates turn to litigation, then, they face difficult pragmatic

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signify monolithically”); Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET*, *supra* note 3, at xii, xxvi (“The preference for ‘queer’ represents, among other things, an aggressive impulse of generalization; it rejects a minoritizing logic of toleration or simple political interest-representation in favor of a more thorough resistance to regimes of the normal. . . . ‘Queer’ . . . suggests the difficulty in defining the population whose interests are at stake in queer politics.”).

97. Media reports on the scientific studies examined below tend to exaggerate the extent to which members of gay/lesbian/bisexual/queer communities support the argument from immutability. For a discussion of how this exaggeration reflects the mainstream media’s relationships to gay, lesbian, and bisexual community sources, see Kay Diaz, *Are Gay Men Born That Way?*, *Z MAGAZINE*, Dec. 1992, at 42, 46; Kathryn E. Diaz, *The Cultural (Mis)appropriation of a Brain Cell Study? The Media, the Motive, and the Hypothalami of Gay Men*, *GAY COMMUNITY NEWS*, Oct. 6-12, 1991, at 9, 9-11. For a discussion of pressures within gay, lesbian, and bisexual communities to suppress differences on this point, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 522-27 (1992).

and normative questions that should not inhibit them when they engage in other forms of political action.

Outside of litigation, gay men, lesbians, bisexuals, and queers—in fact, anybody who brings an open mind to debates about sexuality—should continue to disagree as vociferously as we want about the degree to which our identities are essential or constructed. But the distinctive and broad effects of litigation, in particular its power to normalize in law and culture any definitions of homosexuality and homosexuals it adopts, must be measured against the exiguous need for a doctrinal argument that defines who we are in ways that some of us object to and cannot, and will not, conform to. Pro-gay essentialists and pro-gay constructivists should stop treating their conflict over legal strategy as a winner-take-all contest, and seek common ground.

### III. THE STUDIES

Recent studies in neuroanatomy, endocrinology, and behavioral genetics have strengthened the allure of the pro-gay argument from immutability. These reports have entered popular culture sufficiently to influence the thinking of litigators and judges and have actually appeared in pro-gay litigation strategy as proud supports for the argument from immutability.

This Part undertakes a critique of the most important recent studies reporting on biological correlates to homosexual orientation. Three considerations limit the scope of this critique. First, I will report on but will not pretend to develop further the critique offered by scientific professionals as they evaluate the experiments in light of the standards of modern science and delineate the (quite narrow) reach of the studies' well-justified conclusions.<sup>98</sup> Second, I

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98. William Byne and Bruce Parsons provide an intelligent and intelligible description of how experimental design limits the inferences that can be drawn from published research reports. William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228 (1993). Among the questions debated in that literature are whether biological causes of human sexual orientation can ever be deduced from neuroanatomic findings or studies of twins raised apart. A series of studies issued in the mid-1980s demonstrated that experience could cause changes in brain development. *Id.* at 229, 237 nn.6-8; see also Russell D. Fernald, *Cichlids in Love*, THE SCIENCES, July/Aug. 1993, at 27; Richard C. Francis, Kiran Soma & Russell D. Fernald, *Social Regulation of the Brain-Pituitary-Gonadal Axis*, 90 PROC. NAT'L ACAD. SCI. 7794 (1993) (reporting on changes in the size of cichlid fish brain structure after manipulation of fishes' social structure and gonadal state).

A well-conducted twins study cannot prove more than a correlation. Because Bailey and Pillard studied twins raised together, they were unable to do more than wish away possible environmental differences in experience. See Theodore Lidz, *Reply to [Bailey and Pillard's] "A Genetic Study of Male Sexual Orientation,"* 50 ARCHIVES GEN. PSYCHIATRY 240 (1993) (letter to the editor); J. Michael Bailey & Richard Pillard, in *id.* (response to Lidz defending methodology of twins study). Even twins studies using twins raised apart can produce correlations that can be described as genetically caused only on highly speculative grounds. One famous study of twins reared apart found that different twin pairs liked the same brand of cigarettes, had married women with the same name, and had chosen the same names for their children and dogs. Donald Dale Jackson, *Reunion of Identical Twins, Raised Apart, Reveals Some Astonishing Similarities*, SMITHSONIAN, Oct. 1980, at 48; see also Thomas J. Bouchard, Jr., David T. Lykken, Matthew McGue, Nancy L. Segal & Auke Tellegen, *Sources of Human Psychological Differences: The Minnesota Study of Twins Reared Apart*, 250 SCIENCE 223 (1990). For an examination of the many ways in which environmental influences can contribute to the development of similar traits even in twins raised apart, see FARBER, *supra* note 77.

leave to other critics the internal and external criticism of this literature on grounds that it incorporates questionable assumptions about gender.<sup>99</sup>

And third, the project undertaken here—to find common ground from which pro-gay essentialists and pro-gay constructivists can launch litigation strategies that include rather than divide pro-gay constituencies—can hardly begin on an assumption that the argument from immutability must certainly be wrong. For pragmatic and ethical reasons arising from the special demands of litigation strategy, the following critique quite deliberately falls short of a claim that the relevant experiments are *bad science*. To be sure, this Part offers a criticism of the experiments' assumptions about sexual orientation categories, but the argument pursued here is not that the studies are flawed because they make such assumptions. Science must always begin with hypothetical definitions, drawn from conventional language, of the phenomena it seeks to study. A realist would posit that science eventually refines those conventional assumptions to arrive at transparently *correct* descriptions of nature, while a pragmatist would merely require that good science gradually accommodate its categories closely enough to the emerging data that it can offer more or less reliable predictions and, where appropriate, serviceable technologies. The recent studies of homosexual orientation inaugurate rather than conclude research programs in this field: They are owed the forbearance that realists grant to early work, and that pragmatists grant to *all* science, even if their categorical assumptions reflect social biases.<sup>100</sup>

They are not owed more than that, however. Specifically, they are not owed any deference at all on the question whether human sexual orientation is bimodal or continuumized: whether it appears in the forms of homo- and heterosexuality or in more minute gradients between these two. When an experimenter faces the threshold decision whether to assume human sexual orientation to be bimodal or continuously variable, she faces a question that underlies the political dispute among pro-gay constituencies over the pro-gay argument from immutability: Proponents favor a bimodal model; opponents favor a continuumized model. Thus, science must choose between politically loaded definitions for its hypotheses. Because the ultimate strength of statistical findings depends in part on the model of sexual orientation traits that researchers adopt as their hypothetical apparatus,<sup>101</sup> and the available

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99. Neuroanatomical and hormonal reports repeatedly assume that homosexuals are sex inverts, such that gay men resemble women, and lesbians men, along some dimension that has been found to be dimorphic for sex. This assumption has led hormone researchers to classify the male rat who presents himself to be penetrated as "homosexual," but the male rat who penetrates him as "heterosexual." Byne & Parsons, *supra* note 98, at 231. This inversion hypothesis richly warrants a thick cultural explanation, but I do not attempt to fashion one here. For a brief restatement of the rationale for distinguishing sexual orientation from gender, and pursuing analysis of the former on the assumption that it operates semi-autonomously from the latter, see Halley, *supra* note 87, at 1724-26.

100. For an argument that science may incorporate social biases and nevertheless be "good science," see Elizabeth Potter, *Modeling the Gender Politics in Science*, in *FEMINISM AND SCIENCE* 132, 141-44 (Nancy Tuana ed., 1989).

101. See EAVES ET AL., *supra* note 73, at 45 ("Estimates of genetic and environmental parameters will be biased if the model is wrong").

hypothetical apparatuses are politically contested, science may never find itself in a position to adjudicate the essentialism/constructivism dispute.

The troubling feature of recent scientific developments in the area of human sexual orientation is not experimenters' simple use of conventional definitions about homosexual and heterosexual orientation (they could hardly do otherwise). The problem arises in the way the resulting scientific reports have been assimilated into the broader culture and into legal culture in particular. Often at the urging of the scientists themselves, this science has been understood in the broader culture as a series of empirical confirmations that *those definitions* are natural and fixed. But the studies hypothesize definitions of homosexual and heterosexual orientation that are subject to question *politically*; the definitions the scientists incorporate should remain topics for political debate.

Thus, the following critique focuses not on what science can prove, but on how science works at its common border with culture. At that border, cultural practices become scientific assumptions, and scientific findings are offered to confirm and disconfirm cultural intuitions. As the following analysis shows, the political character of sexual orientation categories lurks at the outer edge of the experimenters' method. Those of us who work politically and legally should not allow the bright light thrown by scientific findings to dazzle us so that we cannot see the political problems that the experimenters assumed away. Indeed, as I argue in Part IV, the excluded dynamics of sexual-orientation definition are precisely where common ground between pro-gay constructivists and pro-gay essentialists is to be found.

#### A. *Recent Experiments*

Scientists have acclaimed three recent research reports—one from neuroanatomy and two from behavioral genetics—as major breakthroughs in the search for biological causes of homosexuality in humans.<sup>102</sup> Simon LeVay's study of hypothalamic structure launched the current avid scientific and media interest, perhaps because it was the first neuroanatomic study claiming to find correlations between sexual orientation and a brain structure that has been shown to have direct control over sexual behavior in rats.<sup>103</sup>

102. See Bailey & Pillard, *supra* note 1; Hamer et al., *supra* note 1; LeVay, *supra* note 1. Recent work on hormonal patterns has not achieved similar success. William Byne and Bruce Parsons have concluded that hormone research currently comprises two separate literatures—studies of nonhuman mammals and studies of humans—that are not as yet mutually illuminating. Byne & Parsons, *supra* note 98, at 230-34. Research in nonhuman mammals has sought examples of gender nonconformity exhibited in sexual behavior, for example, male rats who exhibit "lordosis," or readiness to be mounted, and female rats who mount. *Id.* at 231. But this model has not been successful in predicting the bewildering variety of gender nonconformity found in research on humans, where the interrelations between hormone balances, genital configuration, and social gender attribution are complex; where sexual orientation identity and erotic gesture are relatively autonomous; and where sexual fantasy often entertains different objects than does sexual behavior. *Id.*; see also Louis Gooren, *Biomedical Theories of Sexual Orientation: A Critical Examination*, in *HOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION* 71 (David P. McWhirter, Stephanie A. Sanders & June Machover Reinisch eds., 1990).

103. LeVay, *supra* note 1. For earlier studies of brain structures not linked to sexual behavior in nonhuman animals, see Laura S. Allen & Roger A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, 89 *PROC. NAT'L ACAD. SCI.* 7199 (1992); D.F. Swaab &

Genetic claims about sexual orientation have emerged from what I will call "twins studies" and, most recently, in a pedigree and genetic linkage study. In a twins study, researchers seek evidence of genetic relationships by examining whether a trait appears in identical twins, fraternal twins, nontwin siblings, or adopted siblings in proportions greater or less than one would expect from the trait's distribution in the population at large. J. Michael Bailey and Richard C. Pillard's widely acclaimed study of male twins and adopted brothers is the largest and most carefully designed twins study to date.<sup>104</sup> At the time of its publication it constituted the strongest evidence yet that any biological differences between gay and straight men cause rather than result from their sexual orientations.<sup>105</sup>

Since publication of Bailey and Pillard's twins study, a study using pedigree and DNA-linkage analysis has produced an even bolder genetic claim. Dean H. Hamer and a team of researchers examined gay men's family tree patterns, or pedigrees, and observed higher rates of homosexuality in maternal rather than paternal relatives, suggesting that male homosexuality might be genetically transmitted through the mother.<sup>106</sup> In the next phase of their investigation, a linkage study, Hamer's team examined chromosomal material from homosexual brothers with no more than one lesbian relative and no homosexual fathers or sons. The researchers found that 64 percent of the sibling pairs shared an identifiable genetic sequence on the X chromosome.<sup>107</sup> According to the authors, that result was "evidence that one form of male homosexuality is preferentially transmitted through the maternal side and is genetically linked to chromosomal region Xq28."<sup>108</sup> They ultimately concluded, however, that while this gene sequence appeared to contribute to sexual orientation in some males, it could not be a determining factor for homosexual orientation generally.<sup>109</sup>

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M.A. Hofman, *An Enlarged Suprachiasmatic Nucleus in Homosexual Men*, 537 *BRAIN RES.* 141, 146 (1990). Both studies used methods similar to LeVay's.

104. See Bailey & Pillard, *supra* note 1.

105. See *id.* I dub Bailey and Pillard's study of male twins "the twins study" merely for shorthand, though (1) it focuses on twins, nontwin siblings, and adopted siblings; and (2) other important studies have used its methods.

Bailey and Pillard have conducted a more recent study of sexual orientation in women. It followed almost exactly the methods used in their study of men and drew virtually the same conclusion: that homosexuality in women is significantly heritable. J. Michael Bailey, Richard C. Pillard, Michael C. Neale & Yvonne Agyei, *Heritable Factors Influence Sexual Orientation in Women*, 50 *ARCHIVES GEN. PSYCHIATRY* 217 (1993). Because of these similarities, the twins study of women is subject to the same criticisms I bring to the twins study of men, and I give it separate attention only when it departs from the male study in ways important for my analysis. See, e.g., note 144 *infra*. A more recent twins study focused on a source of variance ignored in the Bailey and Pillard studies: differences in the subjects' sexual practices. Frederick L. Whitam, Milton Diamond & James Martin, *Homosexual Orientation in Twins: A Report on 61 Pairs and Three Triplet Sets*, 22:3 *ARCHIVES SEXUAL BEHAV.* 187 (1993). For a collection of articles on twins studies and sexual orientation, see *TWINS AND HOMOSEXUALITY: A CASEBOOK* (Geoff Puterbaugh ed., 1990).

106. Hamer et al., *supra* note 1.

107. *Id.* at 325-26.

108. *Id.* at 325.

