

Science, Identity, and the Construction of the Gay Political Narrative

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I. INTRODUCTION

On May 9, 2001, newspapers across the country reported that a study conducted by noted psychiatrist Dr. Robert Spitzer had concluded that homosexuals who were motivated to change their sexual orientation could achieve “good heterosexual functioning.”¹ The breaking news that “Gays Can Change”² and the resulting media frenzy represented the latest in a series of highly publicized scientific studies concerning the nature of same-sex desire.³ Many in the media were openly skeptical of Spitzer’s results,⁴ as the study seemed to contradict a growing public

1. See, e.g., Erica Goode, *Study Says Gays Can Shift Sexual Orientation*, N.Y. TIMES, May 9, 2001, at A24 (reporting results of study); Shankar Vedantam, *Studies on Gays Yield Conflicting Findings: Effectiveness of Efforts to Change Orientation Through Counseling Disputed*, WASH. POST, May 9, 2001, at A13 (comparing Spitzer study with conflicting study). Based on 45 minute telephone interviews with 143 men and 57 women, Spitzer concluded that sixty-six percent of the men and forty-four percent of the women had achieved “good heterosexual functioning.” Vedantam, *supra*. Under the terms of the study, “good heterosexual functioning” was achieved when an individual reported “having been in a ‘loving and emotionally satisfying heterosexual relationship’ for the year leading up to the interview, having engaged in satisfying heterosexual sex at least monthly and having never or rarely thought of same-sex partners during heterosexual sex.” Goode, *supra*, at A24.

2. See, e.g., Tamra Santana, *Study Finds Some Gays Can Change Orientation, Newspapers Say*, BLOOMBERG NEWS, May 9, 2001 (reporting “gays can change”); Robert H. Knight, *‘Gays’ Can Change, Psychiatrist Tells APA* (May 9, 2001), at http://cwfa.org/library/family/2001-05-09_hs-change.shtml (last visited June 19, 2001).

3. The most celebrated of these scientific pronouncements was the 1993 genetic linkage study involving gay men published by researchers at the National Cancer Institute. Dean Hamer, et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, SCIENCE, July 16, 1993, at 321. Most closely associated with the lead researcher, Dr. Dean Hamer, the report became known as the “Gay Gene” study. See, e.g., Jerry E. Bishop, *Research Points Toward a ‘Gay’ Gene*, WALL ST. J., July 16, 1993, at B1.

4. See, e.g., Patrice Wingert, *Straight Talk*, NEWSWEEK (May 10, 2001), at <http://www.newsweek.com/archives.html> (last visited Nov. 19, 2002) (stressing similar study showing dramatically different results released at same conference as Spitzer’s); Jeffrey Klugar, *Can Gays Switch Sides? An Inflammatory Report Rekindles Old Arguments About Whether Homosexuality Is a Matter of Choice*, TIME, MAY 21, 2001, at 62 (asserting even if gays could “swear off one kind of sex and grimly slog away at another, that doesn’t alter their basic orientation”); see also Chuck Colbert, *From Gay to Straight Remains a Path Unproven*, BOSTON GLOBE, May 13, 2001, at E4. This skepticism was compounded by the fact that Spitzer’s study also directly contradicted a second study released at the same time that concluded a successful “heterosexual shift” in sexual orientation was extremely unlikely. Vedantam, *supra* note 1, at A13. Both studies were presented at the annual meeting of the American Psychiatric Association. *Id.* The second study was conducted by Ariel Shidlo and Michael Schroeder and was based on interviews with 202 gay men and lesbians who had been in therapy to change their sexual orientation. *Id.* The results were strikingly divergent from those obtained by Spitzer and indicated that “178 reported that their efforts ‘failed,’ many were harmed by the attempt to change and only 6 achieved what the researchers called a ‘heterosexual shift.’” Goode, *supra* note 1, at A24. This represents a three percent “success” rate. Wingert, *supra*. Spitzer had reported a sixty-six percent success rate among men and forty-four percent among women. Goode, *supra* note 1, at A24.

understanding that sexual orientation has a biological component and is exceedingly difficult, if not impossible, to alter.⁵ With Spitzer's report, scientific studies regarding the nature of same-sex desire were beginning to seem as contradictory and confusing as the constant barrage of scientific pronouncements regarding the benefits of certain food groups: one day broccoli will reduce the risk of cancer, whereas the next day, it will not.⁶

The organizations on either side of the debate over gay civil rights, however, could not afford the detached skepticism expressed by the media.⁷ To pro-gay and pro-family organizations, Spitzer's report had far reaching political ramifications because each side has constructed its arguments for and against civil rights protections for gay men and lesbians around a particular vision of same-sex desire.⁸ If Spitzer's study offered reliable evidence that "Gays Can Change," it would undermine

5. See EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 230 (1999) (discussing increase in number of people who ascribe a biological or genetic cause of homosexuality). Stein asserts that this increase is "more than the evidence seems to warrant." *Id.* According to a 1977 Gallup poll, only thirteen percent of Americans believed that homosexuality was inborn. Mark Schoofs, *Straight to Hell*, *VILLAGE VOICE*, Aug. 11, 1998, at 56. That number had increased to thirty-one percent by 1996. *Id.* By 2001, the number of respondents who believed that homosexuality is something "a person is born with" had risen to 40 percent. See Ontario Consultants on Religious Tolerance, *U.S. Public Opinion Polls on Homosexuality*, ReligiousTolerance.org (July 10, 2001), at http://www.religioustolerance.org/hom_poll2.htm (last visited Aug. 4, 2002) (reproducing Gallup results from 1977 through 2001).

6. See, e.g., Gary Taubes, *What If It's All Been a Big Fat Lie?*, *N.Y. TIMES MAG.*, July 7, 2002, at 22 (questioning conventional wisdom of low-fat high-carbohydrate diets).

7. This Article identifies the organizations and advocates on either side of the debate as either "pro-gay" or "pro-family." Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 *HOFSTRA L. REV.* 401, 403 (2002). The term "pro-gay" is more often used than the lone adjective "gay" in order to include those organizations such as the American Civil Liberties Union and People for the American Way, which, although not primarily "gay" organizations, have well developed pro-gay policies.

"Pro-family" refers to organizations and advocates who pursue a conservative political and social agenda often informed by evangelical Christian thought. These organizations, such as Concerned Women for America and Family Research Council, have pronounced anti-gay policies. However, they refer to themselves as "pro-family" in order to stress their commitment to preserving (or imposing) policies that support a particular vision of the American family. It is a mistake to view these organizations as part of a political fringe. Their views reflect a behavior-based understanding of homosexuality that continues to influence the policies and laws regulating same-sex desire. They also engage in an aggressive program of litigation and lobbying to further their anti-gay agenda. In this regard, they deploy reconfigured anti-gay rhetoric that strengthens the traditional behavior-based understanding of homosexuality. See generally DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1997); JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S* (1996).

8. Knauer, *supra* note 7, at 403. Pro-gay advocates advance an understanding of homosexuality as an "immutable, unchosen, and benign characteristic." *Id.* Pro-family advocates offer a counter-vision where homosexuality is an immoral, freely chosen, sexual behavior. *Id.*

the pro-gay position that gay men and lesbians should have civil rights protections because homosexuality is an immutable characteristic.⁹ The study would then necessarily bolster the pro-family position that gay men and lesbians do not deserve such protections because homosexuality is a chosen behavior.¹⁰

In the days following the release of Spitzer's study, as morning news programs and cable talk shows grappled with the nature of same-sex desire, pro-gay and pro-family organizations mobilized to either deride or applaud Spitzer's findings.¹¹ They issued competing press releases, jockeyed for air time, and tried valiantly to establish or dispute that the study had an anti-gay bias.¹² Apparently unaware that Spitzer had led the efforts of the American Psychiatric Association to declassify homosexuality as a mental disorder in 1973, some pro-gay organizations attempted to characterize Spitzer as an anti-gay activist whose findings were necessarily suspect.¹³ In the end, the controversy regarding whether

9. HERMAN, *supra* note 7, at 72-73. Herman notes that pro-family organizations "identified immutability early on as a significant battleground of debate on gay issues." *Id.* Spitzer's study would also strengthen the claims of the ex-gay movement that gay men and lesbians can successfully "come out of homosexuality." See Family Research Institute, *Toward Hope and Healing for Homosexuals* (Sept. 15, 1998), at <http://www.family.org/research/papers/a0002798.html> (last visited June 19, 2001) (an ex-gay counter-narrative). In recent years, pro-family organizations have embraced the ex-gay message as a way to disprove pro-gay claims of immutability. HERMAN, *supra* note 7, at 58.

10. HERMAN, *supra* note 7, at 72-73.

11. See, e.g., ABC News Transcripts, *Good Morning America*, May 9, 2001 (reproducing Diane Sawyer interview with Spitzer).

12. See, e.g., Human Rights Campaign, *New Study on Conversion Therapy is Biased and Unscientific, HRC Says: Researcher Had Ties to Anti-Gay Political Extremists* (May 9, 2001), at <http://www.hrc.org/newsreleases/2001/010509exgay.asp> (last visited July 17, 2001) (offering a pro-gay rebuttal); Nat'l Ass'n for Research and Therapy of Homosexuality, *Historic Gay Advocate Now Believes Change Is Possible* (May 9, 2001), at <http://www.narth.com/docs/spitzer3.html> (last visited July 12, 2001) (explaining that most of Spitzer's research subjects were referred by ex-gay organizations).

13. See Chris Bull, *Much Ado About Changing*, THE ADVOCATE, June 19, 2001, at 30 (noting both Human Rights Campaign and the National Lesbian and Gay Task Force erroneously associated Spitzer with anti-gay political biases); RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 123-38 (1981) (explaining Spitzer's role in the declassification of homosexuality as a mental disorder). Although it is true that Spitzer identified many of his subjects with the help of ex-gay organizations, Spitzer continues to support broad civil rights protections for gay men and lesbians, as he did in 1973 when he drafted the APA civil rights proposal to accompany the declassification of homosexuality as a mental disorder. See Bull, *supra* (reporting Spitzer's strong support of gay civil rights protections). Predictably, ex-gay organizations such as Exodus International and the National Association for Reparative Therapy (NARTH) highlighted Spitzer's earlier activism on behalf of homosexuals and asserted that his reputation as a "gay advocate" would force people to take the study seriously. Exodus North America, *"Some Gays Change," Prominent Psychiatrist Says* (May 9, 2001), at <http://www.exodusnorthamerica.org/news/pressrel/a0000921.html> (last visited May 22, 2001) (quoting Dr. Nicolosi, a proponent of reparative therapy and the founder of NARTH).

“Gays Can Change” quickly devolved into a battle of competing truth claims regarding the nature of same-sex desire—claims that science is arguably no closer to resolving today than it was in the late nineteenth century when the sexologists first identified the homosexual as a legitimate object of study.¹⁴

The fact that Spitzer’s relatively small study of 200 subjects culled from the ranks of ex-gay ministries and reparative therapy clinics could adversely affect the legal status of gay men and lesbians illustrates the folly of constructing a civil rights movement on an uncertain and shifting foundation of scientific knowledge.¹⁵ The strong statements of immutability emanating from the pro-gay camp are based on a handful of scientific studies and, therefore, it is to be expected that a study of 200 subjects reporting contrary findings could prove very disruptive.¹⁶ By premising their rights claims and related appeals to equality principles on assertions of immutable status, pro-gay advocates have entrusted the success of a major social and political movement to the reliability of a few inconclusive studies concerning, *inter alia*, the size of the hypothalamus in the cadavers of gay men and the inner ears of lesbians.¹⁷

Throughout the controversy, Spitzer claimed he was trying to chart a middle course. Vedantam, *supra* note 1, at A13. In a WASHINGTON POST interview, Spitzer explained his position as follows: “I am just trying to be a scientist. The whole thing is so polarized and everybody takes positions. The Christian Right says ‘You should change.’ The gay position is, ‘you shouldn’t change.’ And my position is, ‘You can change, if you want to.’” *Id.*

14. For a discussion of the early sexologists, see *infra* text accompanying notes 51-82. Foucault asserted that the sexologists’ act of naming created the modern homosexual. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans., 1978) (stating that “the medical category of homosexuality was constituted from the moment it was characterized”). Any literal claim that homosexuals as a group emerged in response to the creation of the scientific category has been refuted by an emerging historical consensus that group identity preceded the pronouncements of the sexologists. See Knauer, *supra* note 7, at 419. This notwithstanding, Foucault’s assertion regarding the creation of the modern homosexual remains the starting-point in the ongoing essentialist/constructionist debate. See STEIN, *supra* note 5, at 93-116 (critiquing both constructionist and essentialist positions); Knauer, *supra* note 7, at 418-22 (discussing Foucault’s claims regarding the impact of the early sexologists on homosexual identity).

15. Goode, *supra* note 1, at A24. Spitzer’s study consisted of 200 subjects: 143 men and 57 women who desired to change their sexual orientation and who had sought counseling or other assistance. *Id.* His conclusions were based on a forty-five-minute telephone interview with each subject. *Id.*

16. See Robert Alan Brookey, *Bio-rhetoric, Background Beliefs And The Biology of Homosexuality*, 37 ARGUMENTATION AND ADVOCACY 171 (2001) (noting “dependence on biological research places the gay rights movement in a precarious position”).

17. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, SCIENCE, Aug. 30, 1991, at 1034; see also SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY 143-47 (1996) (discussing results of study). The lesbian inner ear study was published in 1998 by a team of researchers based at the University of Texas. *Link to Lesbianism Found*, NY TIMES, Mar. 3, 1998, at F3. The study “measured the function of the cochlea, a key sound amplifier in the inner ear.” *Id.* It reported

The furor unleashed over Spitzer's study, however, also illustrates that the current debate over gay civil rights is at base a dispute over the nature of same-sex desire.¹⁸ The core of the ethnic or identity model of homosexuality advanced by pro-gay forces is the conviction that sexual orientation is an immutable, unchosen, and benign characteristic.¹⁹ This assertion that, in essence, gays are "born that way," has produced a gay political narrative that rests on claims of shared identity (i.e., homosexuals are a blameless minority) and arguments of equivalence (i.e., as a blameless minority, homosexuals deserve equal treatment and protection against discrimination).²⁰ The pro-family counter-narrative is based on a behavioral model of same-sex desire under which homosexuality is an immoral, freely chosen, sexual practice.²¹ This produces an anti-gay political narrative that relies on claims of free will and self-determination (i.e., individuals choose to engage in homosexual acts) and arguments of nonequivalence (i.e., homosexuals are not the same as other deserving minority groups).²² Given the importance placed on establishing the "true" nature of same-sex desire, every scientific pronouncement regarding the nature of same-sex desire is hotly contested and immediately politicized.

that, like men, lesbians had less sensitive amplifiers than heterosexual women and, therefore, the researchers concluded that "the auditory system [of the lesbian subjects] has been masculinized along with whatever brain sites are controlling sexual preference." R. Stein, *Study Suggests Biological Basis for Lesbianism*, WASH. POST, Mar. 3, 1998, at A09 (quoting lead researcher).

18. Knauer, *supra* note 7, at 403.

19. *Id.* This Article refers to these core beliefs collectively as the "identity model" of homosexuality. Jagose describes the same concept as an "ethnic model of identity." ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 60 (1996). Jagose explains that the ethnic model is "committed to establishing gay identity as a legitimate minority group, whose official recognition would secure citizenship rights for lesbian and gay subjects." *Id.* at 61.

20. The gay political narrative animates the identity politics practiced by contemporary pro-gay organizations and advocates. It is grounded on an identity-based understanding of homosexuality that, in turn, relies increasingly on the burgeoning bio-science of immutability. Jagose provides a concise critique of gay identity politics from a queer theory perspective. *See generally id.*

21. Knauer, *supra* note 7, at 403. Herman notes that pro-family organizations hold that "homosexual practice is an incontrovertible sin" and "homosexuality is a chosen behavior." HERMAN, *supra* note 7, at 69. As noted earlier, this behavioral model reflects the understanding of homosexuality that informs much of the existing policies and laws regulating same-sex desire. *See supra* note 7. However, the pro-family organizations and advocates have reinvigorated this understanding with ideological innovations such as reparative therapy, ex-gay testimony, and the "special rights" argument.

22. The anti-gay political narrative directly challenges the ordering principles of gay identity politics. The emphasis on behavior contradicts immutability and attempts to forge minority status. By reducing homosexuality to behavior, the anti-gay political narrative attempts to recast pro-gay claims of equivalence as a campaign for "special rights" based solely on sexual tastes. *See* HERMAN, *supra* note 7, at 133-36 (discussing "special rights" strategy).

At the risk of providing an out of context quote for some future pro-family publication, this Article contends that the pro-gay insistence on immutability represents the Achilles' heel of the contemporary gay political narrative.²³ Claims of immutability rest on a shaky factual basis, produce stable desexualized gay subjects with no transformative value, and they are ultimately unresponsive to the pro-family characterization of homosexuality as a chosen and immoral behavior. Moreover, the supposed strategic or pragmatic benefits of asserting an unchosen and unchangeable sexual orientation (i.e., group cohesion, the ability to secure third-party alliances, and legal utility) are in many instances illusory, or at least highly debatable. This Article concludes that the resources currently expended to promote and protect the notion of immutability could be more profitably allocated to establishing the inherent morality of same-sex desire and same-sex relationships.

Part II of this Article highlights the danger inherent in linking civil rights protections to a dubious and incomplete science by placing the contemporary queer bio-science of immutability in the larger historical context of prior medico-scientific models of homosexuality.²⁴ It notes that although inverts and homosexuals embraced the potential emancipatory value of various scientific models generations ago, science has never lived up to its promise to liberate gay men and lesbians.²⁵ The goal of the pro-gay movement should be to secure for every individual the freedom to choose a partner of the same sex without having to submit

23. Pro-family organizations often pepper their publications with quotes from pro-gay advocates who express skepticism regarding either immutability or the efficacy of identity politics in general. See, e.g., Yvette C. Schneider, *The Gay Gene: Going, Going . . . Gone* (Apr. 24, 2000), at <http://www.frc.org/iss/hsx/retrieve.cfm?get=IS00D2> (last visited June 19, 2001) (quoting Edward Stein's *Mismeasure of Desire* three times).

24. Garland E. Allen, *The Double-Edged Sword of Genetic Determinism: Social and Political Agendas in Genetic Studies of Homosexuality, 1940-1994*, in *SCIENCE AND HOMOSEXUALITIES*, 264 (Vernon Rosario ed., 1997). Garland E. Allen expresses this view succinctly: "civil rights or any form of social justice should never hinge on biology." *Id.* He continues, "[b]iology may inform us about how to deal medically with particular human characteristics, but the decision to treat or not treat, or whether treatment is even necessary, is a social not a biological decision." *Id.*

25. Henry Minton has published a comprehensive study of the relationship between homosexual activists and science in the United States from the 1930s until the 1973 decision of the American Psychiatric Association to declassify homosexuality as a mental disorder. See generally HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* (2002). Discussing the longstanding connection between homosexuality and scientific research, Minton writes: "From the origins of the first homosexual rights movement, which took place in Germany in the late nineteenth century, there has been an ongoing effort to use scientific knowledge as one means to emancipate homosexual men and women from the tyranny of moral ostracism, legal punishment, and medical treatment." *Id.* at 3; see also JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* (1999).

to a DNA test or to wait for such a test to be developed.²⁶ To pin that freedom on the existence of an unproven biological determinant is not only risky, it also diminishes the very idea of freedom.

Part III introduces the pro-family counter-narrative and questions the validity of the first two of the three strategic benefits purportedly offered by the identity model, namely it fosters group cohesion because it reflects the beliefs of a large number of gay men and lesbians, and it facilitates alliance building because third parties who believe that sexual orientation is immutable are more likely to support gay rights.²⁷ The group cohesion fostered by the identity model is a necessarily exclusionary project where stable gay subjects are coded white and male and definitely not bisexual or transgendered.²⁸ The production of stable gay subjects who are firmly disassociated from their sexuality, or any suggestion of physicality, fails to provide a transformative vision of sexuality and simply reinscribes the existing hetero-homo binary.²⁹ Moreover, the retreat of the gay political narrative to biological theories and claims of immutability presents an understanding of homosexuality with a nonvolitional core that is ultimately disempowering and thoroughly abdicates the claims of individual autonomy and self-determination that animated the early gay rights movement in the period immediately following Stonewall.³⁰ In the end, even if the argument that gay men and lesbians cannot help who they are, and presumably what they do may win points in opinion polls, the cost of popular support for gay civil rights should not be the acceptance of a fiction regarding the fixity of object choice and the immutability of sexual orientation.³¹ This

26. Hamer, who was the lead researcher on the 1993 “gay gene” study, dismisses the possibility of creating an accurate genetic test for homosexuality. DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 218 (1994) (asserting that accuracy of test would be “low”). Pro-gay advocates have expressed concern that genetic information concerning homosexuality may be misused. *Id.* at 214-19. In fact, the question of whether a pre-natal test would invite selective abortions was the plot of a popular play *The Twilight of the Gods*. *Id.* at 217. Hamer’s 1993 study contained a concluding paragraph urging future researchers to resist such unethical applications of genetic research. Hamer, *supra* note 3, at 321.

27. See *infra* text accompanying notes 213-222.

28. See JAGOSE, *supra* note 19, at 62 (noting “[i]ronically, given its origins in race-based politics, the ethnic model’s gay and lesbian subject was white”).

29. This is because the identity model views individuals as either irreversibly homosexual or irreversibly heterosexual.

30. See JAGOSE, *supra* note 19, at 30-43 (discussing the gay liberationist strategy emerging after Stonewall).

31. Public opinion polls indicate that individuals who believe that homosexuality is inborn are more likely to support gay civil rights initiatives. See *infra* text accompanying notes 219-229.

approach denies the power of human agency and the many vagaries of the human heart.

Part IV discusses the legal arguments deployed by the gay political narrative, specifically the arguments of shared identity and equivalence. The argument of shared identity attempts to establish an essence that is distinct from sexuality, a formidable task when the shared identity in question is sexual orientation. Although this bifurcation of status and conduct supports legal arguments which may side-step *Bowers v. Hardwick*,³² it rests on fundamentally disingenuous claims, such as when service members aver that the statement “I’m gay” has nothing to do with the intent or desire to engage in a particular kind of sex or when Assistant Scout Master James Dale argues that the statement “I’m gay” is nothing more than self-identifying speech.³³ Arguments of equivalence build on the notion of shared identity and assert that being gay is “no different than” or “the same as” being a member of any other protected minority. These arguments may advance attempts to secure enhanced constitutional protections for sexual orientation, but they also risk “overstating the reality of gay oppression [and] understating its singularity.”³⁴

Finally, Part V concludes that pro-gay arguments that rely on queer bio-science to establish a biological determinant or predisposition misapprehend the nature of the pro-family characterization of homosexuality and the behavior-based understanding of homosexuality that continues to inform the laws and policies regulating same-sex desire. All pro-family discussions of homosexuality are premised on the belief that individuals are imbued with free will and that homosexuality is an immoral behavior.³⁵ The discovery of a bona fide “gay gene” would be of limited utility against such a blanket moral condemnation of homosexual acts because pro-family organizations are quite clear that they would continue to urge abstinence, just as one would urge abstinence of an individual who might have a genetic predisposition towards alcoholism.³⁶

32. 478 U.S. 186, 196 (1986) (holding homosexual sodomy not protected under constitutional right to privacy).

33. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). For purposes of the U.S. military, the statement “I’m gay” is considered prohibited homosexual conduct. See *infra* note 290.

34. Nancy J. Knauer, “*Simply So Different*”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 Ky. L.J. 997, 1039 (2001).

35. Ironically, the pro-gay forces advance a view of human sexuality that is preordained and inescapable, whereas their more conservative opponents purport to champion autonomy and free will.

36. Thus, pro-family groups do not concede that moral absolutism necessarily flows from the claim that homosexuals are “born-that-way.” The acceptance of ex-gays might signal a

II. SCIENTIFIC EXPLANATIONS FOR THE HOMOSEXUAL CONDITION

The science of immutability that undergirds the contemporary gay political narrative belongs to a longstanding tradition that attempts to explain or define the homosexual condition in scientific terms. Speaking with some generality, the early sexologists inaugurated this tradition in the late nineteenth century with their theories of congenital inversion.³⁷ The congenital school was later supplanted by a psychoanalytic model where an experiential explanation of the homosexual condition offered diagnosis and therapeutic intervention.³⁸ This model predominated from the 1930s until the 1973 decision by the American Psychiatric Association (APA) to declassify homosexuality as a mental disorder.³⁹ With the end of diagnosis, scientific research shifted to exploring a biological or genetic cause of homosexuality, and the emerging bio-scientific model of homosexuality gained considerable influence during the 1990s with the release of several well publicized studies.⁴⁰ By asserting the primacy of a scientific understanding of homosexuality, each of these various models of homosexuality challenged, but never completely displaced, the traditional discourse of same-sex desire; a reinforcing amalgam of sin and criminal transgression.

Proponents of the science of immutability often point to the high level of acceptance it enjoys among gay men and lesbians as proof that the theory of a biological cause must be correct.⁴¹ However, during its period of scientific predominance, each of the preceding theories was also accepted by a considerable number of inverts and homosexuals according to whom the given explanation reflected their lived reality.⁴² Just like the current day gay men and lesbians who eagerly await news of a “gay gene,” many inverts and homosexuals welcomed scientific inquiry into their nature because it had the potential to remove them from the

willingness to absolve homosexual orientation if it were proven to be genetic. However, such absolution would in no event extend to homosexual acts.

37. For a discussion of the theories of the early sexologists, see *infra* text accompanying notes 51-82.

38. For a discussion of the psychoanalytic model, see *infra* text accompanying notes 85-108.

39. For a discussion of the declassification of homosexuality as a mental disorder, see *infra* text accompanying notes 109-119.

40. For a discussion of the emerging body of queer bio-science, see *infra* text accompanying notes 129-162.

41. LEVAY, *supra* note 17, at 7 (asserting “gay people have a certain privileged insight into their own natures”). LeVay states that the new queer bio-science may “help the larger society recognize what gays and lesbians have generally believed about themselves: that their sexual orientation is a central, defining aspect of their identity.” *Id.* at 9.

42. See generally *id.*

overlapping jurisdictions of the church and the criminal law.⁴³ They also recognized that they could marshal the weight of objective scientific authority on their own behalf and use it instrumentally to argue for positive change in their political and legal status, an example of what Foucault termed “reverse discourse.”⁴⁴

To date, not one of the scientific models has established the irrefutable cause of homosexuality, or, for that matter, the cause of heterosexuality.⁴⁵ Nor have any of the models successfully displaced the discourse of sin and transgression which stubbornly continues to define same-sex desire.⁴⁶ In fact, it cannot even be said that each new theory completely supplanted the preceding model, as each model remained contested during its period of predominance.⁴⁷ Even today, a group of psychoanalysts affiliated with pro-family and ex-gay organizations rejects outright any biological explanation of homosexuality and holds fast to a psychoanalytic model that is characterized by gender inversion and constrained by a fierce morality discourse.⁴⁸ Once deployed,

43. This longstanding practice of looking to science illustrates the shared belief that once the true nature of same-sex desire is established, liberation will follow. See TERRY, *supra* note 25, at 178-79, 301-09, 387-88. The belief in the liberatory value of this science may seem incongruous given that from a distance of many decades we have come to view both the inversion and the psychoanalytic models of homosexuality as exceedingly conservative life-denying views of sexual orientation. To some extent, this Article suggests that upon reflection the identity model of homosexuality crafted from bits and pieces of queer bio-science may appear no better than the earlier scientific attempts at explanation and categorization. MINTON, *supra* note 25 (discussing supposed liberatory attributes of scientific models).

44. FOUCAULT, *supra* note 14, at 101. Foucault described “reverse discourse as the ability of the subjects of study to appropriate the language and pronouncements of their elite observers and use it to articulate a program for reform.” *Id.* Foucault argued that the sexologists “made possible the formation of a ‘reverse’ discourse: homosexuality began to speak [o]n its own behalf, to demand that its legitimacy or ‘naturalness’ be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.” *Id.*

45. Heterosexuality, like homosexuality, is also a social construct. See JAGOSE, *supra* note 19, at 16. Jagose notes that heterosexuality “is equally a construction whose meaning is dependent on changing cultural models.” *Id.* at 17. However, its formulation as a cultural construct has not attracted as much attention as that of homosexuality because of its presumed naturalness. See generally JOHNATHAN KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995).

46. The morality discourse surrounding homosexuality separates gay men and lesbians from other minority groups. Michael Warner explains that “[t]here have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not whether to be one.” Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* at xviii (Michael Warner ed., 1993).