109. *Id.*

Hamer's linkage study thus forges out beyond Bailey and Pillard's twins study by proposing that the causation of male homosexuality can be studied at the level of a specific, identified genetic sequence. It is important, however, to understand the limits of Hamer's study, as the study itself describes them. Hamer's linkage study focused on a group of homosexual men selected to intensify the likelihood of finding that the primary subjects' homosexuality was transmitted to them by their mothers. Accordingly, the "one form of male homosexuality" purportedly linked to the genetic sequence is the form that affects gay men with homosexual brothers, no lesbian relatives, and no gay fathers or sons.<sup>110</sup> The study provided no basis for any statements about the causes of homosexuality in families with lesbians or paternally-related gay men, no basis for inferring that the genetic markers identified in the study would reappear as significant in a study of the general population of gay men, and no basis for supposing that non-gay brothers of men in the study do not also have the genetic markers identified in the study.<sup>111</sup> Moreover, as the authors are quick to point out, the study did not show any genetic concordance in seven of the study's forty brother pairs.<sup>112</sup> Thus, even if one assumes that the identified genetic sequence expresses itself somewhere in its bearers, the findings do not command that their *homosexuality* is that place.<sup>113</sup>

Culturally contested understandings of the categories, homosexual and heterosexual, became part of the experimental hypotheses of all three studies. That in itself is not troubling. It is troubling, however, that cultural reception of these studies has led nonscientific readers to suppose that the categories have themselves been found to exist in nature. For three reasons it is most appropriate to examine this problem in LeVay's brain study and Bailey and Pillard's twins study, and to premit consideration of Hamer's pedigree and linkage study. First, Hamer employs categorical assumptions very similar to those used by Bailey and Pillard, but provides less detail about how he deployed them.<sup>114</sup> Second, LeVay, Bailey, and Pillard have all actively and personally engaged in media coverage of their studies, fostering the misunderstanding of this body of science, while Hamer cuts a far less prominent figure in the media databases.<sup>115</sup> And third, Hamer draws conclusions from his data that afford an opportunity

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110. See Mary-Claire King, *Sexual Orientation and the X*, 364 NATURE 288, 288 (1993).

111. Hamer et al., *supra* note 1, at 325; see also Anne Fausto-Sterling & Evan Balaban, *Letters: Genetics and Male Sexual Orientation*, 261 SCIENCE 1257 (1993) (describing lack of a control group of nonhomosexual brothers as "[t]he most obvious weakness[]" of the Hamer study).

112. Hamer et al., *supra* note 1, at 325.

113. Biologists Anne Fausto-Sterling and Evan Balaban point out additional weaknesses in Hamer's study, in particular its reliance on certain assumptions that, if disproven, might rob their findings of statistical significance. Fausto-Sterling & Balaban, *supra* note 111; see also Neil Risch, Elizabeth Squires-Wheeler & Bronya J.B. Keats, *Technical Comments: Male Sexual Orientation and Genetic Evidence*, 262 SCIENCE 2063 (1993); Dean H. Hamer, Stella Hu, Victoria Magnuson, Nancy Hu & Angela M.L. Pattatucci, *Reply to Male Sexual Orientation and Genetic Evidence*, 262 SCIENCE 2065 (1993).

114. Hamer et al., *supra* note 1, at 321-22.

115. See texts accompanying notes 121, 123, 145-148, & 238 *infra*.



for pro-gay essentialists and pro-gay constructivists to meet on the common ground I identify in Part IV below.<sup>116</sup>

### B. *The Brain Study*

In the most celebrated study linking homosexuality to biological traits, Simon LeVay found that a group of cells in a certain portion of the brain—the third interstitial nucleus of the anterior hypothalamus or INAH 3—was larger in men he classified as heterosexual than in men he classified as homosexual.<sup>117</sup> His experiment used postmortem samples from the brains of forty-one subjects, thirty-five men and six women.<sup>118</sup> He drew from his findings essentialist conclusions that increased in confidence and breadth as he moved beyond “high science” fora to more popular culture venues.

In the research report he published in *Science*, LeVay claimed only that his findings “suggest[ ] that sexual orientation has a biological substrate” and “illustrate[ ] that sexual orientation in humans is amenable to study at the biological level.”<sup>119</sup> He conceded his inability to determine whether the size of an individual’s INAH 3 “is the cause or consequence of that individual’s sexual orientation,” but indicated a preference for the former explanation of his findings by pointing out studies showing that the size of an apparently similar brain structure in male rats remains stable after birth and strongly correlates with “the amount of male-typical sexual behavior shown by the animals.”<sup>120</sup>

In discussing his study with the popular press, LeVay has consistently pointed out these limits, and yet has simultaneously insisted that his study will be foundational for determining whether nature or nurture causes sexual orientation—indeed, that his research makes this the question upon which future inquiry must focus.<sup>121</sup> “We can’t say on the basis of [the brain study] what

116. See text accompanying notes 236-238 *infra*.

117. LeVay, *supra* note 1, at 1035.

118. *Id.* LeVay’s study adopted the assumption, prevalent in hormonal research, that male homosexuals’ brains would be more like female heterosexuals’ brains than like male heterosexuals’ brains. *Id.* The underlying paradigm is one of male homosexual feminization. Because LeVay was unable to identify any of his female subjects as homosexual, he drew no conclusions about the etiology of homosexual orientation in women. *Id.* I do not examine this interesting assumption about the intersection of gender and sexual orientation.

119. *Id.* at 1034, 1036.

120. *Id.* at 1036.

121. See also David Perlman, *Brain Cell Study Finds Link to Homosexuality: Tissue Differs Between Gay and Straight Men*, S.F. CHRON., Aug. 30, 1991, at A1, A12 (“‘What the study means is that I’ve observed structural differences in the brains of gay and straight men, but it doesn’t indicate whether you’re born with those differences . . . or whether there’s some aspect of sexual behavior—perhaps even in AIDS itself—that leads to structural changes. . . . [W]hat’s most important is that homosexuality is now a topic that can be studied in the laboratory as a problem in neurobiology, and not something that must be left to the psychiatrists or the psychoanalysts.’”) (quoting LeVay); MacNeil/Lehrer NewsHour: *Sex and the Brain* (PBS television broadcast, Aug. 30, 1991) (transcript No. 4150 at 4-6, available in LEXIS, Nexis Library, Current File) (conceding that his study did not resolve whether the difference in brain structure was the cause or the effect of homosexuality, but insisting that his study opens up avenues for discovering “what it is that causes us to be homosexual or heterosexual”).

In these statements LeVay proposes that his study frames the question for future investigators to answer. The goal is to find the *cause* of human sexual orientation, the options are *nature* or *nurture*, and the forms in which sexual orientation appears naturally are mapped by the homo/hetero dichotomy. To be sure, he has occasionally made more equivocal claims about his work. See Simon LeVay, *Replica-*

makes people gay or straight," he explains, "[b]ut it opens the door to find the answer to that question."<sup>122</sup> As he raises this question, he also suggests that the designations homosexual and heterosexual will ultimately be found to match their biological bases, making no secret of the answer he expects to find: "If there are environmental influences," he says, "they operate very early in life, at the fetal or early-infancy stage, when the brain is still putting itself together. I'm very much skeptical of the idea that sexual orientation is a cultural thing."<sup>123</sup> In another interview, he indicated the depth of this conviction and the strength with which he believes that his findings demonstrate its truth:

LeVay was alone in his fifth-floor laboratory when his moment of discovery came. "I was measuring the total volume in the brain samples, blind to where they came from, and it was right there."

The scientist looked down at the tissue samples, now blurred by tears. "I was very emotional about it. I had a lot invested in my work. . . . I have always felt that I was born gay," he said.<sup>124</sup>

LeVay's claim to the media is that the brains of gay men differ from those of heterosexual men in a way that causes their homosexuality, and that essentialist assumptions about sexual-orientation categories will be proven true. One need not decide whether such a claim is empirically plausible or implausible, normatively good or bad, or pragmatically useful or harmful, to see that in reaching it LeVay begs the question of essentialism *vel non*. LeVay assumes essentialism in framing the finding upon which his conclusion is based as well, and thus begs the question as to even the less controversial component of his claim that INAH 3 size differs between gay and heterosexual men.

LeVay's experiment could be promoted as the first tentative proof that homosexual *orientation* is a biological fact, only because constructivist elements in homosexual *identity* were excluded from its method. A somewhat detailed review of LeVay's experimental procedure indicates that profoundly complex social and political elements of sexual orientation identity fall outside its frame.

LeVay obtained the brain tissue samples and corresponding medical records directly from hospital pathologists "at routine autopsies of persons who died at seven metropolitan hospitals in New York and California."<sup>125</sup> LeVay's report does not suggest that he sought or obtained permissions from the individuals before their deaths. LeVay thus had no access to his subjects' own assessments of their sexual orientations or to the history of their same-sex or heterosexual

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*tion Will Tell*, N.Y. TIMES, Oct. 7, 1991, at A16 (letter to the editor) ("The ultimate significance of my report will depend on whether or not it can be replicated and on determining if the structural differences I have seen are actually related to a person's sexual drive."); see also Angier, *supra* note 2, at 1 ("Dr. LeVay in no way claims to have discovered the—or even a—cause of male sexual preference, but merely suggests he has detected something worth further investigation."). But the modesty of these statements only brings into high relief his more typical claim to have framed the agenda for future research.

122. Gelman et al., *supra* note 2, at 50 (quoting LeVay).

123. *Id.* at 50-52. Gelman further reports that "LeVay . . . thinks a small number of sex genes may be isolated, perhaps within five years: 'And that's going to blow society's mind.'" *Id.* at 48 (quoting LeVay).

124. Talan, *supra* note 2, at 41.

125. LeVay, *supra* note 1, at 1035.

contacts. Instead, LeVay depended wholly on the subjects' medical records. The records of the twenty-six subjects who had died of AIDS indicated "at least one AIDS risk group to which [each] patient belonged (homosexual, intravenous drug abuser, or recipient of blood transfusions)";<sup>126</sup> the records of the remaining subjects indicated sexual orientation only by fortuity.

LeVay classified his subjects as "homosexual" or "heterosexual" on these scant records. If a subject had died of AIDS and his records indicated that he was in the risk group "homosexual," LeVay classified him as homosexual.<sup>127</sup> Conversely, LeVay classified as heterosexual two AIDS patients who, according to their records, had denied engaging in homosexual activity.<sup>128</sup> At least one subject's records indicated that he had been identified as bisexual; LeVay classified him as homosexual.<sup>129</sup> If the record did not indicate past sexual practices, LeVay classified the subject as heterosexual "on the basis of the numerical preponderance of heterosexual men in the population."<sup>130</sup> This last group included all the women.<sup>131</sup>

In each instance, LeVay treated a *representation* of sexual identity as the thing itself. The entire process of assigning sexual orientation identities to the brains assumed that the artifactual document of a patient's hospital record was a transparent window into his or her sexual history. But to take at face value possibly self-protective denials of homosexual activity or identity is to ignore the social history of AIDS as it has shaped the meaning of gay male identity. The AIDS/HIV epidemic has been conducted in a way that requires every HIV-positive person to *do something* about homosexual identity: disavow it, confess it, embrace it, ally with it. LeVay's method excludes from consideration the complex social patterns of identity profession and ascription, the refracting layers of representation in which the image of sexual orientation is managed, groomed, appropriated, negotiated, and captured. He reduced this complexity to a single characteristic: essential sexual orientation lodged neatly within the atomized individual who has died.<sup>132</sup>

This exclusion of the social and representational aspects of sexual orientation identity makes LeVay's handling of his bipolar categories, homosexual and heterosexual, almost startlingly crude. If a subject had died of AIDS and had left records classifying him as belonging to the risk group "homosexual," LeVay implicitly determined that that subject had engaged in homosexual *conduct* and was therefore properly given a homosexual *identity*.<sup>133</sup> A single act of homosexual conduct that could transmit HIV is treated as irrevocably defining:

126. *Id.* at 1037 n.9.

127. *Id.* at 1036 n.7.

128. *Id.*

129. *Id.* at 1035.

130. *Id.* at 1036 n.7.

131. *Id.* at 1035.

132. For a more satisfactory but necessarily more complex account of the relationship between homosexual identification and HIV or AIDS diagnosis, see CINDY PATTON, *INVENTING AIDS* 120, 131 (1990) ("The relationship between identity—especially gay . . . identity—and HIV is highly unstable at present. . . . [T]he AIDS narrative exists as a technology of social repression; it is a representation that attempts to silence not only the claims of identity politics, but the people marginalized by AIDS.").

133. See LeVay, *supra* note 1, at 1036 & n.7.

It was of itself constitutive of a subject's homosexuality. Conversely, LeVay "presumed" that any subject not identified as homosexual was heterosexual.<sup>134</sup> LeVay has subsequently defended his research against the internal critique that this assumption renders his data unreliable, as he had no way of assuring that, if better informed, he would not have designated many of his heterosexual subjects homosexual.<sup>135</sup> Whatever the ultimate resolution of those debates about experimental technique, LeVay's deployment of his categories remains open to cultural criticism for ignoring the complexity of his subject. By making his heterosexual class a universal default, LeVay insists that all persons are indeed located in one of his two classifications. As a matter of theoretical assumption, he eliminates the possibility of a person with a sexuality neither heterosexual nor homosexual.

LeVay himself defined sexual orientation as "the direction of sexual *feelings* or behavior toward members of one's own or the opposite sex."<sup>136</sup> Clearly his categorical apparatus fails to capture this nuance. LeVay never knew whether, and to what extent, male subjects whose records indicated no homosexual contacts nevertheless had had conscious homoerotic feelings on which they had not acted, either because they disapproved of those feelings themselves or were not willing to contradict widespread social disapproval of them. Nor did he know to what extent those subjects had had homoerotic fantasies which they had failed or refused to construe as such. No matter how complexly they might have engaged in homosexual desires, LeVay's method made them heterosexual. Conversely, naming a man gay because he has been infected with HIV through anal intercourse with another man is to deny the complexity of fantasy, desire, and internal and public identity that give subjective and public heterosexual identity its layered instabilities.

LeVay's error was more grave than simply misclassifying some subjects who are "really" heterosexual as homosexual, or vice versa. He has changed the nature of his categories from the merely lexical to the ontological. His method forced these categories to describe and conclude the entire range of human possibility—to constitute us, no matter who we are and what we do or feel.

That's essentialism. Many people committed to increasing legal protection for lesbians and gay men are deeply averse to this view of sexual orientation categories; others are just as staunchly devoted to it. But both parties to the pro-gay essentialism/constructivism debate should be able to agree that an experiment resting on an essentialist assumption cannot prove an essentialist conclusion.

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134. *Id.* at 1035.

135. Joseph M. Carrier & George Gellert, *Letters*, 254 *SCIENCE* 630 (1991) (letter to the editor) (noting "misclassification bias" in LeVay's use of "bipolar categories of 'heterosexual' and 'homosexual' men"). *But see* Simon LeVay, *Letters*, 254 *SCIENCE* 630, 630 (1991) (letter to the editor) ("I may well have oversimplified the problem in my study, but sometimes such oversimplification is necessary to make progress in a novel field.").

136. LeVay, *supra* note 1, at 1034 (emphasis added). My thanks to Lisa Hayden for pointing this out.

### C. *The Twins Study*

As LeVay acknowledged in his research report, even a conclusive showing that a particular brain structure is larger in heterosexual than in homosexual men cannot exclude the possibility that the difference is the effect rather than the cause of sexual orientation.<sup>137</sup> Thus, when J. Michael Bailey and Richard C. Pillard announced a carefully constructed and administered study comparing the degree to which congenital male twins, fraternal twins, and adopted brothers exhibited the same or different sexual orientation,<sup>138</sup> hopes were raised that genetic effects would be isolated.

Bailey and Pillard found that identical twins were more likely to be consonant for homosexuality than fraternal twins or adopted brothers.<sup>139</sup> Like LeVay, Bailey and Pillard make conservative claims for their study in their research report. In the *Archives of General Psychiatry*, they reach the guarded conclusions that their statistics "suggest that genetic factors are important in determining individual differences in sexual orientation," and are "consistent with some genetic influence."<sup>140</sup> They estimate that heritability of homosexuality is between 31 and 74 percent, depending in part on the incidence of homosexuality in the population.<sup>141</sup> In comments consistent with other researchers' predictions of the strength of heritability findings in behavioral genetics,<sup>142</sup> they also explain that a finding of heritability does not indicate the presence of a genetic on-off switch, conceding that heredity may cooperate with environmental factors in producing individuals willing to live as gay men.<sup>143</sup> Indeed, they point out that finding that any identical twins pairs differ in sexual orientation proves that sexual orientation is not entirely genetic.<sup>144</sup>

Again like LeVay, however, Bailey and Pillard make more heroic claims for their data in other venues. They began a *New York Times* editorial essay by proclaiming that "[s]cience is rapidly converging on the conclusion that sexual orientation is innate."<sup>145</sup> In an interview with *Science*, Bailey announced the

137. *Id.* at 1035-36.

138. Bailey & Pillard, *supra* note 1.

139. *Id.* at 1093. An anomaly in Bailey and Pillard's male study was that fraternal twins were only slightly more likely to be consonant for homosexuality than adoptive brothers. *Id.* at 1092 ("[T]he difference was only marginally significant."). Their study of lesbians resulted in similar findings. Bailey et al., *supra* note 105, at 219 ("Rates for [fraternal twins] and adoptive sisters did not differ significantly.").

140. Bailey & Pillard, *supra* note 1, at 1093.

141. *Id.*

142. See, e.g., Plomin, *supra* note 79.

143. See *id.* at 1095. "[G]iven any heritability estimate, there are a variety of possible developmental mechanisms. For instance, these data are consistent with heritable variation in prenatal brain development or in some aspect of physical appearance that, by way of differential parental treatment, leads to differences in sexual orientation." *Id.*

144. Bailey, Pillard, and their coauthors make this point explicitly in the lesbian twins study. Bailey et al., *supra* note 105, at 222 (explaining that identical twins "who differ in sexual orientation can do so only because relevant environmental factors differ"). LeVay makes the same point in a book addressed to a popular audience. SIMON LEVAY, *THE SEXUAL BRAIN* 138 (1993) (concluding from the variability of sexual orientation between identical twins that "nature alone, or nurture alone, cannot provide an adequate explanation for our sexual individuality").

145. J. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21.

team's belief that their twins study supplies the element of causation missing from LeVay's brain study.<sup>146</sup> He stated that he and Pillard maintain a "working hypothesis" that the genetic substrate they identified "affect[s] the part of the brain that [LeVay] studied."<sup>147</sup> If confirmed, this hypothesis would suggest that hypothalamus size causes homosexual orientation. In the same interview, Bailey also threw cold water on theories suggesting that social experience contributes to homosexuality: "No one has ever found a postnatal social environmental influence for homosexual orientation—and they have looked plenty . . . ."<sup>148</sup> Others seem to agree. Psychology professor Gregory Carey, for instance, promptly expressed the view that, though earlier studies suggested a genetic contribution to homosexuality, the Bailey and Pillard study "really sort of clinches it."<sup>149</sup>

As Bailey and Pillard ushered their study into the mainstream media, they consistently implied that they had shown that homosexuality was a discrete trait, not a continuous one. Their *New York Times* editorial, for instance, describes homosexuality and heterosexuality not as conventional categories of analysis, but as the labels for distinct populations: "Homosexuals often act differently from heterosexuals in early childhood"; brain structure may differ "between homosexual and heterosexual men"; "a biological explanation is good news for homosexuals."<sup>150</sup> But a close examination of their methods indicates that, even more than LeVay, they have simply assumed this bipolar model of sexual orientation, and have systematically excluded the social and political dynamics of sexual orientation identity.

Advertising in urban gay publications, Bailey and Pillard recruited 161 self-identified gay and bisexual men (I will call them the "volunteers") and their male twins or adoptive brothers (the "brothers").<sup>151</sup> To test their hypothesis, Bailey and Pillard had to assign sexual orientation identities to both groups.<sup>152</sup> They used three indicators of sexual orientation identity. First, when possible, they asked subjects whether they identified as "homosexual/gay," "bisexual," or "heterosexual." Next, they asked subjects to rate themselves for adult fantasy and behavior on the Kinsey scale.<sup>153</sup> When they were unable to ask a brother these questions (either because his volunteer sibling refused permission

146. Constance Holden, *Twin Study Links Genes to Homosexuality*, 255 *SCIENCE* 33 (1992).

147. *Id.* In a recent interview, however, Pillard expressed caution about relying on LeVay's study, indicating that it should be replicated before such inferences are drawn. Edward Stein, *Evidence for Queer Genes: An Interview with Richard Pillard*, 1 *GLQ: J. LESBIAN & GAY STUD.* 94, 103-04 (1993).

148. Holden, *supra* note 146, at 33. Bailey does, however, accept the possibility of environmental influences that are "biological" rather than social. *Id.* Nevertheless, Pillard makes sweeping claims for the exonerating power of even a genetic contribution to sexual orientation, implicitly denying that that would be any different from an unmediated genetic determination or a genetic contribution that cooperates only with prenatal factors: "A genetic component in sexual orientation says, 'This is not a fault, and it's not your fault . . . .'" Gelman et al., *supra* note 2, at 48 (quoting Pillard).

149. *Gay Men in Twin Study*, *N.Y. TIMES*, Dec. 17, 1991, at C5 (quoting Gregory Carey, Assistant Professor of Psychology at the University of Colorado).

150. Bailey & Pillard, *supra* note 145.

151. Bailey & Pillard, *supra* note 1, at 1090.

152. For a detailed discussion of their methodology, see *id.* at 1090-91.

153. See ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638 (1948).

to contact him, or because he declined to participate in the study or to answer questions about his sexual orientation<sup>154</sup>), Bailey and Pillard asked the volunteer sibling to designate his brother's sexual orientation. Once again, the options were "homosexual/gay," "bisexual," or "heterosexual." If the brother could make such an identification with a high degree of certainty, Bailey and Pillard used that identification for the brother.<sup>155</sup>

Unlike LeVay's subjects, Bailey and Pillard's were alive when the experimenters met them. They chattily ascribed sexual orientation identities to themselves, estimated the proportion of their desires and conduct that were homosexual or heterosexual, guessed their brothers' sexual orientations, and in some cases actively refused to answer questions about their sexual orientations. In short, Bailey and Pillard set up a living theater of sexual orientation self-representation and allo-interpretation. Particularly in its handling of bisexual identity and of the nonresponsive brothers, the twins study reaches out more decisively than LeVay's to the border between science and culture, creating a more detailed photographic negative of the cultural assumptions that it silently incorporates.

### 1. *The "bisexuals."*

Bailey and Pillard classified as *homosexuals* all self-designated bisexuals, an unspecified number of subjects whose Kinsey responses indicated that their sexual practices and fantasies were just as often heterosexual as homosexual, and three subjects whose sexual practices and fantasies were more often heterosexual than homosexual but who "rated the idea of having sex with men as 'very sexually exciting.'"<sup>156</sup>

This method of classifying ambiguous subjects is entirely consistent with LeVay's, and incorporates similar essentialist assumptions. Once again, human sexual orientation is assumed to be bimodal and polar (homosexual/heterosexual). These categories swallow all intermediate identities and are imposed on every subject; *any* indication of homosexual *anything* (self-description, fantasy, or conduct) conclusively classifies a subject as "a homosexual," while the mere absence of those indicators leaves the subject in a default classification, that of heterosexuals. By forgoing the opportunity to recognize a bisexual category or to allow for a continuum of sexual orientation categories, Bailey and Pillard embrace an essentialist hypothetical apparatus. Their use of the Kinsey scale not only frustrates the heuristic purpose for which the scale was designed in the first place, but also ignores important refinements in sexual-orientation models that have arisen to overcome the scale's defects.

The social science of sexual orientation had already moved beyond the crude dichotomous system hypothesized by Bailey and Pillard when Alfred C.

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154. Bailey and Pillard were denied permission to contact 21% of the brothers; of those whom the experimenters were permitted to contact, almost 6% did not return questionnaires. Bailey & Pillard, *supra* note 1, at 1091. One brother filled out the questionnaire, but left the questions about his sexuality blank. *Id.*

155. *Id.*

156. *Id.*

Kinsey introduced the very scale they use. The multipoint Kinsey scale reflects the proportion of a person's sexual behavior and fantasy that is homosexual and heterosexual.<sup>157</sup> Kinsey designed the scale in this way to defeat the use of "homosexual" and "heterosexual" as personal designations.<sup>158</sup> Far from realizing this intention, the Kinsey scale is repeatedly used to flout it, as Bailey and Pillard's unapologetic misappropriation illustrates. And Bailey and Pillard are not alone: People familiar with the scale readily invoke it as a catalog of human types (e.g., "he's a Kinsey 5" or "she's a Kinsey 1"). To stanch these tendencies, subsequent sex researchers have sought to amend the Kinsey scale in ways that emphasize possible refinements in the hypothetical construction of sexual orientation categories.

An important alternative measure proposed by Michael Storms focuses on a point that Bailey and Pillard failed to notice: the way in which the Kinsey scale represents homosexuality and heterosexuality as mutually exclusive opposites, such that one must retreat if the other is to advance. Of course a person who scores as a Kinsey 3 (equally homosexual and heterosexual) could have heterosexual eroticism as intense as any Kinsey 0 *and* homosexual eroticism as intense as any Kinsey 6. Storms therefore argues that the *intensity* of homo- or heterosexual eroticism should be registered as a variable independent of the *proportion* of homo- or heterosexual eroticism.<sup>159</sup> Arraying heteroeroticism by intensity on one axis and homoeroticism by intensity on another yields a rich field of variation not readily subsumed into the identities homosexual and heterosexual except at its extremes.

Another often-noted defect of the Kinsey scale is its aggregation of behavior and fantasy.<sup>160</sup> This feature of the scale, though it properly acknowledges the relevance of two quite incommensurate elements of erotic life, at once confounds them and omits many other factors that enter into sexual orientation identity. Sexual fantasy and behavior may entertain divergent objects and may, in turn, differ from desire, personal self-designation, and public identity. To address this problem, Fritz Klein has developed a multifactorial grid to register the possibility that, in a single person, sexual attraction, behavior, fantasies, emotional preference, social preference, self-identification, and "hetero/homo life style" might not "match"—and furthermore to distinguish between the re-

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157. Kinsey's seven points on the continuum were: (0) exclusively heterosexual; (1) largely heterosexual but with incidental homosexual history; (2) largely heterosexual but with a distinct homosexual history; (3) equally heterosexual and homosexual; (4) largely homosexual but with a distinct heterosexual history; (5) largely homosexual but with incidental heterosexual history; (6) exclusively homosexual. KINSEY ET AL., *supra* note 153, at 638-39.

158. Explaining the findings he produced on the basis of this continuum, Kinsey stated: "Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white." *Id.* at 639.

159. Michael D. Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOC. PSYCHOL. 783, 784-86 (1980); see also ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 470-72 (1953).

160. See, e.g., Mary McIntosh, *The Homosexual Role*, reprinted in *THE MAKING OF THE MODERN HOMOSEXUAL* 30, 39 (Kenneth Plummer ed., 1981) (originally published in 1968).



sulting patterns in a subject's present, past, and "ideal" life.<sup>161</sup> These factors not only complicate—perhaps the better word is *multiply*—the identity "bisexual," they also acknowledge that the social designation "heterosexual" may be assigned to a person whose sexuality is quite complex.

Bailey and Pillard claim that they merely simplified their analysis when they reduced sexual orientation to a homo/hetero dichotomy.<sup>162</sup> But they did much more than that, particularly when they introduced their study to the general public with no proviso that their categories "homosexual" and "heterosexual" were experimental devices, not human types soon to be mapped unerringly onto nature. In a subsequent interview with philosopher Edward Stein, Richard Pillard expressed the only misgivings I have found in the public record about the misprision he and Bailey have invited. Commenting on the study of lesbians, Pillard said:

I think women are much more flexible in their sexual orientation—they don't as often label themselves as gay or straight. Usually when you ask that question of men, at least men over the age of thirty or thirty-five, a few will say they're bisexual but most will say they're gay or straight; they dichotomize. Women often will say, "Well, it depends on who I'm with, on what sort of relationship I'm having . . ." And they'll often have had relationships that are lesbian and relationships that are heterosexual . . . . You might want to call more women bisexual, which we end up doing, but I think women's orientation is really much more complicated than men's sexual orientation.<sup>163</sup>

If the struggle to define sexual-orientation categories is a political one, the imposition of Bailey and Pillard's model on experimental subjects who actively resisted it—even though it occurred within the framework of the experiment itself—is also political. By presenting their results to the press without explaining that this imposition was merely an experimental convenience operating at the level of an untested hypothesis, Bailey and Pillard effectively transferred some power to make decisions about sexual categories out of the political and social spheres into the scientific laboratory.

## 2. *The nonresponsive brothers.*

In one of their most tendentious moves, Bailey and Pillard assigned nonresponsive brothers the sexual orientations attributed to them by their volunteer siblings *if* the volunteers were willing to say that they made the attribution with complete or virtual certainty.<sup>164</sup> Bailey and Pillard based this

161. Fritz Klein, *The Need to View Sexual Orientation as a Multivariable Dynamic Process: A Theoretical Perspective*, in *HOMOSEXUALITY/HETEROSEXUALITY*, *supra* note 102, at 277, 280; see also Braden Robert Berkey, Terri Perelman-Hall & Lawrence A. Kurdek, *The Multidimensional Scale of Sexuality*, 19 J. *HOMOSEXUALITY* 67 (1990); Richard E. Whalen, David C. Geary & Frank Johnson, *Models of Sexuality*, in *HOMOSEXUALITY/HETEROSEXUALITY*, *supra* note 102, at 60.