47. This is clearly true with respect to public opinion which never wholly accepted a single theory. However, even within the medical community the various theories remained contested. See Erin G. Carlson, “A *Finer Differentiation*,” *Female Homosexuality and the American Medical Community, 1926-1940*, in *SCIENCE AND HOMOSEXUALITIES*, *supra* note 24, at 175 (noting “the medical discourse on homosexuality was never uniform”).

48. See JOSEPH NICOLSI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY* 3 (1991) (discussing reparative therapy).

scientific explanations for homosexuality enjoy considerable longevity in the popular imagination.⁴⁹ Anti-gay stereotypes incorporate strong notions of gender inversion that were so central to the early sexologists, as well as the specter of the sexual psychopath which was popularized by the psychoanalytic model.⁵⁰ As discussed below in Part IV, echoes of these earlier scientific models of homosexuality can be found throughout the laws and policies regulating same-sex desire.

A. *Congenital Predisposition: Inversion or “Contrary Sexual Feeling”*

The early sexologists, notably Richard von Krafft-Ebing and Havelock Ellis, directly challenged the jurisdiction of the church and the criminal law over same-sex sexuality with the production of an elaborate taxonomic scheme of inversion or “contrary sexual feeling.”⁵¹ They created a medico-scientific category of the invert or homosexual who existed as a distinct type of person with an identifiable constitution.⁵² At

49. See generally *id.*

50. These stereotypes of gender inversion and sexual rapaciousness continue to form the basis of much of the anti-gay activities and pronouncements of pro-family organizations. The notion of gender inversion even continues throughout much of the new queer bio-science. See STEIN, *supra* note 5, at 203. Stein asserts that “[t]he inversion assumption is present to a greater or lesser degree in most biological research on sexual orientation from the late nineteenth century to the present.” *Id.*

51. Karl Westphal, a German physician, is generally identified as the author of the first medical article on homosexuality published in 1869, although he referred to it as “contrary sexual feeling.” TERRY, *supra* note 25, at 36, 45. Ronald Bayer establishes a much earlier date, noting that a description of homosexuality, although not the term, appeared in the medical literature in 1825. BAYER, *supra* note 13, at 18-19 (citing Sir Alexander Morison’s 1825 “Outlines on Lectures on Mental Disease”). Foucault used the date of Westphal’s article to establish the creation of the modern homosexual, but was one year off. FOUCAULT, *supra* note 14, at 39 (using date of 1870); JAMES D. STEAKLEY, *THE HOMOSEXUAL EMANCIPATION MOVEMENT IN GERMANY* 9 (1993) (establishing date as 1869, not 1870). Foucault’s influential and much contested pronouncement reads:

[T]he psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized—Westphal’s famous article of 1870 on “contrary sexual sensations” can stand as its date of birth—less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself The sodomite had been a temporary aberration; the homosexual was now a species.

FOUCAULT, *supra* note 14, at 39 (footnote omitted).

52. The term “homosexuality” is credited to journalist Karoly Maria Benkert who used the term in an 1868 letter to the German sexologist and homosexual activist Karl Heinrich Ulrichs. TERRY, *supra* note 25, at 44. Berkert, who later went by the name Kertbeny, introduced the term to public discourse in an 1869 open letter to the Prussian Minister of Justice urging for the repeal of criminal sanctions for sodomy on the grounds that it was both innate and a matter of personal privacy. Karoly Maria Benkert, *An Open Letter to the Prussian Minister of Justice* (1870), in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 67 (Mark Blasius & Shane Phelan eds., 1997). Ulrichs coined the term “Urning” to describe the

the time, expressions of same-sex sexuality were just one variation in a broad range of sexual practices that were subject to religious and criminal proscriptions.⁵³ The criminal offense of sodomy applied to crimes against nature committed “with mankind or beast.”⁵⁴ A man who could commit sodomy with another man, a woman, or an animal,⁵⁵ whereas today, as Janet Haley suggests, sodomy is a “metonym” for homosexual.⁵⁶

“third sex” within his larger theory of human sexual attraction. See Hubert Kennedy, *Karl Heinrich Ulrichs: First Theorist of Homosexuality*, in SCIENCE AND HOMOSEXUALITIES, *supra* note 24, at 30 (stating “Ulrichs never used ‘homosexual,’ preferring Urning and the positive connotations it had for him”). Ellis and Krafft-Ebing both used the terms “inversion” and “homosexuality.” See, e.g., Havelock Ellis & John Addington Symond, *Sexual Inversion* (1897), in NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK 96 (Chris White ed., 1999); R. VON KRAFFT-EBING, *Psychopathia Sexualis: A Medico-Legal Study* 230 (Charles Gilbert Chaddock trans., F.A. Davis Co. 7th ed. 1920).

53. Bayer notes that the relatively few medical references to homosexuality were deeply influenced by religious proscriptions. BAYER, *supra* note 13, at 18. Bayer explains, “what medical discussion of homosexuality did take place clearly bore the mark of the more powerful religious tradition.” *Id.*

54. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 157 (1999). In England, sodomy was first criminalized during the reign of Henry VIII. *Id.* The penalty for “the detestable and abominable vice of buggery committed with mankind or beast” was death. *Id.* Eskridge reports that the “[t]he English crime of buggery was generally applicable in the American colonies, either as a matter of common law or statutory decree.” *Id.* Under English law, the death penalty for sodomy was not removed until the Offences Against the Person Act of 1861. The Offences Against the Person Act of 1861, in NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK, *supra* note 52, at 44. Both Sir Edward Coke and Sir William Blackstone believed that the very nature of the act was unmentionable and described sodomy as “the infamous crime against nature.” ESKRIDGE, *supra* note 54, at 158. In his *Commentaries*, Blackstone promised his readers that he would not “dwell any longer upon a subject, the very mention of which is a disgrace to human nature.” 4 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 215 (1769). Instead, he elected “to imitate . . . the delicacy of our English law, which treats it, in it’s [sic] very indictments, as a crime not fit to be named; *peccatum illud horribile, inter christianos non nominandum.*” *Id.*

55. The 1831 *Digest of the Criminal Law of England* attempted to define “this detestable crime.” EDWARD E. DEACON, *DIGEST OF THE CRIMINAL LAW OF ENGLAND* (1831), in NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK, *supra* note 52, at 27. Describing the offense as “revolting,” “disgusting,” and “dreadful,” the definition still lacks specificity: “it is a carnal knowledge committed against the order of nature by man with man, or in the same unnatural means with woman, or by man or woman in any manner with beast.” *Id.* Under English law, sodomy did not include oral sex. *Id.* The Labouchere Amendment to the Criminal Law Amendments Act of 1885 criminalized oral sex between men with the creation of a separate criminal offense of “gross indecency with another male person.” ESKRIDGE, *supra* note 54, at 158 (quoting Amendment). Eskridge reports that in the United States a number of states later amended their sodomy laws to include oral sex. *Id.*

56. Janet Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1737 (1993).

Ellis defined inversion “as largely a congenital phenomenon, or . . . as a phenomenon which is based on congenital conditions.”⁵⁷ Krafft-Ebing characterized inversion as “a process of development of the psycho-sexual character” which manifests as “a sexual instinct . . . which is the exact opposite of that characteristic of the sex to which the individual belongs.”⁵⁸ Working from a strict presumption of heterosexuality, the sexologists concluded that a woman who desired a woman was acting like a man; she was experiencing “contrary sexual feeling.”⁵⁹ Accordingly, the tell-tale inversion at the core of the sexologists’ theories was that of object choice.⁶⁰

Within the general category of invert, there were sub-categories which separated the congenital inverts from those exhibiting acquired inversion.⁶¹ Krafft-Ebing further divided these sub-categories based on gradations of inversions; in some ways foreshadowing the famous Kinsey scale which measured the degree of same-sex desire on a rating scale of zero to six.⁶² Unlike the Kinsey scale which measured the strength of object choice, the Krafft-Ebing gradations of inversion measured object choice *and* the relative degree of other cross-gender performance.⁶³ A contrary object choice was sufficient to warrant the

57. HAVELOCK ELLIS & JOHN ADDINGTON SYMONDS, *Sexual Inversion* (1897), in NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK, *supra* note 52, at 99.

58. KRAFFT-EBING, *supra* note 52, at 187.

59. *Id.*

60. Foucault asserted that under the sexologists’ theories the newly minted homosexual “was characterized . . . less by a type of sexual relations than by a certain way of inverting the masculine and the feminine in oneself.” FOUCAULT, *supra* note 14, at 43; *see also* EVE KOSOFSKY SEDWICK, *EPISTEMOLOGY OF THE CLOSET* 44-47 (1990) (discussing Foucault’s critique of inversion).

61. KRAFFT-EBING, *supra* note 52, at 187. For example, Krafft-Ebing considered congenital inversion to be at work where an individual only ever experienced “contrary sexual feelings.” *Id.* However, his diagnosis would be acquired inversion where the individual at one point experienced “normal” attraction to the opposite sex, but later develops “contrary sexual feeling.” *Id.*

62. *See* Knauer, *supra* note 7, at 415-16 (restating four stages of “psychical hermaphroditism,” “homo-sexual individuals, or urnings,” “effemination and viraginity,” and “androgyny and gynandry”). The Kinsey scale measures only object choice with a score of zero representing exclusive opposite-sex attraction and a score of six representing exclusive same-sex attraction. *See* Stephanie H. Kenen, *Who Counts When You’re Counting Homosexuals? Hormones and Homosexuality in Mid-Twentieth-Century America*, in *SCIENCE AND HOMOSEXUALITIES* 208-09 (Vernon A. Rosario ed., 1997) (discussing Kinsey’s “heterosexual-homosexual rating scale”).

63. *See* Knauer, *supra* note 7, at 416. The first two of the four stages on Krafft-Ebing’s inversion scale measured the degree of non-normative objective choice. *Id.* In the first stage, “contrary sexual feeling” is primary, but there is some heterosexual attraction. KRAFFT-EBING, *supra* note 52, at 230 (describing “psychical hermaphroditism”). In stage two, the “contrary sexual feeling” is exclusive. *Id.* at 255 (describing “homo-sexual individuals or Urnings”). Only

classification of invert, and additional manifestations of cross-gender behavior, such as dress and mannerisms, would consign the invert to increasingly more severe degrees of inversion.

For Krafft-Ebing and Ellis, inversion was a natural, albeit not normal, biological variation. Ellis described inversion as “a ‘sport’ or variation, one of these organic aberrations which we see throughout living nature, in plants and in animals.”⁶⁴ The naturalness of inversion generally mitigated impulses toward therapeutic intervention, although a patient’s prognosis was often dependent upon whether he was diagnosed with acquired or congenital inversion.⁶⁵ Just because inversion was natural, however, did not make it the equivalent of heterosexuality. In the sexologists’ world, an invert was clearly considered degenerate, as in fallen from the genus.⁶⁶ Later, psychiatrists would simply refer to homosexuality as “suboptimal.”⁶⁷

Even though homosexuality was viewed as degenerate, the fact that the sexologists understood inversion as a natural human variation argued against criminal sanction. Both Krafft-Ebing and Ellis claimed that scientific advances in the study of human sexuality should direct legal reform with regard to the regulation of sexuality.⁶⁸ Indeed, Krafft-Ebing’s famous *Psychopathia Sexualis*, in which he catalogues a bewildering array of human sexual variations, was sub-titled “a medico-legal study.”⁶⁹ As Krafft-Ebing explained in his *Preface*:

in stages three and four does the inversion manifest itself with respect to the individual’s “character and mental personality.” *Id.* at 255, 279, 304 (describing stages two, three, and four).

64. Ellis & Symonds, *supra* note 52, at 101. Ellis compared the invert “to the congenital idiot, to the instinctive criminal, to the man of genius, who are all not strictly concordant with the usual biological variation . . . but who become somewhat more intelligible to us if we bear in mind their affinity to variations.” *Id.*

65. Knauer, *supra* note 7, at 416. While both Krafft-Ebing and Ellis believed that treatment of congenital inversion would not be fruitful, Krafft-Ebing considered acquired inversion treatable, and Ellis thought that it was at least preventable through sound social hygiene. *Id.* On the subject of treatment, Ellis concluded that “if we can enable an invert to be healthy, self-restrained, and self-respecting, we have often done better than to convert him into the mere feeble simalcrum of a normal man.” Ellis & Symonds, *supra* note 52, at 104.

66. KRAFFT-EBING, *supra* note 52, at 187. For example, Krafft-Ebing described congenital inversion as “a functional sign of degeneracy.” *Id.* Bayer notes a general interest in the scientific community at the time regarding “the extent to which various forms of degeneracy represented an atavistic reappearance of primitive tendencies.” BAYER, *supra* note 13, at 20.

67. See BAYER, *supra* note 13, at 127 (quoting Spitzer).

68. See KRAFFT-EBING, *supra* note 52, at 230.

69. See *id.* In addition to inversion, the book catalogues numerous human sexual variations and violations, including necrophilia, “[r]ape and lust-murder,” and “[i]mmoral acts with persons in the care of others.” *Id.* at xiv. The last chapter consists of Krafft-Ebing’s scientifically informed recommendations for sex crime legal reform organized by headings of the relevant sections of the German and Austrian criminal law. *Id.* at 378-432.

The importance of the subject [of human sexuality] for the welfare of society, especially forensically, demands, however, that it should be examined scientifically. Only he who, as a medico-legal expert, has been in a position where he has been compelled to pass judgement upon his fellow-men, where life, freedom, and honor were at stake, and realized painfully the incompleteness of our knowledge concerning the pathology of sexual life, can fully understand the significance of an attempt to gain definite views concerning it.⁷⁰

With regard to inverts, Krafft-Ebing argued that the law should “cease to punish them” and that society should not stigmatize them because of the terrible toll it takes on the invert, resulting in “mental despair . . . even insanity and suicide . . . at the very least, nervous disease[.]”⁷¹

In addition to the sexologists, homosexual emancipation organizations, such as the German Scientific-Humanitarian Committee,⁷² individual homosexual social activists, such as Edward Carpenter,⁷³ and homosexual authors, such as Radclyffe Hall,⁷⁴ used the scientifically declared naturalness of homosexuality to argue for legal and social reform. For example, founded in 1887 by Magnus Hirschfeld, the Scientific-Humanitarian Committee lobbied vigorously for the repeal of paragraph 175 of the German Imperial Penal Code criminalizing sodomy.⁷⁵ When Hirschfeld petitioned the Reichstag to repeal section

70. *Id.* at iv. Krafft-Ebing directly challenged the law to be informed by scientific advances, stating “Law and Jurisprudence have thus far given but little attention to the facts resulting from investigations in psychopathy. Law is, in this, opposed to Medicine.” *Id.*

71. *Id.* at 410. Ellis voiced a similar concern regarding the effect of social stigma on the invert, when he wrote that “[t]he invert is not only the victim of his own abnormal obsession; he is the victim of social hostility.” Ellis & Symonds, *supra* note 52, at 104.

72. The Scientific-Humanitarian Committee was the first of several politically active homosexual organizations established in Germany beginning in the late nineteenth century. *See generally* STEAKLEY, *supra* note 51, at 82. Although homosexual organizations proliferated during the Weimar Republic, many were primarily social in nature. *Id.* The elections of 1933 marked the end of the German homosexual emancipation movement. *Id.* at 104-05. In May 1933, the Nazis targeted the Institute of Sexual Science in Berlin which had been founded by Magnus Hirschfeld. *Id.* In order to rid Berlin of “un-German spirit,” the Nazis looted the building and later burned over 12,000 books taken from its libraries in a public ceremony. *Id.* at 104.

73. Edward Carpenter was a British social activist who espoused socialism and was vocal on the topic of the intermediate sex. *See generally* SHEILA ROWBOTHAM & JEFFREY WEEKS, *SOCIALISM AND THE NEW LIFE: THE PERSONAL AND SEXUAL POLITICS OF EDWARD CARPENTER AND HAVELOCK ELLIS* (1977).

74. *See generally* Knauer, *supra* note 7 (discussing Radclyffe Hall’s reliance on the science of the sexologists in her novel *The Well of Loneliness* and ensuing obscenity trials).

75. LEVAY, *supra* note 17, at 232. Paragraph 175 was enacted in 1871 after the conclusion of the Franco-Prussian War and represented a combination of the Prussian and the North German penal codes. STEAKLEY, *supra* note 51, at 21. It provided: “Unnatural vice committed by two persons of the male sex or by people with animals is to be punished by imprisonment; the verdict may also include the loss of civil rights.” *Paragraph 175 of the German*

175, he stressed the biological origin of homosexuality and argued that “no moral blame should be laid on a person for possessing the capacity for such feelings.”⁷⁶ It was an argument that would later be reworked under the identity model to claim not only freedom from criminal regulation, but also affirmative rights and protections based on sexual orientation.⁷⁷

However, it would be a mistake to conclude that individuals with “contrary sexual feeling” only viewed the theory of inversion instrumentally.⁷⁸ In fact, many accepted the science and participated in its production.⁷⁹ Ample anecdotal evidence exists, in the form of memoirs and letters, that individuals with “contrary sexual feeling” were often relieved and grateful to discover the “true” nature of their identity.⁸⁰ As inverts they became part of a transhistorical and cross-cultural community—one that Hirschfeld represented to the Reichstag had existed “at all times, all over the world.”⁸¹ In the words of one of Krafft-Ebing’s readers, the appellation of invert gave many “the comfort of belonging together and not being alone anymore.”⁸²

Imperial Penal Code (1871), in *WE ARE EVERYWHERE* 63 (Mark Blasius & Shane Phelan eds., 1997). The Napoleonic Code had decriminalized sodomy. STEAKLEY, *supra* note 51, at 12. The reach of Paragraph 175 was enhanced by the Nazis to include nine additional homosexual acts, including a kiss or embrace. See generally *id.* at 103-19 (describing fate of homosexuals under National Socialism).

76. LEVAY, *supra* note 17, at 232 (quoting Hirschfeld). LeVay correctly points out that Hirschfeld’s “attempt to deny a volitional element in homosexuality” suffered from two major flaws: he did not have the science to back up his claim and sodomy laws regulate behavior not desire. *Id.* Of course, the same can be said of contemporary claims of immutability. For example, in 1897 Hirschfeld’s petition to the Reichstag submitted on behalf of The Scientific Humanitarian Committee made several bold statements concerning the nature of homosexuality. See Scientific Humanitarian Committee, *Petition to the Reichstag* (1897), in *WE ARE EVERYWHERE* 135 (Mark Blasius & Shane Phelan eds., 1997). Hirschfeld noted that the “real cause of homosexuality” was “practically proved.” *Id.* at 135-36. He also claimed that “scientific research . . . had asserted without exception, that this way of love is constitutional.” *Id.* at 135.

Hirschfeld was a scientist, and his motto was *per scientiam ad justitiam* or “[t]hrough science to justice.” MINTON, *supra* note 25, at 3.

77. See *infra* text accompanying notes 265-270 (discussing arguments of identity and equivalence).

78. MINTON, *supra* note 25, at 12.

79. *Id.* at 14. Homosexuals participated in the sexologists’ studies, at times sending researchers unsolicited accounts of their lives as inverts. *Id.* at 16.

80. Minton reports that Krafft-Ebing received thankful letters from his readers. *Id.* In addition, Hall’s novel *The Well of Loneliness* became the most influential lesbian novel of the century and countless personal stories credit reading the novel with a profound sense of personal self-discovery. See REBECCA O’ROURKE, REFLECTING ON THE WELL OF LONELINESS 114-42 (1989) (discussing results of survey designed to measure impact of *The Well* on lives of individual women).

81. Scientific Humanitarian Committee, *supra* note 76, at 135.

82. MINTON, *supra* note 25, at 16

B. *Mental Disorder and the Psychoanalytic Model*

The early sexologists were empiricists who measured and mapped the bodies of inverts in an attempt to make sense of difference through the process of endless categorization. The human variations they observed were attributed to the existence of a biological predisposition. Psychoanalytic theory, to the contrary, offered an experiential explanation for homosexuality. Informed by an elaborate interior view of psychological development, it discarded the congenital determinants of the early sexologists and instead located the cause of homosexuality in an individual's experience or environment.⁸³ According to this new theory, homosexuals were made, not born.⁸⁴

1. Freudian Psychoanalytic Theory

Freudian psychoanalytic theory characterized homosexuality as a perversion of the normal sex drive that occurred during the course of an individual's natural psychosexual development out of a state of original bisexuality.⁸⁵ Initially, the psychoanalytic model did not endorse a therapeutic response to homosexuality, based on the conviction that homosexuality represented a perversion of the sex drive rather than a neurosis.⁸⁶ On the topic of curing homosexuality, Freud wrote:

One must remember that normal sexuality also depends upon a restriction in the choice of object; in general to undertake to convert a fully developed homosexual into a heterosexual is not much more promising than to do the reverse, only that for good practical reasons the latter is never attempted.⁸⁷

In 1935, Freud wrote his now famous "Letter to an American Mother" where he advised a mother anxious about her son that "[h]omosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a

83. See BAYER, *supra* note 13, at 21 (noting "Freud set himself in sharp opposition to those scientists who claimed that homosexuality was an indication of degeneracy").

84. *Id.*

85. See TERRY, *supra* note 25, at 56 (describing psychoanalytic model of homosexuality "as *perversions* of the normal sex drive caused by the stresses and strains of psychosexual development" as opposed to "a hereditary or congenital defect that manifested itself in sexual inversion") (emphasis in original); see also LESBIANS AND PSYCHOANALYSIS (Judith M. Glassgold & Suzanne Iasenza eds., 1995).

86. BAYER, *supra* note 13, at 26 (noting that Freud was "critical of those whom he termed 'therapeutic enthusiasts'"). Unlike neurosis, which produced pain and discomfort, homosexuality was a source of pleasure: "[p]erversions are the negative of neurosis." *Id.*

87. *Id.* (quoting Freud).

certain arrest of sexual development.”⁸⁸ Saying that it was “a great injustice to persecute homosexuality as a crime,” Freud attempted to reassure the worried mother by noting that “[m]any highly respectable individuals of ancient and modern times have been homosexuals.”⁸⁹ Apparently working from that premise, Freud also advocated that acknowledged homosexuals should be eligible for membership in a psychoanalytic training institute.⁹⁰

This relatively benign view of homosexuality changed in the 1940s with the reappraisal of the etiology of homosexuality by a group now referred to as the “American Freudians.”⁹¹ They rejected the Freudian concept of incipient bisexuality, assumed the potential for universal heterosexuality, and theorized homosexuality as a phobic response to the opposite sex.⁹² As a phobic or neurotic response, the American Freudians viewed homosexuality as potentially responsive to therapeutic intervention.⁹³ This therapeutic optimism, coupled with an unwavering commitment to the inherent heterosexuality of all individuals, led psychiatrists to develop an arsenal of procedures and protocols designed

88. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 143 (1997 & Supp. 2001) (quoting letter).

89. *Id.* Freud expressed his objection to the criminalization of homosexuality as early as 1903 when he wrote: “I am of the firm conviction that homosexuals must not be treated as sick people for a perverse orientation is far from being a sickness. Homosexual persons are not sick, but they also do not belong in a court of law!” Richard C. Pillard, *The Search for a Genetic Influence on Sexual Orientation*, in *SCIENCE AND HOMOSEXUALITIES* 227 (Vernon A. Rosario ed., 1997).

90. ESKRIDGE & HUNTER, *supra* note 88, at 143.

91. *See id.* at 144-45 (describing American Freudians). Pillard also notes that this shift did not occur until after Freud’s death in 1939, beginning what he refers to as “the era when psychoanalysts began to occupy positions of power in the U.S. medical establishments as well as in legal theory and the popular media.” Pillard, *supra* note 89, at 227-28.

92. BAYER, *supra* note 13, at 28-29. Charles Socarides, who remains a major player in the anti-gay pro-family movement, theorized that homosexuality was the result of a pre-oedipal phobic response to the opposite sex. *Id.* at 35. By establishing an earlier developmental root of homosexuality, Socarides made the case that homosexuals were “more profoundly pathological than it was generally considered.” *Id.* Specifically, Socarides claimed nearly one half of homosexuals suffered from “concomitant schizophrenia, paranoia, or latent pseudoneurotic schizophrenia or are in the throes of ‘a manic-depressive reaction.’” *Id.* In a much more recent publication, entitled *How America Went Gay*, Socarides explained that “obligatory homosexuals are caught up in unconscious adaptations to early childhood abuse and neglect.” Charles Socarides, *How America Went Gay* (Nov. 18, 1995), at <http://www.leaderu.com/jhs/socarides.html> (last visited June 19, 2001). His extreme distaste for the “homosexual condition” is illustrated when he clarifies that the “‘adaptation’ [he] speak[s] of is a polite term for men going through the motions of mating not with the opposite sex but with one another.” *Id.*

93. BAYER, *supra* note 13, at 33. For example, in a 1962 study Irving Bieber reported that “a heterosexual shift is a possibility for all homosexuals who are strongly motivated to change.” *Id.* Bayer notes that “[t]hroughout the 1960s Bieber’s name became synonymous with all that was hateful in American psychiatry.” *Id.* at 80.

to cure homosexuals, including at one time or another electro-shock, aversion therapy, and even pre-frontal lobotomies.⁹⁴ The first *Diagnostic and Statistical Manual of Mental Disorders (DSM-I)* published in 1952 listed homosexuality as among the most severe sociopathic personality disorders.⁹⁵

During this period, the pathologizing influence of psychiatry and the promise of a cure influenced both the criminal law and public policy regarding homosexuality and inscribed a behavior-based understanding of homosexuality throughout U.S. jurisprudence. In particular, the construction of the (mostly male) homosexual as a predatory sexual psychopath led to the enactment of sexual psychopath laws which authorized the admission of an individual charged with a sex crime to a mental institution for an indeterminate period of treatment before standing trial for the underlying criminal charge.⁹⁶ Throughout the 1950s, federal, state, and local governments heightened surveillance of suspected homosexuals and homophile organizations.⁹⁷ In a series of “witch hunts” on the federal, state, and local levels, homosexuals were discharged from government employment⁹⁸ because, in the words of a 1950 U.S. Senate Report, “[o]ne homosexual can pollute an entire office.”⁹⁹

Perhaps surprisingly, throughout this period many homosexuals actually welcomed the depressing account of homosexual development offered by the American Freudians and many willingly entered therapy.¹⁰⁰

94. ESKRIDGE & HUNTER, *supra* note 88, at 172 (reporting 2000 pre-frontal lobotomies performed on sex offenders between 1938-1946).

95. BAYER, *supra* note 13, at 39 (explaining *DSM*).

96. See TERRY, *supra* note 25, at 273 (describing “the historical emergence of the sexual psychopath”); ESKRIDGE, *supra* note 54, at 43-44, 61-62 (describing sexual psychopath laws).

97. See ESKRIDGE, *supra* note 54, at 74-76 (noting FBI began keeping files on reported homosexuals “no later than 1937”).

98. *Id.* at 70; see also JOHN D’EMILIO, *SEXUAL COMMUNITIES, SEXUAL POLITICS* 40-53 (1983).

99. ESKRIDGE & HUNTER, *supra* note 88, at 174.

100. BAYER, *supra* note 13, at 9 (noting “[f]or much of the first half of this century many homosexuals who were willing to express themselves publicly welcomed the psychiatric effort to wrest control of the social definition of their lives from moral and religious authorities”). Bayer attempts to sum up the welcoming view of homosexuals with the simple statement “Better sick than criminal.” *Id.* However, not all homosexuals were equally enamored with psychotherapy. *Id.* Writing in 1932, under the pseudonym of Parisex, Henry Gerber, voiced the following complaint: “Now, that the inverts have almost escaped the stake and the prison, the psychoanalysts threaten them with the new danger of the psychiatric torture chamber.” Parisex (Henry Gerber), *In Defense of Homosexuality*, in *WE ARE EVERYWHERE* 220 (Mark Blasius & Shane Phelan eds., 1997). Henry Gerber was one of the founding members of The Chicago Society for Human Rights, the earliest known homophile organization in the United States. See JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 385-93 (1992) (describing short-lived organization formed in 1924); see also MARTIN DUBERMAN,

The fledgling homophile movement endorsed medical and psychiatric research into, not only the cause, but also the cure, of homosexuality.¹⁰¹ For example, the two largest homophile organizations, the Mattachine Society, founded in 1950, and the Daughters of Bilitis (DOB), founded in 1955, both adopted a neutral stance regarding scientific research into homosexuality and included commitments to such research in their official statements of purpose.¹⁰² Although both organizations cooperated with the Kinsey Institute, they also made it a practice to invite researchers, who by today's standards would certainly be considered anti-gay, to speak at their conventions and contribute articles to their publications.¹⁰³

By 1965 some homophile activists began to question the efficacy of a science that continued to pathologize them in the most disparaging terms. When Frank Kameny wrote a scathing indictment of psychiatry in the *Ladder*, the publication of the DOB, and ran for a position on the board of directors of the New York Mattachine chapter, he provoked fierce opposition from members who held fast to the belief that

CURES: A GAY MAN'S ODYSSEY (1991); BETTY BERZON, SURVIVING MADNESS: A THERAPIST'S OWN STORY (2002).

101. See BAYER, *supra* note 13, at 70-88 (describing early homophile movement); see also MINTON, *supra* note 25, at 238-41.

102. The first paragraph of the DOB's Statement of Purpose provides that the purpose of the organization is:

Education of the variant, with particular emphasis on the psychological, physiological and sociological aspects, to enable her to understand herself and make her adjustment to society in all its social, civic and economic implications—this to be accomplished by establishing and maintaining as complete a library as possible of both fiction and non-fiction literature on the sex deviant theme; by sponsoring public discussions on pertinent subjects to be conducted by leading members of the legal, psychiatric, religious and other professions; by advocating a mode of behavior and dress acceptable to society.

Statement of Purpose (1955), in WE ARE EVERYWHERE 328 (Mark Blasius & Shane Phelan eds., 1997); see also *id.* at 283 (quoting Mattachine statement of purpose and membership pledge).

103. MINTON, *supra* note 25, at 174-75. Bayer explains the relationship between the homophile organizations and the researchers in this way:

The existence of the [homophile] movement had a subtle but nonetheless crucial impact upon the social context within which such research was undertaken. The findings of the research were, in turn, vitally important to the early leaders of the homophile movement, encouraging them in their early tentative efforts at organizational and ideological development. Finally, it was the struggle for homosexual rights that ultimately transformed this research from an interesting methodological critique of psychiatric theory and practice into a weapon in the assault on the power of psychiatry.

BAYER, *supra* note 13, at 42.

homosexuality was a sickness.¹⁰⁴ One of the most vocal was Edward Sagarin, who, under the pseudonym Daniel Webster Cory, authored the ground-breaking 1951 book, *The Homosexual in America: A Subjective Approach*.¹⁰⁵ Writing in an introduction for a book on homosexuality by a psychologist who maintained that exclusive homosexuality was necessarily neurotic, Sagarin warned homosexuals against engaging in “a head-on clash with men of science”¹⁰⁶ and argued “that there is nothing inconsistent between acceptance of the work of psychotherapists who report success, nay cure, and the struggle for the right to participate in the joys of life for those who cannot, will not or do not undergo change.”¹⁰⁷ Speaking at a DOB convention in 1964, Sagarin admonished the homophile movement for “‘alienating itself from scientific thinking . . . by the constant, defensive, neurotic, disturbed denial’ that homosexuality was a sickness.”¹⁰⁸

2. 1973: “20 Million Homosexuals Gain Instant Cure”¹⁰⁹

After 1965, homophile activists and organizations increasingly began to identify the continued classification of homosexuality as a mental disorder as a major roadblock to achieving their goals of “equality” and “acceptance.”¹¹⁰ The cooperative relationship between the homophile organizations and psychiatry was not severed officially until 1968 when the North American Conference of Homophile Organizations, prior to Stonewall, adopted a platform that declared “Gay Is Good” as an unqualified rejection of the sick homosexual and the assimilationist homophile.¹¹¹ Emboldened by the empirical work of

104. Franklin Kameny, *Does Research Into Homosexuality Matter?*, THE LADDER (1965), in WE ARE EVERYWHERE 335 (Mark Blasius & Shane Phelan eds., 1997); see also MINTON, *supra* note 25, at 245-46, 251-52 (describing 1965 elections).

105. See *id.* at 245-51 (describing tortured life of Sagarin).

106. BAYER, *supra* note 13, at 84 (quoting Sagarin, but using his pseudonym). The author of the book, Dr. Albert Ellis, had raised the ire of readers of the *Mattachine Review* where he had published his theories on homosexuality and its cure. MINTON, *supra* note 25, at 240. Reflecting the Mattachine Society of 1956, the editors of the *Review* responded to the critical letters from readers with the following neutral statement: “We hesitate to comment that either Ellis or his critics is to be regarded as wrong or right We shall not evade an issue simply because it may be controversial and Albert Ellis dared to face it.” *Id.* (quoting the editorial response).

107. BAYER, *supra* note 13, at 84.

108. MINTON, *supra* note 25, at 251 (quoting Sagarin).

109. LEVAY, *supra* note 17, at 224 (quoting headline from Philadelphia newspaper reporting on declassification of homosexuality as a mental disorder).

110. Kameny, *supra* note 104, at 335. Kameny argued in his 1965 article that “[homosexuals] cannot declare [their] equality and ask for acceptance and for judgment as whole persons, from a position of sickness.” *Id.* at 337.

111. BAYER, *supra* note 13, at 88; see also LEVAY, *supra* note 17, at 222 (describing adoption of “Gay is Good” slogan). The Mattachine Society of Washington had voted three years

Alfred Kinsey and Evelyn Hooker¹¹² and working from within a larger critique of psychiatry's enforcement of social convention,¹¹³ gay activists took direct aim at the psychoanalytic model of homosexuality and for the next several years lobbied, at times ferociously, for the deletion of homosexuality from the *DSM-II*.¹¹⁴

In 1973, the Nomenclature Committee of the APA, led by the same Dr. Spitzer whose 2001 study would rankle pro-gay forces, voted, after considerable and often acrimonious internal debate, to remove homosexuality from its list of mental disorders.¹¹⁵ Perhaps

earlier in 1965 to disaffirm the psychoanalytic model of homosexuality when it adopted the following resolution: "The Mattachine Society of Washington takes the position that in the absence of valid evidence to the contrary homosexuality is not a sickness, disturbance or other pathology in any sense but is merely a preference, orientation or propensity on a par with, and not different in kind from, heterosexuality." BAYER, *supra* note 13, at 88.

Homophile pickets at medical conventions began as early as 1968, when activists picketed an American Medical Association convention to demand the inclusion of pro-gay views and speakers. *Id.* at 92.

112. See generally BAYER, *supra* note 13, at 45-53. Kinsey's massive empirical studies on the human sexual response normalized homosexuality by establishing a relatively large percentage of the general population had some form of homosexual experience. See generally MINTON, *supra* note 25, at 159-95. Hooker's empirical work with gay men disputed the psychoanalytic model of homosexuality as pathology when she reported that the homosexuals in her studies were no more maladjusted than the heterosexual subjects. See generally *id.* at 219-36. Hooker wrote:

It would be strange indeed if all the traits due to victimization in minority groups were in the homosexual produced by inner dynamics of the personality, since he is also a member of an outgroup which is subject to extreme penalties involving, according to Kinsey, cruelties which have not been matched except in religious and social persecutions.

BAYER, *supra* note 13, at 53.

113. BAYER, *supra* note 13, at 55-60.

114. *Id.* at 105. This led to a series of dramatic confrontations between gay activists and the forces of organized psychiatry, such as the 1971 protest at the annual meeting of the APA where activists declared "[p]sychiatry is the enemy incarnate." *Id.* In particular, Kameny rejected the power of psychiatry to define the homosexual. *Id.* at 106. At a panel on "Lifestyles of Non-Patient Homosexuals," Kameny stated, "We're rejecting you as our owners. We possess ourselves and we speak for ourselves and we will take care of our own destinies." *Id.* Of course, homosexuals were also psychiatry's consumers. *Id.* Bayer reports that the existence of psychiatry's "proprietary relationship to the homosexual" was not lost on the gay activists. *Id.* Many in the psychiatric community were apparently dismayed because they had traditionally seen themselves "as the protectors of deviants who had suffered at the hands of society and the more traditional forces of social control." *Id.* at 11.

115. *Id.* at 123 (asserting, although technically not chair, Spitzer "assumed a central role in directing its considerations"). Irving Bieber and Charles Socarides organized the Ad Hoc Committee Against the Deletion of Homosexuality from DSM-II. *Id.* at 121. The argument waged against deletion was couched in terms of compassion for the homosexual and foreshadowed the arguments currently used by the ex-gay movement. See *infra* text accompanying notes 240-243. Bayer explains the opponents argued that "declassification of homosexuality would represent a 'cold and unfeeling response' to those in need, creating 'more despair than hope.'" BAYER, *supra* note 13, at 136.

foreshadowing Spitzer's interest in whether "Gays Can Change," the committee remained concerned about individuals who desired to change their sexual orientation and created the classification of "sexual orientation disturbance."¹¹⁶ Spitzer later reworked the category of sexual orientation disturbance, and it was replaced by "ego-dystonic homosexuality" that is manifested by the desire to achieve a "heterosexual shift." Ego-dystonic homosexuality was finally deleted from the *DSM-III* in 1987,¹¹⁷ but it remains an integral part of the lexicon of reparative therapists who comprise the medical wing of the ex-gay movement.¹¹⁸ Armed with a modified psychoanalytic model of

Bieber was the author of a 1962 study that reported all "strongly motivated" homosexuals could change. *Id.* at 29-33 (discussing Socarides' extreme pre-oedipal view of homosexuality). Socarides remains a central figure in the pro-family/ex gay movement. *See infra* text accompanying notes 403-406.

Bieber and Socarides forced a membership referendum on the deletion to take place in 1974. BAYER, *supra* note 13, at 148; *see also* LEVAY, *supra* note 17, at 224. Of the 10,000 psychiatrists who participated in the referendum, fifty-eight percent voted in favor of the deletion with thirty-seven percent opposed. BAYER, *supra* note 13, at 148. Bayer suggests that "[n]arrow professional self-interest" may have accounted for the large number opposed to the deletion. *Id.* at 150 (noting "declassification represent[ed] a narrowing of their professional domain, [and] posed a specific challenge to the financial interest of those with large homosexual case loads").

116. BAYER, *supra* note 13, at 137 (reporting vote was thirteen to zero with two abstentions). The new classification was "for individuals whose sexual interests [were] directed primarily towards people of the same sex and who are either disturbed by, in conflict with, or wish to change their sexual orientation." *Id.* Although Spitzer approved the deletion of homosexuality and supported gay civil rights claims, he was adamant that homosexuality was 'suboptimal' and that individuals who experienced distress on account of their sexual orientation should be treated for a mental disorder. *Id.* at 126. Bayer explains that Spitzer wanted to "avoid[] the implication that [homosexuality] was no different from heterosexuality—in his view the preferred form of human sexuality." *Id.* Spitzer argued for the deletion of homosexuality on the grounds that all suboptimal conditions do not warrant classification as a psychiatric disorder. *Id.* at 124. Spitzer reasoned that psychiatric disorders must involve some degree of "subjective distress and/or 'some generalized impairment in social effectiveness or functioning.'" *Id.* at 127 (quoting Spitzer). It was this definition that led Spitzer to propose the new classification of "sexual orientation disturbance" and later "ego dystonic homosexuality." LEVAY, *supra* note 17, at 229. Spitzer's work at this point in his career doubtless informed his study released in 2001 regarding whether homosexuals who were highly motivated to change could achieve "good heterosexual functioning." *See supra* notes 1-5.

117. LEVAY, *supra* note 17, at 229. Egodystonic homosexuality is defined as "[a] desire to acquire or increase heterosexual arousal so that heterosexual relations can be initiated or maintained and a sustained pattern of overt homosexual arousal that the individual explicitly complains is unwanted as a source of distress." BAYER, *supra* note 13, at 176.

118. *See* NICOLOSI, *supra* note 48, at 3. Reparative therapists such as Joseph Nicolosi claim that they only seek to treat individuals who are distressed by their homosexuality and who otherwise would be denied the opportunity to seek treatment. *Id.* Nicolosi refers to these individuals as "non-gay" gays because, *inter alia*, they desire the trappings of a heterosexual lifestyle. *Id.* at 3-6. The factors that Spitzer identified as predisposing one to ego-dystonic homosexuality are exceedingly similar to those identified by Nicolosi. *Id.* In addition to internalized "negative societal attitudes towards homosexuality," Spitzer specifically mentioned the desire for "features associated with heterosexuality such as having children and socially

homosexuality, reparative therapists advocate therapeutic intervention and produce much of the secular science upon which pro-family organizations and ex-gay ministries construct their counter-narrative of homosexuality.¹¹⁹

Despite the optimism of gay activists, the various social and legal disabilities imposed on gay men and lesbians did not disappear with the deletion of homosexuality as an official diagnostic category. Although the APA and other influential professional organizations quickly endorsed broad civil rights proposals rejecting criminal sanctions for private consensual same-sex behavior and called for the end of discrimination against gay men and lesbians, legal reform proceeded at a

sanctioned family life.” BAYER, *supra* note 13, at 177 (quoting Spitzer). Spitzer noted that those “features associated with heterosexuality” may be considered “incompatible with a homosexual arousal pattern.” *Id.*

According to this post-1973 psychoanalytic model, same-sex desire is a “defensive detachment” from members of the same sex, as opposed to a phobic reaction to members of the opposite sex. *See generally* ELIZABETH MOBERLY, *PSYCHOGENESIS: THE EARLY DEVELOPMENT OF GENDER IDENTITY* (1983); NICOLosi, *supra* note 48, at 3. The “defensive detachment” typically stems from a hurtful experience with the parent of the same sex.” MOBERLY, *supra*, at 53. As a result, the individual stops identifying with members of the same sex and “needs for love, dependency and identification which are normally met through the medium of such an attachment, remain unmet.” *Id.* at 67. Under this theory, individuals suffering from this defensive detachment turn to homosexuality as a “reparative device.” *Id.* It operates as an “attempt to fulfill a deficit in wholeness of one’s original gender.” NICOLosi, *supra* note 48, at 109. So-called “reparative therapy,” such as that advocated by Joseph Nicolosi and his National Association of Reparative Therapists (NARTH), is designed to address this gender deficit and lead eventually to “good heterosexual functioning.” *Id.* at 165. Many ex-gay ministries also base their counseling programs on the gender deficit theory of homosexuality, although some eschew any psychological explanations as “unbiblical” and prefer to rely solely on Scripture for therapeutic guidance. When Spitzer recruited subjects for his 2001 study, he relied heavily on referrals from NARTH and Exodus International, the highest profile ex-gay ministry, because he wanted to study individuals who were highly motivated to change their sexual orientation. *See supra* note 15. Both the APA and the American Psychological Association have taken negative positions regarding attempts at reparative therapy. *See generally* David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999); SANTINOVER, *HOMOSEXUALITY AND THE POLITICS OF TRUTH* 36 (1996) (claiming they ignore “professional standards . . . that psychiatrists need to accept a patient’s own goals in treatment”); David Tuller, *Psychologists Oppose ‘Conversion’ Therapy for Gays/Approach Could Cause Real Harm, They Say*, S.F. CHRON., Aug. 15, 1997, at A3.

119. Herman notes that the debate over immutability allows pro-family forces “to enter the gay rights debate on secular ground.” HERMAN, *supra* note 7, at 73 (stating “the immutability debate has allowed the [Christian Right] to pose as objective researchers and to publish documents ostensibly containing no religious content whatsoever”).

The pro-family reliance on a psychoanalytic model of homosexuality refutes the very foundation of the identity model, “pathologize[s] homosexuality,” and reinforces its contagious nature which in turn justifies its suppression. *Id.* at 71. Herman goes on to point out that the psychological theories offered to explain homosexuality also “provide further ammunition in the fight against single parenthood and inappropriate gender modeling.” *Id.* *See generally* Knauer, *supra* note 7 (discussing the issue of suppression).

much slower rate.¹²⁰ Ten years after the deletion of homosexuality as a mental disorder, only one state, Wisconsin, had included sexual orientation as a protected category under its nondiscrimination law¹²¹ and only twenty-two states had repealed their sodomy statutes.¹²² Nearly thirty years later, only twelve states and the District of Columbia provide anti-discrimination protection in private employment¹²³ and fifteen states retain their sodomy laws, four of which apply only to same-sex sodomy.¹²⁴

In what could serve as a warning for those who believe that the discovery of the gay gene will translate into spontaneous equality, gay activists soon discovered that even though the elimination of diagnosis might have been a necessary step to secure equal rights for gay men and

120. BAYER, *supra* note 13, at 137. The other professional organizations included the American Bar Association, the American Medical Association, and the American Psychological Association. *Id.* at 156.

121. WISC. STAT. § 111.36 (2001). Wisconsin amended its non-discrimination provisions to include sexual orientation in 1981. *Id.*

122. Jeremy Quittner, *Are You Breaking the Law? Where does Your State Stand on Sodomy Laws?*, THE ADVOCATE, Aug. 20, 2002, at 52. In order of repeal, the twenty-two states are: Illinois (1962), Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), North Dakota (1973), Ohio (1974), New Hampshire (1975), New Mexico (1975), California (1976), Maine (1976), West Virginia (1976), Washington (1976), Indiana (1977), South Dakota (1977), Vermont (1977), Wyoming (1977), Iowa (1978), Nebraska (1978), New Jersey (1979), Alaska (1980), Wisconsin (1983). *Id.* By 1983, sodomy laws had been overturned by the courts of two states: New York and Pennsylvania. *See* *People v. Onofre*, 415 N.E.2d 936, 953-54 (N.Y. 1980); *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. Commw. Ct. 1980).

123. *See* Human Rights Campaign, *Addressing Discrimination in the Workplace*, at <http://hrc.org/worknet/nd/index.asp> (n.d.) (last visited Aug. 8, 2002) (listing the twelve states that provide antidiscrimination protection in private employment).

124. Quittner, *supra* note 122, at 52. Only two states and the District of Columbia have repealed their sodomy laws since 1983: Nevada (1993), District of Columbia (1995), Arizona (2001). *Id.* However, the courts have overturned sodomy laws in seven additional states: Kentucky (1992), Tennessee (1996), Montana (1997), Georgia (1998), Maryland (1999), Minnesota (2001), Arkansas (2002). *Id.*

The four states with sodomy laws that only apply to same-sex sodomy are Kansas, Missouri, Oklahoma, and Texas. *See* MO. R.S. § 566.090.1 (2002) (criminalizing deviate sexual intercourse with “another person of the same sex”); KAN. STAT. ANN. § 21-3505 (1995) (criminalizing acts between “members of the same sex or between a person and an animal”); 21 OKLA. STAT. ANN. § 886 (West 1983) (noting per judicial decision “crimes against nature” only apply to same-sex conduct); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994) (criminalizing acts “with another individual of the same sex”).

Although Michigan and Missouri are included within the fifteen states which “retain” their sodomy statutes, court cases in both states cast doubt on whether the statutes remain enforceable. Quittner, *supra* note 122, at 52. In 1999, an appellate court in western Missouri ruled that the state sodomy law did not apply to consensual sodomy. *State v. Cogshell*, 997 S.W.2d 534, 537 (Mo. Ct. App. 1999). Prosecutors have continued to bring criminal actions against individuals charged with consensual sodomy. *See* Lambda Legal Def. and Educ. Fund, *State-by-State Sodomy Law Update*, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=275> (n.d.) (last visited Aug. 8, 2002). In Michigan, a trial court held the sodomy law unconstitutional, but the Attorney General did not appeal. *Id.*

lesbians, it alone was not sufficient to ensure such treatment. Gay activists were correct that the categorization of homosexuality as a mental disorder provided a justification for the legal and social disabilities imposed on gay men and lesbians and, indeed, in many instances was the innovative source of an entirely new set of disabilities.¹²⁵ It was, however, never the only justification. The attempt of the psychoanalytic model, as well as the inversion model, to displace the pre-existing discourses of sin and transgression was at best partial.¹²⁶ Although the end to the diagnostic category of homosexuality represented a major victory for pro-gay forces, it did not topple the well-worn understanding of same-sex desire framed by religious prohibitions and criminal sanctions.¹²⁷ Nor did it banish the notion of cross-gender performance popularized by the inversion model or the rapacious sexual psychopath, both of which continue to live on in anti-gay stereotypes and the laws and policies regulating same-sex desire.¹²⁸

C. *Queer Bio-Science: The Science of Immutability*

After the 1973 APA decision, scientific inquiry into the nature of sexual orientation largely shifted to studies designed to determine whether sexual orientation is biologically, as opposed to experientially, based. Marking a departure from the psychoanalytic school, the new queer bio-science looks for a biological or genetic cause for homosexuality. In the 1990s a series of highly publicized studies offered tentative findings that seemed to suggest just such a cause. In *The Mismeasure of Desire*, Edward Stein identifies three distinct areas of research—neuroanatomical research, heredity studies concerning the incidence of homosexuality in families, and genetic linkage studies—that, taken together, have been “widely interpreted as indicating that sexual orientations are strongly biologically based and that the biological basis is inborn or determined at an early age.”¹²⁹ These three areas are represented by Simon LeVay’s 1991 study examining the structure of the hypothalamus in gay men,¹³⁰ the twin study by J. Michael Bailey and

125. BAYER, *supra* note 13, at 158-59.

126. See generally BAYER, *supra* note 13, at 10 (discussing attempt to “substitut[e] the concept of illness for that of sin”).

127. *Id.*

128. *Id.*

129. STEIN, *supra* note 5, at 120. Stein refers to this body of work as the “emerging scientific program for the study of sexual orientation.” *Id.*

130. LeVay, *supra* note 17, at 1034.

Richard Pillard, which was also published in 1991¹³¹ and Dean Hamer's 1993 "gay gene" study.¹³² The research is focused predominantly on gay men and what little research there has been on lesbians has proven inconclusive, leading Hamer to conclude that "female sexual identification is more a matter of environment than of heredity."¹³³

Research into a biological cause of homosexuality dates back to the early sexologists and the first twin study was published in 1952.¹³⁴ However, the first report in this new wave of scientific inquiry that captured the public imagination was LeVay's 1991 hypothalamus study.¹³⁵ LeVay reported anatomical differences between homosexual and heterosexual men located in the portion of the hypothalamus responsible for sex drive, among other functions, known as the INAH-3.¹³⁶ In prior studies, researchers had reported "robust" sex differences between INAH-3 in men and INAH-3 in women, with INAH-3 in men averaging two to three times the size of that in women.¹³⁷ In a leap of logic that is reminiscent of the inversion theories of the early sexologists, LeVay hypothesized that the sex of an individual's object choice would determine INAH-3 size.¹³⁸ Given that INAH-3 is larger in men than

131. See Malcolm Gladwell, *Genes Tied To Sexual Orientation; Study of Gay Men Bolsters Theory*, WASH. POST, Dec. 17, 1991, at A1, A4 (discussing Bailey's 1991 twin study); see also Pillard, *supra* note 89, at 233-35 (discussing twin studies).

132. Hamer, *supra* note 3, at 321.

133. John Gallagher, *Gay for the Thrill of It; A Shocking New Book by Geneticist Dean Hamer Suggests that Homosexual Tendencies May be Just a Novel Experience for Some of Us, Particularly Women*, THE ADVOCATE, Feb. 17, 1998, at 35 (quoting Hamer).

134. See Geoff Puterbaugh, *Introduction*, in TWINS AND HOMOSEXUALITY: A CASEBOOK xiv (Geoff Puterbaugh ed., 1990) (discussing Franz J. Kallmann's 1952 "classic study"); see also Franz J. Kallmann, *Comparative Twin Study on the Genetic Aspects of Male Homosexuality*, in TWINS AND HOMOSEXUALITY: A CASEBOOK 3 (Geoff Puterbaugh ed., 1990). Stein also notes that studies using twins to examine the heredity of homosexuality began in the 1950s. STEIN, *supra* note 5, at 144-47 (describing history of heredity studies).

135. See, e.g., Christine Gorman, *Are Gay Men Born That Way?*, TIME, Sept. 9, 1991, at 60-61 (describing LeVay's findings); LEVAY, *supra* note 17, at 143-47 (discussing results of study).

136. See LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 53 (1998) (noting portion of the hypothalamus measured was responsible for regulation of "sex drive, body temperature, sleep, and appetite"). INAH stands for "interstitial nucleus of the anterior hypothalamus." LEVAY, *supra* note 17, at 142.

137. LEVAY, *supra* note 17, at 142 (describing earlier studies in gender differences and INAH-3).

138. *Id.* at 143. LeVay explains, "[m]y specific hypothesis was that the size of INAH3 . . . would be correlated with a sexual drive directed toward females; that is, it would be large in heterosexual men and lesbian women and small in heterosexual women and gay men." *Id.*

Stein notes that the "inversion assumption" exists "throughout almost all of the scientific literature from Ulrichs to the present." STEIN, *supra* note 5, at 202-03. He points to LeVay's hypothesis as evidence that "LeVay . . . accepts the inversion assumption without argument." *Id.* at 203.

women, and men typically desire women and women typically desire men, LeVay reasoned that INAH-3 would be larger in individuals who desire women and smaller in individuals who desire men.¹³⁹ LeVay's study reported that INAH-3 was indeed two to three times larger in the heterosexual men than in the homosexual men.¹⁴⁰ Based on this observation, LeVay concluded that "sexual orientation in humans is amenable to study at the biological level," although he acknowledged that "the results do not allow one to decide if the size of INAH-3 is the cause or the consequence of that individual's sexual orientation."¹⁴¹ Thus, whereas, LeVay's study suggests a correlation between INAH-3 size and sexual orientation in men, it fails to establish a causal link between INAH-3 size and sexual orientation.¹⁴²

Criticism of LeVay's findings takes issue with the size of the study, the conclusions he reached regarding the sexual orientations of the subjects, and the fact that a large percentage of the subjects died as a result of complications associated with HIV/AIDS.¹⁴³ These core

139. This is very similar to the description of "contrary sexual feeling" offered by the sexologists. See *supra* text accompanying notes 51-82.

140. LEVAY, *supra* note 17, at 143. LeVay's study could not offer any findings regarding lesbians because he was not able to determine the sexual orientation of the individual women whose brains were included in the study. *Id.* The way in which LeVay determined or assigned sexual orientation to the men whose brains he was studying is a continuing source of criticism. See STEIN, *supra* note 5, at 196-97 (criticizing LeVay's rationale).

141. LeVay, *supra* note 17, at 1036.

142. STEIN, *supra* note 5, at 213-16. Stein spends a considerable time discussing the distinction between correlation and causation. *Id.* With regard to LeVay's findings, Stein concludes:

LeVay has at best shown that there is a *correlation* between INAH-3 and sexual orientation; he has not, as he admits when he is careful . . . shown any causation. Further, and relatedly, he has no evidence that biological factors directly affect sexual orientation. Even if he could prove that INAH-3 size and sexual orientation are perfectly correlated in his sample population . . . this would not establish any direct causal account of homosexuality. It would remain equally plausible that INAH-3 size leads to certain personality attributes that in certain contexts leads to homosexuality in men.

Id. at 215.

Stein's critique of the new queer bio-science has been incorporated in pro-family texts. See, e.g., Schneider, *supra* note 23 (including three quotes from Stein to help prove case against existence of gay gene).

143. See, e.g., KEEN & GOLDBERG, *supra* note 136, at 53. LeVay only examined forty-one brains, thirty-five were from men, and six were from women. LeVay, *supra* note 17, at 1035. For purposes of his study, LeVay labeled as homosexual all the men whose medical records indicated that they had had sex with men, including one man who had had sex with both women and men. *Id.* LeVay categorized as heterosexual the remaining men and all of the women. *Id.*; see STEIN, *supra* note 5, at 196-201 (illustrating impact of possible misidentification on LeVay's results); see also KEEN & GOLDBERG, *supra* note 136, at 53. All of the men whom LeVay classified as homosexual also died from complications associated with HIV/AIDS, thus raising the question of

criticisms regarding causation, sample size or bias, and subject identification have been leveled at the twin heredity studies and Hamer's genetic study.¹⁴⁴ The best known of the twin studies is the 1991 study by Bailey and Pillard.¹⁴⁵ It tested the heritability of sexual orientation by comparing the concordance of the trait in 110 male twins and nontwin adoptive brothers.¹⁴⁶ The study concluded that thirty percent to seventy percent of male homosexuality is determined by genetic factors.¹⁴⁷ The study reported that where one identical twin is gay there was a fifty-two percent chance that the other twin was also gay.¹⁴⁸ This percentage was reduced to twenty-two percent in the case of fraternal twins and eleven percent in the case of unrelated adopted brothers.¹⁴⁹ However, the Bailey and Pillard study, like the other heredity studies, also suggests environmental factors and does not establish that homosexuality is genetically predetermined.¹⁵⁰ After concluding that sexual orientation is "likely to be powerfully influenced by an innate, inherited predisposition[.]" Pillard reasserts that "[s]ocial influences are not dismissed."¹⁵¹

Hamer's linkage research builds on the heredity studies by pursuing a genetic marker to account for the higher incidence of homosexuality identified among the maternal relatives of gay men.¹⁵² Studying the DNA of gay brothers, Hamer found statistically improbable similarities in the

whether the size differential could be the result of disease rather than orientation. See STEIN, *supra* note 5, at 201 (suggesting that decreased testosterone levels could effect INAH-3 size). Of the thirty-five men studied, nineteen had died from complications associated with HIV/AIDS. LeVay, *supra* note 17, at 1035. LeVay raised the question of HIV influence, but dismissed it as unlikely. *Id.* He also suggested that the men who died from complications related to HIV may "constitute an unrepresentative subset of gay men." *Id.* at 1036.