162. Bailey & Pillard, *supra* note 1, at 1091 ("Because the broader categories are fewer in number and more readily understood, we have used them herein.").

163. Stein, *supra* note 147, at 99 (first ellipsis in original). A gender analysis would ask whether the difference Pillard comments on here results in an account of homosexuality less appropriate to women than to men.

164. Bailey & Pillard, *supra* note 1, at 1091.

inference on their own and other studies showing that sibling pairs with responsive brothers almost always agreed on a description of the brothers' sexual orientation.<sup>165</sup> This practice exemplifies the experimenters' exclusion of the representational dynamics in which one brother's semaphore of his sexual orientation to his brother and possibly other family members becomes part of the *other* brother's sexual orientation identity. Once again, social-representational dynamics are excluded only by hypothesis, and cannot be deemed to be proven unimportant by a study that ignores them.

First, there's the problem of why Bailey and Pillard had a problem in the first place. A volunteer sibling might refuse to grant the researchers permission to contact his brother for a great number of reasons, many of which directly touch the question of how well a brother knows his sibling's sexual orientation identity. Gay men are often apprehensive about letting their brothers (and possibly, through them, other family members) know they are gay. Thus, a gay man might well hesitate before doing anything to indicate an interest in his brother's sexual orientation. In particular, an openly gay man who thought his brother was gay but deeply closeted might pause before making such inquiries. Conversely, the brother of an openly gay man might refuse to participate in a behavioral genetics study that probes sexual orientation precisely because the genetics study itself revives fears or hopes that the brothers' sexuality, or their styles of self-disclosure, are tightly linked.

Bailey and Pillard's questionnaire instructed each volunteer to consider himself "completely certain" about his brother's sexual orientation if his brother had told the volunteer how he identified, and to consider himself "virtually certain" if he felt he could decide on the basis of his brother's "behavior alone."<sup>166</sup> It is not clear why the experimenters reposed such confidence in a brother's decontextualized verbal disclosure of his own sexual orientation. Nor is it clear why declarations of heterosexual orientation were deemed as unproblematic as professions of homosexuality. It is not clear why behavior was considered a less reliable indicator than speech, or what kinds of behavior the volunteers were supposed to recall, or what inferences they were supposed to draw from different types of behavior. Of course, volunteers with strongly held ideas about the semiology of sexual orientation inconsistent with these instructions might ignore them: Why should two brothers' agreement about ultimate designation erase this rich source of misprision?

In relying on a volunteer's assessment of his brother's sexual orientation, Bailey and Pillard treated the brother's sexual orientation category and his sibling's confidence in ascertaining that category as independent. But they can't be, because you're less likely to feel certain about which category to assign when applying a rigid either/or categorical system to someone who sends ambiguous signals. Indeed, Bailey and Pillard note that the volunteers whose brothers responded to questions about their sexual orientation "were not accurate in predicting whether a nonheterosexual relative would label himself 'gay/

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165. *Id.*

166. *Id.*

homosexual' or 'bisexual.'"<sup>167</sup> The volunteers tended not to mislabel self-identified heterosexual relatives as bisexual,<sup>168</sup> or to mislabel self-identified homosexual relatives as bisexual.<sup>169</sup> Where errors occurred, they involved the volunteers' descriptions of brothers who identified themselves as bisexual. Of the six such brothers, the volunteers designated only one as bisexual; they designated two of the remaining six as heterosexual, and three as homosexual.<sup>170</sup> The siblings tended to confirm identities in the polar categories when describing their brothers and to impose the polar categories on more ambivalent relatives. (There's no reason to think the volunteers did not do something similar in describing themselves.)

These complex epistemologies of the closet<sup>171</sup> suggest not only that two brothers might adjust their tolerance for disclosure in light of what each thinks the other thinks is good, but also that they might actually reconceptualize their own sexual orientation identities in light of their understanding, however glimmering, of their siblings' sexual orientation identities. They suggest that sexual orientation in each brother may not be an atomized, essential state, but a responsive activity. To rely directly on the volunteers' certainty under these circumstances is to deeply underestimate the complexity of sexual knowledge.

The experiment was conducted, however, without much attention to these difficulties. Bailey and Pillard conclude that their routine miscategorization of bisexuals poses no problem to their method because "[its] major distinction . . . is between heterosexual and nonheterosexual relatives, which [the volunteers] made quite well."<sup>172</sup> In other words, the researchers and their subjects shared the same essentialist assumptions that led them both to exclude the classification "bisexual" in the first place. But the knowingness one has about someone else's sexual orientation depends on how that person enacts it and on one's interpretation of the resulting performances. The twins study purports to examine sexual orientation; instead, it covertly and complexly enacts sexual orientation *identity*.

### 3. *One autobiography.*

One of Bailey and Pillard's own subjects gave a sexual-orientation autobiography that suggests how deeply their experiment reflects, rather than examines, social practices of sexual-orientation categorization. According to this autobiography, "Doug Barnett" was confident in his heterosexuality until he was twenty-eight years old, when his identical twin brother "came out" to him.<sup>173</sup> Barnett, who believes that sexual orientation is genetic, became curious about his own orientation. He experimented with sex with men and was

167. *Id.*

168. They did so for only 1 out of 80 such relatives. *Id.*

169. They did so for only 4 out of 35 such relatives. *Id.*

170. *Id.*

171. I am pluralizing the term invented by Eve Kosofsky Sedgwick. SEDGWICK, *EPISTEMOLOGY*, *supra* note 92, at 67-68.

172. *Id.*

173. Gelman et al., *supra* note 2, at 46. *Newsweek* carefully points out that "Doug Barnett" is "not his real name." *Id.*

surprised to find such encounters "more fulfilling."<sup>174</sup> "A year later both twins told their parents they were gay."<sup>175</sup> They later participated in Bailey and Pillard's twins study.

Barnett's autobiography and Bailey and Pillard's study incorporating it implicitly asked the same question, "Was Barnett ever straight?" Barnett's own reported belief that homosexuality is genetic implicitly answers that his substantial heterosexual history was delusional—a long, unwilling conscription of a naturally homosexual body into heterosexual culture. Bailey and Pillard's conclusion that Barnett's homosexuality is probably genetically caused translates that belief into the authoritative vocabulary of science.

But once we decide that Barnett can be wrong about his sexual orientation, why not say he is wrong about it now? Of course, passing as straight captures more social rewards than passing as gay, a circumstance that creates some preference for believing Barnett now and not then. But that explanation does not account for Barnett's sweet surprise at his homosexual engagement or its implicit suggestion that his sojourn in heterosexuality had not felt like a forced march through alien territory. To save appearances in this case as it is reported to us, we need to acknowledge that Barnett's stable belief that his twin brother was heterosexual, and his later loss of that belief, may have been causes of his sexual orientation at least as important as their common genes. We cannot believe anything about Barnett's self-description unless we also believe that his self-description depends to some extent on his perception of his brother.

Barnett's perception of his brother depends, in turn, on his brother's representation of himself. That representation was apparently plastic, at least in that the brother had some power over when to tell Barnett that he was gay. It is almost unimaginable that the brother's reasons for delay were unrelated to a desire to avoid the stigma of homosexual identity. Moreover, the brother knew that as long as he failed to "come out" to Barnett, Barnett would think him heterosexual. Thus, the social and representational superordination of heterosexuality over homosexuality, and the supporting ideological construction of heterosexuality as a norm from which homosexuality deviates, acted twice to shape Barnett's perception of his brother's sexual orientation.

*Causa causae est causa causati*: "The cause of the cause is to be considered as the cause of the effect also."<sup>176</sup> If perceiving his brother as straight caused Barnett to think of himself as straight, then the social superordination of heterosexuality over homosexuality, and the interpretive system that supports it, also caused Barnett to experience himself as straight. Perceiving his brother as gay activated the reverse causal chain. In both phases of Barnett's life, the representational system of sexual orientation intervened in his sexual-orientation identity.

Researchers using twins to study the relationship between homosexuality and genetics worry about ascertainment bias, but not enough. They worry that

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174. *Id.*

175. *Id.*

176. BLACK'S LAW DICTIONARY 220 (6th ed. 1990).

twins studies, unless based on a random sample, will attract subjects with some atypical pattern of commitments or characteristics that will distort their findings. In particular, researchers worry that people who have a personal investment in promoting biological explanations of homosexuality—perhaps people like Barnett—may volunteer for twins studies more often than people who do not.<sup>177</sup> But a more primary form of ascertainment bias occurs when study subjects share the experimenters' assumptions that two types of sexual orientation exist, that one (homosexuality) is a marked deviation from the norm represented by the other (heterosexuality), and that any homosexual behavior excludes one permanently from the class of heterosexuals. When subjects do not share these assumptions, as in the cases of Bailey and Pillard's self-described heterosexuals with high scores for homoerotic fantasy, the bisexuals, and the identity-resistant lesbians, the experimenters' decision to impose those assumptions anyway implicates the political problems described above. But when experimenters and subjects agree on these cultural assumptions, they slip into the conclusions covertly.

#### IV. COMMON GROUND

As a matter of logical coherence and simple honesty, pro-gay essentialists need not capitulate to pro-gay constructivists, or vice versa, to reach a common litigation strategy. Pro-gay essentialists and pro-gay constructivists already share common ground. It, rather than their differences, can and should form the basis of their common litigation strategy.<sup>178</sup>

This Part begins the task of defining that common ground by setting out ranges of conceptually available essentialist and constructivist positions. It then spells out how historians and anthropologists of sexuality have differed in the degree to which they pursue pure essentialist, pure constructivist, or merged approaches, and argues that one particular merged approach offers the optimal common position from which pro-gay advocates should develop litigation strategy. Finally, it concludes that equal protection arguments that can be articulated from that position offer better conceptual and descriptive resources for pro-gay equal protection arguments than more essentialist alternatives.

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177. A recent twins study invited such a possibility. The researchers advertised in the gay press for study subjects using the following inducement: "Twin research is an important technique for understanding the nature vs. nurture problem in the social sciences ascertaining which aspects of human sexuality are learned and which are biologically determined." Whitam et al., *supra* note 105, at 203 app. A. Even without such a bald invitation, it is hard to imagine gay, lesbian, or bisexual twin adults who do not know why experimenters might want their time and attention.

178. The differences will remain, but will, I hope, be irrelevant to the arguments and descriptive claims pro-gay litigants will need to make *in court*. For the many important issues on which pro-gay constructivists and pro-gay essentialists disagree, fora other than litigation remain fully available. Indeed, any proposal that such a strategic division of audiences is unethical probably rests on the easily challenged assumption that the state is entitled to a clear, unmediated view of all one's meanings at once.

### A. *Coming to Terms with Essentialism and Constructivism*

Up to this point, I have assumed that an essentialist view of homosexual orientation claims that homosexuality is a deep-rooted, fixed, and intrinsic feature of individuals, determined and not chosen. I have assumed that the constructivist view of homosexual orientation holds pretty much the opposite: that it is a contingent, socially malleable trait that arises in a person as she manages her world, its meanings, and her desires. Essentialism and constructivism are actually a good deal more complex than that. The purpose of this section is to describe the range of possible conceptual positions that could fall under the rubrics essentialist and constructivist. Distinguishing among essentialisms and constructivisms is particularly important because high feelings in essentialism/constructivism controversies tend to obscure underlying definitional problems, and to foreclose the possibility of agreement and strategic cooperation.

#### 1. *Essentialisms.*

In her influential book on the cultural and literary issues raised by post-modern antiessentialism, Diana Fuss defines essentialism as "a belief in true essence—that which is most irreducible, unchanging, and therefore constitutive of a given person or thing."<sup>179</sup> In particular, she notes that nature is the paradigmatic source of true essence: "[F]or the essentialist, the natural provides the raw material and determinative starting point for the practices and laws of the social."<sup>180</sup>

Fuss' definitions elide three axes along which essentialist practices differ. First, she recognizes only one source of essences: nature. Second, she uses an ambiguous term—"unchanging"—as though it had a single meaning. And third, she treats all essentialism as a matter of individual rather than group characteristics. In the following paragraphs, I explore the consequences of making the first two of these distinctions; I defer consideration of the third to the conclusion of this section because it implicates the relationship between essentialism and constructivism in practice.

*Distinguishing essentialism from biological causation.* Essentialism assumes at minimum that a pure and perfect definition of a particular thing can be found. An essentialist view of a tree is that, even if the human mind is not now capable of articulating it, some definition of "tree" can be framed that is irreducible in the sense that it has all the necessary descriptors and no unnecessary ones, and that is constitutive in the sense that, wherever the qualities described by those terms appear in a single thing, that thing will be a tree.

If this is what an essence is, clearly nature cannot be the only source of essences. Any attribution of an irreducible, constitutive characteristic to a person or thing attributes to it an essence. An artifact can very plausibly be said to

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179. DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* 2 (1989).

180. *Id.* at 2-3.

have an essence, as Plato himself acknowledged in the *Seventh Letter*.<sup>181</sup> Think of the kitchen table caught in the hedges of *To the Lighthouse*.<sup>182</sup> Socially descriptive legal rules establish essences: Nature did not create felons or tortfeasors, but law nonetheless imposes on them irreducible and constitutive characteristics.

Attribution of a *natural* essence, then, is but one kind of essentialism. It is "essentialism-plus": generic essentialism that specifies a certain source—nature—for the essence it detects. I propose, therefore, to distinguish between "weak essentialism" (attribution of any irreducible and therefore constitutive characteristic, regardless of its source) and "strong essentialism" (attribution of such a characteristic that is also natural or biological).

Detaching essentialism from nature permits one to see that biologically caused characteristics need not also be essential ones. Freckles, tonsils, the size of "moons" at the base of one's fingernails, the ability to roll one's tongue—these examples suggest that biological causes determine many features of an individual that are rarely, if ever, considered to *define* her.<sup>183</sup> Even a biological characteristic needs some other rationale to explain why it is essential.