144. STEIN, *supra* note 5, at 192-94 (discussing sampling bias in twin studies).

145. Gladwell, *supra* note 131, at A1, A4. Reporting the story on its front page, *The Washington Post* announced that "[s]cientists have uncovered new evidence that genetic factors may play an important—if not dominant—role in determining whether males become homosexual." *Id.*

146. Richard A. Knox, *New Study of Twins Finds Genetic Basis for Homosexuality*, BOSTON GLOBE, Dec. 15, 1991, at 20; see Pillard, *supra* note 89, at 235-36 (explaining basis for heritability studies).

147. *Id.* Although the Bailey and Pillard study only involved men, Hamer reports that studies of women report a percentage of twenty-seven to seventy-six percent. Hamer, *supra* note 3, at 321.

148. *Id.*

149. *Id.*

150. See STEIN, *supra* note 5, at 215-16.

151. Pillard, *supra* note 89, at 235-36.

152. Hamer, *supra* note 3, at 321 (identifying higher incidence of homosexuality in maternal uncles and sons of maternal aunts). Stein describes Hamer's work as "the most complex of the three studies," noting that "in a sense, it combines features of LeVay's study and Bailey and Pillard's studies." STEIN, *supra* note 5, at 216.

q28 region of the X chromosome that led him to conclude that “[w]e have now produced evidence that one form of male homosexuality is preferentially transmitted through the maternal side and is genetically linked to chromosomal region Xq28.”¹⁵³ The daily newspapers reported that Hamer had identified the elusive “gay gene.”¹⁵⁴

The results from each of these areas of inquiry remain inconclusive and have been subject to considerable criticism from within the mainstream scientific community, as well as from pro-family organizations armed with their own particular brand of science.¹⁵⁵ The criticism notwithstanding, the media treats this new queer bio-science as front-page news and the coverage is often overwhelmingly positive.¹⁵⁶ As early as 1991, Peter Jennings, the anchor for the ABC evening news, announced that “new evidence . . . about what causes a man to be homosexual . . . suggests that the answer, to a very large degree, may be found in a person’s genetic inheritance.”¹⁵⁷ Opinion polls indicate that an increasing percentage of the general public accept Jennings’ assertion regarding a biological or genetic cause of homosexuality.¹⁵⁸ Moreover, many gay men and lesbians praise the studies for finally confirming what many of them have intuitively suspected—that they were indeed “born that way.”¹⁵⁹

153. Hamer, *supra* note 3, at 321.

154. *See, e.g.*, Bishop, *supra* note 3, at B1. The title of Hamer’s book telling the story behind the research project and the resulting barrage of media attention, *The Science of Desire: the Search for the Gay Gene and the Biology of Behavior*, does not necessarily dissuade this misconception. HAMER & COPELAND, *supra* note 26, at 218.

155. Stein devotes a chapter to the various criticisms of these three research agendas. STEIN, *supra* note 5, at 190-228. He acknowledges that “[l]ack of replication is common.” *Id.* at 219. Pro-family forces also stress the fact that the results of these leading studies have not found easy replication. *See* Schneider, *supra* note 23. *But see* KEEN & GOLDBERG, *supra* note 136, at 54-55 (discussing later neuroanatomical studies reporting brain size differences between homosexual and heterosexual men).

156. *See, e.g.*, Natalie Angier, *Report Suggests Homosexuality is Linked to Genes*, N.Y. TIMES, July 16, 1993, at A1; *see also* HAMER & COPELAND, *supra* note 26, at 17-19 (discussing media reaction to 1993 study).

157. ABC News Transcript, *World News Tonight With Peter Jennings*, Dec. 17, 1991.

158. According to a 1977 Gallup poll, only thirteen percent of Americans believed that homosexuality was inborn. Ontario Consultants on Religious Tolerance, *supra* note 5 (reproducing Gallup results from 1977 through 2001); Schoofs, *supra* note 5, at 56. That number had increased to thirty-one percent by 1996. Ontario Consultants on Religious Tolerance, *supra* note 5 (reproducing Gallup results from 1977 through 2001). By 2001, the number of respondents who believed that homosexuality is something a person is born with had risen to forty percent. *Id.*

159. *See, e.g.*, Andrea Ford & Bill Billiter, *Researcher’s Findings Stir Debate on Homosexuality*, L.A. TIMES, Aug. 31, 1991, at B1 (reporting gay activists “praised” LeVay’s findings). Hamer reports that after his 1993 study was released his “mailbox filled with letters from people thanking me for doing the study.” HAMER & COPELAND, *supra* note 26, at 18.

Perhaps believing that the shortest distance to full and equal civil rights is a genetic marker, pro-gay organizations have embraced the findings suggesting a biologic cause of homosexuality which now serve as the scientific foundation of the identity model of homosexuality. As did the inverts and homosexuals before them, many gay men and lesbians not only believe this new research, but they have attempted to use the results to advance the cause of gay and lesbian civil rights.¹⁶⁰ Unlike prior generations, contemporary gay men and lesbians are not content to use science solely for its exculpatory force to argue against criminal sanction. The proponents of the identity model appeal directly to science to help secure affirmative rights for the gay minority on the grounds that sexual orientation is immutable.¹⁶¹

As discussed more fully in Part III below, the contemporary gay political narrative strongly relies upon the science of immutability when it asserts that homosexuality is an unchosen, innate, and benign characteristic. In the ongoing political struggle over gay civil rights, the line has been drawn: pro-gay forces assert immutability, whereas anti-gay pro-family forces assert that homosexuality is a chosen lifestyle. Given the importance of immutability to the pro-gay platform, pro-family organizations directly challenge the results of the queer bio-science and their materials repeatedly assert that there is no evidence of a biologic or genetic basis of homosexuality. For example, *The Gay Gene: Going, Going . . . Gone*, written by a Family Research Council (FRC) policy analyst, critiques LeVay's anatomical work, the twin studies, and Hamer's linkage studies along lines very similar to those discussed above and even incorporates several quotes from Stein's *The Mismeasure of Desire*.¹⁶² It concludes:

Scientists have not even come close to proving a genetic or biological cause for homosexuality, yet homosexual activists continue to say that sexual activity between members of the same sex is just the same as race or gender. Using "biology" as a stamp of legitimacy, activists have pushed for special rights, from sex-partner subsidies to "gay marriage" and adoption. Without scientific evidence to support such claims, it is wrong and dangerously misleading to say that people are born homosexual and cannot change.¹⁶³

160. See KEEN & GOLDBERG, *supra* note 136, at 68-73 (describing Hamer's testimony at the Amendment 2 trial).

161. Even with this distinction, however, the similarities to the Victorian inversion model remain. In both cases, the subjects of study affirmed the findings that sexual orientation is in some way inborn and then argued that they should not be punished for their natures.

162. Schneider, *supra* note 23.

163. *Id.*

III. THE CONTEMPORARY GAY POLITICAL NARRATIVE

The identity-based civil rights platform advocated by the gay political narrative rests on two fundamental assertions: gay men and lesbians share a common immutable identity and, by virtue of this shared identity, gay men and lesbians should be treated the same as any other disadvantaged minority. These claims of shared identity and equivalence are widely deployed in the struggle to secure gay civil rights and to construct a deserving gay minority. As explained in the Introduction, the resulting identity model is thought to offer three strategic benefits. It helps solidify group coherence among gay men and lesbians, thereby shaping a unique gay social, economic, and political base.¹⁶⁴ It also appeals to third parties who, according to opinion polls, are more inclined to support gay civil rights if they believe sexual orientation is inborn.¹⁶⁵ Finally, it asserts a distinction between status and conduct that seems tailor-made for post-*Bowers v. Hardwick* jurisprudence where appeals to equality principles based on minority status may offer the greatest opportunity for legal reform.¹⁶⁶

The legal arguments of identity and equivalence are discussed in greater detail in Section IV, but at the outset it is important to establish the social context in which these arguments are deployed. This Part discusses the first two advantages of the identity model—group cohesion and third-party appeal—and suggests that the correlation between these goals and the identity model may be overstated. Upon closer examination, the group cohesion supposedly fostered by the identity model is a necessarily exclusionary project that embraces only a subset of individuals who experience same-sex desire.¹⁶⁷ In addition, there is no evidence that a belief in immutability actually causes an individual to support extending civil rights to gays and lesbians.¹⁶⁸ It is just as possible that a pre-existing favorable opinion of gay men and lesbians predisposes individuals to accept immutability.¹⁶⁹ Perhaps most importantly, the arguments and images that the gay political narrative deploys to further

164. See generally David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002) (describing deployment of “LesBiGay identity” in marketplace).

165. See STEIN, *supra* note 5, at 301 (criticizing perceived pragmatic benefit of immutability argument).

166. Halley, *supra* note 56.

167. Based on personal narratives and the new queer bio-science, the identity model seems to have greater applicability to gay men than to lesbians. See *infra* text accompanying notes 185-188.

168. *Id.*

169. See STEIN, *supra* note 5, at 230 (suggesting favorable opinion of gays may predispose individuals to believe genetic claims).

the goals of group cohesion and third party appeal are not without costs and unintended consequences that may prove ultimately disempowering.¹⁷⁰

Given that the pro-gay identity model does not exist in a political vacuum, this Part also outlines the competing pro-family behavioral model of homosexuality, much of which informs the anti-gay legal arguments discussed in Part IV below. Pro-family organizations readily accept that the identity model with its core adherence to a biological explanation for homosexuality is detrimental to the pro-family agenda because it “offers a measure of validity to a behavior that is otherwise considered illogical, immoral, and dangerous.”¹⁷¹ Although pro-family organizations are committed to discrediting claims of immutability, their condemnation of homosexuality rests primarily on a moral judgment regarding homosexual behavior.¹⁷² Accordingly, the anti-gay political narrative is not nearly as dependent on science as is its pro-gay counterpart.

Although a large percentage of gay men and lesbians, and an increasing percentage of the general public, accept the notion of a shared immutable gay identity, it would be a mistake to see the current prominence of this particular understanding of homosexuality as inexorable.¹⁷³ True, it is supported by countless personal narratives and a burgeoning, yet inconclusive, body of scientific studies. However, in the years immediately following Stonewall, the personal narratives of gay men and lesbians featured themes of individual autonomy, liberation, and the freedom to determine one’s sexual preference, as opposed to contemporary narratives that extol the courage required to acknowledge one’s innate sexual orientation.¹⁷⁴ The 1980s saw the consolidation of the

170. See Knauer, *supra* note 34, at 1051.

171. Family Research Council, *Science Speaks on ‘Gay Gene’ Theory . . . But is Anyone Listening?* (Aug. 24, 2000), at <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00H4&arc=yes> (last visited Nov. 11, 2000); see also Schoofs, *supra* note 5, at 56 (stating “the main impetus for the ex-gay ads lies in the polls”).

172. See Warner, *supra* note 46, at xviii (describing centrality of morality discourse).

173. A 1977 Gallup poll revealed that only thirteen percent of Americans believed that homosexuality was inborn. Ontario Consultants on Religious Tolerance, *supra* note 5. By 2001, the number of respondents who believed that homosexuality is something “a person is born with” had risen to forty percent. *Id.*

174. See JAGOSE, *supra* note 19, at 30-43 (describing liberationist strategy). The 1973 declassification of homosexuality as a mental disorder was significant because of what it signaled homosexuality was not. Unencumbered by the stigma and legal disabilities surrounding mental illness, gay liberationists pursued a path of revolutionary social and political change which stressed autonomy and individual freedom. The liberation model of homosexuality was short-lived, spanning from the 1969 Stonewall riots until the mid-1970s. *Id.*

gay civil rights movement around an ethnic model of gay identity that has produced the current gay political narrative under which individuals who believe they share a common culture, a common past, and, perhaps, a common gene, demand equal rights.¹⁷⁵

A. *Group Coherence and Competing Truth Claims*

The identity model, which advances a civil rights program based on the belief that homosexuality is an immutable, unchosen, and benign trait, enjoys wide support among individuals who self-identify as gay or lesbian.¹⁷⁶ It is bolstered by many compelling first person accounts that confirm the tentative findings of the new queer bio-science, namely that sexual orientation is inborn.¹⁷⁷ This strong sense of shared identity facilitates community building around points of common interest and experience,¹⁷⁸ something that is often considered a necessary prerequisite for political action.¹⁷⁹ The relatively high level of group coherence also means that the force of the contemporary gay political narrative is not diluted by factious counter-claims, at least not in the form of sustained critiques from other pro-gay sources.¹⁸⁰

The few anti-discrimination protections that existed at the time spoke of sexual preference rather than orientation. See *id.* at 58 (discussing introduction of term “orientation”). By the mid-1970s, however, the call for systemic change yielded to more discrete and assimilationist demands for equal rights. *Id.* at 58-59.

175. See *id.* at 91 (discussing “organising [sic] affect of ‘pride’”).

176. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument of Immutability*, 46 STAN. L. REV. 503, 526-28 (1994).

177. See STEIN, *supra* note 5, at 111-12 (discussing use of such “common experience” as “an argument for essentialism”); see also Halley, *supra* note 176, at 526-28.

178. The gay gene confirms and cements a sense of lineage or kinship that is otherwise lacking for gay men and lesbians who are raised in heterosexual families. Vernon Rosario writes very persuasively regarding the appeal of an imagined genetic “gay kinship.” Venron A. Rosario, *Homosexual Bio-Histories: Genetic Nostalgias and the Quest for Paternity*, in SCIENCE AND HOMOSEXUALITIES 11 (Vernon Rosario ed., 1997). Rosario reasons that a gay gene offers both “vertical and horizontal lines of imagined, gay kinship.” *Id.* The vertical line extends to the past, linking the present-day gay individual with historical figures of gay genius and thereby “legitimizes a homosexual metahistory that transcends traditional genealogies.” *Id.* The horizontal kinship line, Rosario suggests, provides “the objective, biological confirmation of ‘gaydar.’” *Id.*

179. KEEN & GOLDBERG, *supra* note 136, at 116 (discussing intensity of demand among gay men and women for certain political and social reform).

180. There are a few exceptions to this, but the critics tend to be found within marginalized groups. For example, queer theory has produced a sustained critique of the identity-based politics of the contemporary gay civil rights movement. See generally JAGOSE, *supra* note 19. In addition, people of color and lesbians have tried to expose the white male bias of the movement. *Id.* at 62-63. Finally, there has been some debate regarding the importance or advisability of maintaining a full-court press for equal marriage rights. See, e.g., Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry* (1989), in WE ARE EVERYWHERE 753 (Mark Blasius &

According to two nonrandom surveys conducted by THE ADVOCATE, a national gay magazine, ninety percent of gay men and roughly one half of the lesbians surveyed believed that their sexual orientation was inborn.¹⁸¹ These percentages are considerably higher than those reflected in surveys of the general public, and they are often cited as proof that the biologic research into sexual orientation is on the right track.¹⁸² Pillard refers to this widespread belief among gay men and lesbians as the “natural history” of sexual orientation. Based on a review of first person accounts, Pillard concludes that “[f]or most people, sexual orientation *feels* innate.”¹⁸³ LeVay also uses first person accounts to debunk the notion that an individual actually chooses his sexual orientation. LeVay reasons that “[i]f homosexuality is a conscious choice made at puberty or later . . . then gays and lesbians should remember making that choice.”¹⁸⁴

1. The Narrow Parameters of the Group

The most obvious shortcoming of the gay political narrative is that it bases its sense of common identity on a shared immutable characteristic rather than on a shared non-normative object choice. Its insistence on immutability precludes it from encompassing the full range

Shane Phelan eds., 1997); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation (1989)*, in WE ARE EVERYWHERE 757 (Mark Blasius & Shane Phelan eds., 1997).

181. LEVAY, *supra* note 17, at 6 (citing surveys). Based on these surveys, LeVay concludes that “[a]lthough there are significant differences between the attitudes of lesbians and gay men, it is clear that both groups are far more inclined to consider their sexual orientation a biological ‘given’ than the general population.” *Id.* The surveys conducted by THE ADVOCATE and other commercially oriented gay concerns have produced some very questionable data, particularly those designed to measure the economic power of the gay community. *See generally* M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (2001).

182. *See, e.g.*, Pillard, *supra* note 89, at 233. Based on personal narratives and studies regarding gender atypical behavior, Pillard concludes “[t]here seems to be a fundamental bias toward either a heterosexual or homosexual developmental path, prefigured early in life, neither taught nor learned, and profoundly resistant to modification.” *Id.*

183. *Id.* at 231 (emphasis in original). Pillard notes that “[a]ccounts of same-sex erotic attraction beginning spontaneously at an early age and persisting through adolescence despite overwhelming negative reinforcement are found again and again in the sexual histories of gays and lesbians.” *Id.*

184. LEVAY, *supra* note 17, at 7 (asserting “gay people have a certain privileged insight into their own natures”). LeVay claims that:

[R]esearch into homosexuality is worth pursuing, not merely because of the intrinsic interest in understanding the basis of human diversity, but because this research may indeed, as Hirschfeld believed, help the larger society recognize what gays and lesbians have generally believed about themselves: that their sexual orientation is a central, defining aspect of their identity.

Id. at 9.

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

For example, there is a marked difference between the way men and women explain their sexual orientation, with a much greater percentage of women reporting that their sexuality is the result of some form of choice.¹⁸⁵ Assuming the forty percent of lesbians who report that their sexual orientation is the result of choice have accurately reported the genesis of their lesbianism, then the question remains where, or even whether, they fit within the identity model. Recall, Hamer believes that lesbianism “is more the result of environment than heredity.”¹⁸⁶ A program for social and legal change premised on immutability would seem to leave out individuals who assert the right to choose a sexual partner regardless of the partner’s gender. This reasoning would lead to the ridiculous conclusion that the gay political narrative offers greater protection for men than women because the former are more often “really” and “immutably” gay.¹⁸⁷ The alternative is to dismiss the personal narratives of the choice-affirming lesbians as false consciousness, perhaps a delusion of autonomy produced by over-exposure to feminist thought claiming biology is not destiny.¹⁸⁸

Beyond the issue of choice, however, there is also the question of those individuals who report bisexual attraction, transgendered identification, or whose sexual orientation varies over their lifespan.¹⁸⁹ The identity model, under which individuals are either irreversibly heterosexual or irreversibly homosexual, leaves little room for such

185. *Id.*

186. Gallagher, *supra* note 133, at 35 (quoting Hamer).

187. *See* STEIN, *supra* note 5, at 112.

188. Hamer agrees that for lesbians sexual orientation is less biologically driven. *See* Gallagher, *supra* note 133, at 35 (describing Hamer’s views regarding lesbianism).

189. However, the alternate stories are not simply lost to or ignored by the identity model. At times they are denied or the subject of outright hostility. *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW*, at xii (1996) (discussing the need to “incorporate human hybrids into the *legal* world”).

sexual ambiguity. The personal narratives it draws upon showcase individuals who report that they were born gay, not those who claim that they were born a little gay, or bisexual, or a Kinsey 3, or those who decided to be gay for the duration of their sophomore year in college.¹⁹⁰ As explained below, the insistence on the fixity of object choice also hampers the ability of the gay political narrative to respond to the emerging ex-gay counter-narrative.¹⁹¹

Given that the first person accounts touted by researchers only represent a particular subset of individuals who experience same-sex desire, it makes sense to approach these claims of corroboration with some skepticism. On one hand, the weight given to the accounts of individual gay men and lesbians by researchers establishes the coming out story as a privileged site of knowledge regarding the nature of same-sex desire,¹⁹² something that homophile activists first advocated during the reign of the psychoanalytic model.¹⁹³ On the other hand, it is exceedingly difficult to assess the reliability or accuracy of the truth claims asserted by the gay men and lesbians who relate an unconscious spontaneous feeling of difference.¹⁹⁴ In addition, it is important to recall the historical lesson outlined in Part II. Many inverts subscribed to the theories of congenital inversion and many homosexuals embraced psychoanalytic explanations and cures.¹⁹⁵ The fact that these theories were widely accepted by the objects of study may have encouraged the

190. A “Kinsey 3” refers to an individual’s score on the scale developed by Kinsey to measure the degree of same-sex attraction. See Kenen, *supra* note 62, at 208-09 (discussing Kinsey’s “heterosexual-homosexual rating scale”). A score of zero represents exclusive opposite-sex attraction and a score of six represents exclusive same-sex attraction. *Id.*

191. See *infra* text accompanying notes 240-244. Pro-family organizations also report instances where celebrities publicly shift their sexual orientation. For example, pro-family publications breathlessly reported actress Anne Heche’s engagement to a man and regularly point to other former gay activists who have entered romantic relationships with members of the opposite sex. See Family Research Council, *Born Again? Heche Engaged to ‘Straight Shooter’* (June 7, 2001), at <http://www.frc.org/papers/culturefacts/index.cfm?get=CU01F2&arc=yes> (last visited July 24, 2001); see also Family Research Council, *Q & A* (Oct. 19, 2000), at <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00j3&arc=yes> (last visited Nov. 13, 2000) (mentioning singer-songwriter Holly Near and author JoAnn Loulan).

192. The coming out story, a defining feature of gay culture, relates how an individual braves condemnation, ostracism, and worse to be true to his nature and in so doing overcomes fear to find community. This promise of rebirth and acceptance also animates the ‘coming out of homosexuality’ stories deployed by the ex-gay movement as well as the ex-ex-gay narratives.

193. See BAYER, *supra* note 13, at 105-06.

194. See *generally* STEIN, *supra* note 5, at 239-41. First, memories are not always as reliable as one would like to believe, and individuals do possess an observed tendency to view and interpret past events in light of present realities. *Id.* Moreover, the fact that gay men and lesbians do not recall making a conscious choice regarding their sexual orientation does not necessarily mean that they were born without the power to make such a choice. *Id.* at 240.

195. See *supra* text accompanying notes 72-77 and 100-103.

researchers, but it did not necessarily prove that the theories offered an accurate explanation for the cause or nature of homosexuality.¹⁹⁶

2. The Cost of Stable Gay Subjects

The cohesion fostered by the identity model exists among a self-selected group. The constraint of immutability and lack of tolerance for sexual ambiguity has transformed what began as a program for personal liberation into an exclusionary project.¹⁹⁷ The identity model perpetuates an either/or approach to human sexuality that denies fluidity of object choice and marks individuals as irreversibly homosexual or heterosexual. In terms of race or gender, however, the gay political narrative remains unmarked, thereby leaving it unmistakably white and male. Those it does include may find a place of belonging with regard to their orientation, but they will not find one for their sexuality.

Queer theory has produced a sustained critique of the identity model's insistence on stable gay subjects and identity politics in general.¹⁹⁸ Central to this critique is a social constructivist approach to sexual orientation that seeks to destabilize the historically contingent categories of heterosexual and homosexual.¹⁹⁹ The identity model, to the contrary, works to strengthen the category of homosexual by policing its boundaries and enlisting the science of immutability.²⁰⁰ From the standpoint of queer theory, the claim that individuals are capable of classification as definitively gay or definitively heterosexual is not only hubris, but counter-productive.²⁰¹ It reinscribes the oppressive hetero-

196. Present-day researchers who point to the homogeneity of the "born-that-way" coming out story are in many ways preaching to the converted. The researchers cite as proof of the intrinsic validity of the queer bio-science the personal beliefs of a subset of individuals who experience unchanging same-sex desire as innate. The publication of each new study in turn reinforces the "born-that-way" conviction producing a self-referential cycle that ignores alternate stories of same-sex desire.

197. See JAGOSE, *supra* note 19, at 30-43 (discussing liberationist strategies).

198. *Id.* at 61 (referring to identity model as "ethnic model" of sexual orientation). Jagose notes that the identity-based politics of the contemporary gay civil rights movement are "committed to establishing gay identity as a legitimate minority group, whose official recognition would secure citizenship rights for lesbian and gay subjects." *Id.*

199. See STEIN, *supra* note 5, at 93-116 (critiquing both constructionist and essentialist views of homosexuality).

200. See CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 141-42 (1995). Stychin explains "[t]o the extent that the coherent gay subject depends upon the construction of sexuality as a binary opposition dependent upon the gender of object choice, the articulation of a gay subjectivity can reinforce and reify the hetero-homo dichotomy which forms the basis of categorical thinking around sexuality." *Id.*

201. On this point, Jagose asks: "is the man who lives with his wife and children, but from time to time has casual or anonymous sex with other men, homosexual?" JAGOSE, *supra* note 19, at 7.

homo opposition and frustrates the potentially transformative value of nonnormative libidinal object choice.²⁰² On a more pragmatic level, this insistence on the fixity of object choice has left the gay political narrative ill-equipped to deal effectively with questions of bisexuality²⁰³ and woefully unprepared to respond to the emerging ex-gay counter-narrative that has been warmly embraced and advanced by pro-family organizations.²⁰⁴

Another important critique of the identity model takes issue with its inability to conceptualize the multivalent nature of identity.²⁰⁵ This comes into particularly sharp relief when dealing with the claims of equivalence that assert that gay men and lesbians are the same as other deserving minority groups, but it begins on the individual level.²⁰⁶ The gay political narrative quite naturally foregrounds the sexual orientation of its subjects. However, when sexual orientation is the only articulated identity, and the subjects remain otherwise unmarked, the subjects are configured as white and male.²⁰⁷ The silence of the gay political narrative on issues of race and, until recently, issues of gender, produces a one-dimensional white male subject who faces a singular point of oppression. This simplistic approach to liberation obscures the multivalent nature of our identities, as well as our oppressions.²⁰⁸

202. STYCHIN, *supra* note 200, at 141-42. Diana Fuss explains the relationship of dependency existing between homosexual and heterosexual as follows: "The homo in relation to the hetero, much like the feminine in relation to the masculine, operates as an indispensable interior exclusion—an outside which is inside interiority making the articulation of the latter possible, a transgression of the border which is necessary to constitute the border as such." Diana Fuss, *Introduction*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 3* (Diana Fuss ed., 1991).

203. See generally Yoshino, *The Epistemic Contract*, *supra* note 189; COLKER, *supra* note 189. Individuals who identify as bisexual report experiencing hostility from gay men and lesbians who dismiss the label of bisexual as either a stubborn refusal to let go of heterosexuality on the part of someone who really is gay or an attempt to appear progressive on the part of someone who really is heterosexual. *Id.*

204. See Nancy J. Knauer, *Immutability and the Ex-Gay Counter-Narrative* (forthcoming and discussing the importance of the alliance between pro-family forces and the ex-gay movement).

205. See Knauer, *supra* note 34, at 1038-40; see also Darren Lenard Hutchinson, *Out Yet Unseen, A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561, 648 (1997) (describing "identity formation" as "an ongoing and multivalent process").

206. See *infra* text accompanying notes 331-338.

207. See JAGOSE, *supra* note 19, at 62-64 (discussing critique of gay identity politics by lesbians and gays of color). Jagose notes "in describing that community as organised [sic] by a single defining feature—sexual orientation—the ethnic model could theorise [sic] race only as an insubstantial or, at best, additional category of identification." *Id.* at 63; see also Hutchinson, *supra* note 205, at 648 (discussing the absence of consideration of race within gay and lesbian scholarship).

208. See Knauer, *supra* note 34, at 1038-40; see also Hutchinson, *supra* note 205, at 648 (describing "identity formation" as "an ongoing and multivalent process").

Finally, the attempts of the identity model to bury same-sex desire under the mantle of “orientation” presents an inherently disempowering view of sexuality.²⁰⁹ The military cases where service members assert that the statement “I’m gay” signals no propensity to engage in homosexual conduct represent the extreme extent to which the identity model can divorce individuals from expressions of sexuality.²¹⁰ Thus, the identity model offers an image of a predominantly chaste subject who should not be punished for his nature.²¹¹ This appears to be not only disempowering, but potentially of limited utility in terms of any civil rights protections that may be garnered. As Edward Stein has noted, gay men and women most often need civil rights protections for their actions, not their thoughts.²¹²

Granted, the split between identity and conduct offered by the identity model initially may have been necessary to enable gay men and lesbians to escape the legacy of the sexualized psychopath. However, if the goal had been to allow gay men and lesbians to be seen as individuals, rather than as sex perverts, the identity model falls considerably short of that mark. To the contrary, a model that separates identity from sexuality will never produce a whole individual. The separation is, at base, dishonest and unworkable because sexuality is part of one’s individuality, part of one’s identity.

B. *Third Party Appeal and Alliance Building*

The ability to form alliances is crucial to any program for social change, and public opinion surveys indicate that nongay individuals who believe in a biological cause of homosexuality are more inclined to support gay civil rights initiatives.²¹³ This gives gay organizations the

209. See JAGOSE, *supra* note 19, at 58 (discussing introduction of term “orientation”).

210. See *infra* text accompanying notes 288-290. Halley notes that unless the servicemember “is truly and contentedly celibate,” the litigation strategy “is an insult to the personal sexual dignity of most servicemember clients.” JANET HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 125 (1999).

211. See HALLEY, *supra* note 210, at 125 (referring to servicemembers who are “truly and contentedly celibate”).

212. STEIN, *supra* note 5, at 295. Stein writes:

[L]esbians and gay men deserve protection against discrimination and positive rights with respect to their actions and decisions rather than for their mere orientations. It is when they engage in same-gender sexual acts, identify as gay men and lesbians, and create lesbian and gay families that they especially need protections for and rights based on choices that build on their underlying (and perhaps immutable) desires.

Id.

213. LeVay explains: “Attitudes towards gays and lesbians are inextricably tied up with beliefs about what causes them to be homosexual.” LEVAY, *supra* note 17, at 2.

clear incentive to deploy the identity model of homosexuality as widely as possible because if more individuals believe that homosexuality is inborn, fewer will support anti-gay ballot referenda, lobby their elected representatives for anti-gay marriage reform, practice discrimination, or commit hate crimes.²¹⁴

Indications are that the wide deployment of the identity model may be working. Surveys report that an increasing number of individuals assign a biological root to homosexuality.²¹⁵ In 1977, only thirteen percent of individuals polled believed that homosexuality was biologically based, whereas fifty-six percent believed that homosexuality was the result of environment or other factors.²¹⁶ By 2001, the percentage of individuals convinced of a biological cause had grown to forty percent, with only thirty-nine percent citing environmental causes.²¹⁷ Both pro-gay activists and pollsters interpret the increase in the number of those subscribing to the “born-that-way” explanation as a good sign for gay rights, evidence that public approval is increasing with time.²¹⁸

214. The Human Rights Campaign has conducted its own research on this subject and found that only fifty percent of those surveyed who believe that homosexuality is a chosen behavior believe that gays should have equal rights in the workplace, whereas the number favoring anti-discrimination protection jumps to sixty-nine percent among those who believe that homosexuality is inborn. Chuck Colbert, *From Gay to Straight Remains a Path Unproven*, BOSTON GLOBE, May 13, 2001, at E4.

215. See Ontario Consultants on Religious Tolerance, *supra* note 5. The website of the Ontario Consultants on Religious Tolerance provides a chart mapping the Gallup poll results from 1977 through 2001. *Id.* In seven separate polls, the Gallup organization asked whether homosexuality is something “a person is born with” or “due to other factors such as upbringing or environment.” *Id.* The margin of error is plus or minus five percent. *Id.*

Year	Born w/	Upbringing	Both	Neither	No Opinion
June 1977	13	56	14	3	14
June 1982	17	52	13	2	16
Oct. 1989	19	48	12	2	19
Nov. 1996	31	40	13	3	13
June 1998	31	47	6	3	13
Feb. 1999	34	44	13	1	8
May 2001	40	39	9	3	9

Id.

216. *Id.*

217. *Id.*

218. Referring to the Amendment 2 trial in Colorado, LeVay notes that “[o]ne thing that everyone involved in the trial seemed to agree on was the biological theories of sexual orientation are ‘good for’ gay rights, whereas environmental theories, and especially anything smacking of choice, are bad for them.” LEVAY, *supra* note 17, at 244; see also STEIN, *supra* note 5, at 230 (discussing increase in number of people who ascribe a biological or genetic cause to homosexuality). Stein asserts that this increase is “more than the evidence seems to warrant.” STEIN, *supra* note 5, at 230.

1. Questionable Causation

Despite the resources devoted to advancing the cause of immutability, it is not clear why, or even whether, a biological explanation for homosexuality makes the extension of basic civil rights to gay men and lesbians more palatable. The public opinion surveys only show that individuals who ascribe to biological explanations are more likely to support civil rights protections than those who believe that homosexuality is chosen. They do not show that a particular understanding of homosexuality produces a particular political opinion. As with Hamer's "gay gene" study, the surveys illustrate linkage, but not causality.²¹⁹

One explanation that assumes a causal relationship between biology and support for civil rights is rooted in reasoning very similar to that employed by Krafft-Ebing and Hirschfeld, both of whom used the inversion model to argue for an end to criminal sanctions because individuals should not be punished for their natures.²²⁰ If homosexuals are indeed "born that way," the argument goes, then they cannot really help who they are and, by extension, what they do.²²¹ This argument foregrounds identity and maintains that behavior (i.e., sexuality) is an unavoidable consequence of one's given nature. It is assumed that the de-emphasis of sexuality may also make homosexuality less distasteful to the general public who may support gay rights in the abstract, but may remain squeamish when presented with overt representations of same-sex desire.²²²

The fact that individuals support affirmative gay civil rights and not just the decriminalization of homosexual acts, however, may suggest a slightly more sophisticated thought process. Those who subscribe to a biological view of homosexuality are not simply more likely to oppose criminalization of homosexual acts.²²³ They are more likely to favor the grant of affirmative civil rights protections such as those extended to

219. See STEIN, *supra* note 5, at 213-16 (discussing difference between linkage and causality).

220. See *supra* text accompanying notes 69-77.

221. *Id.* Stein refers to this as "the biological argument for lesbian and gay rights." STEIN, *supra* note 5, at 277. He explains that "this argument tries to use scientific research on sexual orientation to show that sexual orientations are not chosen and then use this result to show that lesbians and gay men should not be punished for their sexual orientation." *Id.* This argument is different from the "Don't Ask, Don't Tell" litigation which argues against any propensity to commit sodomy. See *infra* text accompanying notes 294-296.

222. J. LeLand & Mark Miller, *Straight Views, Gay Views: By the Numbers*, NEWSWEEK, Aug. 17, 1998, at 52 (reporting fifty-one percent of those surveyed "are 'very' bothered by gays kissing in public" and "29 percent are 'very' bothered by same-sex couples holding hands").

223. See *supra* note 214.

other disadvantaged minorities.²²⁴ Once homosexuality is conceptualized as an immutable, unchosen, and benign trait, the identity model then invites comparisons between homosexuals and other minority groups and allows gay activists to appropriate much of the language and argumentation of the civil rights movement, perhaps striking a sympathetic chord with certain segments of the population.²²⁵ In this way, the support for the affirmative grant of rights may stem from a commitment to equal treatment for all minority groups and an abiding sense of fairness.

Edward Stein does not attribute the persuasive power of biological theories to either the exculpatory strength of nature or the enduring commitment of the American people to principles of equality.²²⁶ Instead, he notes that the causal relationship between biological theories and support for gay civil rights may be reversed.²²⁷ Stein suggests that perhaps a pre-existing favorable opinion of gay men and lesbians makes one more likely to subscribe to biological theories.²²⁸ The increase in support for gay civil rights would then presumably be the result of changing attitudes towards gay men and lesbians and not the result of the persuasive power of the queer bio-science. In other words, individuals first become favorably disposed towards gay men and lesbians and only then do they become convinced that gay men and lesbians are born that way.²²⁹

2. A Potentially Disempowering and Isolating Message

Undeterred by such questions of causation, pro-gay organizations base their equality demands on the constitution of gay men and lesbians

224. *Id.*

225. See JAGOSE, *supra* note 19, at 61-62 (explaining the strategy of the “ethnic model” as derived from race-based politics”).

226. STEIN, *supra* note 5, at 230.

227. *Id.* To the contrary, LeVay maintains very early in his book that “[a]ttitudes towards gays and lesbians are inextricably tied up with beliefs about what causes them to be homosexual.” LEVAY, *supra* note 17, at 2.

228. STEIN, *supra* note 5, at 230. Stein explains that the biological evidence does not entail (logically or even pragmatically) the shift in ethical views. *Id.* In fact, it is more plausible that changes in attitude about homosexuality have made biological theories seem more palatable and made psychological theories seem less so: a person who is favorably inclined towards lesbians and gay men may be more willing to accept biological theories than psychological ones; a person who is not so inclined might have the reverse dispositions. *Id.*

229. *Id.* at 301. Stein is critical of what he refers to as a “pragmatic” approach to gay rights, where advocates believe “whatever their strength, make the arguments that persuade people to support lesbian and gay rights.” *Id.* He concludes that this “pragmatic approach is not promising.” *Id.*

as a disadvantaged minority.²³⁰ This argument sidesteps the issue of the morality of same-sex desire because homosexual identity is innate and the lack of volition or free will somehow results in moral absolution. The only moral force is in the claim of equality, namely that unequal treatment is wrong. However, equality claims that presuppose an immutable gay identity are premised on a distinction between orientation and behavior that may prove ultimately disempowering and untenable. A major consequence of this effort to distance gay men and lesbians from the expression of their sexuality means that the pro-family/ex-gay forces are the only ones talking about same-sex sexuality and, as discussed below in Part III.C., what they are saying is not particularly flattering.²³¹

Moreover, by preferring discussions of equality over those of morality, the pro-gay forces advocate an identity-based civil rights platform that relies on an unexamined equivalence between and among minority groups.²³² The insistence on the equivalence of minority experiences ignores the inherent complexity of identity and the singularity of oppression.²³³ For example, the analogy between gay men and lesbians and African-Americans assumes not only a congruence of oppression, but also mutually exclusive boundaries between the two groups. Under such a model, the trials of a gay man (who is assumed to be white) are considered the same as those of an African-American man (who is assumed to be heterosexual).²³⁴ In the race to establish gay men and lesbians as a legitimate minority, such claims of equivalence can erase the gay African-American subject and the particularity of his experience.²³⁵ This can lead not only to the offensive assertion that anti-gay oppression is the same as the legacy of hundreds of years of racial slavery, but it can also obscure the uniqueness of sexual orientation as a defining group feature, namely the centrality of questions of morality.²³⁶

230. See Knauer, *supra* note 34, at 1051 (noting “[i]f the catchword for the pro-family movement is ‘morality,’ then the catchword for the pro-gay organizations is ‘equality’”). In fact, the emphasis on equality is so strong that the logo of the Human Rights Campaign is a yellow equal sign against a purple background. *Id.*

231. See, e.g., Timothy J. Dailey, *The Negative Health Effects of Homosexuality* (Mar. 1, 2001), at <http://www.frc.org/get/is01b1.cfm> (last visited Jan. 4, 2002); see also Robert E. Regier, *Crimes Against the Law of Nature: In Defense of Sodomy Laws* (Jan. 17, 2001), at <http://www.frc.org/papers/infocus/index.cfm?get=IF01A2&arc=yes> (last visited June 16, 2001).

232. See Knauer, *supra* note 34, at 1038-41.

233. *Id.* at 1039 (noting “[t]his lack of nuance thus risks not only overstating the reality of gay oppression, but also understating its singularity”).

234. *Id.* at 1038-41.

235. See generally Hutchinson, *supra* note 205.

236. Warner explains that this morality discourse distinguishes sexual orientation from all other minority classifications. Warner, *supra* note 46, at xviii. Warner writes: “There have

C. *The Pro-Family Counter-Narrative*

Pro-family organizations strenuously dispute the claims of shared identity and equivalence with a mixture of secular and religious or moral arguments. With regard to the notion of shared identity, pro-family activists are adamant that the only defining feature of homosexuals is a shared predilection for immoral and unhealthy sexual acts resulting from an early failure of psychosexual development which can be corrected through therapy and prayer.²³⁷ As explained in Part II.C. above, they actively dispute the findings of the queer bio-science with their own independent research and the help of reparative therapists.²³⁸ In addition, pro-family organizations have increasingly attempted to utilize the testimony of ex-gays to discredit claims of immutability.²³⁹

The ex-gay counter-narrative purports to offer “living proof” that homosexuality is not immutable and that a “heterosexual shift” is possible.²⁴⁰ Unlike the individuals who experience a change in sexual orientation over their lifespan, the ex-gay experience is distinctly political. Ex-gays continue to define themselves by what they no longer are (or do), and they are committed to helping others “come out of homosexuality.”²⁴¹ Their reverse coming-out stories are used strategically

always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not whether to be one.” *Id.*

237. Central to this belief is the conviction that all individuals are possessed of free will and have the capacity to resist immoral behavior. It is difficult to overstate the degree to which pro-family organizations attempt to characterize homosexual behavior as unhealthy. *See, e.g.,* Dailey, *supra* note 231. These exceedingly negative characterizations lead to strong support for sodomy laws. *See* Regier, *supra* note 231.

238. *See supra* text accompanying notes 162-163.

239. A consortium of pro-family organizations inaugurated their affiliation with ex-gay voices in a 1998 advertising campaign. *See* Laurie Goodstein, *The Architect of the ‘Gay Conversion’ Campaign*, N.Y. TIMES, Aug. 13, 1998, at A10. The organizations ran a series of full-page advertisements in newspapers throughout the country. *Id.* The ads featured self-described “ex-gays” who claimed that “nurture, not nature, is the real cause of homosexual behavior.” Family Research Institute, *In Defense of Free Speech* (Sept. 15, 1998), at <http://www.family.org/research/papers/a0002800.html> (last visited June 19, 2001).

240. *See* Family Research Institute, *supra* note 9. For example, one of the advertisements features Anne Paulk, who is described as a “wife, mother, former lesbian.” *Id.* The ad quotes Paulk, “I’m living proof that Truth can set you free.” *Id.*

241. Until recently, pro-family organizations had to rely on experts such as Paul Cameron and Joseph Nicolosi to make their case about the excesses of gay (male) sexuality and the possibility for conversion. *See* Nicolosi, *supra* note 48, at 165. Although these experts were able to provide startling snapshots of the putative decadence and hopelessness of the gay lifestyle, their testimony lacked the persuasive power of the first person narratives—something that the pro-gay opposition used very effectively with the coming out story and its tale of personal discovery, bravery, and, ultimately, liberation. The state of Colorado originally intended to call Cameron as an expert witness in its defense of Amendment 2. *See* KEEN & GOLDBERG, *supra* note 136, at 60-61.

by pro-family forces to provide a first-hand description of the purported excesses of the “gay lifestyle”²⁴² and to justify therapeutic intervention.²⁴³

The pro-gay response to the ex-gay narrative has been constrained due to its insistence on stable gay subjects. Since change is not possible under the rubric of immutability, the debate between pro-gay and ex-gay factions often devolves into a barrage of competing truth claims concerning sexual identity, the veracity of which is exceedingly difficult to assess or measure. The typical pro-gay response to the ex-gay counter-narrative can be described as follows: ex-gays were either never gay or they are still gay, but they are certainly not ex-gay.²⁴⁴ Obviously, this response is based on a strong belief in an essential unchangeable gay identity. It does not assert the inherent freedom to act on same-sex desire, but instead to act in accordance with one’s true nature.

Pro-family groups systematically take issue with the claim that gay men and lesbians comprise a minority that should be granted equal rights. The argument against minority status is basically two-fold: first, gay men and lesbians do not share an immutable characteristic, only behavior; and second, even if they were considered a valid minority, they are not a deserving minority in need of special civil rights protections.²⁴⁵ From a pro-family standpoint it is important to dispel the notion that gay men and lesbians constitute a valid and deserving minority because it undercuts the appeal to equality principles. By drawing often crude analogies to African-Americans, pro-family organizations attempt to establish that gay men and lesbians are undeserving of civil rights protections based on sexual orientation, and they are actually demanding special rights, not equal rights.²⁴⁶

242. Pro-family advocates commonly use the pejorative term “gay lifestyle.” The use of “gay” as an adjective to modify “lifestyle” underscores the pro-family view that homosexuality is a chosen behavior. For example, Nicolosi writes about the “compulsive addictive elements of the gay lifestyle.” NICOLOSI, *supra* note 48, at 123.

243. The expressed concern for the ex-gay or the homosexual “struggler” gives new immediacy to pro-family arguments against attempts to “normalize” homosexuality. The pro-family argument says if gays really can change and the gay lifestyle really is so terrible, then it is only compassionate to try to help individuals come out of homosexuality. This allows pro-family organizations to adopt a more conciliatory and compassionate tone than that which had characterized the Culture Wars throughout the mid- to late 1990s.

244. On the “never-were-gay” side, David Smith of the Human Rights Campaign said on CNN that “[f]or the most part,” Spitzer’s research subjects, “sound[] like they were not gay to begin with.” CNN News Transcripts, *David Smith: Gay Study “Unscientific,”* May 9, 2001. On the “still-gay” side, Richard Isay responds that “[t]here’s no question in my mind that what Spitzer reported was not a change in sexual orientation but simply a change in sexual behavior.” Mubarak Dahir, *Why Are We Gay? Opinions and Research*, THE ADVOCATE, July 17, 2001, at 37.

245. See generally HERMAN, *supra* note 7, at 111-36.

246. *Id.*

The starting point of the pro-family argument is that gay men and lesbians do not constitute a valid minority because their only defining feature is behavior—immoral, unhealthy behavior that individuals can and do successfully renounce.²⁴⁷ The pro-gay silence when it comes to matters of overt sexuality, as opposed to concepts once or twice removed from physicality, such as domestic partnerships and civil unions, consigns the definition of same-sex desire and sexuality to the morality discourse of the pro-family factions. Failure to deal with issues of morality beyond abstract notions of equality leaves the pro-gay movement ill-equipped to counter the pro-family moral condemnation of homosexual acts and allegations of promiscuity which are regularly used to garner support for anti-gay ballot initiatives and resonate even within Congressional debate.²⁴⁸

Pro-family arguments employ their own version of equivalence claims, asserting that gay men and lesbians can not comprise a valid minority because they do not share an immutable characteristic like race.²⁴⁹ They attempt to discredit any comparison between sexual orientation and race and frequently quote Colin Powell's comment during the 1993 "Gays in the Military Debate" that unlike sexual orientation, "skin color is a benign, nonbehavioral characteristic."²⁵⁰ Pro-family

247. The emphasis on the ability to renounce homosexual behavior highlights the importance of the ex-gay movement and reparative therapy efforts. It also illustrates why pro-family organizations embraced the findings of Spitzer's "Gays Can Change" study.

248. The materials produced by the organization Colorado for Family Values (CFV) in support of Amendment 2 provide an example of the pro-family sensationalized treatment of same-sex sexuality. ESKRIDGE & HUNTER, *supra* note 88, at 269-76. The infamous eight-page CFV circular is reproduced in full in the 2001 Supplement to the Eskridge and Hunter casebook. *Id.*

The 1996 Congressional debate over DOMA included repeated references to the fall of Rome. See Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W.VA. L. REV. 129, 195-96 (1998) (quoting Senator Byrd). During the debate, Representative Coburn stated "over 43 percent of all people who profess homosexuality have greater than 500 partners." *Id.* at 196 (quoting Rep. Coburn).

249. See *supra* text accompanying notes 205-208. In their discussions of sexual orientation and race, the pro-family organizations, like their pro-gay opponents, speak as if the two categories were mutually exclusive. *Id.* The analogy between race and sexual orientation was used unsuccessfully during the "Gays in the Military Debate" when commentators pointed to President Truman's 1948 Executive Order desegregating the armed forces as precedent for President Clinton's proposal to allow gay men and women to serve openly. See Ann Scales, *President Takes Stand on Gay Rights: In Speech, Promotes Equality as Part of 'One America' Push*, BOSTON GLOBE, Nov. 9, 1997, at A1. President Truman's Executive Order mandated equal opportunity "for all persons in the armed services without regard to race, color, religion or national origin." Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

250. GALLAGHER & BULL, *supra* note 7, at 134-38. Pro-family activists have latched on to Powell's testimony and quote it frequently. *Id.* at 137. For example, the publication entitled *Homosexuality: A Civil Right or Wrong?*, available on the website of Concerned Women for America, begins with the following quote from Powell's Congressional testimony: "Skin color is

organizations use Powell's quote, along with anti-gay remarks from other prominent African-Americans, to suggest that any attempt at such a comparison is offensive and demeaning to the black struggle for civil rights.²⁵¹ They also engage in their own contrived comparisons which invariably show that, unlike African-Americans, gay men and lesbians are a very wealthy, privileged, and politically powerful group.²⁵²

Instead of comparing sexual orientation to race, pro-family organizations claim that it would be more appropriate to compare homosexuality to alcoholism.²⁵³ This preferred parallel offers an image of self-destructive behavior that begs for therapeutic intervention. It also delegitimizes homosexuality as a minority group because, the argument asserts, no society would ever consider extending civil rights protections on the basis of an individual's addiction to alcohol.²⁵⁴ Furthermore, if

a benign, non-behavioral characteristic . . . sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two—racial and sexual discrimination—is a convenient but invalid argument.” Concerned Women for Am., *Homosexuality: A Civil Right or Wrong?* (Apr. 1, 1999), at http://www.cwfa.org/library/family/1999-04_pp_homo.shtml (last visited Aug. 7, 2002).

251. *Id.* For example, Concerned Women for America reports that Alveda King, the niece of Martin Luther King, Jr. and founder of King for America, “is insulted by the homosexual community’s attempt to equate their crusade for special rights with the civil rights movement led by Dr. King.” *Id.* The Family Research Council reports that while campaigning against domestic partnership legislation, a black minister remarked “I have met many ex-homosexuals. I have never met an ex-black.” Family Research Council, *Stop the Insanity, Gov. Davis* (Sept. 21, 2000), at <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00I3&arc=yes> (last visited Nov. 13, 2000). In addition, one of the 1998 ‘change ads’ featured African-American “minister and pro-football player” Reggie White, whom the ad explained had been “branded” by the media for telling the pro-family truth about homosexuality. Family Research Institute, *supra* note 239. Another ad lauds Reggie White and the African-American singing duo of Angie and Debbie Winans as “prominent people . . . [who] have spoken out on homosexuality . . . calling it a sin.” Family Research Council, *supra* note 9.

252. See *Eskridge & Hunter, infra* note 362, at 269. Frequently cited statistics that were first used in connection with the Amendment 2 campaign, purport to show that homosexuals have very high levels of disposable income when compared with the same figures for “disadvantaged African-Americans.” See *infra* note 362.

253. Schneider, *supra* note 23. Pro-family writings also occasionally make the comparison between sexual orientation and obesity. Concerned Women for Am., *supra* note 250. The following quote from Martin Luther King, Jr.’s niece, Alveda King, is illustrative:

I used to be overweight. When I was large, I could have chosen to be a victim, like many other obese people, and lobbied for laws protecting obese people from discrimination, but [instead] I decided to make a change Homosexuals can either choose to be victims, or choose to make a change.

Id.

254. An illustrative pro-family publication draws the following analogy between alcoholism and homosexuality:

People have asserted that they cannot keep themselves from smoking, drinking, or even adultery, because they were born with uncontrollable proclivities. While it is true that we are born with fallen natures that incline us toward any number of vices, it is an error

homosexuality is like alcoholism, then society should not celebrate or even tolerate homosexuality, but instead should offer to help the homosexual to stop engaging in the harmful behavior which is at the root of his or her addiction. The alcoholism analogy urges society to assume a therapeutic posture vis-à-vis the homosexual and retains its validity regardless of whether the “cause” of homosexuality is psychosexual or biological. Ultimately, pro-family organizations want to establish that gay men and lesbians choose to engage in homosexuality and, therefore, they can choose to stop.²⁵⁵

IV. THE LEGAL ARGUMENTS OF IDENTITY AND EQUIVALENCE

The current state of gay civil rights presents an interesting paradox. Although gay men and lesbians now enjoy a greater range of protections, they are also the subject of more specifically anti-gay legislation than ever before.²⁵⁶ These anti-gay laws, such as the legislation prohibiting same-sex marriage, are relatively new developments. Indeed, until recently, the restraining force of heteronormativity was sufficient to eliminate the need for anti-gay laws.²⁵⁷ For example, in 1970 no one would have seriously considered that a court would approve an application for a marriage license by a same-sex couple under a gender-neutral marriage law.²⁵⁸ However, after the 1993 Hawaii Supreme Court

to contend that an inclination is “uncontrollable.” We can make choices and are not forced to engage in illicit or dangerous practices of any sort.

Id.

255. Even if certain early childhood experiences may pre-dispose an individual to experience homosexual tendencies, “these life situations don’t deny the choice each makes in yielding to temptation.” Family Research Institute, *We’re Standing for the Truth That Homosexuals Can Change*, at <http://www.family.org/cforum/research/papers/a0002799.html> (n.d.) (last visited June 19, 2001). This reasoning even survives a concession that there is a biological link to homosexuality. In fact, the emphasis on free will has led some to assert that “[h]omosexuals can either choose to be victims, or choose to make a change.” Concerned Women for Am., *supra* note 250 (quoting Alveda King).

256. ESKRIDGE, *supra* note 54, at 210 (referring to such laws as “a novelty, not showing up in state sodomy law until 1969”). For example, Eskridge reports that sodomy laws restricted to same sex sodomy did not appear until 1969. *Id.*

257. Michael Warner used the term heteronormativity to refer to the view of heterosexuality “as the elemental form of human association, as the very model of intergender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn’t exist.” Michael Warner, *supra* note 46, at xxi.

258. See generally *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974). There are several early same-sex marriage cases that date from the early 1970s around the time when states began adopting Equal Rights Amendments and ratification of the federal Equal Rights Amendment was pending before the states. *Id.* The claims were rejected largely on definitional grounds: marriage can only exist between a man and a woman. *Id.*

decision in *Baehr v. Lewin*, thirty-seven state legislatures and Congress have enacted legislation restricting marriage to the union of one man and one woman.²⁵⁹ Recent advances in gay civil rights have invigorated pro-family efforts to preserve their particular vision of morality and family, and the result has been numerous legal efforts designed to hold the line against what the pro-family organizations would characterize as the ever encroaching homosexual agenda.²⁶⁰

Legal disputes over gay rights take place on the federal, state, and local levels and arise in a wide variety of contexts, including battles over referenda,²⁶¹ proposed legislation,²⁶² high profile lawsuits,²⁶³ and even curriculum reform.²⁶⁴ These legal challenges require a more formal deployment of the gay political narrative than that discussed in Part III in connection with the socio-political goals of advancing group cohesion and enhancing third party appeal. In many ways, however, the arguments are very similar and rest on the same assertions of identity and equivalence. From a legal standpoint, the gay political narrative first establishes that gay men and lesbians possess a common orientation or status. Once gay men and lesbians are configured as a valid minority

259. See generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The Defense of Marriage Act (DOMA) states that a same-sex partner cannot qualify as a "spouse" for any federal purpose. 1 U.S.C.A. § 7 (West 2001). DOMA adds the following definition of "marriage" and "spouse" to the United States Code:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus or agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to the person of the opposite sex who is a husband or wife.

Id. The website of the Human Rights Campaign (HRC) provides a list of the thirty-seven states which expressly prohibit same-sex marriage. Human Rights Campaign, *Laws in Your State* (Jan. 27, 2003), at <http://www.hrc.org/familynet/chapter.asp?article=554> (last visited Jan. 27, 2003). Same-sex marriage is not legal in any state. *Id.* Vermont recognizes same-sex civil unions. 15 VT. STAT. ANN. §§ 1201-1207 (Supp. 2001). Hawaii grants certain rights to same-sex "reciprocal beneficiaries." HAW. REV. STAT. § 572C-1 (1999). California grants registered domestic partners certain decision-making authority typically reserved for spouses, as well as standing to sue for wrongful death. CAL. CIV. PRO. CODE § 377.60, ch. 893 (Deering 2001).

260. Concerned Women for Am., *Holding the Line* (Aug. 1, 1998), at http://www.cwfa.org/library/family/1998-08_fv_homo.shtml (last visited June 20, 2001) (discussing the ex-gay counter-movement).

261. KEEN & GOLDBERG, *supra* note 136, at 5. Keen and Goldberg report that there has been at least one anti-gay ballot initiative each year since 1974. *Id.*

262. See Knauer, *supra* note 248, at 185-97 (discussing pro-family lobbying efforts in support of DOMA).

263. *Boy Scouts of America v. Dale* is an example of a high profile lawsuit that was avidly followed in both the pro-gay and pro-family press, propelling Assistant Scout Master Dale to minor celebrity status. See Knauer, *supra* note 34, at 1053 (describing Dale "as a gay celebrity litigant").

264. See Knauer, *supra* note 7, at 473-75 (discussing curriculum issues).

with a shared nature or identity, it then appeals to equality principles and asserts that gay men and lesbians should be treated the same as any other deserving minority.