In all but a few cases, human characteristics are *socially and culturally designated* as essential. To be sure, from time to time the additional rationale that explains why a characteristic is constitutive and defining is so predominantly natural that it virtually restores the univocal relationship between essence and nature posited by Fuss. Imagine a genetically caused physical condition so harmful to health that no infant born with it lives more than a few days. Such a condition (along with any genes that cause or prevent it) distinguishes with grim certainty those who *must* die from those who *may*. The decisiveness of this distinction might justify our deeming the characteristics that produce such outcomes *essential* features of individuals, particularly of those who must die because of them. That is, nature, appearing in its guise of imminent and inescapable physical mortality, might properly be considered to

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181. Plato, *Letter VII*, in *THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS* 1574, 1589-90 (Edith Hamilton & Huntington Cairns eds. & L. A. Post trans., 1963). Plato wrote:

For everything that exists there are three classes of objects through which knowledge about it must come; the knowledge itself is a fourth, and we must put as a fifth entity the actual object of knowledge which is the true reality. We have then, first, a name, second, a description, third, an image, and fourth, a knowledge of the object. Take a particular case if you want to understand the meaning of what I have just said; then apply the theory to every object in the same way. . . .

The same doctrine holds good in regard to shapes and surfaces both straight and curved, in regard to the good and the beautiful and the just, *in regard to all bodies artificial and natural*, in regard to fire and water and the like, and in regard to every animal, and in regard to every quality of character, and in respect to all states active and passive.

*Id.* (emphasis added).

182. When Andrew Ramsay tried to explain his father's philosophical work to Lily Briscoe, "she said Heavens, she had no notion what that meant. 'Think of a kitchen table then,' he told her, 'when you're not there.'" Lily went on to think, "Naturally, if one's days were passed in this seeing of angular essences, this reducing of lovely evenings, with all their flamingo clouds and blue and silver to a white deal four-legged table (and it was a mark of the finest minds so to do), naturally one could not be judged like an ordinary person." VIRGINIA WOOLF, *TO THE LIGHTHOUSE* 38 (1927).

183. Of course, many differences that are not currently considered to be biologically determined, such as preference for bright colors or spicy foods, are similarly deemed nonessential.

provide the rationale for deeming these characteristics essential.<sup>184</sup> Short of such cases, the importance even of a biologically caused characteristic—the decisiveness that induces us to consider that its possessors are irrevocably and always suffused in their very being with that characteristic—will almost certainly be social.

That means that a commitment to essentialism, even strong essentialism, cannot eliminate the obligation to examine the social and cultural processes that designate characteristics to be so important they define who or what people are.

*Distinguishing kinds of change.* Under an Aristotelian conception of essence, the requirement that an essential characteristic be “unchanging” means not that it cannot be altered or effaced, but that altering or effacing it changes the nature of the thing under definition.<sup>185</sup> That the letters “S-T-O-P” are essential to a stop sign does not imply that they are impervious to change; if that series of letters is removed, the sign may still be a sign, but it is no longer a *stop* sign.

But that is not to answer questions about other kinds of change. Is it a stop sign if only the “S” is missing? If it says “S-T-O-P” but is painted green, or is round, or is in Beijing? Fuss’ use of the term “unchanging” fails to anticipate these various types of change, all of which may be crucial to deciding whether a given sign remains a stop sign.

Similarly, the claim that a sexual-orientation category is immutable may have a range of meanings. If the Aristotelian sense of immutability applies to claims of identity, then the essentialist merely claims that to be a lesbian, a woman must have whatever characteristic defines a lesbian, and if she loses that characteristic she ceases to be a lesbian. Claims that homosexual orientation is immutable usually rely on a much stronger definition of change—that whatever it is that constitutes the essence of homosexual identity cannot be lost or removed from a person once it exists, whether that occurs at conception, before birth, in infancy, at a wild high school party, or in an agony of early adult self-re-creation.

None of these distinctions predetermines *what* the essence of sexual orientation is. Some people define a “homosexual” as a person who entertains desire for erotic contacts with a person of the same sex. Others require same-sex fantasy, as well or instead. Still others require actual erotic contacts, and there is a lot of disagreement about whether it takes one contact or many, recent contacts or any, to make a homosexual. Finally, the problem of identity vexes any effort to establish all important aspects of homosexual orientation as unchanging. If a person has a lot of same-sex contacts, desires them and fantasizes about them, but does not imagine himself to be gay, or a homosexual, or bisexual, is he wrong? And public identity has its own range of

184. For an extrapolation from this point to a more inclusive “Aristotelian essentialist” list of capabilities that define “humanness,” see Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *POL. THEORY* 202, 214-23 (1992).

185. *Essence and Existence*, in 3 *THE ENCYCLOPEDIA OF PHILOSOPHY* 59 (Paul Edwards ed., 1967) (“For Aristotle, the essence of an object . . . was what finds expression in the concept which the object embodies, the concept under which it must be identified if it is to be identified as what it is.”).



mutabilities largely regulated by the closet and the rule that anyone not designated homosexual is by default construed as heterosexual.

It is not at all settled, inside pro-gay communities or outside them, which of these elements is essential to the identity homosexual, and which is merely an accident that can alter without producing a definitional change. Weak essentialism is committed to characterizing one or more of these elements as essential; strong essentialism adds that the essence(s) are produced by nature; and strong essentialists espousing the argument from immutability most often say that the essence(s) are installed at conception, before birth, or not long thereafter. But the constructivist is more interested in the special sort of mutability engendered by the simultaneous operation in a single culture of incommensurate selections from this meta-definitional menu. If you think someone is a homosexual because he routinely has same-sex erotic contacts, and I think he is not because he fantasizes about women, on a constructivist analysis our struggle to define him is a struggle to change what he is.

## 2. Constructivisms.

If constructivism has an essence, it is the claim that human activities of perception, conceptualization, description, or work produce or maintain (or produced or maintained) some part of the world or the world itself.<sup>186</sup>

Constructivisms vary along two axes: who or what does the constructing, and who or what gets constructed. Labelling theory developed in sociology in the 1950s and 1960s, for instance, predominantly concerned itself with the ways in which individuals designated by others as, for example, deviant, come to occupy the meanings and institutions assigned to them, and thus come to participate in constructing themselves as deviant and in "managing" that identity.<sup>187</sup> In labelling theory's studies of deviance, the constructing is done by the

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186. Constructivism is not the same as the "antiessentialism" that has come under fire at the intersection of critical race theory with feminist legal theory in articles critiquing feminism's use of the category "woman." See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152-57; Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 404-05; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586-87 (1990). First, the intersectionality literature is not primarily concerned with replacing the essentialism it critiques with constructivism. Second, when intersectionality scholars seek to keep white feminists from covertly defining feminism's constituency as "white women" rather than "women," the actual target of their analysis may not always be feminist *essentialism* in the sense in which I use that term here. On that sense of the term, feminist legal theory is essentialist only if it involves a claim that being a woman is *conceptually inconsistent with* being a person of color, but most of the examples cited in the intersectionality analyses probably involve white women's *forgetting* or *not caring about* women of color—conceptual and normative errors that are more accurately described not as essentialist but as racist.

187. See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963) (discussing deviance by reference to those inside or outside a particular set of social rules); ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961) (examining the relationship of an inmate's world view to his role in the institutional culture); ERVING GOFFMAN, *THE PRESENTATION OF THE SELF IN EVERYDAY LIFE* (1959) (examining the role an individual plays in shaping others' impressions of her); ERVING GOFFMAN, *STIGMA: NOTES ON THE*

particular players involved in deviance relationships and institutions, and what they construct are specific deviant and, implicitly, normal persons.

Sociology of knowledge, and particularly social studies of science, leave largely in place labelling theory's assumption that individuals acting alone or in groups within institutions are the source of epistemic constructions, but they have considerably deepened the constructivist claim about what those individuals construct. Sociologists of knowledge insisted that all perceptions of reality are produced through conceptual systems.<sup>188</sup> But they did not attend systematically to the social location or interests of those who produce knowledge, and have been criticized for giving little attention to "the extent to which socially constructed meanings may reflect and reinforce the disparate power of ruling elites."<sup>189</sup> To some extent, recent work in sociology of science moves beyond this limit. Social studies of science pursue the hypothesis that professional forms of organization, communication, and activity (and not an objectively-perceived nature) are what produce scientific "facts."<sup>190</sup> In doing so, they focus sustained attention on the constraints of academic discipline, on the practices of group work, and on the local culture of career competition.<sup>191</sup> This inquiry thus takes into account the possibility that the activities of producing knowledge produce, in turn, the producers.

This double extension of social constructivism reached perhaps its most thorough extent in the work of Michel Foucault. Foucault posited that human knowledge arises "not from transcendental facts about language or human beings," but from the systematic quality of knowledge itself, organized into an "*episteme*, which is the total set of relations or discursive regularities that set out the possibilities of meaning and truth."<sup>192</sup> The specific discourses which an episteme might incorporate function to produce knowledge not by their reference to things outside of discourse but by their internal regularities.<sup>193</sup> "[T]here can be no question," Foucault believed, "of interpreting discourse with a view to writing a history of the referent."<sup>194</sup> Moreover, forms of human experience and subjectivity were themselves produced through the historical

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MANAGEMENT OF SPOILED IDENTITY (1963) (formulating concepts about how stigmatized individuals convey self-image).

188. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 97-98 (1966) (describing the "conceptual machineries of universe-maintenance" that construct "the social phenomena"); Ernst von Glaserfeld, *An Introduction to Radical Constructivism*, in *THE INVENTED REALITY: HOW DO WE KNOW WHAT WE BELIEVE WE KNOW? CONTRIBUTIONS TO CONSTRUCTIVISM* 17, 19 (Paul Watzlawick ed., 1984) (explaining that "for constructivists, all communication and all understanding are a matter of interpretive construction on the part of the experiencing subject").

189. ANDREW KOPPELMAN, *THE ANTIDISCRIMINATION PROJECT* (forthcoming 1995) (manuscript at ch. 2, p. 141, on file with the *Stanford Law Review*).

190. See, e.g., LATOUR & WOOLGAR, *supra* note 5, at 105. For other works in this school, see note 5 *supra*.

191. LATOUR & WOOLGAR, *supra* note 5.

192. Linda Alcoff, Michel Foucault, in *A COMPANION TO EPISTEMOLOGY* 143 (Jonathan Dancy & Ernest Sosa eds., 1992).

193. *Id.*

194. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 47 (A.M. Sheridan Smith trans., 1972), quoted in HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 61 (2d ed. 1983).

operation of discourses. Knowledge produces knowers, not the other way around.<sup>195</sup>

In all these forms, and in the many others which I do not distinguish here, constructivism is a causal theory, in which the causal agent is always some version of "culture." It thus opposes strong essentialism, which identifies nature as the causal agent, but not necessarily weak essentialism, which merely identifies the existence of essences.<sup>196</sup> Some very strong versions of constructivism identify categories *themselves* as the instruments of unjustified power and sources of oppressive constraint. This hypothesis is (again) most frequently associated with Foucault, who proposed that knowledge and power are inextricably interlinked: "'Truth' is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it."<sup>197</sup> If the constructivist generation of categories is inevitably associated with the application of force, constructivism offers an attack even on weak essentialism. Short of strong ethical constructivism of this sort, however, essentialism and constructivism are opposed only when both reach an exclusive theory of causation. The possibility of common ground between essentialism and constructivism, explored below, arises from this incomplete contradiction of the former by the latter.

Nor does constructivism necessarily refute claims of immutability. I argued above that essentialisms differ a great deal in the sense of "unchangingness" that they posit. Correspondingly, constructivism claims that important features of human beings and our world are contingent, historical products of human activity and interaction, but it does not claim that anything it describes as socially constructed would be easy, or even possible, to change. Eve Kosofsky Sedgwick wryly comments:

I remember the buoyant enthusiasm with which feminist scholars used to greet the finding that one or another brutal form of oppression was not biological but "only" cultural! I have often wondered what the basis was for our optimism about the malleability of culture by any one group or program.<sup>198</sup>

Indeed, some forms of constructivism involve a converse ethical problem: whether they leave any room at all for human agency and decision.<sup>199</sup> Thus, it is possible for a constructivist to claim that sexual-orientation identity is muta-

195. DREYFUS & RABINOW, *supra* note 194, at 168-83 ("The Genealogy of the Modern Individual as Subject").

196. For a discussion of this incomplete disagreement of essentialism and constructivism, see Daniel R. Ortiz, *Creating Controversy: Essentialism/Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1842-43 (1993).

197. Michel Foucault, *Truth and Power*, in THE FOUCAULT READER 51, 74 (Paul Rabinow ed., 1984).

198. SEDGWICK, *EPISTEMOLOGY*, *supra* note 92, at 41.

199. One such critique is offered by Bryan D. Palmer, who argues that the promotion of language as the sole constitutive activity in some discourse theories tends "to reify language, objectifying it as unmediated discourse, placing it beyond social, economic, and political relations, and in the process displacing essential structures and formations to the historical sidelines." BRIAN D. PALMER, DESCENT INTO DISCOURSE: THE REIFICATION OF LANGUAGE AND THE WRITING OF SOCIAL HISTORY 5 (1990).

ble across the range of human possibility, without making the distinct claim that it is mutable in a given person, or even in a given society or era.<sup>200</sup>

### 3. *Impure identity.*

It is a cherished premise of the essentialism/constructivism impasse that essentialism and constructivism are mutually exclusive. On this assumption, if essentialism and constructivism appear together in the formation or description of a social category, logical incoherence or hypocrisy must be at work. Probing a third distinction passed over by Fuss indicates that this premise should be rejected.

Fuss focuses exclusively on the attribution of a fixed, determinative characteristic to a particular thing or person. Of course, one can also attribute such a characteristic to an entire category, making the entire *group* essentialist. Nothing requires that one proceed in any particular order through the step of forming a category on one hand, and the step of placing individuals in it on the other. One might proceed deductively, and establish a category before consulting the qualities of proposed individual members. One might pursue a more inductive course, and aggregate apparently similar individuals before forming a general category in which to encompass them. Essentialism in these two different kinds of definitional practice takes correspondingly different forms: Deductive essentialism would posit that a group shares a certain constitutive characteristic, while inductive essentialism would incrementally note that individuals are strongly marked by a characteristic that increasingly seems important enough to be considered constitutive of them. A researcher might decide before making any experimental observations, for instance, that a human category is defined by its members' enthusiasm for having sex on airplanes (deductive essentialism); or she might find upon interviewing a number of experimental subjects that some of them are saliently differentiated by such an enthusiasm and consequently decide to classify them using it as an index (inductive essentialism). Moreover, each of these essentialist practices can take a weak or a strong form: The researcher might suppose that noticing some subjects' enthusiasm for having sex on airplanes is a fleetingly useful heuristic (weak essentialism) or that it is a deeply embedded, gravely differentiating characteristic (strong essentialism). The possibility of these discontinuities underlies the rifts dividing LeVay and Bailey and Pillard's rationales for setting up crude, conventional hypothetical categories "homosexual/heterosexual" for purposes of administering their experiments (weak deductive essentialism) from their actual practice of categorizing individual subjects (strong inductive essentialism), and again from their misleading statements to the press suggesting that their experiments confirmed the natural origin of those categories (strong deductive essentialism).