In attempting to construct a valid minority, the gay political narrative must overcome the resilience of the behavioral model of homosexuality and the precedent of *Bowers v. Hardwick*, both of which conflate the homosexual with sodomy.²⁶⁵ Thus, the identity model's first task is to establish what homosexuality is not: to decouple homosexual acts from homosexual orientation. This disavowal of physicality then makes way for the argument that regardless of the law's ability to criminalize same-sex sodomy, individuals should not be punished for their orientation and gay men and lesbians should be granted the same level of protection afforded to other minority groups, perhaps even suspect or quasi-suspect classification for purposes of the Equal Protection Clause of the U.S. Constitution.²⁶⁶

This dual reasoning of identity and equivalence has made considerable legal inroads, even though the legal status of gay men and lesbians continues to vary greatly from jurisdiction to jurisdiction.²⁶⁷

265. *Bowers v. Hardwick*, 478 U.S. 186, 190, 192-94, 196 (1986). *Hardwick* upheld the constitutionality of criminal sodomy statutes, holding that homosexual sodomy was not protected under the constitutional right of privacy in light of our nation's history and tradition. *Id.*

266. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." *Id.* State and federal laws or policies that extend benefits, protections or burdens based on certain classifications or categories of individuals are always subject to the mandate of the Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the Due Process Clause of the Fifth Amendment extends equal protection safeguards to federal laws and policies). Most classifications or categories need only bear a rational basis to a legitimate state interest. *Id.* Certain types of classifications require a higher degree of justification. *Id.* The highest degree of scrutiny, the so-called "suspect classification," requires the state actor to establish that the classification at issue is narrowly drawn to further a compelling state interest. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967). The standard applied to suspect classification such as race is designed to combat "prejudice against discrete and insular minorities" and is derived from the famous footnote four in the *Carolene Products* case. *See United States v. Carolene Prods., Co.*, 304 U.S. 144, 153 n.4 (1938). A form of heightened or intermediate scrutiny is often applied to classifications based on gender, in which case the classification must serve an important, rather than a compelling, state interest. *See United States v. Virginia*, 518 U.S. 515, 523-24 (1996).

267. The status of gay men and lesbians can vary even within a given jurisdiction as an increasing number of municipalities extend various civil rights protections to gay men and lesbians. For example, Virginia vigorously defends its sodomy law and has passed anti-marriage legislation. *See* VA. CODE ANN. § 18.2-361 (Michie 2000) (sodomy law); VA. CODE ANN. § 20-45.2 (Michie 2000) (anti-marriage law). On the local level, however, numerous municipalities prohibit discrimination based on sexual orientation. *See* Lambda Legal Def. & Educ. Fund, *Virginia State Law*, at <http://www.lambdalegal.org/cgi-bin/iowa/states/record?record=46#Domestic> (n.d.) (last visited Jan. 18, 2002). When the county of Arlington, Virginia voted to extend health benefits to domestic partners, it was challenged on the grounds that it exceeded the county's authority. *See Arlington v. White*, 528 S.E.2d 706, 707 (Va. 2000) (declaring policy *ultra vires*).

Acceptance of gay men and lesbians as a deserving and valid minority has prompted many jurisdictions, along with many private employers, to extend anti-discrimination protection on account of sexual orientation.²⁶⁸ Some have even expanded the idea of nondiscrimination to include the extension of domestic partnership benefits or other forms of recognition of same-sex couples.²⁶⁹ In many other instances, however, the law continues to cleave to a behavior-based understanding of homosexuality where homosexuals are defined by their sexual behavior or their propensity to engage in such behavior, thereby undermining attempts to argue for minority status, and its attendant civil rights protections.²⁷⁰

A. *Constructing Identity*

Legal arguments regarding gay civil rights, whether they be pro or con, are necessarily premised on a particular understanding of the nature of homosexuality. Thus, at the most basic level, gay civil rights claims must overcome the assumptions of the behavioral model that define homosexuality by reference to acts and continue to serve as the basis for many of the laws and policies regulating same-sex desire. The identity model meets this challenge by asserting that homosexuality is itself independent of acts, and it has been relatively successful outside the military context in establishing that “I am gay” is not simply coterminous with the phrase “I engage in sodomy.”²⁷¹ However, as seen in *Boy Scouts of America v. Dale*, the gay political narrative has had some difficulty establishing positive content for the statement “I am gay.”²⁷² In other words, the gay political narrative may be very clear on what being gay *does not* mean, but it has been less clear on what being gay *does* mean.

268. See Human Rights Campaign, *Addressing Discrimination in the Workplace* (Oct. 25, 2002), at <http://hrc.org/worknet/nd/index.asp> (last visited Oct. 25, 2002). Twelve states and the District of Columbia prohibit discrimination on the basis of sexual orientation in both public and private employment. *Id.* The Human Rights Campaign reports that 298 of all Fortune 500 companies have a policy prohibiting discrimination based on sexual orientation, along with 1234 additional private companies, and 359 colleges and universities. *Id.*

269. See Human Rights Campaign, *State Governments That Offer DP Health Benefits* (Oct. 25, 2002), at <http://www.hrc.org/worknet/dp/index.asp> (last visited Oct. 25, 2002). Eight states and the District of Columbia offer domestic partner health benefits. *Id.* The Human Rights Campaign reports that 179 of all Fortune 500 companies have a policy extending health benefits to domestic partners, along with 4021 additional private companies, and 173 colleges and universities. *Id.*

270. This is clearly the case with current U.S. military policy where the statement “I’m gay” does not signal mere membership in a minority group, but the propensity to engage in sodomy. See *infra* text accompanying notes 296-297.

271. *Id.* Under current U.S. military policy, the statement “I’m gay” is prohibited homosexual conduct. *Id.*

272. 530 U.S. 640 (2000).

The 1986 U.S. Supreme Court decision in *Bowers v. Hardwick* prompted gay and lesbian litigants to shift their focus from claims based on privacy to ones based on equality principles.²⁷³ The then emerging identity model was well equipped to accommodate such a shift because it already decoupled acts from status, thereby emphasizing the public nature of identity, as opposed to asserting the private, yet ever present, nature of sexuality.²⁷⁴ The resulting bifurcation of status from conduct stood in marked contrast to the sexual freedom and liberation advocated during the period immediately following Stonewall,²⁷⁵ although it seemed to offer an ingenious way to side-step the continued constitutionality of criminal penalties for private, consensual, noncommercial, same-sex sodomy.²⁷⁶ The separation of acts from status also affirmed the world view of many gay men and lesbians who saw their sexual orientation as something that preceded, and was in some ways independent from, homosexual conduct.²⁷⁷ Finally, it furthered the public relations goal of downplaying the sexual aspects of sexual orientation while foregrounding the importance of identity.²⁷⁸

The behavior model conflates the homosexual with the homosexual act, thereby viewing all gay men and lesbians as presumptive sodomites.²⁷⁹ This invites the conclusion that the continued criminalization of sodomy justifies denying civil rights protections to gay men and lesbians because a homosexual has no status or identity that is separate and distinct from the sexual behavior in which he engages.²⁸⁰

273. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); see also Halley, *Reasoning About Sodomy*, *supra* note 56, at 1737.

274. Knauer, *supra* note 34, at 1043. This bifurcation requires “gay rights activists to assert that individuals who self-identify as gay are more than the sum of their sexual acts (or tastes).” *Id.*

275. See JAGOSE, *supra* note 19, at 30-43 (discussing liberationist strategy following Stonewall).

276. Lambda Legal Def. & Educ. Fund, *State-by-State Sodomy Law Update*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275> (last modified May 11, 2001).

277. For a discussion of the prevalence of first person narratives which assert that sexual orientation is inborn, see *supra* text accompanying notes 176-184. See STEIN, *supra* note 5, at 239 (noting “many people seem to have sexual orientation and particular sexual desires *before* they have ever had any sexual experiences”).

278. See Leland & Miller, *supra* note 222, at 52.

279. See Knauer, *supra* note 7, at 465-66 (discussing the “presumptive sodomite” argument).

280. Pro-gay advocacy organizations are well aware of this reasoning and in recent years have placed a renewed emphasis on the repeal of sodomy laws. See, e.g., Lambda Legal Def. & Educ. Fund, *supra* note 276; Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000). Leslie asserts that “the very existence of sodomy laws creates a criminal class of gay men and lesbians, who are

Justice Scalia adopted this homosexual-as-sodomite reasoning in his scathing dissent in *Romer v. Evans*.²⁸¹ Justice Scalia wrote: “If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct.”²⁸²

When the majority in *Romer v. Evans* invalidated Colorado’s Amendment 2 on the grounds that it did not serve a legitimate state interest,²⁸³ it did not raise either the presumptive sodomite issue or *Bowers v. Hardwick*. However, the unwillingness of the majority in *Romer v. Evans* to address *Bowers v. Hardwick* did not mean that current U.S. Supreme Court jurisprudence had accepted *sub silentio* the identity model of homosexuality.²⁸⁴ To the contrary, four years after *Romer v. Evans* the Court roundly rejected the identity model of homosexuality advocated by James Dale, an openly gay Assistant Scout Master, in *Boy Scouts v. Dale*.²⁸⁵ Instead, the majority seemed to settle on a hybrid view of homosexuality under which an avowal of homosexuality was not

consequently targeted for violence, harassment, and discrimination because of their criminal status.” *Id.*

281. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

282. *Id.* at 642 (Scalia, J., dissenting). Although Justice Scalia remarked that “it is our moral heritage that one should not hate any human being or class of human beings,” he continued that “one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.” *Id.* at 644 (Scalia, J., dissenting). Focusing on the criminal and moral status of homosexual acts, Justice Scalia concluded that “Coloradans are . . . entitled to be hostile toward homosexual conduct.” *Id.* (Scalia, J., dissenting).

Pro-family organizations roundly praised Justice Scalia’s dissent which wholeheartedly endorsed a behavior-based model of homosexuality. Robert H. Knight, *The Impact of Romer v. Evans*, at <http://www.frc.org/insight/is96e2hs.html> (n.d.) (last visited Aug. 27, 2000). One pro-family commentator remarked very favorably on Justice Scalia’s ability to distinguish between the homosexual and homosexuality. *Id.* In this way, the writer said that “Scalia correctly reflected the Christian view of loving the sinner but hating the sin.” *Id.*

283. *Romer*, 517 U.S. at 635-36.

284. In his dissent, Justice Scalia criticized the majority decision for its omission of any reference to *Hardwick*. *Id.* at 640-41 (Scalia, J., dissenting). Justice Scalia referred to *Hardwick* as “[t]he case most relevant to the issue before us today.” *Id.* at 640 (Scalia, J., dissenting).

285. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Writing for the majority, Chief Justice Rehnquist was joined by Justices O’Connor, Scalia, Kennedy and Thomas. *Id.* at 642. Justice Stevens filed a dissenting opinion that was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 663 (Stevens, J., dissenting). Justice Souter filed a separate dissent that was joined by Justices Ginsburg and Breyer. *Id.* at 700 (Souter, J., dissenting).

conflated with sodomy, but was something more than a simple statement identifying membership in a specific minority group.²⁸⁶

1. The Presumptive Sodomite: Asserting a Negative

In some ways, the presumptive sodomite cases harken back to the notion of the homosexual as a sexual psychopath who could not control his sexual impulses and whose notoriety in the 1940s and 1950s spawned the enactment of the sexual psychopath laws.²⁸⁷ As explained above, the presumptive sodomite reasoning has been used to justify the continued denial of civil rights protections for gay men and lesbians in light of the enduring legacy of *Bowers v. Hardwick*.²⁸⁸ Even in the absence of the disabling precedent of *Bowers v. Hardwick*, the behavior model and its unrelenting focus on conduct can discredit attempts to establish a deserving gay minority because it contends that the only thing homosexuals share is a predilection for particular sexual acts.²⁸⁹

The homosexual-as-sodomite reasoning is the basis of the military propensity cases which hold that it is rational to categorize the statement “I’m gay” as a prohibited act of homosexuality because it signals a

286. The majority wrote that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” *Id.* at 653.

287. See Knauer, *supra* note 34, at 1025-26 (describing sexual psychopath and sexual psychopath laws).

288. This argument was addressed and rejected by the Colorado state Supreme Court the second time it considered the constitutionality of Amendment 2. *Evans v. Romer*, 882 P.2d 1334 (Colo. 1994). The state argued that even if the court struck down disabilities imposed on account of orientation, *Bowers v. Hardwick* allowed Amendment 2 to impose disabilities on the basis of “homosexual, lesbian, or bisexual . . . conduct, practices or relationships.” *Id.* at 1349; see also KEEN & GOLDBERG, *supra* note 136, at 190 (describing *Evans II* opinion). The Colorado Supreme Court held that the four different characteristics identified in the text of Amendment 2, including “orientation, conduct, practices [and] relationships,” were “nothing more than a different way of identifying the same class of persons.” *Evans*, 882 P.2d at 1350. It further declared “[t]he fact that there is no constitutionally recognized right to engage in homosexual sodomy [citations omitted] is irrelevant [because] Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy.” *Id.* The court specifically rejected the reasoning later employed by Justice Scalia in his dissent when it noted:

While it is true that such a law could be passed and found constitutional under the United States Constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible.

The government’s ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

Id.

289. See *infra* text accompanying notes 439-441 (discussing how a behavior-based understanding of homosexuality can undercut attempts to establish a deserving gay minority).

propensity to commit sodomy.²⁹⁰ The homosexual-as-sodomite argument has also been used successfully in a variety of other contexts, such as employment and child custody, to justify imposing certain disabilities on gay men and lesbians on the grounds that they are presumptive criminals.²⁹¹ Under this reasoning, it is permissible to discharge a government employee who publicly announces her same-sex commitment ceremony because such an announcement signals her disregard for the law and inability to foster the public trust²⁹² or to deny a mother in a same-sex relationship custody of her child because she is a presumptive felon.²⁹³

The military cases involving service members who are discharged when they acknowledge their homosexuality illustrate the extreme arguments one is forced to make when adhering to a strict divide between status and conduct. According to Defense Department Regulations interpreting the “Don’t Ask, Don’t Tell” Policy, “sexual orientation is considered a personal and private matter, and [homosexual orientation] is not a bar to continued service . . . unless manifested by homosexual conduct.”²⁹⁴ “Homosexual conduct” is a bar to service because it is inimical to “unit cohesion.”²⁹⁵ “Homosexual conduct” is defined very

290. See *infra* text accompanying notes 390-391.

291. See generally Leslie, *supra* note 280.

292. *Shahar v. Bowers*, 114 F.3d 1097, 1106, 1108 (11th Cir. 1997) (holding, based on a *Pickering* balancing test, employer’s interest “in promoting the efficiency of the Law Department’s important public policy service does outweigh Shahar’s personal associational interests”). When Robin Shahar told several of her coworkers that she and her female partner were planning a religious commitment ceremony, Michael Bowers, the then-Attorney General of the State of Georgia, rescinded her offer of employment as a staff attorney in his office. *Id.* As justification for his action, the Attorney General pointed to the now-overturned Georgia sodomy law, the constitutionality of which he had earlier fought to uphold in *Bowers v. Hardwick*. *Id.* The court noted that the Georgia Law Department “had already engaged in and won a recent battle about homosexual sodomy—highly visible litigation in which its lawyers worked to uphold the lawful prohibition of homosexual sodomy.” *Id.* at 1108. The Eleventh Circuit accepted Attorney General Bowers’ claim that Shahar’s employment as an attorney in the state Attorney General’s Office would undermine the public’s confidence that the Attorney General would faithfully uphold the law. *Id.* The Attorney General had claimed that the presence of Shahar would result in “loss or morale, loss of cohesiveness and so forth.” *Id.*

293. *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). The fact that a homosexual is a presumptive sodomite figured in the Virginia fight between Sharon Bottoms and her mother over the custody of Sharon Bottoms’ son when the Virginia Supreme Court referred to sodomy as the “[c]onduct inherent in lesbianism.” *Id.* The court acknowledged that “a lesbian mother is not per se an unfit parent,” but went on to stress that the “[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth; thus, that conduct is another important consideration in determining custody.” *Id.*

294. United States Dep’t of Def. Directive No. 1332.14.E3.A1.1.8.1.1 (1993).

295. HALLEY, *supra* note 210, at 69. In explaining the need for the policy, Senator Sam Nunn stated: “[T]he presence in military units of persons who, by their acts or by their statements demonstrate a propensity to engage in homosexual acts, would cause an unacceptable risk to the

broadly to include not simply sodomy or other forms of physical expression of same-sex desire, but also the identifying statement “I’m gay.”²⁹⁶ The statement is included within the definition because it is considered to signal the all-important “propensity” to engage in sodomy.

In challenging the propensity argument, litigants have unsuccessfully attempted to disavow any connection between identifying as gay and demonstrating a propensity to engage in homosexual acts.²⁹⁷ Indeed, the dissent in *Steffan v. Perry* reads as if the dissenting judges took offense that the majority would suggest that a nice boy like midshipman Joseph Steffan would ever intend to engage in something as nasty as homosexual sodomy.²⁹⁸ The dissent denounced as a “stereotypical assessment”²⁹⁹ the majority’s finding that “the class of self-described homosexuals is sufficiently close to the class of those who engage or intend to engage in homosexual conduct.”³⁰⁰ The dissent forcefully asserted that “it is inherently unreasonable to equate an admission of homosexual identity with commission or intent to engage in homosexual conduct.”³⁰¹ In a very revealing analogy, the dissent equated the majority’s presumption that a self-described homosexual intends to engage in sodomy with the nonexistent offense of “constructive treason.”³⁰² The dissenting judges reasoned that the fact that an individual harbors “private Communist sympathies,” does not mean that he will

high standards of morale, good order, and discipline, and unit cohesion that are absolutely essential to effective combat capability.” *Id.* (quoting Senator Nunn).

296. 10 U.S.C. § 654(b)(2) (1994). In certain instances, uttering the words “I’m gay” may constitute a more serious infraction than actually engaging in same-sex sodomy. *See generally id.* A service member can successfully disavow a misguided act of sodomy and remain in the service provided he shows, inter alia, that the act was a “departure from the member’s usual and customary behavior,” and “the member does not have a propensity or intent to engage in [future] homosexual acts.” United States Dep’t of Def. Directive Nos. 1332.14.E3.A1.1.8.1.2.1.1 (1993); 1332.14.E3.A1.1.8.1.2.5 (1993).

297. *See generally* HALLEY, *supra* note 210.

298. *Steffan v. Perry*, 41 F.3d 677, 700-01 (D.C. Cir. 1994) (Ginsburg, J., dissenting). *Steffan* was decided before the implementation of “Don’t Ask, Don’t Tell,” but the applicable regulations provided that a statement of homosexuality was grounds for separation from the service. *Id.* at 683-84. While Steffan was in his senior year at the Naval Academy, he told two friends and a chaplain that he was a homosexual. *Id.* at 683. Under pressure, Steffan resigned from the Academy and then later sued for reinstatement. *Id.* at 683-84. The Circuit Court for the District of Columbia, held that the regulations applied to Steffan rationally furthered a legitimate purpose. *Id.* at 692-93.

299. *Id.* at 712 (Wald, J., dissenting).

300. *Id.* at 686-87.

301. *Id.* at 701 (Ginsburg, J., dissenting).

302. *Id.* at 713 (Wald, J., dissenting). After noting the constitutional requirement of an overt act to support a case of treason, the dissent observes that even the Smith Act did not allow “prosecutions for merely private Communist sympathies.” *Id.* at 714 (Wald, J., dissenting).

engage in an overt act of treason.³⁰³ Accordingly, they argued that it was irrational to infer “future homosexual conduct” from Steffan’s private homosexual desires.³⁰⁴ The parallel between treason and sodomy speaks for itself, but the dissent does little to illuminate what it *is* reasonable to infer when someone announces “I’m gay.”

The pro-gay military litigation strategy directly challenges the notion that homosexuals all harbor a strong propensity to commit sodomy or, that if they do, it is not controllable. It is interesting, however, to note that beginning with Hirschfeld, pro-gay interests have actually used a modified propensity argument to justify the decriminalization of same-sex sodomy.³⁰⁵ This pro-gay propensity argument accepts that homosexuality is immutable, rather than a question of choice, and has met some with some success in recent state law sodomy law challenges.³⁰⁶ As explained in Part II.A. above, when Hirschfeld petitioned the Reichstag in the late nineteenth century, he argued that sexual expression was an inevitable outgrowth of an invert’s innate character and no one should be punished for his nature.³⁰⁷ He adopted a position of moral blamelessness, but it extended to *acts* as well as nature.

303. *Id.* (Wald, J., dissenting). The dissent writes:

Thus, even Cold War fears of internal subversion could not induce the Supreme Court to countenance the kind of presumption that the government argues and the majority adopts here—an inference of future misconduct on the basis of an admission of inchoate “desire,” unaccompanied by any specific intent to engage in misconduct. Such an inference is repugnant to time-honored legal principles that guard the sanctity of a person’s “thoughts and desires” against government control.

Id. (Wald, J., dissenting).

304. *Id.* at 710 (Wald, J., dissenting).

305. See *supra* text accompanying notes 75-77 (discussing the modified propensity argument).

306. The opinion invalidating Texas’ sodomy law, which was later reversed by the Fifth Circuit Court of Appeals, reasoned:

Obligatory homosexuality is not a matter of choice: it is fixed at an early age—before one even begins to participate in sexual activities—and only a small minority can be changed or ‘cured,’ if at all. Although there are different theories about the ‘cause of homosexuality, the overwhelming majority of experts agree that individuals become homosexuals because of biological or genetic factors, or environmental conditioning, or a combination of these and other causes—and that sexual orientation would be difficult and painful, if not impossible, to reverse by psychiatric treatment. Indeed, homosexuality is not a “disease” and it is not, in and of itself, a mental disorder.

Baker v. Wade, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982). LeVay notes: “Like Hirschfeld, [the judge in *Baker v. Wade*] concluded that the connection between homosexual feeling and homosexual behavior was so strong as to make the behavior more or less inevitable.” LEVAY, *supra* note 17, at 234.

307. See note 72 (discussing Hirschfeld).

Obviously, the military service member litigation is constrained by the broadly drawn prohibitions against homosexual conduct. Litigants are faced with the unenviable task of affirming their homosexuality while disavowing any propensity to act on it and, hopefully, avoiding perjury. Janet Halley has called this litigation posture “an insult to the [service member’s] personal sexual dignity.”³⁰⁸ Despite what Steffan’s counsel may have argued, being gay most certainly has something to do with sex.³⁰⁹ Gay men and women are not, as pro-family organizations would argue, simply the sum of their immoral and unhealthy sexual practices, or desires, or propensities. Sexual orientation has undeniable political, social, and emotional meaning, but that meaning, that difference, is grounded in same-sex desire.

Within the larger context of the gay political narrative, it is tempting to dismiss the disempowering military litigation as an extreme example of the identity model’s denial of sexuality, borne of pragmatism and ultimately of limited relevance.³¹⁰ It is arguable, however, that the abstruse legal positions assumed in the military litigation are the inescapable result of litigating based on an identity model that eschews sexuality and cedes any discussion of overt sexuality to the pro-family opposition. In addition, the military litigation would certainly be relevant to any presumptive-sodomite arguments leveled against gay men or lesbians in the remaining fifteen states with criminal sodomy statutes. But even where sodomy is not criminalized, and remember not even Scalia would attempt to convict on the grounds of desired sodomy, there remains a very strong sentiment that same-sex sodomy is immoral and unhealthy.³¹¹ If civil rights arguments based on the identity model continue to avoid discussions of overt sexuality, as does the military litigation, then they risk reinforcing these existing highly negative images and perpetuating a disempowering split of sexuality from identity. The

308. HALLEY, *supra* note 210, at 125.

309. The majority in *Steffan* rejected his attempt to establish that “homosexual orientation and conduct are analytically distinct concepts.” *Steffan*, 41 F.3d at 712 (Wald, J., dissenting). The majority, instead, took judicial notice that “the human sexual drive is enormously powerful.” *Id.* at 690. It concluded that “an open declaration that one is a homosexual is a rather reliable indication as to the direction of one’s drive.” *Id.*

310. However, in addition to the homosexual-as-sodomite arguments, it is important to be mindful of the expressive value of law, particularly where it involves the regulation or recognition of same-sex desire. See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999).

311. In *Romer*, Justice Scalia advanced the notion that orientation was a valid proxy for conduct, except in the case of criminal prosecution. *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

gay political narrative could begin to sound like the dissenting judges in *Steffan*.³¹²

2. Self-identifying Speech: The Search for Positive Content

In response to the presumptive sodomite arguments, the gay political narrative is very clear with respect to what the statement “I’m gay” *does not* mean. Of course, this negative assertion still leaves open the question of what “I’m gay” *does* mean. Apparently, the answer is that “I’m gay” is mere identifying speech, which, according to one litigant, is the same as saying “I’m Italian.”³¹³

The theory of self-identifying speech was advanced by pro-gay advocates in *Boy Scouts v. Dale* when the Boy Scouts of America claimed that by requiring the organization to reinstate openly gay Assistant Scout Master James Dale the New Jersey public accommodations law violated the organization’s First Amendment freedoms.³¹⁴ The U.S. Supreme Court, in a five to four decision, agreed with the Boy Scouts and held that the forced inclusion of an “avowed homosexual” would amount to an unconstitutional “interfer[ence] with the Boy Scout’s [sic] choice not to propound a point of view contrary to its beliefs.”³¹⁵ The majority rejected Dale’s argument that the declaration “I’m gay” was simply self-identifying speech.³¹⁶ However, it also rejected the presumptive sodomite/pedophile arguments advanced by several of the pro-family amici.³¹⁷ Instead, it accepted the Boy Scouts’ contention that the presence of Dale would constitute forced speech because it would send a message that the Boy Scouts approved of homosexuality when such approval was contrary to the organization’s requirements that

312. *Steffan*, 41 F.3d at 701-21.

313. Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Dale argued that the statement “does not reveal a belief system, in contrast to revealing one’s religion, atheism, political party, or membership in the Klu Klux Klan.” *Id.*

314. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

315. *Dale*, 530 U.S. at 654. The majority analogized Dale to the band of marchers in *Hurley* who proposed to march in the Boston St. Patrick’s Day Parade behind banners proclaiming their sexual orientation. *Id.*; see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

316. See Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000); see also Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993); Brian C. Murchinson, *Speech and Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 550 (1998).

317. See Knauer, *supra* note 34, at 1047-49 (discussing deployment of pedophile images in two amicus briefs filed by prominent pro-family organizations, Family Research Council and Concerned Women for America).

a Scout be “straight” and “clean.”³¹⁸ This view of homosexuality, which could be considered “identity plus,” does not directly conflate the homosexual with homosexual acts, although it does purport to equate a statement of status with a political and moral judgment regarding homosexual acts. The clear assumption was that anyone who would openly self-identify as gay must be unconflicted about the morality of sodomy and the efficacy of the contemporary gay civil rights movement.

It is instructive to compare the arguments promoted by Dale with those of the pro-family amici because each depict the apotheosis of their respective understandings of same-sex desire. According to Dale, working from the identity model, the statement “I’m gay” is self-identifying speech and does not “communicate[] more than one’s sexual orientation.”³¹⁹ Dale argued that the statement “does not reveal a belief system, in contrast to revealing one’s religion, atheism, political party, or membership in the Ku Klux Klan.”³²⁰ For Dale it was a bare statement of identification that he belonged to a certain minority group and, therefore, was entitled to the protection afforded by the New Jersey antidiscrimination law. Under this reasoning, Dale was no different than any other Scout Master who happened to be a member of a minority group.³²¹ The majority disagreed and concluded that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”³²²

The Boy Scouts had argued from a modified behavioral model under which Dale’s statement expressed a moral and political judgment concerning homosexual conduct. This is one step removed from the presumptive sodomite reasoning. The Boy Scouts did not claim it excluded Dale because he had the propensity to engage in sodomy, which

318. *Dale*, 530 U.S. at 649. The Boy Scouts argued that homosexuality was contrary to a provision in the Scout Oath which required that a scout be “morally straight” and a provision in the Scout Law requiring that a scout be “clean.” *Id.*; see Knauer, *supra* note 34, at 1012-15 (discussing these requirements). The majority stated that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” *Dale*, 530 U.S. at 653.

319. Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

320. *Id.* Dale specifically compared the statement “I’m gay” to the statements “I am Italian,” “I am Latina,” and “actually, I guess you can’t tell, but my mother is African-American.” *Id.*

321. See Knauer, *supra* note 34, at 1039 (discussing how this comparison “risks not only overstating the reality of gay oppression, but also understating its singularity”).