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200. David Halperin, for example, argues that "[p]articular cultures are contingent, but the personal identities and forms of erotic life that take shape within the horizons of those cultures are not." HALPERIN, *supra* note 4, at 51-52.

Additional complexity arises, first, from the fact that definitions of groups and of individuals can proceed on constructivist rather than essentialist premises; and second, from the fact that a given definitional practice can exhibit both inductive and deductive sequences. Indeed, one might well find it impossible to proceed in any way other than by combining induction and deduction in a process that gives neither decisive priority.<sup>201</sup> Both forms of complexity—inconsistent reliance on essentialist and constructivist modes of definition and cycling through deduction to induction to deduction—can be detected in the armed services' practice of applying an essentialist definition of "a homosexual" as any person who evinces homosexual desire<sup>202</sup> to women who have resisted sexual harassment by men.<sup>203</sup> However essentialist the regulatory category, these women are included in it on the basis of adventitious, contingent, even falsely attributed characteristics: they are *constructed* lesbians. And this inductive phase of the military's articulation of the category of homosexuals produces a new, deductive essentialism: homosexuality in women has as its essence not the positive demonstration of sexual desire for women, but the failure to evince sexual desire for men.

In an important recent analysis of the essentialism/constructivism impasse in gay and lesbian identity politics, law professor Daniel R. Ortiz suggests that the impasse be resolved by making a strong formal distinction between its antipodes. Ortiz argues that "[t]he questions of how a person comes to have same-sex desire and how that person is viewed are completely independent" such that "the constructivist debate . . . asks *not* how a person comes to fall into a particular identity category *but rather* how the identity category itself is formed."<sup>204</sup> This utter divorce of the process of defining groups from that of placing individuals in them, of deduction from induction, may be conceptually

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201. Kant distinguished between "intuition" (which "can never be other than sensible"), and "understanding" ("the faculty . . . which enables us to *think*"). IMMANUEL KANT, CRITIQUE OF PURE REASON 93 (Norman Kemp Smith trans., 1968). He concluded that they are mutually informing: "To neither of these powers may a preference be given over the other. Without sensibility no object would be given to us, without understanding no object would be thought. Thoughts without content are empty, intuitions without concepts are blind." *Id.*

The claim that empirical observation is "theory laden" and thus not prior to theory has been advanced by MARY HESSE, *REVOLUTIONS AND RECONSTRUCTIONS IN THE PHILOSOPHY OF SCIENCE* 63-109 (1980); MARY HESSE, *THE STRUCTURE OF SCIENTIFIC INFERENCE* (1974); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-51 (2d ed. 1970).

202. See, e.g., 32 C.F.R. pt. 41, app. A §§ H.1.a, H.1.c(2) (1993).

203. Military regulations providing for the discharge of homosexuals have been disproportionately applied to women. Mark Thompson, *Lesbian Troops More Often Get Boot: Insecurity, Vindictiveness Among Men May Be Why Women Face Allegations*, DETROIT FREE PRESS, Feb. 16, 1993, at 4A (reporting that women are less than 10% of military personnel, but 23% of those discharged for homosexuality). Many commentators explain this disparity by noting that a woman's noncompliant response to sexual overtures by male soldiers can lead to investigation and discharge, whether or not she is lesbian. *Id.*; Judy Mann, *Conduct Unbecoming*, WASH. POST, July 7, 1993, at E13 (reporting that an investigation of a female lieutenant "involved with a woman in her battalion" was triggered when a "man whom she had rebuffed turned her in"); Randy Shilts, *Dismissed: The Purging of Gay and Lesbian Troops from the Armed Forces*, L.A. TIMES MAG., Apr. 25, 1993, at 10, 14 (speculating that an officer was investigated for being a lesbian "because she rejected the passes of male crew members," and reporting that, unlike other women discharged in the course of the same investigation, she was exonerated by testimony of her boyfriend that she was "a good sexual performer").

204. Ortiz, *supra* note 196, at 1835, 1838 (emphases added).

imaginable, but it offers a parched analysis of social categories as laden with meaning as sexual-orientation and race groups.<sup>205</sup> For instance, Ortiz states that skin color is genetic but that "race . . . is socially constructed," so that the constructed category "race" *independently* construes a natural given, "skin color."<sup>206</sup> But the cultural system of race interferes in the very designation of some skin colors as "white" (instead of "pinko-grey," "orange," etc.) and others as "black" (instead of "mocha," "brown," "yellow," etc.); different cultural systems of race notice different gradations of color.<sup>207</sup> Culture thus interferes in deciding what the genetic endowment of skin color is. And conversely, genetic race adjudicates cultural race, inasmuch as one cannot know whose culture African-American culture is, without resorting (secretly, if one wants to keep faith with a commitment to strong constructivism) to a biological conception of race.<sup>208</sup>

Precisely such an imbrication of essentialist with constructivist models of race appears in Gloria Anzaldúa's invocations of *mestiza* identity.<sup>209</sup> Anzaldúa's *mestizaje* is the radically unstable identity of women living on the border between the United States and Mexico; between English, Spanish, and Indian languages; between sexualities and genders; between races so complexly mixed that they cannot be disentangled.<sup>210</sup> Anzaldúa celebrates the rich range of possibility created by this instability and porosity in an implicit insistence that *mestiza* identity is not reducible to any essence. But she also designates its essence precisely where pro-gay biological essentialism would locate it: in genes.<sup>211</sup> This is to establish a provisional, negotiable, contingent, historicized category, and then insert individuals into it on the basis of strong essentialist characterizations.

Ortiz's proposal that the formation of an identity category proceeds independently of the process of locating individual persons in it would require us to ignore the complex interdependence of constructivist and essentialist elements in Anzaldúa's *mestizaje*. Genetic race is part of the social meaning of that identity, just as current debates about the genetic elements of sexual orientation

205. A similar reduction of descriptive complexity to serve analytic clarity occurs in Richard Mohr's resolution of pro-gay definitional debates in favor of essentialism. RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 221-26, 234 (1992). Mohr proceeds from the empirical claim that "most social history is simply irrelevant to the question whether there is an innate biological drive in some people to have erotic encounters with members of their biological sex." *Id.* at 234. This claim describes a possible world, but not our world. Because he ignores the ways in which cultural definitions produce the need for biological ones, Mohr is inattentive to the extent to which his own proposed "minimal or core" definition—"the desire for sexual relations with members of one's own biological sex," *id.* at 240-41—is politically loaded, adjudicating the boundaries between homosexual, bisexual, and heterosexual in a way that many participants in current sexual politics disagree with.

206. Ortiz, *supra* note 196, at 1839.

207. See generally F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION* (1991).

208. Walter Benn Michaels, *Race into Culture: A Critical Genealogy of Cultural Identity*, 18 *CRITICAL INQUIRY* 655, 675-85 (1992).

209. GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987).

210. *Id.* at 1-13, 53-64, 77-91.

211. *Id.* at 77 (describing *mestiza* consciousness both as the "consciousness of the Borderlands" and as definitionally genetic, a "confluence of two or more genetic streams" producing a "more malleable species with a rich gene pool").

identity have become important parts of gay, lesbian, and bisexual identity. If inductive and deductive processes of category formation can be interlocked, and if either, neither, or both processes can be (weak or strong) essentialist or constructivist, then the essentialism/constructivism debate has to deal with a myriad ways in which essentialism and constructivism can be interlocked in the articulation of complex social categories.

## B. *Finding Common Ground*

Essentialisms differ in the depth or "thickness" of their causality: Weak essentialism merely claims that some entity (here, homosexuality) is an "irreducible, unchanging [in the Aristotelian sense] and therefore constitutive" characteristic,<sup>212</sup> while strong essentialism gives that definitional core not only a cause but a cause in nature. I propose that pro-gay essentialists litigate from a position of weak, not strong, essentialism. In all but its strongest forms, constructivism already coheres with such weak essentialism.

### 1. *The lay of the land.*

Different versions of constructivism differ in the depth or thickness of the thing they claim is caused by socially and historically contingent circumstances and activities. In a wonderfully clear essay differentiating constructivisms in the study of human sexuality, Carole S. Vance argues that constructivists "differ in their willingness to imagine *what* was constructed":<sup>213</sup>

At minimum, all social construction approaches [to sexuality] adopt the view that physically identical sexual acts may have varying social significance and subjective meaning depending on how they are defined and understood in different cultures and historical periods. . . .

A further step in social construction theory posits that even the direction of sexual desire itself, for example, object choice or hetero/homosexuality, is not intrinsic or inherent in the individual but is constructed. *Not all constructionists take this step*; for some, the direction of desire and erotic interest are fixed, although the behavioral *form* this interest takes will be constructed by prevailing cultural frames, as will the subjective experience of the individual and the social significance attached to it by others.

The most radical form of constructionist theory is willing to entertain the idea that there is no essential, undifferentiated sexual impulse, 'sex drive' or 'lust', which resides in the body due to physiological functioning and sensation. . . . This position, of course, contrasts sharply with more middle-ground constructionist theory which implicitly accepts an inherent sexual impulse which is then constructed in terms of acts, identity, community, and object choice.<sup>214</sup>

212. Fuss, *supra* note 179, at 2.

213. Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in *HO-MOSEXUALITY, WHICH HOMOSEXUALITY?* 13, 21 (Dennis Altman, Carole Vance, Martha Vicinus & Jeffrey Weeks eds., 1989) (emphasis in original).

214. *Id.* at 18-19 (first emphasis added) (footnote omitted).

Vance discerns five different forms of constructivism, each with a more expansive claim as to what is constructed than the last. The following paragraphs further explicate Vance's essentialism/constructivism spectrum.

*Social meanings constructivism.* This approach regards sexual object choice as fixed. The categories homosexual and heterosexual are good descriptions of all human beings, cross-culturally and transhistorically. Sexual object choice in turn dictates certain patterns of behavior, which also, therefore, appear in all human societies without alteration in their form. But different cultures and historical contexts give these differences in object choice and the attendant range of activities different social and experiential meanings. Activities that are thought normal in one setting are taboo or criminalized in another. Thus, in one culture it might be a sign of maternal affection for a mother to kiss her infant son's penis, while in another the same act would be deemed child abuse.<sup>215</sup> In the former culture, this act would make a woman feel like a good mother; in the latter, like a transgressor. This shift in levels of social approval might mean that in the first culture a lot of women fellate their sons, but some in the second, who really relish this ritual, would be tempted to do it even at the cost of sanctions. The behavioral raw material underlying that difference in valuation does not vary: A person who would enjoy this act in the first culture would enjoy it in the second because she comes hardwired for female/male fellatio (of a particular kind).

*Behavioral constructivism.* This approach regards sexual object choice as fixed across cultures and historical eras. In the most common version of this approach, some people are predominantly disposed to have sex with people of their own sex; some are predominantly disposed to have sex with people of the so-called opposite sex. That much is determined by nature. But the behavioral patterns available for satisfying these predispositions vary across time and place. *A fortiori*, the meanings attributed to sexual variety differ, as do the feelings they arouse. John Boswell has described this position as "realist" in the sense that it regards sexual orientation as "'real' apart from social structures bearing on it,"<sup>216</sup> and distinguishes it from a nominalist view, on which "categories are only the names (Latin: *nomina*) of things agreed upon by humans."<sup>217</sup> Boswell himself adopts the realist view that "'gay persons' [are] . . . those whose erotic interest is predominantly directed toward their own gender (i.e., regardless of how conscious they are of this as a distinguishing characteristic)."<sup>218</sup> Boswell's own work is a testimony to the vast range of social constructive activity that his assumption allows a realist, or a behavioral constructivist, to describe: Though he assumes the transhistorical existence of what he calls "gay persons," his work continually notices the astounding range of social forms available to them and the volatility of the social and normative

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215. Cf. William Davenport, *Sexual Patterns and Their Regulation in a Society of the Southwest Pacific*, in *SEX AND BEHAVIOR* 164, 166-69 (Frank A. Beach ed., 1965); Marvin K. Opler, *Anthropological and Cross-Cultural Aspects of Homosexuality*, in *SEXUAL INVERSION* 108 (Judd Marmor ed., 1965).

216. Boswell, *Revolutions, Universals, and Sexual Categories*, *supra* note 92, at 17, 35.

217. *Id.* at 18-19.

218. *Id.* at 35.



meanings attributed to their erotic lives.<sup>219</sup> His approach is even calibrated enough to register differing proportions of realist and nominalist views of "gay persons" in different ancient and medieval cultures.<sup>220</sup>

Behavioral constructivism as Vance configures it is rather specific about what aspect of sexuality remains essential: gender-of-object-choice. A weaker form of behavioral constructivism is distinguishable, however, in which *some* object is intrinsically and inherently preferred, but it is not necessarily congruent with sex or gender or even a particular kind of person.<sup>221</sup>

Weak behavioral constructivism acknowledges the powerful reality of sexual-orientation categories as we know them, but posits that some *other* form or forms of human variance are primary. It thus challenges us to imagine *beyond* the sexual-orientation categories homo- and heterosexual. Eve Kosofsky Sedgwick provides a suggestive list of object choices that might definitively distinguish people, but that our culture either ignores or sorts only roughly into categories differentiated by gender-of-object-choice:

- Some people spend a lot of time thinking about sex, others little.
- Some people like to have a lot of sex, others little or none.
- Many people have their richest mental/emotional involvement with sexual acts that they don't do, or even don't *want* to do.
- For some people, it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their life; for other people, it is important that they not be; to others it doesn't occur that they might be.<sup>222</sup>

It is difficult (though not impossible) to imagine that an array of individuals essentially committed to one of these object choices might tend to sort predominantly into the currently available diacritical categories, homosexual and heterosexual. Other sexual object choices—a taste for anal penetration or for sexual daringness or safety, or for reviving or avoiding certain childhood memories in sexual encounters—might be more likely to produce regular correlations, without installing *gender-of-object-choice* as the essential substrate of behavioral constructivism. And it is not difficult to imagine *genetic* causes of these differences, for instance, by genes causing development of more neurons in a particular zone of the body or, as biologists Anne Fausto-Sterling and Evan Balaban suggest for the repeatedly studied group of gay men with gay male

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219. See, e.g., JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980).

220. Boswell, *Revolutions, Universals, and Sexual Categories*, *supra* note 92, at 24-29. William N. Eskridge, Jr. provides another example of behavioral constructivism of the sort that animates Boswell's work. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). Eskridge assumes that the same-sex-ness of same-sex marriage has a stable cross-cultural unity, providing an unmovable platform from which to admire the spectacular array of its behavioral and ideological manifestations in various times and places. *Id.*

221. Edward Stein articulates this model of sexual orientation as "sophisticated essentialism." Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 325, 332-38 (Edward Stein ed., 1990).

222. SEDGWICK, *EPISTEMOLOGY*, *supra* note 92, at 25.

siblings, "any gene that might increase the tendency of brothers to psychologically identify with one another."<sup>223</sup> Even in our culture, it is not clear whether the identity homosexual or heterosexual would offer a person essentially differentiated by such characteristics a more suitable means of exercising it. But neither is it clear that a pattern would not emerge.

*Gender-of-object-choice constructivism.* In this approach, sexuality—the capacity for a coherent, patterned organization of sex drive or sexual appetite—is predetermined and invariant, but sexual object choice, the associated behavioral forms, and their social and experiential meanings remain available for social adaptation. At this point constructivism abandons the assumption that the terms "homosexual" and "heterosexual" necessarily describe human sexual predispositions. Though this category is conceptually open, most historians of sexuality who pursue constructivism of a more thoroughgoing kind than behavioral constructivism develop the stronger constructivist hypothesis which I dub sexuality constructivism.

*Sexuality constructivism.* This approach, inaugurated by Foucault's *History of Sexuality*, Vol. I, but declining to extend constructivism as far as he did in that work, distinguishes between a raw physical capacity for erotic pleasure and the organization of that capacity into a coherent, patterned element of the self. The former is part of being human, but the latter is the product of complex historical contingencies which, once in place, are as inescapable as the capacity for orgasm. Object choice, behavioral repertoire, social meaning, and sexual emotion all fall within the domain of sexuality, and are produced by its means. David Halperin provides an exemplary, even pyrotechnic, display of what this approach can do in his book *One Hundred Years of Homosexuality*, the title of which proclaims the view that homosexuality is quite a recent invention.<sup>224</sup>

Halperin states that, "[u]nlike sex, which is a natural fact, sexuality is a cultural production: It represents the *appropriation* of the human body and of its erogenous zones by an ideological discourse."<sup>225</sup> Sexuality is relatively autonomous from gender, and "[t]hat is precisely what makes sexuality alien to the spirit of ancient Mediterranean cultures," where "sexual typologies generally derived their criteria for categorizing people not from sex but from gender."<sup>226</sup> Halperin does not question that "there really are, nowadays, homosexual and heterosexual people . . . : they really do desire what they do, and that is a *fact* about them."<sup>227</sup> But this is a weak essentialist form produced by social rather than natural causes.

*Sex constructivism.* This may be the most thorough view of constructivism in the area of sexuality yet articulated. It assumes that the sheer recognition of certain bodily sensations *as sexual* is constructed. This is not merely to say, for instance, that living in a culture that "implants" "sex drive" would be a differ-

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223. Fausto-Sterling & Balaban, *supra* note 111.

224. David M. Halperin, *One Hundred Years of Homosexuality*, in *ONE HUNDRED YEARS OF HOMOSEXUALITY*, *supra* note 4, at 15-18, 24-27.

225. *Id.* at 25 (footnote omitted).

226. *Id.*

227. *Id.* at 43 (emphasis in original).

ent thing than living in a culture in which sex originates in an "appetite." It is to insist that culture supplies the very terms for understanding bodily sex, in or between persons, as distinct from other modes of physical configuration, action, or sensation. Halperin crisply distinguishes his more moderate position from Foucault's sex constructivism:

I should point out that Foucault himself decisively abandoned the distinction between sex and sexuality, as I have drawn it. Not only is Foucault's final conception of "sex" much less positivistic (he categorically denies that "sex" is a biological fact), but his own understanding of the distinction between "sex" and "sexuality" reverses the sequence postulated here [in *One Hundred Years of Homosexuality*]: "[S]exuality," on his view, arises in the eighteenth century and eventually produces "sex," as an idea internal to its own apparatus, only in the nineteenth century.<sup>228</sup>

The equivalent of "sex constructivism" in the study of gender is, perhaps, Monique Wittig's response to the question whether she had a vagina, that she did not.<sup>229</sup>

## 2. *Choosing a place to stand.*

Each constructivist theory except the last renders some aspect of sexuality essential. The range of potential common ground is nevertheless rather limited. Most pro-gay essentialists are deeply committed to denying gender-of-object-choice constructivism, for the quite logical reason that gender-of-object-choice constructivism is intrinsically inconsistent with social meanings constructivism.<sup>230</sup> Neither side should seek to legitimate its claim on these points in the context of litigation. But there is an alternative: behavioral constructivism. The view that object choice may be essential and indeed, biological, and that the related behavior and its meanings belong to the domain of culture is *already* essentialist.

Behavioral constructivism comes in two versions, each distinguished by the specificity with which it describes its most extensive essentialist element, object choice. Both strong behavioral constructivism (gender-of-object-choice is essential, but its translation into behavioral patterns is not) and weak behavioral constructivism (object choice is essential but is not necessarily inflected by gender) offer some common ground accessible to most pro-gay essentialists and constructivists. Two principles of selection indicate quite decisively, however, that the weaker form of behavioral constructivism is more suitable to pro-gay constructivists and pro-gay essentialists alike. First, it offers less offense to the principle that neither pro-gay essentialists nor pro-gay constructivists

228. *Id.* at 162 n.47 (construing FOUCAULT, *supra* note 4, at 152-57).

229. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 157 n.54 (1990).

230. Halperin concedes the mutual antagonism of gender-of-object-choice constructivism and behavioral constructivism. In an interview in which he seems most concerned to assert gender-of-object-choice constructivism, and not the broader claim that sexuality is constructed, he quite rightly states that any conclusive and unassailable scientific proof that homosexuality as such is biologically caused would defeat his project entirely. David M. Halperin, "Homosexuality": A Cultural Construct (An Exchange with Richard Schneider), in *ONE HUNDRED YEARS OF HOMOSEXUALITY*, *supra* note 4, at 41-49.

should be required to enter into litigation with an argument that requires them to say something inconsistent with their commitments. And second, it is simply more consistent with the rich variety of human sexualities cross-culturally and with the evidence of modern science itself.

A compromise stopping at strong behavioral constructivism would require pro-gay constructivists to retreat to the position that, while an essential and possibly natural difference among humans directs some of us to seek erotic contacts with persons of the same sex, and others to select persons of the so-called opposite sex, culture provides the human *character* of these essentially different sexualities, and the social organization for their realization. Settling on strong behavioral constructivism would not be a total rout for constructivists, inasmuch as behavioral constructivism can be given quite a pronounced constructivist spin. Those pre-committed to same-sex contacts might be pederasts, sodomites, mollies, berdache, invert, homosexuals, gay men, lesbians, queers, and so on. People's subjective experience of sexuality, and the behavior they undertake to support it, would be radically contingent on the identity offered by their culture for persons of their object choice and on their own opportunities for altering or shaping the options on offer. Behavioral constructivism is already a respectable pro-gay constructivist position. John Boswell is largely (though not entirely) right when he denies being an essentialist.<sup>231</sup>

It is precisely Boswell's maintenance of transhistorical human categories "homosexual" and "heterosexual" that many pro-gay constructivists find objectionable, however. Our difficulty on this point is not trivial: It is that such an assumption, by naturalizing a human characteristic currently invoked to explain (and sometimes to justify) a social hierarchy may make the role of power in generating and maintaining that hierarchy invisible or obscure. Pro-gay constructivists who take this position should not be required to share in litigation strategy with pro-gay essentialists at the cost of positively contradicting a point this important to their distinctive analysis.

Weak behavioral constructivism poses constructivists a much less strenuous case of conscience. To subscribe to this position, which implicitly recognizes the possibility that different individuals sort into homo- and heterosexual orientations with varying degrees of natural aptitude, we would merely be asked to agree with William E. Connolly, that "[t]o treat identity, as I do, as a site at which entrenched dispositions encounter socially constituted definitions is not to insist that any such definition will fit every human being equally well or badly."<sup>232</sup>

Strong essentialists who seek to rely on scientific findings should like the weak version better too, because it almost exactly matches the findings to date and scientists' predictions about what they will find in the future. Indeed, scientific research to date supports no stronger essentialist claim than weak behav-

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231. Boswell, *Revolutions, Universals, and Sexual Categories*, *supra* note 92, at 35 (asserting that "no current historians consciously defend an essentialist point of view"). Boswell is not entirely accurate in denying all essentialism here, inasmuch as he maintains an essentialist view of gender-of-object-choice.

232. CONNOLLY, *supra* note 4, at 163 (emphasis added).

ioral constructivism—a fact that puts pro-gay essentialists who invoke science on a virtual estoppel. As Part III above suggests, pro-gay essentialists have not demonstrated why the categories “homosexual” and “heterosexual” are the ones that will ultimately correlate best with any biological causes of sexual object choice that science might eventually identify. Pro-gay essentialism has to date been silent when faced with the question, “What reason have we to think that the categories ‘homosexual,’ ‘heterosexual,’ and perhaps ‘bisexual’ will be the categories explained by an advanced [essentialist] theory of sexual orientation?”<sup>233</sup> Indeed, Richard Pillard has gone on record *agreeing* with weak behavioral constructivism.<sup>234</sup>

It is no surprise that a prominent pro-gay essentialist researcher would reach this conclusion without an apparent sense of self-contradiction. In their study of lesbians, Bailey and Pillard (working with a new team of researchers) acknowledge “the power of genetic studies such as ours to demonstrate the importance and illuminate the nature of environmental influences.”<sup>235</sup> This power is confirmed in the Hamer study, in which seven out of forty gay male subjects *did not have* the specific gene sequence associated with homosexual orientation in men.<sup>236</sup> Hamer and his team conclude that “[g]iven the overall complexity of human sexuality, it is not surprising that a single genetic locus does not account for all of the observed variability,” and recommend further research to identify “additional genes or *environmental, experiential, or cultural* factors (or some combination of these) that influence the *development* of male sexual orientation.”<sup>237</sup> In a rare comment to the media, Hamer has given a similar caution: “[W]hat we have found is a linkage between a small region on one chromosome and sexual orientation in men, and what that suggests is that *part* of whether a person is gay or heterosexual is *influenced* by the genes that they inherit. However we have not found the gene, *which we don’t think exists*, for sexual orientation.”<sup>238</sup>

These are compelling reasons for pro-gay essentialists and pro-gay constructivists to conduct common projects—particularly litigation on behalf of

233. Stein argues that the answer is “none”: “[A] viable version of essentialism should not assume our standard categories of sexual orientation.” Stein, *supra* note 221, at 337.

234. Stein, *supra* note 147, at 103. In response to Stein’s claim that “homosexual” and “heterosexual” are merely “folk categories” and that biological research can at best be hoped to confirm weak behavioral constructivism, Pillard said: “That puts us a step closer than I thought we were. You suggest an interesting location: ‘folk categories.’ *That’s exactly what they are, because we don’t really know in any specific way what behavior genes code for.*” *Id.* (quoting Pillard) (emphasis added).

235. Bailey et al., *supra* note 105, at 222.

236. Hamer et al., *supra* note 1, at 325.

237. *Id.* at 325-26 (emphasis added); see also Fausto-Sterling & Balaban, *supra* note 111, at 1257. Commenting on Hamer’s study, Fausto-Sterling and Balaban stated that a “gene affecting sexual orientation in some segment of the male population might do so very indirectly. For instance, any gene that might increase the tendency of brothers to psychologically identify with one another might influence their similarity in such matters and would be picked up in the present study.” *Id.*

238. Tim Radford, *Your Mother Should Know*, THE GUARDIAN, July 17, 1993, at 23 (quoting Hamer’s comments broadcast on BBC radio) (emphasis added) (paragraph break omitted); see also Hamer et al., *supra* note 113, at 2065 (“We did not say that Xq28 ‘underlies’ sexuality, only that it contributes to it in some families. Nor have we said that Xq28 represents a ‘major’ gene, only that its influence is statistically detectable in the selected population that we studied.”).

gay men, lesbians, bisexuals, and queers—from the position I have described as weak behavioral constructivism. The exactions of equal protection analysis do not appear to require this level of specificity, however. As the following general review of equal protection arguments suggests, these projects may require only an agreement to litigate from a position of behavioral constructivism *simpliciter* (and thus to abandon all strong essentialist arguments based on biology).

### C. *Arguing for Equal Protection on Common Ground*

The recent history of gay equal protection plaintiffs includes male inmates who “appear[ ] weak, small or effeminate” to the sheriffs at the Shelby County Jail and are therefore segregated in special “gay” cells;<sup>239</sup> the shamed and confused James Miller, confessing to military inquisitors that he had committed a “homosexual act” and renouncing it;<sup>240</sup> the discrete Majorie Rowland, quietly indicating to a coworker that she was bisexual;<sup>241</sup> and the bold Miriam ben-Shalom, consistently coming out as a lesbian to her military superiors and suing to invalidate her discharge for more than ten years.<sup>242</sup> These plaintiffs do not even have a sexual orientation in common. What they share is a life-altering rejection imposed because they entered the zone in which the social representation of same-sex desire became a means of institutional ordering. The essence of the class that needs protection is not, then, *in* its members: It is in the interactions among class members and between them and others about the meaning and value of same-sex erotic desire.

Under these circumstances, strong essentialist models of sexual orientation groups are likely to exhaust their resources long before a fully adequate analysis of anti-gay discrimination can be built. And conversely, at each stage in the explication of equal protection analysis—from the determination whether heightened scrutiny is possible after *Hardwick*, to the determination whether heightened scrutiny is due, to the assessment (under heightened scrutiny or rational basis review) of the ends and means of anti-gay discrimination—behavioral constructivism enriches the conceptual, analytic, and representational resources of pro-gay litigators.

Indeed, at the threshold of suspect class analysis, strong essentialist models of sexual-orientation identity are a positive impediment. Several federal courts have held that *Hardwick* forecloses heightened scrutiny because criminalizable “sodomy defines the class” for which protection is sought.<sup>243</sup> Though litigators

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239. *Gay Inmates of Shelby County Jail v. Barksdale*, No. 84-5666, 1987 WL 37565, at \*1 (6th Cir. June 1, 1987).