322. *Dale*, 530 U.S. at 653.

had been decriminalized in New Jersey since 1979.³²³ Nor did it argue that Dale posed a sexual threat to the boys under his care. Rather, the organization argued that his presence would send a pro-gay message about sodomy that was at odds with the organization's generic moral code.³²⁴

Whereas the Boy Scouts attributed to the avowed homosexual certain moral and political views regarding sodomy, the pro-family amici did not exhibit the same reluctance to conflate the homosexual directly with the offending behavior. Working from a pro-family behavioral-based understanding of homosexuality, the amici sought to conflate the (male) homosexual not only with sodomy, but also with pedophilia given Dale's proximity to young boys.³²⁵ Briefs filed by two pro-family organizations with well developed anti-gay platforms, Concerned Women for America and FRC, were very clear that avowed homosexuals should not be permitted in the Boy Scouts because (male) homosexuals are likely to molest (male) children. Invoking the well-worn image of the sexual psychopath, the FRC argued, in a thirty-page brief that used the term "pedophile" or some derivation thereof thirty-one times, that the New Jersey Supreme Court had based its decision on "misinformation regarding homosexuals and child molestation."³²⁶ Citing what it considered "significant credible evidence,"³²⁷ FRC claimed that homosexuals accounted for a vastly disproportionate number of pedophiles and, therefore, the Boy Scouts actually had a duty to exclude Dale and other avowed homosexuals because the organization had a "compelling duty to . . . provide[] the greatest protection to the Scouts."³²⁸

323. Quittner, *supra* note 122, at 52.

324. Dale v. Boy Scouts of Am., 706 A.2d 270, 288-89 (N.J. Super. Ct. 1998). Early in the litigation, the New Jersey Superior Court reprimanded a trial court judge who had referred to Dale as an "active sodomist." Dale v. Boy Scouts of Am., 706 A.2d 270, 288-89 (N.J. Super. Ct. 1998). The court was concerned that the focus on conduct suggested "the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts." *Id.* at 289. In a concurring opinion, Judge Handler of the New Jersey Supreme Court declared that "[t]he myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished." Dale v. Boy Scouts of Am., 734 A.2d 1196, 1243 (N.J. 1999) (Handler, J., concurring). At oral argument, counsel for the Boy Scouts expressly disavowed any attempt to characterize homosexuals as child molesters. Transcript of Oral Arguments, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

325. See Knauer, *supra* note 34, at 1045-49 (discussing pro-family efforts to characterize (male) homosexuals as pedophiles).

326. Brief of Amicus Curiae Family Research Council at 22, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

327. *Id.* at 25.

328. *Id.*

Although the Supreme Court did not rule on whether an avowed homosexual serves as a valid proxy for a sexual predator, its decision did find that Dale's mere presence as an avowed homosexual would force the Boy Scouts to send a message.³²⁹ According to the pro-family amici, this message would have been that the Boy Scouts were indifferent to the sexual exploitation of its young Scouts. The majority opinion did not articulate directly what this forced message would have been except to say in the negative that it would have contradicted the Boy Scouts' belief that "homosexual conduct is inconsistent with the values it seeks to instill in its youth members" and its desire not to "promote homosexual conduct as a legitimate form of behavior."³³⁰ Presumably, this means that Dale's presence would have sent the message that homosexual behavior is a legitimate form of human conduct. Thus, even when the Court refuses to conflate the homosexual with behavior and instead adopts a modified identity-plus model of homosexuality, the homosexual remains inexorably linked to behavior. It seems that where the civil rights of gay men and lesbians are involved, concerns about sodomy are never far away.

B. *Arguments of Equivalence*

Arguments of equivalence attempt to transform the shared identity of gay men and women into a shared minority status.³³¹ These arguments are premised on the bifurcation of status and conduct that forms the core of the identity model. This bifurcation allows gay activists and litigants to side-step the precedential roadblock established by *Bowers v. Hardwick* and to defuse the homosexual-as-sodomite arguments.³³² Moreover, its emphasis on a shared homosexual identity or orientation that is separate and distinct from homosexual conduct allows gay activists and litigants to pursue Equal Protection claims on behalf of a historically disadvantaged, politically powerless, and insular minority. This necessitates claims of equivalence, similar to those already introduced when Dale argued that the statement "I'm gay" is *the same as* the statement "I'm Italian."³³³

329. *Dale*, 530 U.S. at 654.

330. *Id.*

331. Again suffering from a lack of content, the gay political narrative claims that gay men and lesbians are *the same as* other deserving minority groups. In this way, it echoes the parallels that homophile activists of the mid-1960s tried to draw to the black Civil Rights Movement. See BAYER, *supra* note 13, at 91 (describing adoption of "Gay Is Good" slogan).

332. 478 U.S. 186, 196 (1986).

333. Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

For Equal Protection purposes, however, the claims of equivalence must go one step further and assert that gay men and lesbians are *the same as* certain protected minority groups and as such state action that draws distinctions on the basis of sexual orientation should be subject to enhanced constitutional scrutiny.³³⁴ In order to secure the highest level of constitutional protection, suspect classification, a litigant would have to show that gay men and lesbians qualify as a suspect class because they have been historically disadvantaged or subjected to “purposeful unequal treatment” due to their sexual orientation,³³⁵ that they are politically powerless,³³⁶ and their sexual orientation is “obvious, immutable, or distinguishing.”³³⁷ Under this level of scrutiny, state action that makes distinctions based on sexual orientation would violate the Equal Protection Clause unless the state could show that the action complained of is substantially related to a compelling state interest.³³⁸

Given the number of specifically anti-gay laws, not to mention the presumably daily incidents of discrimination that take place in public employment, a determination that gay men and lesbians constitute a suspect class could bring about sweeping change in the area of gay civil

334. In the absence of strict scrutiny, or some form of intermediate scrutiny, classifications based on sexual orientation must only bear a rational relationship to a legitimate state interest—a standard that, from the state’s side, is relatively easy to satisfy. The 1996 U.S. Supreme Court decision in *Romer v. Evans* is a notable exception where the state interest was found to be animus against gay men and lesbian which was held not to be a legitimate state interest. *Romer v. Evans*, 517 U.S. 632, 640 (1996). The Court invalidated under the Equal Protection clause of the U.S. Constitution an amendment to the Colorado constitution that had the effect of repealing existing gay civil rights ordinances and prohibiting the enactment of any future protections based on sexual orientation. See generally *City of Cleburne v. Cleburne Living Centers, Inc.* 473 U.S. 432 (1985) (applying rational basis test to invalidate law motivated by dislike of mentally ill persons).

335. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (holding mandatory retirement age does not require heightened scrutiny because older workers are not subject to “purposeful unequal treatment”).

336. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1977) (invalidating a U.S. military policy making it more difficult for a woman to claim her spouse as a “dependent” on the grounds that, inter alia, women have been subject to purposeful unequal treatment).

337. See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (holding statutory classifications of Federal Aid to Families with Dependent Children Program subject to only rational basis review because not related to “obvious, immutable, or distinguishing” characteristic); see also *Lyng v. Castillo*, 477 U.S. 635, 638-39 (1986) (holding statutory classifications of Federal Food Stamp Program subject to only rational basis review). The requirement can also be satisfied by a showing that the distinguishing characteristic is beyond the individual’s control. See *Plyer v. Doe*, 457 U.S. 202, 216 n.14 (1982).

338. The notion of strict constitutional scrutiny for classifications affecting certain groups within society was first enunciated in the famous footnote four of the *Carolene Products* case. *Carolene Prods.*, 304 U.S. at 152-53 n.4 (1938). Footnote 4 provided that “prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry.” *Id.*

rights. It is most likely due to this realization that both the pro-gay and pro-family forces have adopted the constitutional standard for strict scrutiny as a touchstone for what constitutes a deserving or a real minority³³⁹ and it is not unusual to see terms such as “discrete and insular minorities” in writings intended for a general audience.³⁴⁰ The gay political narrative relates that gay men and lesbians have been historically disadvantaged, are politically powerless, and share an immutable characteristic. Not surprisingly, pro-family organizations counter with arguments of nonequivalence and invariably conclude that “homosexuals are upwardly mobile, politically powerful citizens who have chosen to involve themselves in sexual behavior that is neither inborn nor unchangeable.”³⁴¹

Pro-gay activists have not met with much success in getting the courts to see sexual orientation as *the same as* race or sex or ethnicity for Equal Protection purposes. This has been due in part to the ingrained behavior-based understanding of homosexuality that exists throughout U.S. jurisprudence, as well as the inconclusive science of immutability. However, the gay political narrative has also had to contend with virulent pro-family claims of nonequivalence that often use dubious statistics to paint a picture of homosexuals as a wealthy and privileged group whose only commonality is unhealthy and immoral sexual tastes. And, increasingly, the gay political narrative has been forced to respond to charges that the pro-gay claims for equal rights are actually demands for *special* rights.

1. Suspect Classification

The attempt to establish sexual orientation as a suspect category, a classification usually reserved for race, ethnicity, and national origin,³⁴²

339. For example, pro-family organizations carefully frame their arguments in accordance with the requirements for suspect classification under the Equal Protection Clause of the U.S. Constitution. Concerned Women for Am., *supra* note 250. *Homosexuality: A Civil Right or Wrong?* methodically addresses the question of suspect class status on account of sexual orientation in an attempt to establish that homosexuality fails each of the criterion for suspect classification: historically disadvantaged, politically powerless, and immutable characteristic. *Id.*; see also HERMAN, *supra* note 7, at 120 (discussing “discourses of wealth and power”).

340. See, e.g., Concerned Women for Am., *supra* note 250.

341. HERMAN, *supra* note 7, at 120 (discussing “discourses of wealth and power”). By casting homosexuals as a powerful elite, pro-family advocates imply that their demand for “special rights” threatens the economic headway made by recognized minorities and average middle class (white) Americans. In other words, “special rights” are simply not unfair, they are un-American. See generally BADGETT, *supra* note 181.

342. *City of Cleburne v. Cleburne Living Ctrs., Inc.*, 473 U.S. 432, 440 (1985). The U.S. Supreme Court explained the need to subject classifications made on the basis of race, ethnicity, or national origin to higher scrutiny noting that such characteristics were “so seldom relevant to

played a central role in the initial state court challenge to Colorado's Amendment 2.³⁴³ Amendment 2 had the effect of repealing existing gay civil rights ordinances and prohibiting the enactment of any future protections based on sexual orientation.³⁴⁴ In *Romer v. Evans*, the U.S. Supreme Court invalidated the controversial Amendment under the Equal Protection clause on the grounds that the Amendment did not serve a legitimate state interest. Because the Court invalidated the Amendment under the lowest level of Constitutional scrutiny, there was no need to reach the question of whether gay men and lesbians qualified for suspect or quasi-suspect classification.³⁴⁵

At the state level, plaintiffs based their challenge of Amendment 2, in part, on the claim that gay men and lesbians constituted a suspect class

the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.*

343. *Evans v. Romer*, 882 P.2d 1335, 1338-39 (Colo. 1994). After the voters of Colorado ratified Amendment 2 by a margin of 53.4% to 46.6%, plaintiffs filed suit to enjoin its enforcement. *Id.* The trial court held that Amendment 2 implicated a fundamental constitutional right and, therefore, was subject to strict scrutiny, and granted a preliminary injunction. *Id.* The Colorado Supreme Court in *Evans I* held that Amendment 2 burdened the right to participate equally in the political process and remanded the case to the trial court to determine whether Amendment 2 served a compelling state interest. *Evans v. Romer*, 854 P.2d 1270, 1283 (Colo. 1993). The trial court held that Amendment 2 was not supported by a compelling state interest and issued a permanent injunction. *Evans*, 882 P.2d at 1340-41. The Colorado Supreme Court affirmed in *Evans II*. *Id.* at 1341. On appeal to the U.S. Supreme Court, the majority rejected the state court finding of a fundamental right, but invalidated Amendment 2 on the grounds that it did not serve a legitimate state purpose. *Romer v. Evans*, 517 U.S. 640, 635-36 (1996).

At the state court level, the plaintiffs argued that Amendment 2 should be subject to strict scrutiny because it classified individuals based on sexual orientation and because it violated the fundamental right to participate equally in the political process. *Evans*, 882 P.2d at 1338-39. They also argued that, even applying a rational basis test, it violated the Equal Protection Clause because it did not serve a legitimate state interest. *Id.* The Supreme Court of Colorado invalidated Amendment 2 on the grounds that it infringed on a fundamental right, whereas the U.S. Supreme Court based its decision on the absence of a legitimate state interest. *Romer*, 517 U.S. at 635-36. Neither court agreed that classifications based on sexual orientation warranted strict scrutiny. *Id.*

344. *Romer*, 517 U.S. at 624 (quoting COLO. CONST. art II, § 30(b)). The text of Amendment 2 read as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. (internal quotation marks omitted).

345. *Id.* at 632 (stating "Amendment 2 fails, indeed defies, even this conventional inquiry").

for Equal Protection purposes and Amendment 2 failed strict scrutiny because it was not narrowly tailored to further a compelling state interest.³⁴⁶ Ultimately, the Colorado Supreme Court invalidated Amendment 2 because it impermissibly infringed on the fundamental right to participate equally in the political process.³⁴⁷ The trial court rejected the argument that gay men and lesbians should be considered a suspect class when it concluded that “homosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements [necessary] to be found a suspect class.”³⁴⁸ The trial court’s ruling was not reexamined on appeal by either the Colorado Supreme Court or the U.S. Supreme Court.³⁴⁹

Despite the failure of the legal theory to win endorsement by the courts, the Colorado litigation is very instructive because part of the litigation strategy was to *prove* that gay men and lesbians qualify as a

346. KEEN & GOLDBERG, *supra* note 136, at 35-38. Keen and Goldberg report that this decision was not without considerable discussion and some disagreement. *Id.* The immutability factor raised particular concern among members of the legal team:

With respect to the “immutability” factor, the latest genetic research provided strong support for the argument that sexual orientation had biological origins. Some team members, as well as gay leaders, maintained that this evidence would help end discrimination by people who believed homosexuality was a “life-style choice.” Other gay activists were concerned that such research would prompt efforts to find a “cure” for homosexuality. Still others believed that the gay civil rights movement should defend a person’s right to have a same-sex partner, even if it was a choice for that person. And some maintained that the research was far too preliminary and limited to provide any conclusive indication at all.

Id. at 37; *cf.* LEVAY, *supra* note 17, at 244 (noting “[o]ne thing that everyone involved in the trial seemed to agree on was that biological theories of sexual orientation are ‘good for’ gay rights”).

347. *See Evans*, 882 P.2d at 1338-39. In *Evans I*, the Colorado Supreme Court upheld the preliminary injunction, indicating that Amendment 2 violated the fundamental right of gay men and lesbians to participate equally in the political process and, therefore, would have to be narrowly tailored to further a compelling state interest. *Evans v. Romer*, 854 P.2d 1270, 1283 (Colo. 1993). After the Colorado Supreme Court decision upholding the injunction, the parties proceeded to trial. *Id.* The state asserted six compelling state interests to support Amendment 2: deter factionalism between and among jurisdictions within Colorado, protect the state’s political functions, preserve the state’s ability to remedy discrimination against true minorities, prevent the disruption of religious and family privacy interests, prevent state subsidies to special interest groups, and protect the physical and psychological safety of children. *Evans*, 882 P.2d at 1339-40. On appeal, the Colorado Supreme Court held in October 1994 that Amendment 2 infringed on the right to participate equally in the political process and the state had not met its burden of proving that Amendment 2 was narrowly tailored to further a compelling state interest. *Id.* at 1340-41. The U.S. Supreme Court declined to find that Amendment 2 implicated a fundamental right and, therefore, did not subject Amendment 2 to strict scrutiny. *Romer*, 517 U.S. at 631-32. Instead, it found that Amendment 2 failed the rational basis test because it did not further a legitimate state interest. *Id.* at 634-35.

348. *Evans*, 882 P.2d at 1341 n.3 (quoting trial court’s opinion).

349. *Id.* The trial court’s finding had not been appealed and, therefore, was not properly before the court for review. *Id.*

discrete and insular minority by offering testimony, including that dealing with the science of immutability, to support each of the three prongs of the constitutional test.³⁵⁰ The following discusses each of these constitutional requirements, with a particular emphasis on the Colorado trial court's review of Amendment 2, referred to as *Evans II*.

a. Historically Disadvantaged

Generally, courts have been willing to accept that gay men and lesbians have been historically disadvantaged on account of their sexual orientation. The 1987 federal district court decision in *High Tech Gays*, which challenged the more onerous security clearance procedures then applicable to homosexuals because of their supposed susceptibility to blackmail by foreign powers, included a relatively long discussion of the discrimination suffered by gay men and lesbians.³⁵¹ The decision of the federal court for the Northern District of California held that gay men and lesbians were a quasi-suspect class subject to a heightened form of constitutional scrutiny whereby the state action must substantially further a legitimate state interest.³⁵² Although a panel of the Ninth Circuit rejected the finding of quasi-suspect classification, it accepted without discussion the district court's finding that gay men and lesbians had been subject to past discrimination.³⁵³ The Northern District of California recognized that:

Lesbians and gay men have been the object of some of the deepest prejudice and hatred in American society. Some people's hatred for gay

350. KEEN & GOLDBERG, *supra* note 136, at 75-131. Keen and Goldberg provide an excellent account of the testimony offered at the trial court level, dedicating a chapter to each of the three criterion. *Id.*

351. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987). See generally Gregory B. Lewis, *Barriers to Security Clearances for Gay Men and Lesbians: Fear of Blackmail or Fear of Homosexuals?*, 11 J. PUB. ADMIN. RES. & THEORY 539 (2001) (reviewing history of denial of security clearances for homosexuals).

352. *High Tech Gays*, 668 F. Supp. at 1369 (N.D. Cal. 1987). The court rejected the presumptive sodomite argument and dismissed the importance of *Bowers v. Hardwick*. *Id.* at 1370-71. The court wrote:

Even though the Supreme Court in *Hardwick* held that a state law criminalizing homosexual sodomy is not subject to strict scrutiny, this Court finds that a government classification, such as the one at issue in this case, that disadvantages lesbians and gay men because of *any* homosexual activity or sexual preference *itself* is subject to strict scrutiny.

Id. at 1370 (emphasis in original).

353. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). The court noted that "[w]hile we do agree that homosexuals have suffered a history of discrimination, we do not believe that they meet the other criteria. *Id.* at 573.

people is so deep that many gay people face the threat of physical violence on American streets today

. . . . Wholly unfounded, degrading stereotypes about lesbians and gay men abound in American society. Examples of such stereotypes include that gay people desire and attempt to molest young children, that gay people attempt to recruit and convert other people, and that gay people inevitably engage in promiscuous sexual activity. Many people erroneously believe that the sexual experience of lesbians and gay men represents the gratification of purely prurient interests, not the expression of mutual affection and love. They fail to recognize that gay people seek and engage in stable, monogamous relationships. Instead, to many, the very existence of lesbians and gay men is inimical to the family. For years, many people have branded gay people as abominations to nature and considered lesbians and gay men mentally ill and psychologically unstable.³⁵⁴

The district court likened such attitudes to those held against “racial groups” and in declaring homosexuals a quasi-suspect class concluded that “[t]he stereotypes have no basis in reality and represent outmoded notions about homosexuality, analogous to the ‘outmoded notions’ of the relative capabilities of the sexes that require heightened scrutiny of classifications based on gender.”³⁵⁵

In *Evans II*, the trial court cited *High Tech Gays* and agreed that gay men and lesbians had experienced a history of discrimination.³⁵⁶ At trial the plaintiffs called expert witnesses to make the case that gay men and lesbians were a historically disadvantaged group.³⁵⁷ The plaintiffs’ primary expert witness, the noted historian George Chauncey, provided the court with an extensive overview of the regulation of same-sex desire in the United States beginning in the seventeenth century with the colonial prohibitions imposed on homosexual conduct.³⁵⁸ In defense of Amendment 2, the state sought to show that the discrimination experienced by gay men and women was not comparable to that suffered

354. *High Tech Gays*, 668 F. Supp. at 1369.

355. *Id.* In an attempt to refute the implication that gay men and lesbians were more likely to commit treason, the court stated:

The fact that a person is lesbian or gay bears no relation to the person’s ability to contribute to society. Rather than somehow being enemies of American culture and values, lesbians and gay men occupy positions in all walks of American life, participate in diverse aspects of family life, and contribute enormously to many elements of American culture.

Id.

356. KEEN & GOLDBERG, *supra* note 136, at 183.

357. *See id.* at 75-104.

358. *Id.* at 80.

by other protected minorities and that discrimination against homosexual conduct was justified by compelling state interests.³⁵⁹

The comparison of homosexuals to other more deserving minorities, such as African-Americans, was a constant theme in the pro-Amendment 2 materials produced by Colorado for Family Values (CFV) in connection with the ballot fight that preceded the litigation.³⁶⁰ For example, a headline on the front page of an eight page pro-Amendment 2 broadside asks “Are Homosexuals a ‘Disadvantaged’ Minority? You Decide.”³⁶¹ The Article explains that homosexuals actually are “one of the most affluent groups in America” and an easy to read chart shows an “average household income” for “gays” of \$55,439, compared to an “average household income” for “disadvantaged African-Americans” of \$12,166.³⁶²

Justice Scalia accepted the pro-family contention of homosexual affluence in his dissent in *Romer v. Evans* when he uncritically referred to the “high disposable income” enjoyed by homosexuals³⁶³ and complained that the majority decision “places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”³⁶⁴ Furthering the pro-family belief that homosexuals represent a relatively privileged special interest group,³⁶⁵ Justice Scalia stated that “[t]his Court has no business imposing

359. *Id.* at 101-04 (discussing comparable discrimination suffered by other minority groups). The state sought to justify Amendment 2 by asserting six compelling state interests. *See Evans*, 882 P.2d at 1339-40 (listing six compelling interests).

360. ESKRIDGE & HUNTER, *supra* note 88, at 269-76. The infamous eight-page CFV circular is reproduced in full in the 2001 Supplement to the Eskridge and Hunter casebook. *Id.*

361. *Id.* at 269.

362. *Id.* The chart itself is quite remarkable and warrants reproduction here, if only to illustrate the complete lack of subtlety. *Id.*

	Average Household Income	% College Grads	% Professional/ Managerial Positions	% w/ overseas vacations
Gays	\$55,430	60%	49%	66%
Nat'l Average	\$32,286	18%	16%	14%
Disadvantaged Afr. Americans	\$12,166	less than 1%	less than 1%	less than 1%

Id.

363. *Romer*, 517 U.S. at 645. On the similarity between Scalia’s dissent and pro-family writings, Herman asserts that “there is little to distinguish it from the texts of antigay materials” produced by pro-family organizations. HERMAN, *supra* note 7, at 167; *see also* BADGETT, *supra* note 181.

364. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

365. One of Colorado’s justifications for Amendment 2 was that “laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes.” *Evans*, 882 P.2d at 1345

upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that “animosity” toward homosexuality is evil.”³⁶⁶

b. Politically Powerless

Whereas courts have been willing to accede that, historically, gay men and lesbians have suffered discrimination, they have been less willing to find that gay men and lesbians are presently politically powerless. Courts typically point to the existence of anti-discrimination protection and the repeal of sodomy laws as evidence that gay men and lesbians can and do influence the legislative system. For example, in *High Tech Gays* the Ninth Circuit concluded that “homosexuals are not without political power; they have the ability to and do ‘attract the attention of the lawmakers’” because “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation.”³⁶⁷ What is notable about the Ninth Circuit decision is that it was decided in 1990 when only one state, Wisconsin, outlawed discrimination on the basis of sexual orientation and twenty-six states and the District of Columbia still criminalized sodomy.³⁶⁸

Other courts have found that the history of discrimination experienced by gay men and lesbians necessarily translated into current political disabilities.³⁶⁹ In *Evans II*, the plaintiffs introduced social science evidence to establish that gay men and lesbians are politically disadvantaged. Kenneth Sherrill, a professor of political science,

(quoting state). Colorado also argued that a compelling state interest supporting Amendment 2 was that it “prevents government from supporting the political objectives of a special interest group.” *Id.* at 1348 (quoting state).

366. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (citation omitted); see also HERMAN, *supra* note 7, at 127 (stating “[t]he ‘gay community’ thus becomes synonymous with the world of elite, overly privileged people who take more and more for themselves and have no comprehension of the problems of ordinary folk”).

367. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (quoting *Cleburne*).

368. *Id.* at 574 n.10. After citing the Wisconsin statute, a California statute addressing violence motivated by sexual orientation, a Michigan law requiring access to health facilities, and a New York executive order regarding state employment, the best the court could say was that “[m]any cities and counties have also enacted anti-discrimination regulations, including New York, Los Angeles, Chicago, Washington D.C., Atlanta, Boston, Philadelphia, Seattle, and San Francisco.” *Id.*

369. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987) (stating “the pervasive discrimination against gay people has seriously impaired their ability to gain a politically viable voice for their views in state and local legislatures and in Congress”).

testified regarding how the limited “power resources” available to gay men and lesbians affect their ability to influence or direct public policy.³⁷⁰ Sherrill also testified on the “spiral of silence” theory according to which individuals will self-censor unpopular views.³⁷¹ Sherrill explained that the “spiral of silence” further limits the “power resources” of gay men and lesbians because individuals will be disinclined to identify either their identity or their support for gay rights.³⁷²

According to the pro-family view, however, homosexuals have a disproportionate amount of political power as well as disproportionate influence over the media.³⁷³ Indeed, the very reason for Amendment 2 was to stem the tide of the homosexual political agenda, the goal of which is to normalize homosexuality.³⁷⁴ At trial, the state of Colorado presented social science testimony regarding the relative low number of gay people as a percentage of the general population, the relative high level of income enjoyed by gay people, and the “intensity” of their desire for legal reform.³⁷⁵ The state’s expert explained that when these factors were combined the result was a group with disproportionate political power.³⁷⁶

The trial court was persuaded by the “intensity” factor rather than the “spiral of silence” and found that gay men and lesbians were not “politically vulnerable or powerless.”³⁷⁷ The court reasoned that the simple fact that Amendment 2 was successful was not sufficient to support a finding of political powerlessness. To the contrary, the court

370. KEEN & GOLDBERG, *supra* note 136, at 116. With regard to “power resources,” Sherrill identified, *inter alia*, group size, access to money, access to individuals in power, and ability to form alliances. *Id.*

371. *Id.*

372. *Id.* at 119. In addition, Sherrill noted that the “spiral of silence” also “multiplies the apparent power of dominant groups in society” because the unpopular view is voiced less frequently than it is held. According to Sherrill, the self-censorship of unpopular views impairs the ability of gay men and lesbians to amass either large group numbers or significant allies. *Id.*

373. HERMAN, *supra* note 7, at 42-44. Interestingly, Herman notes that in mid-20th century conservative Christian thought, Catholics were described in terms very similar to those used to assign disproportionate political power to gay men and lesbians. *Id.*

374. *Evans*, 882 P.2d at 1340. One of the state’s six justifications for Amendment 2 was to deter “factionalism” which the trial court rejected as a compelling state interest and characterized as “nothing more than an attempt to impede the expression of ‘a difference of opinion on a controversial political question.’” *Id.* (quoting trial court). Colorado also asserted that Amendment 2 was necessary in order to allow “the people themselves to establish public social and moral norms.” *Id.* at 1346 (quoting state). The state claimed that Amendment 2 was necessary to preserve heterosexual families and marriages and send a “societal message condemning gay men, lesbians, and bisexuals as immoral.” *Id.* The Colorado courts also rejected this as a compelling state interest. *Id.* at 1347.

375. KEEN & GOLDBERG, *supra* note 136, at 125-31.

376. *Id.* at 128-29.

377. *Id.* at 184 (quoting trial court’s opinion).

cited testimony that estimated approximately four percent of the population were homosexual and stated that “[i]f 4 percent of the population gathers the support of an additional 42 percent [representing the 46% of voters who voted against Amendment 2], that is a demonstration of power, not powerlessness.”³⁷⁸ Based on the plaintiff’s failure to satisfy the politically powerless prong of the constitutional test, the court held that gay men and lesbians did not qualify as a suspect class.³⁷⁹

Justice Scalia later incorporated the intensity argument in his dissent in *Romer v. Evans* where he made the bald statement that homosexuals “possess political power much greater than their numbers, both locally and statewide.”³⁸⁰ Echoing the stated rationale for Amendment 2, Justice Scalia explained that “[q]uite understandably,” homosexuals “devote [their] political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.”³⁸¹

c. Immutable Characteristic

As explained in Part II.C., the existing science of immutability remains inconclusive and does not totally disregard environmental or other developmental factors. The handful of judicial opinions that have advocated heightened scrutiny for gay men and lesbians have not required strict immutability, but have instead focused on whether sexual orientation is difficult to change.³⁸² This weak view of immutability may make the current queer bio-science less vulnerable to challenge when attempting to establish immutability through a court proceeding. However, it also places renewed importance on studies such as Spitzer’s

378. *Id.* at 183.

379. *Id.* at 184.

380. *Romer*, 517 U.S. at 646 (Scalia, J., dissenting). Justice Scalia added to the intensity argument that of concentration when he noted that homosexuals tend to flock to urban areas producing a disproportionate number of homosexual voters in certain locales. *Id.* (Scalia, J., dissenting). Justice Scalia explained this dual problem as follows:

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.

Id. (Scalia, J., dissenting) (citation omitted).

381. *Id.* at 646 (Scalia, J., dissenting).

382. *See, e.g.,* *Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997); *see also* Samuel A. Marcossan, *Constructive Immutability*, 3 U. Pa. J. CONST. L. 646 (2001).

2001 “Gays Can Change” sensation.³⁸³ If gays can change, then strict immutability would be lacking. Under a weak formulation of immutability, the question would then focus on the degree of difficulty associated with attaining the desired “heterosexual shift.”³⁸⁴

In *Watkins v. United States Army*, the only federal circuit court decision holding that sexual orientation is a suspect category,³⁸⁵ Judge Norris of the Ninth Circuit adopted the weak formulation of immutability and drew the line where change would be “difficult and traumatic.”³⁸⁶ Judge Norris explained:

[W]e have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment But the possibility of such a difficult and traumatic change does not make sexual orientation “mutable” for equal protection purposes. . . . [W]e conclude 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.³⁸⁷

Following a rehearing *en banc*, the Ninth Circuit decided the case without reaching the constitutional questions raised in the earlier *Watkins* decision and withdrew the earlier opinion.³⁸⁸

On the other end of the spectrum, many courts have rejected claims of immutability on a definitional basis. Indeed, if the court adopts a behavior-based understanding of homosexuality, there is no reason to even address the weaker formulation of immutability. Whether the characteristic is “difficult and traumatic” to change becomes irrelevant because, of course, behavior is a matter of choice and sometimes it is

383. See *supra* text accompanying notes 1-5 (discussing Spitzer’s 2001 study concluding “Gays Can Change”).

384. *Id.* Spitzer’s study attempted to measure whether “highly motivated” gay men and lesbians could experience a “heterosexual shift.” *Id.*

385. 847 F.2d 1329, 1349 (9th Cir. 1988).

386. *Id.* at 1348.

387. *Id.* at 347-48.

388. *Watkins v. United States Army*, 875 F.2d 699, 704-711 (9th Cir. 1989). The notion that strict immutability is not a prerequisite for suspect classification suggests that the biological claims made by gay activists, at least for the purposes of litigation, need not be as unyielding. *Id.* Of course, the ex-gay counter-narrative attempts to establish that sexual orientation can be changed by methods less intrusive than “extensive therapy, neurosurgery, or electric shock.” *Id.*

“difficult and traumatic” to discontinue even deleterious behavior.³⁸⁹ Moreover, if behavior is the common characteristic shared by gay men and women, *Bowers v. Hardwick* stands for the proposition that the behavior, the shared predilection towards sodomy, loosely defined, is constitutionally subject to criminal sanction.³⁹⁰ Surely, the argument goes, such strongly disfavored behavior cannot form the basis of suspect classification.³⁹¹

For example, in *High Tech Gays*, the Ninth Circuit rejected a district court finding that gay men and lesbians constituted a suspect class and stated: “Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.”³⁹² Writing in 1995, in *Equality Foundation of Greater Cincinnati v. Cincinnati*, the Sixth Circuit flatly rejected any gay or lesbian identity independent of homosexual acts.³⁹³ The Sixth Circuit, in the first round of litigation involving an anti-gay citizen’s initiative in the City of Cincinnati, held that homosexuals did not constitute either a “suspect class” or a “quasi-suspect class” because the very conduct which defined them as homosexuals was subject to a constitutional prohibition.³⁹⁴ By definition, homosexuality was behavior-based, and the court refused to accept a classification of persons based on “subjective

389. *Watkins*, 847 F.2d at 1348.

390. This refusal to split status from conduct has been reflected in opinions from the Sixth Circuit, the Seventh Circuit, the Ninth Circuit, and the D.C. Circuit, among others. *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266-67 (6th Cir. 1995); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (holding that “[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes”); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (holding that “[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause”); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), (holding “[a]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm”).

391. Justice Scalia expressed this view quite clearly in his dissent in *Romer v. Evans*. 517 U.S. at 641 (Scalia, J., dissenting). “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” *Id.* (Scalia, J., dissenting).

392. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (emphasizing that “[t]he behavior or conduct of such already recognized classes is irrelevant to their identification”).

393. *Equality Foundation*, 54 F.3d at 266-67.

394. *Id.*

and unapparent characteristics such as innate desires, drives, and thoughts.”³⁹⁵

During the Amendment 2 campaign, CFV took aim at claims of immutability and warned voters “Don’t believe lies from the laboratory.”³⁹⁶ Advancing a behavior-based definition of homosexuality, CFV asserted that “homosexuality isn’t something that you ‘are,’ it’s something that you ‘do.’”³⁹⁷ CFV claimed that “militant gays, in order to strengthen their demand for special class status, are desperate to manufacture evidence that homosexuality is a genetic condition.”³⁹⁸ Undaunted, plaintiffs in the Amendment 2 litigation sought to establish the veracity of these alleged “lies from the laboratory” and attempted to prove through expert testimony that sexual orientation was indeed immutable.³⁹⁹ They proceeded with this trial strategy despite some controversy over whether strict immutability was necessary to state a case for suspect classification or whether it was sufficient to show that the condition is difficult to change.⁴⁰⁰ The plaintiffs offered four expert witnesses whose testimony described the nature and prevalence of homosexuality and summarized the scientific research which suggested a biological or genetic cause for homosexuality.⁴⁰¹ This expert testimony accounted for twenty percent of the total hours of testimony presented at trial.⁴⁰²

395. *Id.* at 267. The Sixth Circuit later quoted this language with approval when reviewing the charter amendment in light of the U.S. Supreme Court’s subsequent decision in *Romer v. Evans*. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 293 (6th Cir. 1997). The 6th Circuit again upheld the amendment. *Id.*

396. ESKRIDGE & HUNTER, SUPPLEMENT, *supra* note 88, at 272.

397. *Id.*

398. *Id.*

399. LEVAY, *supra* note 17, at 243. LeVay noted that at the trial “the two sides rolled out their biggest guns to contest the immutability issue.” *Id.*

400. The amicus brief filed by the Human Rights Campaign took the position that biological immutability was not necessary to prove suspect classification. Brief of Amicus Curiae Human Rights Campaign, et al., *Romer v. Evans*, 517 U.S. 620 (No. 94-1039).

401. KEEN & GOLDBERG, *supra* note 136, at 52. Richard Green, a professor of psychiatry who specializes in the development of sexual identity in children, testified regarding the nature of sexual orientation, the prevalence of homosexuality, and the “growing body of biological research pointing to prenatal origins of sexual orientation.” *Id.* (quoting Green). Carole Jenny, a professor of pediatrics, testified that pedophiles were not disproportionately represented within the ranks of gay men. *Id.* at 60 (explaining Jenny’s testimony was offered to rebut the expected testimony of Paul Cameron). Judd Marmor, a psychiatrist who was involved in the 1973 APA decision, testified that homosexuality was not contagious and explained the background of the 1973 declassification. *Id.* at 65-66. Finally, Dean Hamer testified regarding his study indicating that genes in the q28 region of the X chromosome influence sexual orientation. *Id.* at 68-73. Keen and Goldberg characterized Hamer as “the most critical witness to the plaintiff’s case that sexual orientation was an immutable characteristic.” *Id.* at 68.

402. *Id.* at 46.

The state originally indicated that it intended to call Paul Cameron and Charles W. Socarides, two “homosexuality experts,” whose work frequently appears in pro-family writings, to rebut the science of immutability testimony, but in the end decided to call neither.⁴⁰³ Cameron’s work on homosexuality focuses on attempts to conflate (male) homosexuality with pedophilia and reduce (male) homosexuality to a collection of presumably bizarre and sensationalized sexual practices.⁴⁰⁴ Most likely, the state would have used Cameron’s testimony to support the state’s argument that Amendment 2 furthered the state’s compelling interest in safeguarding its children.⁴⁰⁵ The state did submit an affidavit from Socarides outlining his theory regarding the psychological causes of homosexuality which has changed little since the days of the American Freudians discussed in Part II.B.⁴⁰⁶ In lieu of these “homosexuality experts,” the state resigned itself to attempting to undermine the testimony of the plaintiffs’ experts and quickly became mired in questions of genetic markers, causality, and chimpanzees.⁴⁰⁷

Ultimately, the Colorado trial court declined to find whether sexual orientation was immutable.⁴⁰⁸ Pleading the necessary limitations of the judicial role, the opinion stated: “[t]he ultimate decision on ‘nature’ v. ‘nurture’ is a decision for another forum, not this court.”⁴⁰⁹ Nonetheless, the denial of suspect classification was based on a finding that gay men and lesbians are not politically powerless, not on a finding that sexual orientation is mutable.⁴¹⁰

2. “Special Rights”

It was during the contentious 1992 Amendment 2 campaign in Colorado that pro-family activists first unveiled their slogan of “Equal Rights—Not Special Rights.”⁴¹¹ The “special rights” argument is

403. *Id.* at 60-61.

404. See Paul Cameron, *Medical Consequences of What Homosexuals Do*, at http://www.family.org/FRI_Educational_Pamphlets.html (n.d.) (last visited Aug. 9, 2002). Paul Cameron is the chairman of the Family Research Institute which engages in “original cutting-edge research,” according to its website. *Id.* The Family Research Institute publishes “educational pamphlets” on various aspects of homosexuality. *Id.*

405. KEEN & GOLDBERG, *supra* note 136, at 60.

406. *Id.* at 61; see also Socarides, *supra* note 92 (summarizing Socarides’ views regarding politics of gay civil rights movement). See generally CHARLES W. SOCARIDES, *THE OVERT HOMOSEXUAL* 3 (1968) (reporting homosexuals respond well to “psychoanalytic method”).

407. KEEN & GOLDBERG, *supra* note 136, at 61-73.

408. *Id.* at 183.

409. *Id.*

410. *Id.*

411. The Amendment 2 citizen’s initiative was organized by the pro-family group Colorado for Family Values (CFV), which was later a member of the alliance which sponsored

designed to counter the pro-gay appeal to equality principles and is typically preceded by an attempted showing that gay men and lesbians do not constitute a deserving or even a valid minority group. The “special rights” argument has been widely deployed against a number of pro-gay ballot initiatives and proposed legislation in a wide variety of contexts. Then-presidential hopeful George W. Bush retreated to the rhetoric of “special rights” when asked during the second 2000 presidential debate whether “gays and lesbians should have the same rights as other Americans.”⁴¹² He responded, “Yes, I don’t think they ought to have special rights, but I think they ought to have the same rights.”⁴¹³

The “special rights” argument, although immensely persuasive in the voting booth,⁴¹⁴ is not a legal argument *per se*.⁴¹⁵ It reflects a perspective that views civil rights protections as *special* rights afforded to certain deserving groups in society, rather than remedial measures taken to ensure that all groups enjoy *equal* rights.⁴¹⁶ Under a special rights paradigm, it is very easy to argue that gay men and lesbians do not merit *special* civil rights protections once it is established that they do not constitute a deserving minority.⁴¹⁷ From a legal standpoint, this argument

the 1998 ex-gay advertising campaign. See Knauer, *supra* note 7, at 490-91 (discussing ex-gay ad campaign); HERMAN, *supra* note 7, at 133-36 (discussing development of “special rights” strategy).

412. ABC News, *Second Presidential Debate—Complete Transcript*, available at http://www.abcnews.go.com/sections/politics/DailyNews/debate001011_trans_9.html (last visited Aug. 9, 2002) (quoting moderator).

413. *Id.* President Bush then expressed a behavior-based understanding of homosexuality. *Id.* He continued, “I don’t really think it’s any of my, you know, any of my concerns how you conduct your sex life. And I think that’s a private matter. And I think that’s the way it ought to be.” *Id.* Further elucidating on the concept of “special rights,” President Bush continued: “Well, if they’re given—if they’re given special protective status. And that doesn’t mean we shouldn’t fully enforce laws and fully protect people and fully honor people, which I will do as the president of the United States.” *Id.*

414. KEEN & GOLDBERG, *supra* note 136, at 139. Keen and Goldberg cite an exit poll that indicated forty percent voted in favor of Amendment 2 because homosexuals “should not have special rights,” whereas only three percent voted in favor of the amendment because “homosexuality is wrong.” *Id.* They note, however, that the polling results may be skewed as a result of voters’ reluctance to express their true sentiment for fear of being perceived as “bigoted.” *Id.*

415. Keen and Goldberg note that legal counsel had advised CFV that the special rights argument was not a term of art and should not be incorporated into the actual text of Amendment 2. *Id.* at 139.

416. For example, one of the architects of the ‘special rights’ advertising campaign for Amendment 2 testified that he was able to get people to sign the petition to get Amendment 2 on the ballot because the “whole premise of the people that I talked to was that [gay people] have equal rights, and they certainly don’t deserve any special rights. And that’s why they signed the petition.” *Id.* at 138 (quoting testimony of CFV member, Will Perkins).

417. See *supra* text accompanying notes 245-248 (discussing gay men and lesbians as undeserving of minority status).

surfaces to either rebut a claim that an anti-gay law constitutes a denial of equal protection under the U.S. Constitution or to justify the state interest embodied by the anti-gay law.⁴¹⁸

In the *Evans II* litigation, the state raised the special rights arguments both to rebut the plaintiffs' claim and to justify the state's interest.⁴¹⁹ First, the state argued that Amendment 2 did not render homosexuals unequal, but, to the contrary, was necessary to even out the playing field because protections based on sexual orientation gave homosexuals special rights.⁴²⁰ In addition, the state argued that Amendment 2 allowed Colorado to preserve its limited resources to fight discrimination against true minorities and to stop government subsidies to special interest groups (i.e., gay men and lesbians).⁴²¹ In *Romer v. Evans*, the U.S. Supreme Court expressly rejected the state's claim that "the measure does no more than deny homosexuals special rights,"⁴²² declaring such an interpretation of the amendment "implausible."⁴²³ It concluded that the purpose of Amendment 2 was to make gay men and lesbians "unequal to everyone else[]"⁴²⁴ which was not a permissible legislative goal because "[a] state cannot so deem a class of persons a stranger to its laws."⁴²⁵ Justice Scalia, on the other hand, accused the majority of "terminal silliness" and embraced the special rights reasoning.⁴²⁶ He wrote:

The only denial of equal treatment [the majority] contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged

418. In his dissent, Justice Scalia argued that in the case of Amendment 2, "merely stating this alleged 'equal protection' violation [should] suffice to refute it." 517 U.S. at 639.

419. *Evans*, 882 P.2d at 1342-49.

420. *Id.* at 1342-45.

421. *Id.* at 1345. One of Colorado's justifications for Amendment 2 was that "laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes." *Id.* (quoting state).

422. *Romer*, 517 U.S. at 626. The majority wrote: "The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights." *Id.* The State's principal argument in defense of Amendment 2 is that it "puts gays and lesbians in the same position as all other persons." *Id.*

423. *Id.*

424. *Id.* at 635.

425. *Id.*

426. *Id.* at 639 (Scalia, J., dissenting).

“equal protection” violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.⁴²⁷

In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, the Sixth Circuit upheld an amendment to the city charter which purported to deny “special class status” on account of “sexual orientation, conduct, or relationships.”⁴²⁸ The ballot initiative, which had received sixty-two percent of the vote, was immediately challenged on Equal Protection grounds.⁴²⁹ In upholding the Cincinnati charter amendment, the Sixth Circuit distinguished it from Amendment 2 on the grounds that Amendment 2 was “a statewide constitutional amendment that denied homosexuals access to every level and instrumentality of state government as possible sources of special legal protection.”⁴³⁰ To the contrary, the Cincinnati charter amendment was “a purely local measure of modest scope”⁴³¹ through which the electorate sought:

to instruct their elected city council representatives, or their elected or appointed municipal officers, to withhold *special rights, privileges, and protections from homosexuals*, or to prospectively remove the authority of such public representatives and officers to accord *special rights, privileges, and protections* to any non-suspect and non-quasi-suspect group.⁴³²

427. *Id.* at 638-39 (emphasis in original).

428. *Equality Foundation*, 128 F.3d at 291. The text of the charter amendment reads:
NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment . . . Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Id.

429. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 430-34 (S.D. Ohio 1994). The federal district court granted the challengers of the amendment an injunction on grounds similar to those adopted by the Colorado Supreme Court, namely the amendment impaired a fundamental right to participate equally in the political processes and, therefore, must withstand strict scrutiny. *Id.* The Sixth Circuit rejected the fundamental right argument and held that the amendment passed the rational basis test in *Equality Foundation I*. *Equality Foundation*, 54 F.3d at 266-67. After its decision in *Romer*, the U.S. Supreme Court vacated the decision of *Equality Foundation I* and remanded the case to the Sixth Circuit for reconsideration given the new precedent established by the Court’s invalidation of Amendment 2. *Id.*

430. *Equality Foundation*, 128 F.3d at 298.

431. *Id.*

432. *Id.* (emphasis added).

Applying a rational basis test, the Sixth Circuit accepted the claim of the City of Cincinnati that the measure was rationally related to the legitimate purpose of conserving public and private resources because it would “reduc[e] the exposure of the City’s residents to protracted and costly litigation by eliminating a municipally-created class of legal claims and charges, thus necessarily saving the City and its citizens, including property owners and employers, the costs of defending against such actions.”⁴³³ The court concluded that “the voters of Cincinnati were within their constitutional rights to declare that, henceforth, they alone would decide whether the benefits of protecting gays and lesbians from discrimination outweighs the costs.”⁴³⁴ Sixty-two percent of Cincinnati voters apparently agreed that the costs associated with these “*special rights, privileges, and/or protections*” were greater than the benefits gained.⁴³⁵ The name of the pro-family organization which orchestrated the passage of the Cincinnati charter amendment was “Equal Rights Not Special Rights.”⁴³⁶

Certainly, the notion that civil rights protections actually constitute special rights is not new.⁴³⁷ Courts and litigants have registered their discomfort with anti-discrimination measures ever since the *Civil Rights Cases* cautioned against a class of individuals becoming “the special favorite of the laws.”⁴³⁸ When used against gay rights initiatives, the special rights argument has particular resonance because not only are homosexuals an undeserving group due to their high disposable income and vast political power, but they are, according to pro-family forces, a group that shares nothing in common except the proclivity to engage in immoral and unhealthy sexual behavior.⁴³⁹

Once the homosexual is understood as the sodomite, the argument moves to how reprehensible it would be to extend “special rights” to homosexuals solely on the basis of their sexual tastes.⁴⁴⁰ Indeed, pro-

433. *Id.* at 300.

434. *Id.* at 301 n.13.

435. *Id.* at 298 (emphasis added).

436. *Id.* at 291.

437. See KEEN & GOLDBERG, *supra* note 136, at 111-13.

438. *Civil Rights Cases*, 109 U.S. 3, 25 (1885).

439. A member of CFV testified at the Evans II trial that: “Our argument consistently was throughout the campaign that how you have sex, for whatever reason, is not an appropriate criterion for civil rights.” KEEN & GOLDBERG, *supra* note 136, at 152 (quoting the trial testimony of CFV member, Will Perkins).

440. For example, the title of an article in a CFV circular prepared for the Amendment 2 ballot fight posed the rhetorical question “Homosexual behavior—should government protect this?” ESKRIDGE & HUNTER, SUPPLEMENT, *supra* note 88, at 272. The article asks whether voters want their “tax dollars to endorse” gay sexual practices “and the dangerous perversions they involve.” *Id.* The article then discussed the rampant promiscuity of gays and the fact that “‘gays’

family advocates charge that it would make just as much sense to talk about thieves or murderers as a minority group who deserve special rights.⁴⁴¹ This final reduction in the pro-family analysis urges that society should be able to choose not to extend special rights to individuals who practice behavior that is immoral and unhealthy and underscores, once again, the centrality of sodomy in the struggle for gay civil rights.

V. CONCLUSION: MORALITY, THE MISSING PIECE

Today pro-gay and pro-family forces find themselves locked in a process of what has been referred to by rhetorical critics as “antagonistic enjoinder.”⁴⁴² Each advances a distinct view of same-sex desire—one grounded in science, convinced of immutability, and committed to one particular vision of morality; the other grounded in a contradictory science, convinced of free will, and committed to another particular vision of morality. Their respective arguments for and against gay civil rights are based on these competing visions.

As explained in Part II, both competing views are based on a scientific account of homosexuality, consistent with the modern construction of same-sex desire. Moreover, the fact that individuals who experience same-sex desire, both gay and ex-gay, believe that a given scientific explanation of homosexuality reflects their lived experience is not surprising, as over time, such individuals have accepted and vouched for a variety of conflicting and overlapping scientific renderings of the homosexual condition.

[sic] have been unwilling (or unable) to curb their voracious, unsafe sex practices in the face of AIDS.” *Id.* Designed to shock, the article also reports that “[w]ell over a third of gays . . . admitted to ‘fisting’ . . . 29% admitted participating in ‘golden showers.’” *Id.*

441. Pro-family advocate Reverend Louis Sheldon expressed this sentiment when he stated:

Going to a behavior-based status, as opposed to a true “discrete and insular” minority opens up minority status to all behavior-based groups like smokers, bikers, adulterers, pedophiles, thieves, prostitutes, basketball players, outdoorsmen, etc. ‘Gay rights’ activists have parasited the civil rights movement thereby causing society to accept the behavior of same-sex sodomy on equal standing with those born to a certain race or color.

Surina Khan, *Calculated Compassion: How the Ex-Gay Movement Serves the Right’s Attack on Democracy* (Oct. 1998), at <http://www.nglrf.org/downloads/calcomp.pdf> (last visited July 17, 2001).

442. RALPH R. SMITH & RUSSELL R. WINDES, *PROGAY/ANTIGAY: THE RHETORICAL WAR OVER SEXUALITY* xxii (2000). Smith and Windes write: “The study of communication about public policy toward variant sexuality initially can be organized by recognizing that symmetrical relationships of interdependence and mutual influence developed in recent decades between proponents and opponents of a civic culture which tolerates and even celebrates lesbians and gay men.” *Id.* at xviii.

The impossibility of resolving these competing truth claims is part of the source of the “antagonistic enjoinment” which has often paralyzed meaningful debate and deliberation regarding the extension of gay civil rights protections. However, even if the identity model were to win the hearts and minds of voters, legislators, and jurists, the intractable issue of the morality of homosexual acts would remain. Therefore, this question remains inexorably at the core of every discussion of gay civil rights and continues to inform citizen initiatives, legislation, and judicial opinions.⁴⁴³ As the pro-family analogy to alcoholism illustrates, the behavior model focuses on same-sex sexual acts and is not disrupted if the predilection to engage in such acts is biologically predetermined.⁴⁴⁴

Current pro-gay claims of identity and equivalence fail to address the moral content of expressions of same-sex sexuality, emphasizing instead concepts one or two steps removed from physicality, such as orientation or same-sex marriage or co-parenting. This failure is consistent with the liberal practice of “moral bracketing” that has remained a defining feature of liberal political philosophy since John Stuart Mill reasoned in *On Liberty* that the state should not restrain the competent, but foolhardy, citizen who insists on traveling over a dangerously decrepit bridge.⁴⁴⁵ It is also reflected in certain Equal Protection jurisprudence where morality is an impermissible reason to draw lines between groups of individuals.⁴⁴⁶ Finally, it conveniently circumvents the moral justifications for the continued criminalization of sodomy enunciated so clearly in *Bowers v. Hardwick*.⁴⁴⁷

443. See *id.* (discussing morality discourse).

444. See generally Knauer, *supra* note 34 (discussing pro-family analogy of homosexuality to alcoholism). Just as society would not criminalize the status of being an alcoholic, a condition which may have a genetic root, it arguably should institutionalize efforts to help the alcoholic refrain from drinking. *Id.* However, in no event would it extend to special rights in the form of suspect classification based on such noisome behavior. *Id.* Justice Scalia utilized a variant form of this reasoning in his dissent in *Romer v. Evans*. See *supra* text accompanying note 282.

445. See JOHN STUART MILL, *ON LIBERTY* (1997) (discussing state’s duty to “guard against accidents”).

446. *Lawrence v. Texas*, 123 S. Ct. 661 (2002). Since this article was submitted for publication, the Supreme Court has granted certiorari to a case challenging the Texas same-sex sodomy statute. *Id.* The Petition for writ of certiorari argues explicitly that “bare disapproval of a group of people, whether couched as ‘morality’ or otherwise, cannot justify discriminatory laws.” Petition for Writ of Certiorari at 217-22, *Lawrence v. Texas*, 123 S. Ct. 611 (2002) (No. 02-102). Not surprisingly, the state of Texas argues that the statute regulates acts and not persons. Respondent’s Brief in Opposition at 12, *Lawrence v. Texas*, 123 S. Ct. 661 (2002) (No. 02-102). It also argues that no court “has ever rejected the proposition that the implementation and protection of public morality may constitute a rational basis for a statute which criminalizes illicit sexual behavior” in connection with an Equal Protection challenge. *Id.* at 16.

447. 478 U.S. 186, 196 (1986). Justice White wrote in the majority opinion:

Accordingly, one way to address the pro-family behavior model is to argue expressly that questions of morality do not belong in the development of public policy or the implementation of the general laws.⁴⁴⁸ This procedural argument has met some success in connection with the repeal of sodomy statutes based on notions that the state should be concerned with only other-regarding conduct.⁴⁴⁹ However, as Carlos Ball argues in his recently published book on the morality of gay rights, such procedural arguments are ill-equipped to advocate on behalf of the extension of affirmative rights and protections to individuals in same-sex relationships.⁴⁵⁰ Thus, although “moral bracketing” can effectively advance the repeal of sodomy laws, it offers little to claims for equal marriage rights or even anti-discrimination protections.⁴⁵¹

By insisting on a morally neutral claim of equivalence, pro-gay advocates abdicate discussions of the morality of same-sex relationships to pro-family forces and advance an identity model of homosexuality that is devoid of overt sexuality and is ultimately nonvolitional. In addition to the shortcomings identified in Part III, this unwillingness to engage questions of morality ensures that the two competing visions of homosexuality continue to talk past each other, locked in that stance of “antagonistic enjoinder.” This impasse will continue until pro-gay forces engage in the morality discourse that stubbornly continues to circumscribe homosexuality.

The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis.

Id.

448. For example, the influential Wolfenden Report, published in 1957 in Great Britain, recommended the decriminalization of consensual sodomy based on its personal and private nature. *See generally* The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963).

449. *See, e.g.*, Powell v. State, 510 S.E.2d 18, 31 (Ga. 1998) (invalidating Georgia sodomy law upheld in *Hardwick*). Invalidating the Georgia sodomy statute, the Georgia Supreme Court reasoned that it “cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.” *Id.* at 24.

450. CARLOS BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003). Professor Ball writes: “The more difficult question is how an understanding of liberalism that requires government restraint in regulating consensual sexual conduct can also demand that the state recognize and support particular kinds of sexually intimate relationships.” *Id.* at 12. Regrettably, Professor Ball’s book was published after this Article was submitted for publication.

451. *Id.*

This pro-gay morality project can, and probably should, be articulated from a variety of perspectives. As already discussed, some may wish to continue with content neutral equality claims and explicitly contend that moral judgments shared by one group of citizens should be irrelevant.⁴⁵² I would urge, however, that even those committed to this brand of liberal political philosophy establish an argument under which, were morality relevant, same-sex sexual acts would co-exist as equal to opposite-sex sexual acts. This moral equivalence can be grounded in religious or natural law reasoning, thereby responding directly to scholars such as John Finnis.⁴⁵³ It can be based on what Carlos Ball terms “moral liberalism” which postulates universal, yet contextualized, propositions of “human flourishing.”⁴⁵⁴ It can be expressed in terms of respect for individual agency and the dictate that the state should respect an individual’s choice of a partner. It can proceed on as many levels as there are individuals who experience, express, and celebrate same-sex desire and the multitude of relationships and families that it can form. It is thus, concededly, a project for the future and a project that is fundamental to moving the current debate regarding gay civil rights beyond its current state to one of meaningful engagement.

452. See *id.* at 15 (referring to this strain of thought as “neutral liberalism”).

453. See generally John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1049 (1994) (discussing the standard modern European position with regard to the legal regulation of sexual conduct).

454. See Ball, *supra* note 441, at 75-137. Professor Ball coins the term “moral liberalism” to describe the brand of liberalism postulated, most notably, by Martha Nussbaum. *Id.* Professor Ball explains: “The morality that I articulate and defend is grounded on individual autonomy and choice in the leading of lives that are fully human.” *Id.* “It also speaks of the moral respect that we owe others as human beings, a respect that must be reflected in the actions of public institutions and in the content of public policies.” *Id.* at 11.