240. *Beller v. Middendorf*, 632 F.2d 788, 802 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

241. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

242. *See benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (challenging benShalom's discharge for publicly acknowledging her homosexuality); *BenShalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis. 1989) (challenging Army's refusal to reinstate benShalom on the same grounds), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

243. *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1990) (emphasis added); *see note 31 supra*.

have the option of attacking *Hardwick* directly,<sup>244</sup> it is most likely that they will prefer in equal protection cases to "litigate around" it.<sup>245</sup> Litigators can refute the extension of *Hardwick* by attacking its legal premise, that due process precedents apply to equal protection cases.<sup>246</sup> And they can attack its definition of the class.

To make the latter argument, constructivists and essentialists alike should shed unnecessary definitional claims that undermine the distinction between sodomy and the class of homosexuals. Social meanings constructivism, which installs a predetermined behavioral repertoire in its natural categories "homosexual" and "heterosexual," actually *supports* the extension of *Hardwick*. *A fortiori*, unmediated strong essentialism does the same: It posits the same unbroken equation between homosexuals and their behavioral repertoire that disables social meanings constructivism. Behavioral constructivism will work only if it acknowledges that, in our culture, many elements of sexual-orientation identity operate in tandem with and independently of behavior to constitute and to populate the classification homosexual.

The constructivist view that sexual orientation is mutable because of slippages and rearrangements of desire, fantasy, behavior, private identity, and public identity is possibly the strongest refutation of a definition of homosexuality that makes sodomy its essence. Essentialists should be able to agree with this view as long as it falls short of its outermost reach, that *no one's* subjective sexual orientation accurately reflects the gender-of-object-choice entertained by his or her desire and fantasy. Unlike pro-gay essentialist uses of the argument from immutability, which at least theoretically exclude some gay men, lesbians, and bisexuals from the protected zone of heightened scrutiny, a pro-gay argument that distinguishes *Hardwick* by emphasizing the variety of gay, lesbian, bisexual, and queer identities embraces the most unwavering class member too.

Behavioral constructivism is also rich in representational resources for building positive arguments that heightened scrutiny is warranted. On a process-based analysis, behavioral constructivism allows advocates to focus on identity dynamics where they pinch: at the closet door.<sup>247</sup> The process-based argument emphasizes that the volatilities and fixities of public identity make it exceedingly difficult for gay men, lesbians, bisexuals, and their friends to enter

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244. Gay rights litigators who can file their cases in states with sodomy laws and well-developed privacy rights have been engaged in a state-by-state repudiation of *Hardwick*. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (holding that criminal statute proscribing consensual, homosexual sodomy violates privacy and equal protection guarantees of Kentucky Constitution); *Michigan Org. for Human Rights v. Kelly*, No. 88-815820 CZ (Mich. Ct. App. July 9, 1990) (holding that any application of state sodomy and gross indecency statutes to consensual, private conduct violates state privacy guarantee). Federal litigants who do not have real clients, or whose clients do not mind knowing at the outset that they'll lose, might also consider seeking a reversal of *Hardwick*. These are now the only routes open to litigators who want to avoid making an implicit concession that *Hardwick* is in some sense legitimate.

245. Cain, *supra* note 33.

246. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1167-68 (1988) (arguing that an unfavorable due process holding should have "no consequences for an attack brought under the Equal Protection Clause").

247. Halley, *supra* note 22.

fully into political debate. Too many gay men, lesbians, and bisexuals remain silent so that they can keep their jobs; too many sympathetic heterosexuals remain silent so that no one will suppose they are queer.<sup>248</sup> Social-meanings constructivism, because it assumes that public identity univocally and transparently reflects intrinsic sexual orientation, lacks the conceptual apparatus to describe these political impediments. Behavioral constructivism, because it is hospitable to the claim that public homosexual identity is affected by cultural forces, can support the further claim that the resulting social patterns deprive pro-gay advocates of unimpeded access to the political process.

Process-based theories have been subjected to fairly stiff theoretical critique, however, on the ground that they do not actually avoid substantive evaluation.<sup>249</sup> In light of this critique, behavioral constructivism possesses a key advantage: It paints a rich and varied picture of the ways in which official anti-gay discrimination enlists the state in reproducing the social and lexical subordination of gay men, lesbians, and bisexuals. Many of the slippages that become visible on this model are extremely painful to behold, and may form the basis for a coherent, negative normative assessment of anti-gay discrimination. And judges who think they do not know any homosexuals need to be given a "thick" picture not of *homosexuals* but of homosexual *identity* if they are to understand the social and political texture of anti-gay discrimination.<sup>250</sup>

All of this assumes that the goal of equal protection litigation is to get heightened scrutiny. Of course, litigators can and usually must settle for rational basis review, but that is no longer equivalent to losing. Three federal judges have held that the military's former anti-gay policy fails rational basis review.<sup>251</sup> Moreover, both heightened scrutiny and rational basis review re-

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248. *Id.* at 944-46.

249. See note 20 *supra*.

250. Psychologists Gregory M. Herek and Eric K. Glunt have found that heterosexuals who know that they know gay men are more likely to entertain favorable attitudes towards them. Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. SEX RES. 239 (1993). These findings take on an alarming cast when one acknowledges, with Judge Posner, that "judges know next to nothing about the subject [of sexuality] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary." POSNER, SEX AND REASON, *supra* note 59, at 1. One solution to the problem of judicial ignorance of the realities of anti-gay discrimination might be to reverse the screen, and ensure that some gay men, lesbians, and bisexuals become federal judges. Stephen Reinhardt, *Keeping Justice in the Closet: Judge Argues Time Is Right to Break Down Barriers for Gays*, DAILY J., Dec. 6, 1993, at 4. But that approach, if it works at all, will work very slowly. Another is to use litigation as a setting for the first-person narratives of lesbians and gay men. Fajer, *supra* note 97. But that method presupposes the speaker's own unmediated access to the truth of her "experience"—a presupposition that has been convincingly challenged. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Scott, *supra* note 95. The approach suggested here is that litigators give judges not the *equivalent of* but a *substitute for* knowing someone gay: a nuanced depiction of the social, political, and representational dynamics in which sexual-orientation identities are negotiated and ranked.

251. See *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993) (rejecting as irrational Secretary of Defense's justifications for former military ban that it eliminated members with a propensity to engage in illegal conduct; that it preserved the morale or privacy of heterosexual soldiers; that it prevented transmission of the HIV virus; or that it reduced the incidence of blackmail), *vacated for reh'g en banc* 62 U.S.L.W. 2309 (D.C. Cir. Jan. 7, 1994); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319



quire examination of governmental ends and means—that is, of the purposes and methods of anti-gay discrimination. To the extent that anti-gay discrimination is sometimes justified on an essentialist and sometimes on a constructivist model of sexual orientations, it is impossible to determine *a priori* whether pro-gay advocates will encounter any temptation to invoke strong essentialist claims. In recent military cases, the government has sought to justify its anti-gay policy by an unstable amalgam of essentialist and constructivist models: The military, it is said, should defer to the strong feeling among heterosexual male soldiers that homosexual men are essentially unlike them, *and* to the same soldiers' terrible anxiety that their proximity to gay men erodes their own *heterosexuality*.<sup>252</sup> If the military cases are any guide, the temptation to refute using strong essentialist models of sexual orientation will often be muted by the countervailing utility of more constructivist ones. In most cases, the focus should fall not on the nature of the people discriminated against but on the *idea* of them formed in the policies and programs that disadvantage them, and on the implicit premise of all anti-gay legal policy, that the state should serve as a facility for constructing those ideas into social reality.<sup>253</sup> Strong pro-gay essentialism draws attention to the former; behavioral constructivism provides the conceptual apparatus for understanding the latter.

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(M.D. Fla. 1993) (rejecting defendant's rationales for former military policy as motivated exclusively by prejudice, and granting plaintiff summary judgment on equal protection claim after rational basis review); *Meinhold v. Dep't of Defense*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1992) (holding that "[t]he Department of Defense's justifications for its policy banning gays and lesbians from military service are based on cultural myths and false stereotypes" and have no rational basis). These decisions indicate that failure to obtain heightened scrutiny is not necessarily fatal to a gay or lesbian plaintiff's case.

252. See *Dahl*, 830 F. Supp. at 1319 (summarizing Department of Defense rationales for anti-gay policy); *Steffan v. Cheney*, 780 F. Supp. 1, 11-13 (D.D.C. 1991) (same).

253. Several courts have held that the Department of Defense's invocation of heterosexual troops' recoil from homosexual proximity gives official form to private prejudice in violation of *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). *Dahl*, 830 F. Supp. at 1331-32; *Steffan*, 780 F. Supp. at 12-13.

There remains an avenue around *Hardwick* and to heightened scrutiny that does not necessarily depend on an identity claim: The argument that discrimination on the basis of sexual orientation is really discrimination on the basis of sex. That was the basis of the Hawaii Supreme Court plurality opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), summarized in Part I above. The *Baehr* plurality understood the argument as a purely formal one: Hawaii would not let a woman do what a man was free to do, namely, marry a woman. The justices explicitly stated that plaintiffs' professed homosexuality was irrelevant to their logic. *Id.* at 53 n.14, 58 n.17. In separate articles, Andrew Koppelman and Cass Sunstein have offered more socially-descriptive rationales for holding that sodomy laws violate the constitutional bar on sex discrimination. Koppelman emphasizes that "their function is to maintain the polarities of gender on which the subordination of women depends," Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988), while Sunstein emphasizes the rejection of caste implicit in *Loving v. Virginia*. Cass R. Sunstein, *Homosexuality and the Constitution*, in LAWS & NATURE: SHAPING SEX, PREFERENCE AND THE FAMILY (David Estlund & Martha Nussbaum eds., forthcoming) (manuscript at 1-3, on file with the *Stanford Law Review*). Neither the formal nor the social-descriptive argument is constrained by essentialist or constructivist versions of *sexual-orientation* identity, though the richer claims advanced by Koppelman and Sunstein call for a separate assessment of various theories of how sexual orientation and gender intersect.

## CONCLUSION

The argument from immutability responds to a particularly contemptuous and dismissive form of anti-gay animus with elegant simplicity and plangent appeal. It also works. Indeed, it often is the *only* effective resource available to gay men, lesbians, and bisexuals seeking to persuade their parents, coworkers, and neighbors that they can love someone of the same sex and remain fully human. Moreover, for most of the gay children, workers, and neighbors who use the argument from immutability in these settings, it is absolutely true: They can't change their sexual orientation.

When the argument from immutability leaves those settings and becomes a legal strategy, however, the terms by which we should judge its plausibility and effectiveness shift. While it may be entirely responsive to the particular form of personal criticism faced by many gay men, lesbians, and bisexuals ("Why don't you just change?"), it is not fully or even coherently responsive to the forms of anti-gay argument used to justify state-sponsored discrimination against all of us. Three new elements need to be taken into account.

First, anti-gay public policy is complex and flexible, and finds ways to justify itself even on the assumption that homosexual orientation in many, most, or all its bearers is immutable. Second, the reasons why the *state* should not discriminate against gay men, lesbians, and bisexuals are different in important ways from the reasons why parents should not think ill of their gay children. Suspect class analysis (when given its best reading) asks whether the resources of the state are being used to enforce, confirm, and validate social hierarchies. The argument from immutability has never attained the preeminence in suspect class analysis that some pro-gay advocates attribute to it because it carries so little water in that analysis. And third, the argument from immutability, when advanced on behalf of a complex movement, many of whose members *can* change some aspect of their sexuality that is targeted by anti-gay policy, is less directly responsive to the problem we face. Moreover, the argument becomes burdened with an ethical problem it does not have when used privately: When pro-gay advocates use the argument from immutability before a court on behalf of gay men, lesbians, and bisexuals, they misrepresent us.

Even worse, when the pro-gay argument from immutability annexes recent scientific findings to bolster its empirical claim that homosexual orientation is immutable, it becomes simply incoherent. As I have indicated in my summaries of the internal criticism of behavioral genetics and of the particular scientific articles that advocates of the pro-gay argument from immutability have considered most useful, biologically caused traits can change; there is as yet no proof that human sexual orientation has a biological cause; and even if a biological cause of human sexual orientation were eventually identified, the conceptually distinct question whether it causes *homosexuality* and *heterosexuality* would remain outstanding.

Failure to emphasize that last point is perhaps the most disturbing feature of the way in which pro-gay advocates of the argument from immutability have introduced the scientific findings into the broader culture. Of course, one day

science may find that the sexual-orientation categories of our culture are natural, but today their adequacy is a political question—in fact the very same political question that divides pro-gay advocates of the argument from immutability and many of its pro-gay detractors. Proponents of the pro-gay argument from immutability have covertly withdrawn a political question from the political sphere by falsely implying that science has answered it.

Retrieving that political question for social and political debate also provides a better basis for antidiscrimination analysis. A prerequisite for the latter is a representation of homosexuals and heterosexuals, of homosexuality and heterosexuality, that does not divide pro-gay communities (or divides them as little as possible). The controversy over the pro-gay argument from immutability is a controversy between essentialism and constructivism, but it has been conducted with a dangerously thin notion of the complexity of the logical entailments of those theories. It has assumed that an essentialist view of sexual orientation committed one to a claim that homosexuality, as such, is the product of nature; and that a constructivist view committed one to a claim that homosexuality is an entirely contingent social artifact, subject to change at whim. It has assumed that essentialism and constructivism are logical opposites. A more careful explanation of what is involved in essentialism and constructivism indicates that a *weak* form of essentialism—holding that a given entity is subject to consistent conventional definition—actually subtends many forms of constructivism, and that constructivism varies quite widely in the depth of its contingency claims.

Disaggregating the various forms of essentialism and constructivism thus indicates that they are actually intertwined in all but the most extreme ends of their own ranges, and offers the possibility of finding a conceptual location from which pro-gay essentialists and pro-gay constructivists can frame legal arguments that avoid the argument from immutability while not contradicting its empirical predicate. Recent sexuality studies in history, anthropology, and cultural studies vary more or less continuously in the depth of their claim that sexual-orientation categories are socially contingent. All but the most extreme forms of constructivism retain a weak essentialist view of homosexual orientation. And all but the most extreme forms of essentialism permit attention to focus on the social meanings of sexual desire, behavior, and self-description. My proposal is that pro-gay advocates can form litigation strategy at the resulting intersection of essentialism and constructivism. There are distinct legal advantages to this compromise, moreover: Strong essentialism actually supports courts in holding that *Hardwick* forecloses heightened scrutiny; the justifications for heightened scrutiny arise from precisely the social and political elements of sexual-orientation identity that constructivist analysis identifies; and rational basis analysis, because it involves examination of the discriminator's reasons for discriminating, looks not at what gay men, lesbians, and bisexuals really are, but at what we are *thought to be*. Litigating on common ground is thus not only the right thing to do—it is also more likely to work.